Ne bis in idem and Tax Offences

How Belgium Adapted its Legislation to the Recent Case Law of the ECtHR and the CJEU

Francis Desterbeck

eucrim
European Law Forum: Prevention • Investigation • Prosecution

Article

ABSTRACT

For decades, Belgian fiscal criminal law was governed by the fundamental principle that there had to be an absolute separation between the administrative tax investigations by tax authorities and criminal prosecutions carried out by the public prosecutor. In the light of the recent case law of the European Court of Human Rights and the Court of Justice of the European Union on the duality of administrative and criminal proceedings, this principle could no longer be upheld. A new law passed on 5 May 2019 brought Belgian legislation in line with this supranational case law. A consultation mechanism (introduced in 2012) between the tax administration and the prosecution service to give guidance to tax investigations, has been made more efficient.

In order to respect the "ne is in idem" principle, criminal courts must now take into account administrative sanctions of a criminal nature when sentencing tax crimes. The competences of the tax authorities have been changed at the sentencing level, in order to facilitate the recovery of evaded taxes. Within the margin of these fundamental adaptations, some supplementary changes have been carried out to make the system of criminal prosecution more efficient and fairer. This article describes in a practical manner the shift in supranational case law concerning the juxtaposition between administrative and criminal proceedings within the framework of "ne bis in idem" and how this case law laid the foundation for the new Belgian law of 5 May 2019.

AUTHOR

Francis Desterbeck

emeritus First Advocate-General at the Ghent Court of Appeal (Belgium); former President of the Belgian Association for European Criminal Law

CITATION SUGGESTION

F. Desterbeck, "Ne bis in idem and Tax Offences", 2019, Vol. 14(2), eucrim, pp135–141. DOI: https://doi.org/10.30709/eucrim-2019-010

Published in
2019, Vol. 14(2) eucrim pp 135 – 141
ISSN: 1862-6947
https://eucrim.eu

I. Introduction

In no other field than in fiscal criminal law has the tension between criminal and administrative punitive measures caused so much controversy. The case law quickly developed in response to the definition of the criminal nature of proceedings and penalties within the framework of the *ne bis in idem* principle. Belgium adapted its legislation to this most recent supranational case law on 5 May 2019,[1] which now makes the fight against tax fraud more coherent. This article first gives an overview of the international legal basis of *ne bis in idem* and its context in the Belgium legal order (I.). In the second section, the leading cases of the ECtHR and CJEU on the duality of administrative and criminal sanctions within the *ne bis in idem* principle are briefly explained (II.). The evolution of the Belgian legislation as regards the juxtaposition of administrative and criminal proceedings is presented in section III, and the concluding remarks (IV.) summarise the main statements of the article.

II. *Ne bis in idem* in the National Legal Order

1. General remarks

By virtue of the fundamental legal principle *ne bis in idem*, no one can be tried or punished a second time for an offence for which he was already punished or acquitted in an earlier final judgment. In international law, this principle also holds true. Art. 14.7 of the International Covenant on Civil and Political Rights (ICCPR)[2] maintains that "no one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country."

Under the heading "Right not to be tried or punished twice," Art. 4.1 of Protocol no. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) reads: "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." According to the firmly settled case law of the Belgian Supreme Court, the fundamental principle "*ne bis in idem*" in the Belgian legal order follows the same meaning as in Art. 14.7 ICCPR and in Art. 4.1 of Protocol no. 7 to the ECHR.[3]

Art. 50 of the Charter of Fundamental Rights of the European Union (CFR) actually contains similar wording. Under the heading "Right not to be tried or punished twice in criminal proceedings for the same criminal offence" Art. 50 specifies as follows: "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 Charter entered into force on 1 December 2009; it has the same legal value as the Treaties (Art. 6.1 TEU).

Art. 54 of the Convention Implementing the Schengen Agreement (CISA) provides for a transnational *ne bis in idem* clause. However, this article focuses on the application of the *ne bis in idem* rule in the national legal order, thus attaching less importance to the Schengen Agreement.

2. *Ne bis puniri* and *ne bis vexari*

On the basis of the case law of the ECtHR, *P.J. Wattel* distinguishes between two aspects of the "*ne bis in idem*" principle:[4] first, the ban on a double punishment ("*ne bis puniri*")[5] and, second, the ban on a double

charge ("*ne bis vexari*").[6] Both the *ne bis puniri* aspect (no double punishment) and the *ne bis vexari* aspect (no double charge) can be operationalised in two ways:

As yet, he *ne bis puniri* aspect can be operationalised either by taking account of a previous penalty already imposed for an offence when determining the second penalty for the same offence. This is the *credit system* ("*Anrechnungsprinzip*"): the previous penalty is credited against the subsequent second penalty. Or the "cancellation system" ("*Erledigingsprinzip")* applies: a previous penalty is cancelled if the trial for the same offence ends in a conviction or an acquittal. In practice, this is only applicable in cases involving fines. The fine is refunded as soon as the second penalty has become final.

The *ne bis vexari* aspect can first be operationalised by an "*una via"* system.[7] Administrative proceedings with a view to imposing punitive fines must be discontinued as soon as a criminal indictment is issued for the same offence and criminal proceedings must be discontinued if definitive administrative sanctions are imposed. The second way to operationalise the *ne bis vexari* aspect is the *finality* system. Subsequent criminal or administrative proceedings must be discontinued once previous punitive proceedings for the same conduct have become final.

Before we further analyse how the Belgian legislator has combined a *una via* system regarding the *ne bis vexari* with a credit system as regards the *ne bis puniri* aspect, we will first examine how the case law of the ECtHR and the CJEU concerning the concurrence of administrative punitive measures and criminal indictments for the same offence has evolved.

III. The Case Law of the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU)

There has been an emotional and intensive debate on the relationship between administrative punitive measures and criminal indictments in the field of penalties in tax law. Undoubtedly, this has everything to do with the level of both types of sanctions and the case law of the ECtHR, according to which both types of sanctions are criminal in nature. The ECtHR developed its doctrine in the leading case *Engel and Others v. The Netherlands* in 1976.[8] A first starting point for the assessment of whether a punitive measure is criminal in nature is the classification of the offence in domestic law. However, this criterion is of minor importance.

More decisive criteria are the nature of the offence and the degree of severity of the penalty that the person concerned risks incurring (second and third criteria). The authority who imposes a punishment is totally irrelevant for the application of the *Engel* doctrine to the *ne bis in idem* principle. Administrative measures can be considered criminal in nature, although they are imposed by the tax authorities. Thus, a final administrative punitive measure could preclude a subsequent criminal indictment for the same offence.

The CJEU made recourse to the *Engel* criteria in its *Bonda* judgment.[9] Interestingly, the *Bonda* judgment is closely related to the protection of the European Union's own financial interests, which the CJEU placed particular emphasis on.

The ECtHR as well as the CJEU developed case law on the concurrence of administrative punitive measures and criminal indictments for the same offence. The decisions of the ECtHR mainly concerned direct taxes and are based on Art. 4.1 of Protocol no. 7 to the ECHR. The decisions of the CJEU concerned taxes harmonised by Union law, such as customs duties, excise duties, capital duties, and especially VAT.[10] The competences of the CJEU relate to the interpretation of the CFR. The relationship between administrative punitive

measures and criminal indictments of tax offences was developed by leading cases as discussed in the following.

1. The case law of the ECtHR

a) The *Sergey Zolotukhin / Russia* case of 20 February 2009

The ECtHR's *Zolotukhin* judgment[11] did not relate specifically to fiscal criminal law, but had a more general scope. In the case at issue, Sergey Zolotukhin was a soldier who had been found guilty of a number of offences of swearing and disorderly conduct for which he was first sentenced by a court on the basis of the code of administrative offences. In subsequent proceedings, he was convicted by a criminal court for the same offences on the basis of the criminal code.

The ECtHR found that this was not permissible and constituted a breach of Art. 4 of Protocol No. 7 to the ECHR: "The Court takes the view that Art. 4 of Protocol No. 7 must be understood as prohibiting the prosecution of trial of a second 'offence' in so far as it arises from identical facts or facts which are substantially the same."[12] In my opinion, "acts which are substantially the same" are several facts, which form a whole, and which rest on the basis of two indictments, even if the description of the crimes for the two indictments is not necessarily the same. Taking the so-called *Engel* criteria (see above) into consideration, we can conclude that a criminal indictment after a final administrative punitive measure for "substantially the same facts" is simply impossible on the basis of the *Zolotukhin* judgment.

b) The *A & B / Norway* case of 15 November 2016

Unlike the *Zolotukhin* case, the *A & B / Norway* case[13] specifically concerned fiscal criminal law. In the case at issue, tax surcharges were finally imposed on the applicants in administrative proceedings for failing to declare certain income on their tax returns. In parallel criminal proceedings for the same omissions, they were convicted and sentenced for tax fraud. The ECtHR held that administrative punitive measures and a subsequent criminal conviction did indeed go together:[14]

"[…] the Court thus considers that there was a sufficiently close connection, both in substance and in time, between the decision on the tax penalties and the subsequent criminal conviction for them *(= taxable persons, later on defendants)* to be regarded as forming part of an integral scheme of sanctions under Norwegian law for failure to provide information on a tax return leading to a deficient tax assessment."

Thus, the administrative punitive measure and the criminal penalty must both be essential parts of a coherent system of punishment. In my opinion, such coherency can be clearly shown by a legal provision that allows the criminal court to take into account what was decided with regard to administrative punitive measures and vice versa.

c) The *Jóhannesson /Iceland* case of 18 May 2017

In the *Jóhannesson* case, the ECtHR further defined the meaning of the notion "sufficiently close connection, both in substance and in time."[15] The facts of the case were similar to the ones in *A & B v. Norway*: tax surcharges were imposed on the applicants in administrative proceedings for failing to declare certain income on their tax returns. In subsequent criminal proceedings, they were ultimately convicted of criminal offences in respect of the same omissions and given suspended prison sentences and a fine. The tax surcharges were taken into account when fixing the level of the fine. The ECtHR, however, denied the close connection in substance because the police started its own complete investigation, in spite of the fact that it had access to the tax administration file, and this police investigation with the independently collected and assessed

evidence resulted in the applicants' conviction by the Icelandic criminal court. Furthermore, the ECtHR denied a close connection in time because the tax enquiry and the police investigation were conducted simultaneously, in part, for only a short period of time as measured by the overall length of the proceedings.

d) The Belgian case law

The Belgian Supreme Court soon took up the ECtHR's new approach. In its judgment of 21 September 2017,[16] the Court reasoned as follows:

"Article 4.1 of Protocol no. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, as interpreted by the European Court of Human Rights, does not prevent that different procedures to impose tax penalties against the same person for the same facts are set up before one of them is completed, are continued and, if the occasion arises, are completed by a decision to impose a sanction, providing that both procedures are sufficiently close connected, both in substance and in time."

2. The case law of the CJEU

The CJEU's viewpoint concerning the duality of administrative and criminal proceedings within the *ne bis in idem* rule was mainly developed in the judgments *Hans Åkerberg Fransson* of 26 February 2013 and *Menci* of 20 March 2018. In the *Hans Åkerberg Fransson* case, the Court applied the following reasoning:[17]

"The ne bis in idem principle laid down in Article 50 of the Charter of Fundamental Rights of the European Union does not preclude a Member State from imposing successively, for the same acts of non-compliance with declaration obligations in the field of value added tax, a tax penalty and a criminal penalty in so far as the first penalty is not criminal in nature, a matter which is for the national court to determine."

However, in *Menci*, the CJEU's rationale was as follows:[18]

"Article 50 of the Charter of Fundamental Rights of the European Union must be interpreted as not precluding national legislation in accordance with which criminal proceedings may be brought against a person for failing to pay value added tax due within the time limits stipulated by law, although that person has already been made subject, in relation to the same acts, to a final administrative penalty of criminal nature for the purposes of Article 50 of the Charter, on condition that that legislation :

- pursues an objective of general interest which is such as to justify such a duplication of proceedings and penalties, namely combating value added tax offences, it being necessary for those proceedings and penalties to pursue additional objectives,
- contains rules ensuring coordination which limits to what is strictly necessary the additional disadvantage which results, for the persons concerned, from a duplication of proceedings, and
- provides for rules making it possible to ensure that the severity of all of the penalties imposed is limited to what is strictly necessary in relation to the seriousness of the offence concerned."

According to the Court, it is for the national court to ensure, taking into account all of the circumstances in the main proceedings, that the actual disadvantage resulting for the person concerned from the application of the national legislation at issue in the main proceedings and from the duplication of the proceedings and penalties that that legislation authorises is not excessive in relation to the seriousness of the offence committed.

3. Interim conclusion

One can discern subtle distinctions between the case law of ECtHR and the one of the CJEU. Nevertheless, the case law of both courts have converged towards each other. In the *Menci*-judgment the CJEU made repeated references to the ECtHR's *A & B/Norway*-case. Both courts consider that a concurrence between an administrative penalty of a criminal nature and criminal sanctions is admissible, even though the administrative penalty of a criminal nature has become final. The concurrence of both types of sanctions must be the subject of a coherent legal system, so that the taxable person/defendant can take it into account in advance. Furthermore, a reasonableness test must be made, in order to prevent the imposition of unreasonable punishments.

IV. Evolution of the Belgian Legislation

1. Situation before the first "*una via*" law of 20 September 2012

In 1980, Belgium introduced a scheme for an almost complete separation between administrative tax investigations and criminal investigations. Like most countries, Belgium has a legal provision that obliges any civil servant who finds signs of a criminal offence to inform prosecution service immediately. Civil servants belonging to the tax authorities who find signs of a criminal tax offence are under the same obligation, but they need the authorization of their superior for this purpose.

When the tax authorities transferred a dossier to the prosecution service, they adhered to a clear division between the two services that had been set up by law. Civil servants of the tax authorities were not allowed to take part in the criminal investigation. The only measure they were allowed to take was to ask for permission to view the dossier and they could pursue their own tax investigation on the basis of the criminal investigation.

When the dossier that was transferred to the prosecution service led to criminal prosecution, the tax authorities were informed. They could claim damages before the courts, but they were not legally obliged to do so. For the tax authorities, the possibility to claim damages as a plaintiff were rather limited, in particular when direct taxes were concerned.

A cumulation of tax penalties and criminal penalties was explicitly authorized by law. The fines that the criminal judge could inflict were rather limited, but he/she could certainly impose prison sentences, which the tax authorities of course could not.

2. The "*una via*" law of 20 September 2012

The first *una via* approach in Belgium was set up with the law of 20 September 2012.[19] It established the *una via* principle in the prosecution of tax offences and in administrative penalties of a criminal nature. The date of this law is not without importance. The law became effective in the post-*Zolotukhin* but pre-*A & B / Norway* period and before the CJEU's judgments in *Åkerberg Fransson* and *Menci*. In light of the situation at the time, everyone was convinced that the only type of sanction that could be imposed for tax offences was either an administrative sanction of a criminal nature or a criminal penalty. This point of departure allows us to explore a couple of stipulations in this law. The law of 20 September 2012 introduced a number of innovations:

First, a legal provision was introduced that made consultation between the tax authorities and the prosecution service possible in order to determine which service would continue the investigation. If the tax authorities continued the investigation, it could end with an administrative penalty of a criminal nature; if the

prosecution service continued the investigation, criminal penalties could be imposed. This *una via* consultation had to be organized on the initiative and under the authority of the prosecution service, if necessary in the presence of the police. The idea was that, when a judicial investigation was opened, the case was withdrawn from the tax authorities.

Secondly, a subsidiarity principle was introduced. The prosecution service was encharged with cases in which coercive measures had to be applied. Only the judicial authorities were competent for these measures, like house searches and arrests. Other cases, in which the application of coercive measures was unnecessary, had to be dealt with by the tax authorities and sanctioned with administrative sanctions of a criminal nature.

Third, and completely following the logic of *Zolotukhin*, the previously existing legal possibility to impose a cumulation of administrative sanctions and criminal penalties was abolished. The level of criminal fines was considerably increased, bringing them up to the same level as the administrative sanctions of a criminal nature.

3. The second "*una via*" law of 5 May 2019

With the recent law of 5 May 2019,[20] a solution was found by which to meet the requirements concerning *ne bis in idem*, as understood in supranational case law. Some of the provisions are new, others intend to improve the existing system introduced by the law of 20 September 2012.

a) The *una via* consultation (*ne bis vexari* aspect)

The existing formula of *una via* consultation has been maintained and is compulsory for cases of serious fraud. What "serious fraud" exactly means has to be determined by Royal Decree, thus ensuring a flexible response to altered circumstances if the occasion calls for it. The preliminaries of the law already indicate that the concept must be given a rather wide interpretation.

Delays have been introduced for the consultation, which is also new. The prosecution service is obliged to organise the consultation within a month after receipt of the fraud communication from the tax authorities. Three months after the communication, the counsel of the prosecution must report to the tax authorities as to which facts criminal proceedings will be instituted.

b) Taking into account administrative sanctions of a criminal nature (*ne bis puniri* aspect)

No changes were made in the level of criminal fines, which had already been considerably increased by the first *una via* law (see 2.). At the sentencing level, the new law inserted into all federal fiscal codes a provision making it mandatory for the criminal judge to take into consideration the final administrative sanctions of a criminal nature already imposed for the same facts, in order to avoid excessive penalties in relation to the seriousness of the offence committed. Conversely, in the Code of Criminal Procedure, the following provision was inserted, which clearly bears the stamp of the ECtHR's reasoning in *A & B / Norway*:[21]

"When the tax administration levies taxes, including surcharges, tax raises and penalties of administrative or criminal nature, for criminal tax offences, this does not prevent criminal proceeding, insofar both administrative and criminal treatment of the facts are part of sufficiently close connection, both in substance and in time."

c) New form of structural consultation

Also new is the creation of a consultative structure between the tax administration and the Board of Prosecutors General. From now on, the Prosecutor General of Brussels will meet the tax authorities and the federal police twice a year to determine which mechanisms of serious or organized tax fraud demand special attention. Here too, the aim of this new structure is to adjust to new criminal phenomena quickly.

d) The role of tax authorities at the sentencing level

Logically speaking, criminal prosecution in tax matters should lead to the simple recovery of the evaded taxes, as established by the conviction, once the judgment has become final. Up until now, this was not yet the case. However, the new law engenders a fundamental modification: it confers the status of "intervening third party" onto the tax authorities. The tax administration is now informed in a timely manner when a criminal tax case is to be dealt with by the criminal court. The involvement of the tax authorities in the criminal proceedings should allow a full and fair debate before the criminal court judge concerning the amount of payable taxes, even in case of an acquittal. The final judgment is then the document that makes recovery by the tax authorities possible.

The philosophy behind this regulation is that the tax authorities should be able to follow their own direction before the criminal court judge; the outcome of the final judgment on the criminal proceedings should not left to the discretion of the final judgment in the criminal proceedings. The new provision will of course require changes in the minds of civil servants belonging to the tax administration and of criminal court judges alike. Nevertheless, it is expected that dispute settlement in tax matters will be considerably simplified by the new law.

e) Confiscation of proceeds of crime

In its judgment of 22 October 2003, the Belgian Supreme Court decided that the proceeds of tax fraud are to be considered proceeds of crime that qualify for confiscation.[22] Although confiscation of the proceeds of crime from tax fraud is not mandatory, a problem nevertheless exists. A tax debt and proceeds of crime are two different matters. The concept "tax" indicates a general financial contribution required by tax law. The proceeds of crime are a financial benefit, obtained by a crime, which can be confiscated. According to Belgian law, confiscation is considered a punishment.

This approach led to the following problem: Because a tax demand and a confiscation of proceeds of crime have a different nature, it was widely recognised in Belgium that they could be applied together. Thus, the criminal judge's conviction of a defendant to the forfeiture of a tax demand as a proceed of a tax crime did not prevent the tax authorities to require the payment of the same amount afterwards, this time as a tax debt. As a result, a defendant could be obliged to pay the same amount twice, once as a proceed of crime and once as a tax demand. This could have unfair consequences particularly when a defendant had been trying to settle his case with the tax authorities by paying (part of) the tax demand "voluntarily" before his case was treated by the criminal court, but this attempt had failed.

This problem has in the meantime been solved by the new law by inserting a provision into all fiscal codes, according to which the proceeds of crime from tax fraud cannot be confiscated if the claim by the tax authorities is well founded and leads to an effective payment of the full claim.

V. Concluding Remarks

For decades, Belgian tax criminal law had been governed by the fundamental principle that there has to be an absolute separation between administrative tax investigations by the tax authorities and criminal investigations by the public prosecutor. Moreover, an accumulation of administrative sanctions of a criminal nature and criminal penalties was allowed unconditionally and without restriction. This principal approach could no longer be upheld following the recent case law of the ECtHR and the CJEU since *Zolotukhin*.

Two laws have reconciled the Belgian legislation with supranational case law. The law of 20 September 2012 introduced the *una via* consultation and thus made a dialogue between the tax administration and the counsel of the prosecution possible in order to determine which of the two authorities continues a case. The second law of 5 May 2019 aims to make the *una via* consultation mechanism more efficient and obliges both the tax administration and the counsel of the prosecution to mutually take into account their sanctions/penalties. Within the discretionary margins of these adaptations, some minor changes and supplementary adaptations were carried out to make the system of criminal prosecution more efficient and fair. In my opinion, Belgian legislation in the field of tax offences now passes the test of supranational justice and no longer warrants criticism. It is now up to the national administration of justice to administer the new legislation in practice.

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1. Loi portant des dispositions diverses en matière pénale et en matière de cultes, et modifiant la loi du 28 mai 2002 relative à l'euthanasie et le Code pénal social/ Wet houdende diverse bepalingen in strafzaken en inzake erediensten, en tot wijziging van de wet van 28 mei 2002 betreffende de euthanasie en van het Sociaal Strafwetboek, *Official Gazette*, 24 May 2019.↩
2. Treaty of New York of 16 December 1966.↩
3. Settled case law of the Court of Cassation, a.o. Cass., 24 April 2015, AR nr. F.14.0045.N and Cass., 21 September 2017, AR nr. F.15.0081.N.↩
4. P.J. Wattel, "Ne bis in idem and tax offences", in: B. Van Bockel (ed.), *Ne bis in idem in EU Law*, Cambridge University Press, 2016, pp. 172-173.↩
5. *Nemo debet bis puniri pro uno delicto*.↩
6. *Nemo debet bis vexari*.↩
7. *Electa una via non datur resursus ad alteram*.↩
8. ECtHR, 8. June 1976, *Engel and Others v. The Netherlands*, Appl. no. 5100/71 et al., paras. 82, 83.↩
9. CJEU (Grand Chamber), 5 June 2012, case C-489/10, *Łukasz Marcin Bonda*, para. 37.↩
10. Part of the Member States' VAT receipts are own resources of the European Union.↩
11. ECtHR (Grand Chamber), 10 February 2009, *Sergey Zolotukhin v. Russia*, Appl. no. 14939/03.↩
12. ECtHR, ibid., para. 82.↩
13. ECtHR (Grand Chamber), 15 November 2016, *A and B v. Norway*, Appl. no. 24130/11 and 29758/11.↩
14. ECthR, ibid., para. 153.↩
15. ECtHR, 18 May 2017, *Jóhannesson and Others v. Iceland*, Appl. no. 22007/11.↩
16. Court of Cassation, 21 September 2017, F.15.0081.N.↩
17. CJEU (Grand Chamber), 26 February 2013, case C-617/10, *Åklagaren v. Hans Åkerberg Fransson*.↩
18. CJEU (Grand Chamber), 20 March 2018, case C-524/15, *Criminal proceedings against Luca Menci*.↩
19. Loi instaurant le principe " una via " dans le cadre de la poursuite des infractions à la législation fiscale et majorant les amendes pénales fiscales/Wet tot instelling van het " una via "-principe in de vervolging van overtredingen van de fiscale wetgeving en tot verhoging van de fiscale penale boete, *Official Gazette*, 22 October 2012.↩
20. See endnote 1.↩
21. Own translation.↩
22. Court of Cassation, 22 October 2003, AR nr. P.03.0084.F.↩

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The project is co-financed by the Union Anti-Fraud Programme (UAFP), managed by the European Anti-Fraud Office (OLAF).

Co-funded by
the European Union