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**THE *NE BIS IN IDEM* PRINCIPLE AND HUMAN RIGHTS:  
ECTHR, ECJ & U.S. SUPREME COURT ON DIFFERENT TRACKS**

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## Introduction

In this following analysis we deal with one argument that has been of great interest for me because of my roots. Being half Italian and half American it was fascinating for me to get an insight at how the same aspect of law is perceived in different jurisdictions. Moreover, to get an interesting perspective at the development of an area of freedom, security and justice and at how it might have a ‘constitutional’ impact that goes well beyond the *ne bis in idem* principle itself.

The *ne bis in idem* principle is enshrined in both European and U.S. law, and it has been object of an extensive body of case law. Insider trading and market manipulation, as well as many other abuses, can be sanctioned both with criminal and civil (or administrative) penalties. So, is there a chance that receiving both administrative sanctions from the market regulator, and criminal sanctions, violate the prohibition of *double jeopardy*, or *ne bis in idem*? *Double jeopardy*, or *ne bis in idem*, affirms that none should be subject to accusation, tried or punished *criminally* twice for the same behavior, and is a deep-rooted principle at common law; it is enshrined in the American Constitution (Fifth Amendment), and is set forth in the European Convention on Human Rights, among others. Most modern constitutions, or at least criminal statutes, comprise this principle. The problem, here, is whether the sanctions officially defined by the legislatures as "administrative" should, in fact, practically be considered "criminal," in light of their strictness, their punitive goals, and further elements. And, furthermore, if Europe and U.S. perceive it in the same way.

If the response is positive, then the complete preservation of the *double jeopardy* prohibition should apply. Pointless to add, this question can be quite important every time different sanctions for the same conduct can be cumulated.

The thesis is divided in four chapters. In the first chapter of this study, the principle of *ne bis in idem* is analyzed, by the means of a historical overview, followed by a highlight on the different European internal and international sources: the European Convention on Human Rights (Article 4 protocol no 7), the International Covenant on Civil and Political Rights (Article 14 (7)), the Charter of the Fundamental Rights of the EU (Article 50) and the Convention Implementing the Schengen Agreement (Articles 54 to 58).

In the second chapter, the principle is seen from the European prospective and in light of relevant case law of the European Court of Human Rights (ECtHR) and European Court of Justice (ECJ). An in-depth analysis on the scope of application of the principle, so the objective scope, the scope *ratione materiae*, the principle of finality of *ne bis in idem* and finally the element of *idem*, in the two different jurisdictions. Followed by an overview on two leading judgments: the *Akerberg Fransson* case and *Grande Stevens and Others v. Italy*, underlining how there is a substantive approach to the *ne bis in idem* principle.

In the third chapter, we first examine the U.S. *double jeopardy*'s perception and its source in the U.S. Constitution and furthermore we observe an analogous matter to the *Grande Stevens*, that was decided by the U.S. Supreme Court in two important decisions of the 1980s and 1990s, the latter (*Hudson v. U.S.*) overruling the former (*U.S. v. Halper*) and assuming a more formalistic approach than the one followed by the European Court of Human Rights.

Finally, in the fourth chapter, we cover the recent change in the approach of the European Court of Human Rights and the Court of Justice of the EU regarding the right not to be punished twice. An analysis of the *A & B v Norway* judgment, succeeded by the study of *Menci, Garlsson Real Estate and Others* and joint cases *Di Puma and Zecca* will give an overview of the present situation regarding the matter, followed by the analysis of the current status in the U.S. as well.

Conclusions will be drawn up regarding the findings and the valuations raised throughout the thesis.

# CHAPTER 1

## THE INTERNATIONAL LEGAL SOURCES ON THE *NE BIS IN IDEM* PRINCIPLE

**Summary:** 1.1. Origins of the Guarantee; 1.2. The Internal *Ne bis in Idem* principle; 1.2.1 Article 14 (7) ICCPR; 1.2.2. Article 4 Protocol 7 ECHR; 1.3. The International *Ne bis in Idem* principle; 1.3.1. Article 50 Charter of the Fundamental Rights of EU; 1.3.2. Articles 54-58 CISA.

### 1.1. Origins of the Guarantee

*Ne bis in idem* or *double jeopardy* is a fundamental principle of law. It literally translates from Latin as “not twice in the same”. In its essence, it restricts the possibility of a defendant being prosecuted more than one time on the basis of the same facts or offence. Basically, the protection from *ne bis in idem* is a fundamental right designed to protect the individual against governmental hardness. One scholar has advised, maybe in overstated fashion, that the “history of the rule against *ne bis in idem* is the history of criminal procedure.” He goes on to clarify, “No other procedural doctrine is more fundamental or all-pervasive.”<sup>1</sup> The history of *ne bis in idem*, nevertheless, reflects odd twists and turns and shifting interpretations of its crucial meaning. The idea which lies under *ne bis in idem* has deep historical roots. Its origins may be drawn back to the Greeks and the Romans as well as to Jewish sources and early Christian doctrine. The earliest known reference to the principle originates from around 355 BC, when Demosthenes reasoned that “the laws forbid the same man to be tried twice on the same issue”.<sup>2</sup>

Subsequently, the *ne bis in idem* principle became part of the Digest of Justinian. The document incarnated the notion that “the governor should not permit the same

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<sup>1</sup> M. L. FRIEDLAND (1969), *Double Jeopardy*, Oxford Clarendon Press, page 3. See also, J.A. SIGLER (1969) *Double Jeopardy: the development of a legal and social policy*, Cornell University Press

<sup>2</sup> DEMOSTHENES I (355 BC) *Speech against Leptines*, translated by J. H. VINCE (1969) Harvard University Press.

person to be accused of which he had been acquitted.”<sup>3</sup> In spite of this exclusion, a defendant who was absolved could be retried for the same offense as long as the government did so in the time frame of thirty days. Like the privilege against self-incrimination, the prohibition of *double jeopardy* was implanted in the canon law. St. Jerome in the year 391 gave his interpretation in the Bible (Nahum 1:9) in order to forbid a “double affliction”, since God did not punish twice for the same offense.<sup>4</sup> Consequently, what was to become a fixture saying in English and American jurisprudence had its origins in both Roman and canon law.

## 1.2. The Internal *Ne bis in Idem* principle

The principle of *ne bis in idem* is a fundamental principle of law, which limits the opportunity of a defendant of being prosecuted again based on the same offence, act or facts. This principle occurs in national systems of law in various forms, such as a constitutional guarantee, a guarantee in extradition law, and a rule of criminal procedure. A difference is frequently made among the principle’s role as an individual right and its role as a guarantee for legal certainty, even if these facets are basically connected. In the previous sense, the principle looks after the individual from abuses of the state’s right to punish.<sup>5</sup>

Various rationale can be identified in the *ne bis in idem* principle. First, the guarantee provides the impartial administration of criminal justice. A second rationale is seen in the condition that a prosecution must depend on pre-existing legislation, which wouldn’t be true if a defendant were prosecuted constantly for several legal aspects of the same act or facts. Moreover, the principle provides protection for the authority of the judgment by maintaining the final authority of judicial decisions. This is crucial since a court cannot be impartial except if its decisions obligate not just the subject, but additionally more organs of the State and more courts.<sup>6</sup> Thus the guarantee involves

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<sup>3</sup> *Digest of Justinian*, Book 48, Title 2, Note 7, in S.P. SCOTT (2011) *The Civil Law*, The Law Book Exchange.

<sup>4</sup> *Non iudicat Deus bis in id ipsum* from St. Jerome’s commentary on the Prophet NAHUM, Book 1.

<sup>5</sup> B. VAN BOCKEL (2016) *Ne Bis In Idem in EU Law*, Cambridge University Press, page 13

<sup>6</sup> With the exclusion of the action of appeal.

both the “very essence of the right to a fair trial” and the legitimacy of the state.<sup>7</sup> Disregarding of the determinacy of legal rules and doctrines, the legal process per se would evolve into exclusively arbitrary if legal proceedings were to be endlessly repeated.<sup>8</sup> A final rationale is that of proportionality, which is also a significant principle in EU law.<sup>9</sup>

The *ne bis in idem* principle appears in several diverse forms in internal and international instruments.

From an internal perspective the European Convention on Human Rights ( Article 4 protocol no. 7 ) and the International Covenant on Civil and Political Rights (Article 14 (7) ) are two examples of instruments comprising exclusively a clear reference to criminal proceedings pending under the jurisdiction of the “same State”. This implicates that a State will not consider the trial of an individual for a specific criminal offence in another State as an obstacle on prosecuting the individual for the same offence in that State. Consequently, the application of the *ne bis in idem* is limited to a national level, being restricted to the jurisdiction of the same State.

The exclusion spreads on only after the person has been finally acquitted or convicted in accordance with the law and criminal procedure of the State involved. The criminal procedure rules of each State decide if the decision can be deemed final. Particularly whether the law offers for prosecutorial appeals of final judgments or whether it provides retrials. After the accused has run out of its appeal options, *ne bis in idem* gets into force immediately after his acquittal or conviction, in jurisdictions where the prosecutor cannot appeal, or when it expired the time limit for appeals.

The meaning of “final judgement”, preclusive of a new trial or a new conviction, can be better explained by both case law of the ECtHR<sup>10</sup> and the Italian Supreme Court<sup>11</sup>. Any decision by one of the Member States that has attained the control of final

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<sup>7</sup> *Nikitin v. Russia*, ECtHR 20 July 2004, appl. No. 50178/99, para. 57.

<sup>8</sup> Selznick considers the function of the rule of law as the restraint of public authority through what he defines the ‘rational principles of civic order’, which ‘aim to minimize the arbitrary element in legal norms and decisions’. P. SELZNICK, P. NONETTE, AND H. VOLLMER (1980) *Law Society and Instrumental Justice*, Transaction Publishers, 11. This view arguably shows a bias in Dworkin’s ‘right answer thesis’ towards substantive instead of procedural aspects of legal decision making, which determine the legal validity of a judgment as well.

<sup>9</sup> T.I. HARBO (2010) ‘*The Function of the Proportionality Principle in EU Law*’, 16 *European Law Journal*, pages 158-185.

<sup>10</sup> *Nikitin v. Russia*; *Goktan v. France*, ECtHR 2 July 2002.

<sup>11</sup> Supreme Court, Criminal Section I, Decision No. 10426, 2 February 2005, *Boheim*; Supreme Court, Criminal Section VI, Decision No. 5617, 15 February 2004.



decision (*res judicata*) has to be included in the principle's scope of action. As a consequence, any judgment is encompassed if considered equivalent to a final judgment.

Several decisions of the European Court of Justice<sup>12</sup> have determined the constraints of European *ne bis in idem* setting that such principle concerns procedures for release of the criminal action as well, by which the Public Prosecutor of a Member State closes a criminal proceeding after the accused has met certain requirements (i.e., paid a sum of money settled by the Public Prosecutor).

Furthermore, *ne bis in idem* is also applicable to all verdicts, issued by individuals authorized to manage national criminal justice, which can be appointed as "final judgments" and which influence the unlawful conduct of the accused, even if they are not delivered by a judge or in a form other than a judgment.

Moreover, the *ne bis in idem* principle has been embraced in the Italian procedural law as well since 1930 and is now explicated in Article 649 of the Italian code of criminal procedure (c. p. p.).

Indeed, Article 649 expressly states that:

1. "A defendant acquitted or condemned by an irrevocable criminal sentence or decree cannot be subject to further criminal proceedings for the same act, not even when the charge, degree or circumstances are different, with the exception of proscription of a second trial as expressed in Art.69 paragraph 2 and 345.

2. Even though criminal proceedings are reinitiated, the judge in every state and degree of the trial shall declare a sentence of acquittal or non-prosecution to proceed, articulating the reasoning for the ruling."

The proscription of a second trial expressed in Article 649 c. p. p., therefore results in, pursuant to paragraph 2 of the same law, the inadmissibility of criminal prosecution.

The code makes a distinction between two effects presented by the judgment:

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<sup>12</sup> European Court of Justice, 11 February 2003, C-187 + 385/01, *Gözütök and Brügge*; European Court of Justice, 10 March 2005, C-469/03, *Miraglia*; European Court of Justice, 9 March 2006, C-436/04, *Van Esbroeck*; European Court of Justice, 28 September 2006, C-150/05, *Van Straaten*; European Court of Justice, 28 September 2006, C-467/04, *Gasparini*; European Court of Justice, 18 July 2007, C-288/05, *Kretzinger*; European Court of Justice, 18 July 2007, C-367/05, *Kraaijenbrink*; European Court of Justice, 11 December 2008, C-297/07, *Bourquain*; European Court of Justice, 22 December 2008, C-491/07, *Turansky*; European Court of Justice, 16 November 2010, C-261/09, *Mantello*.

- the preclusive effect, which prevents an acquitted or convicted defendant from being subjected to further criminal proceedings for the same act;
- the binding effect, which instead imposes that the ascertained act be held true.

Clearly, the effectiveness of criminal judgment expresses the need for judicial absolute certainty and stability, appropriate for the purpose of a trial, but also the need to set a limit on State intervention regarding individual circumstances. This effectiveness does not imply, however, the absolute immutability of sanctions eventually established in an irrevocable sentence of conviction, in cases where punishment would have to undergo necessary modifications imposed by the judicial system to protect individual rights (Court of Cassation, sezioni Unite 29 May - 14 October 2014, No. 42858).

Among the requirements for proscription expressed therein we find:

- a subjective requirement, taking into consideration the identity of the person who has been previously sentenced and the person who should face criminal proceedings (the "same person");
- an objective requirement, which is represented by the same past act, although represented differently, that is, according to different procedural and substantive procedures, or otherwise considering the charge, degree or circumstances;
- lastly, the irrevocability of a sentence or criminal sentence or decree.

Article 648 c. p. p. attributes the aspect of irrevocability of judgments for which appeals different from re-examination cannot be brought forth; in other words, a sentence which an ordinary appeal is not permissible is irrevocable.

Irrevocability implies the inability to modify the provision itself and therefore, the impossibility of repeating the trial that led to the assessment, contained therein. It is as if to say the power of assessment held by the judge has now become extinct: the judge has now judged.

Considerable doubts have arisen regarding the interpretation of the definition of "the same fact", as referred to in the regulation in question.

Firstly, it is necessary to distinguish the same fact from all the facts that are relevant in proceedings. The facts that are relevant (or legal proceeding facts) are all those that have a procedural effect. However, paragraph 1 of Art. 649 defines precisely which fact, amongst all the relevant facts, constitutes *ne bis in idem*.

The same fact is that which the defendant is accused of (subject to criminal proceedings for the same fact) and which constitutes a crime.

The fact which constitutes an offence, therefore, is something different from an offence that consists of conduct and legal classification and is the result of the subsumption of conduct under case law imposed by Legislature.

Conduct, therefore, is past conduct, an act done by a person in the past. All other facts, although relevant in the trial, are not relevant for the purposes of the judgment of the same fact and for the purpose of the application of Art. 649.

A specific fact that had been ascertained or subject to sentencing in a prior trial is insufficient to trigger the application of Art. 649; instead, it is necessary that the fact constitutes criminally relevant conduct for the implementation of an incriminating case.

Prevailing law holds that the same fact exists only if conduct, event and causality are identical, not only in their historical and natural aspect, but also in the judicial aspect, as expression of the same offence. (Cass. Sezioni Unite, 28 June 2005, No. 231799). Therefore, when at least one of the aforementioned is different, the fact can be introduced in a new criminal procedure against the same defendant, with the possibility of a further decision. In other words, if the crime is different, the fact is also different and therefore, there is no proscription as provided in Article 649.

Not only does this reasoning prevent defining criteria that could lead to valid certainty, it attains an obvious denial of the regulatory provisions expressly provided for in paragraph 1 of Art. 649 which, as mentioned, qualifies as irrelevant for the purpose of verifying the identity-diversity of the fact related to the criminal charges. It is precisely the diversity of the charges that does not allow exclusion of the identity of the fact which, on the contrary, is recognized under a different *nomen juris*, not for this does it cease to be the same.

We are in the presence of an evident case of *interpretatio abrogans*, which has made inoperative the prescribed regulation provided for by law.

If there is formal concurrence of offences with the violation of distinct regulations by the same conduct, preclusion does not take place (eg incompatibility: irrevocable sentence of acquittal is declared because the fact does not exist with subsequent judgment for a crime in formal collusion regarding the same fact).

Lastly, pursuant to the same Art. 649, paragraph 1, the preclusive effect of judgment is not binding in the instance that a sentence is mistakenly dismissed due to the death of the defendant; nor when the defendant is mistakenly acquitted for inadmissibility.

Shall we now see the internal instruments more closely.

### **1.2.1. Article 14 (7) ICCPR**

Article 14(7) of the 1966 International Covenant on Civil and Political Rights (ICCPR) reads as follows:

“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”

This provision was missing from the original text of the ICCPR. Its addition was first considered in the Human Rights Commission drafting the Covenant in 1951 but vanished again. A second proposal was debated in the Third Committee of the General Assembly and made it in the end.<sup>13</sup>

Article 14(7) ICCPR declares that it falls to be applied to a crime, according to the law and penal procedure of each country. It has been pointed out that when the ICCPR was drafted, “international criminal jurisdiction was virtually unknown”. Otherwise, it would have been preferred the term jurisdiction, rather than country.<sup>14</sup> This approach wouldn’t make much of a change on the national level. But internationally, both international criminal courts, and some international and supranational organizations can expect jurisdiction in some cases. This is a circumstance that Article 14(7) ICCPR does not consider.

It is debated the question whether Article 14(7) ICCPR “bears the promise of international application ”.<sup>15</sup> Even if some have discussed that the provision might apply

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<sup>13</sup> According to Trechsel, the matter of including the *ne bis in idem* principle has nevertheless remained controversial ever since. S. TRECHSEL (2005) *Human rights in criminal proceeding*, Oxford University Press, page 382.

<sup>14</sup> S. TRECHSEL (2005) *Human rights in criminal proceeding*, Oxford University Press, page 386.

<sup>15</sup>D. SPINELLIS (2002) *Global report the ne bis in idem principle in “global” instruments*, Eres, page 1152.

internationally, there are various recognized decisions by national courts, and opinions issued by the UN Human Rights Committee, upholding the view that the provision only applies within the same state.<sup>16</sup> It has been pointed out to the explanatory memorandum to the Parliament, in which the Dutch government stated the words “each country” (instead of “any country”) were used to specify that the provision was to function only within each country, and thus not internationally.<sup>17</sup> It therefore “appears to prevail” the latter opinion.<sup>18</sup>

Article 14(7) ICCPR refers to an offence under “the law and penal procedure of each country”. It therefore bars the option of application to proceedings of any other nature, especially administrative law proceedings.<sup>19</sup> It is however debated what the words “law and penal procedure of each country” mean.

These words hint that the state is bound by the obligation to identify the “whole previous procedure” in another state.<sup>20</sup> Others instead have conveyed that the words are correlated to the conviction, imposing the conditionality of a lawful conviction.<sup>21</sup> Based on the wording of Article 14(7) ICCPR the answer to the question who can count on the protection offered by this provision seems unequivocal: “no one shall be liable to be tried or punished again (for an offence for which) he (or she) has already been finally convicted or acquitted”. It is “rather obvious” that only somebody who has truly stood trial should then be in the position to benefit from the protection offered by the principle.<sup>22</sup> It is quite impressive that Article 14(7) ICCPR does not enclose any exclusions and does not require the sentence to be enforced.<sup>23</sup>

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<sup>16</sup> *HRC A.P. v. Italy* 16 Jul. 1986 (Comm. no. 204/1986).

<sup>17</sup> H. G. SCHERMERS (1987) *Ne bis in Idem in du droit international au droit de l'intégration*, Baden-Baden: Nomos Verlagsgesellschaft, page 607.

<sup>18</sup> D. SPINELLIS (2002) *Global report the ne bis in idem principle in “global” instruments*, Eres, page 1152; H. J. BARTSCH (2002) *Council of Europe ne bis in idem: the European perspective*, Eres, page 1165.

<sup>19</sup> D. SPINELLIS (2002) *Global report the ne bis in idem principle in “global” instruments*, Eres, page 1153.

<sup>20</sup> S. TRECHSEL (2005) *Human rights in criminal proceeding*, Oxford University Press, page 390.

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid* page 392.

<sup>23</sup> H. VAN DER WILT and A. KLIP (2002) *The Netherlands ne bis in idem*, Eres, page 1093.

### 1.2.2. Article 4 Protocol 7 ECHR

Article 4 of Protocol no.7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms reads as follows:

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

Even if Art. 4 of Protocol no. 7 ECHR forms a later addition to the ECHR, it is positioned among those guarantees that cannot be derogated from even during war, which indicates its importance.

The draft provision was set by the Steering Committee for Human Rights and subsequently adopted by the Member States of the Council of Europe at the 374th meeting of the Ministers’ Deputies on 22 November 1984<sup>24</sup>. The motive for including the 7th Protocol was, that “problems might, arise from the coexistence of the European Convention on Human Rights and the United Nations Covenants”.<sup>25</sup>

In Recommendation 791,<sup>26</sup> the Assembly advised the Committee of Ministers to “endeavor to insert as many as possible of the substantive provisions of the Covenant on Civil and Political Rights in the Convention”, and the influence of Article 14(7) ICCPR on Art. 4 of Protocol no. 7 ECHR is obvious. Not all of the Member States of the Council of Europe have ratified Protocol no. 7.<sup>27</sup>

The practical limitation of the scope of application of Art. 4 of Protocol no.7 ECHR which results from this is possibly compensated by the fact that the ECJ draws

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<sup>24</sup> The Explanatory Report.

<sup>25</sup> Explanatory Report point 1.

<sup>26</sup> Recommendation 791 (1976) on the protection of human rights in Europe.

<sup>27</sup> Germany and The Netherlands have signed but not ratified the Protocol, the United Kingdom has not signed it.

“inspiration” from the rights contained in the ECHR in formulating general principles of EU law. The Member States are bound by those principles when acting within the scope of EU Law.<sup>28</sup>

As stated by the Explanatory report, Art. 4 of Protocol no. 7 ECHR does not “prevent the reopening of the proceedings in favor of the convicted person or any changing of the judgment to the benefit of a convicted person”, and thus only applies in circumstances in which proceedings are brought in order to assure a conviction.<sup>29</sup>

Art. 4 of Protocol no. 7 ECHR mentions “criminal proceedings” but does not entail the offence to be “criminal” in nature. According to the Explanatory Report:

“It has not seemed necessary . . . to qualify the offence as "criminal". Indeed, Article 4 already contains the terms "in criminal proceedings" and "penal procedure", which render unnecessary any further specification of the text of the article itself.”

The Report continues to state that Article 4 does not prevent an individual from being subjected to an action of a different “character”.<sup>30</sup>

Despite these guarantees, the ECtHR has definitely not restricted itself to criminal proceedings *stricto sensu* in applying Art. 4 of Protocol no. 7. The Court has read the term “criminal proceedings” in Art. 4 of Protocol no. 7 generally and autonomously.<sup>31</sup> Subsequently, the scope of application of Art. 4 of Protocol no. 7 ECHR has expanded into other areas of law, such as administrative and tax law, and disciplinary proceedings of diverse categories.

Art. 4 of Protocol no. 7 states both the right not to be tried, and the right not to be punished again for an “offence” for which the individual has been lastly acquitted or convicted. This may disorientate. The prohibition of double punishment on the one hand only forbids the collecting of penalties in respect of the same offence but does not in itself preclude the option of bringing a second prosecution if this doesn’t lead to the

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<sup>28</sup> B. VAN BOCKEL (2010) *The Ne Bis In Idem Principle in EU Law*, Kluwer Law International, page 15.

<sup>29</sup> Explanatory Report point 31.

<sup>30</sup> Explanatory Report point 28.

<sup>31</sup> Determined according to 'the classification of the offence under national law, the nature of the offence and the nature and degree of severity of the penalty that the person concerned risked incurring.' See: *ECtHR, AP, MP, and TP v. Switzerland*, 29 Aug. 1997 (Appl. No. 19958/ 92) par. 39.

imposition of a “double” penalty on the same subject.<sup>32</sup> On the other hand, the right not to be prosecuted twice excludes any additional proceedings once the outcome of the first has become final. This guarantee discourages the bringing of any new proceedings, irrespective of whether a penalty was imposed in the first proceedings, or of the way in which that penalty was determined.

Art. 4 of Protocol no. 7 ECHR entails that the subject is “finally acquitted or convicted” but does not entail that the penalty imposed has been enforced or is being enforced. Moreover, Art. 4 of Protocol no. 7 ECHR comprises an exception to the *ne bis in idem* rule permitting for a second trial where there are new or newly revealed facts, or if there has been an essential flaw in the previous proceedings affecting the result of the case. This includes new or newly discovered evidence, including new means of proof.<sup>33</sup>

### **1.3. The International *Ne bis in Idem* principle**

At an international level, the principle specifies the prohibition to expose an individual to trial a second time for the same conduct in two different States.

Even if this is a very debated matter, influenced by the absence of coordination among the different national criminal laws, international *ne bis in idem* has been completely recognized by Article 50 of the Charter of Fundamental Rights of the European Union, which expands the scope of application of the principle to the whole territorial zone of the European Union. After the Treaty of Lisbon,<sup>34</sup> such Charter became directly and instantly applicable in each Member State, and, accordingly, the majority of jurisdictions now recognize also the international *ne bis in idem* principle as compulsory and as a right that cannot be ignored by the States in any way.

Not only, the application of the external *ne bis in idem* is evidenced by Articles 54 to 58 of the Convention Implementing the Schengen Agreement (CISA).<sup>35</sup> After

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<sup>32</sup> In some legal systems, this guarantee finds expression in a procedural rule which stipulates that only the highest penalty is actually enforced in the event that several penalties are imposed in respect Of the same event, or course of events.

<sup>33</sup> Explanatory Report point 31.

<sup>34</sup> According to the Treaty of Lisbon, the rights, freedoms and principles sanctioned therein have “the same legal value as the Treaties”.

<sup>35</sup> Convention implementing the Schengen Agreement of 14 June 1985 and entered into force 28 September 1995. With the Treaty of Amsterdam (and the “Protocol integrating the Schengen acquis into



affirming that a final judgment of conviction carried out by the authority of a Member State generates a preclusive effect comparable to that which a judgment issued by a national court can deliver<sup>36</sup> (thus acknowledging that the international *ne bis in idem* applies between States ) it further lists precise instances<sup>37</sup> in which States are permitted to opt out of this provision and hence are not bound by the effectiveness of the principle of *ne bis in idem*.

### **1.3.1. Article 50 of the Charter of Fundamental Rights of the European Union**

Similarly to Art. 4 of Protocol no. 7 ECHR, Art. 50 of the Charter of Fundamental Rights of the European Union reads 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 was declared on December 2000 in Nice and “reaffirms the rights as they happen to be , in particular, from the constitutional backgrounds and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe and the case-law of the Court of Justice of the European Union and of the European Court of Human Rights.”<sup>38</sup>

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the framework of the European Union” the Agreement is now an integral part of the law of the European Union.

<sup>36</sup> CISA Art. 54. This rule, that applies only following a criminal final judgment, does not prevent the same person from being subject simultaneously to two or more pending criminal proceedings, to the extent that the facts constitute an offence.

<sup>37</sup> CISA Art. 55: ‘A Contracting Party may, when ratifying, accepting or approving this Convention, declare that it is not bound by Article 54 in one or more of the following cases: (a) where the acts to which the foreign judgment relates took place in whole or in part in its own territory; in the latter case, however, this exception shall not apply if the acts took place in part in the territory of the Contracting Party where the judgment was delivered; (b) where the acts to which the foreign judgment relates constitute an offence against national security or other equally essential interests of that Contracting Party; (c) where the acts to which the foreign judgment relates were committed by officials of that Contracting Party in violation of the duties of their office.’

<sup>38</sup> Preamble para. 5.

The Venice Commission concluded that the Charter is “obviously inspired by the ECHR”, but that there “exist however significant differences between the two instruments, relating to both the wording and the scope of the rights guaranteed”:

Regarding the rights that are also enumerated in the ECHR, the Charter has taken the text of the latter as a sample, but has frequently revised it aiming at rendering it simpler, more informed, and at times wider. “Possibilities for limitations to the rights guaranteed by the Charter are not listed right-by-right, as in the ECHR, but are delimited in a general provision (Article 52 of the Charter), without a limitative enumeration of the grounds for limitation.” Additionally, certain rights guaranteed by the Charter are not listed in the ECHR but have been documented by the case-law of the European Court as being covered by it.<sup>39</sup>

The Explanatory Memorandum provided by the Bureau of the Convention, the body which drafted the Charter<sup>40</sup>, states that:

in accordance with Article 50, the *ne bis in idem* principle also applies between the jurisdictions of numerous Member States. That corresponds to the *acquis* in Union law; see Articles 54 to 58 of the Schengen Convention, Article 7 of the Convention on the Protection of the European Communities Financial Interests and Article 10 of the Convention on the fight against corruption.”

Article 50 of the Charter was thus drafted having in mind Art. 4 of Protocol no. 7 ECHR and Art. 54 CISA, but differentiates itself noticeably from both in phrasing. Especially, Article 50 of the Charter is phrased more restrictively than Article 54 CISA, as it only refers to the possibilities of “acquittal of conviction” as possible outcomes of the first trial.<sup>41</sup> Article 51 of the Charter indicates the Charter’s scope of application. It says that “the provisions of this Charter are addressed to the institutions and bodies of the Union”. We therefore comprehend that the precise wording of Article 50 of the Charter is not automatically significant in underlying the scope of application of the *ne bis in idem* principle contained in that provision. If the provisions of the Charter are “addressed to” the Union’s institutions and bodies as stated by Article 51 of the Charter,

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<sup>39</sup> *European Commission for Democracy through law* (Venice Commission), Opinion 256/2003.

<sup>40</sup> Convent 49: Text of the explanations relating to the complete text of the Charter as set out in Charter 4487/00/COVENT50. The explanatory notes however state that they have ‘no legal value’ and are ‘simply intended to clarify’ (The Charter).

<sup>41</sup> P. HOET (2008) *Ne bis in idem - nationaal en internationaal : de rechtspraak van het Hof van Justitie en van het Hof van de Rechten van de mens getoetst aan de nationale rechtspraak*, ELS Belgium (Larcier Group) pages 28-30.

Article 50 of the Charter is thus envisioned to apply to all areas of Union law. The only other option would seem to be to look at Article 50 of the Charter as a provision which only applies to the systems of criminal law of the Member States as well as to those areas of EU law where the EU has criminal law competences, and where national criminal law exists, implementing EU law.<sup>42</sup> Such an explanation would extremely bound the scope of application of the provision.

Moreover, neither the Charter nor the explanatory memorandum illustrate that such an interpretation was intended by the Charter's draftsmen. Vice versa, it appears from Article 51 that the imagined scope of application of the Charter is notably extensive. In order for Article 50 of the Charter to achieve its purpose as a provision, the term "criminal proceedings" must therefore be interpreted widely, perhaps similarly to the interpretation given by the ECtHR to the concept of "criminal charge".

In light of all the above, it appears that Article 50 of the Charter simply adds to the number of diverse *ne bis in idem* provisions in EU law, without however adding much in terms of precision or substance<sup>43</sup>.

### **1.3.2. Articles 54-58 Convention Implementing the Schengen Agreement (CISA)**

The introduction of Articles 54 to 58 of the Convention Implementing the Schengen Agreement (CISA)<sup>44</sup> has been an important landmark for the establishment of a multilateral treaty-based international *ne bis in idem*.<sup>45</sup>

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<sup>42</sup> That the Community has certain competences in the field of criminal law is (by now) undisputed. In 2003, the ECJ held for the first time that the Community has the power to that the Member States lay down criminal penalties for the protection of the environment Case C176/03 Commission v. Council [2005] ECR I-7879, regarding Council Framework Decision 2003/80/JHA of 27 Jan. 2003 on the protection of the environment through criminal law [2003] OJ L 29/55). Since then, the Court has confirmed this in several cases, concerning environmental law and maritime safety.

<sup>43</sup> B. VAN BOCKEL (2010) *The Ne Bis In Idem Principle in EU Law*, Kluwer Law International, page 19.

<sup>44</sup> Convention of 19 Jun. 1990 implementing the Schengen Agreement, 2000

Article 54: "A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party."

Article 55:

1. "A Contracting Party may, when ratifying, accepting or approving this Convention, declare that it is not bound by Article 54 in one or more of the following cases:

Even if the 1985 Schengen-agreement and the 1990 CISA were determined outside of the EU framework, they were drafted thinking about the European integration, and are practically connected to the objective of free movement.<sup>46</sup> The Schengen-agreements wanted to establish free circulation of persons by eliminating border checks,<sup>47</sup> while in the meantime enforce balancing measures, which brought to a growth in cross-border implementation of the criminal laws of the Member States. Eventually this would lead to an elevated risk for individuals of being prosecuted, tried, and punished over and over again in various Schengen-states. This was not only unfair for them, but it would also weaken the free movement purpose of the Schengen-agreements.<sup>48</sup> Article 54 CISA counterbalances this. It is mainly considered the best

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(a) where the acts to which the foreign judgment relates took place in whole or in part in its own territory; in the latter case, however, this exception shall not apply if the acts took place in part in the territory of the Contracting Party where the judgment was delivered”;

(b) “where the acts to which the foreign judgment relates constitute an offence against national security or other equally essential interests of that Contracting Party;”

(c) “Where the acts to which the foreign judgment relates were committed by I officials of that Contracting Party in violation of the duties of their office.”

2. “A Contracting Party which has made a declaration regarding the exception referred to in paragraph I(b) shall specify the categories of offences to which this exception may apply.”

3. “A Contracting Party may at any time withdraw a declaration relating to one or more of the exceptions referred to in paragraph 1.”

4. “The exceptions which were the subject of a declaration under paragraph 1 shall not apply where the Contracting Party concerned has, in connection with the same acts, requested the other Contracting Party to bring the prosecution or has granted extradition of the person concerned.”

Article 56: “If a further prosecution is brought in a Contracting Party against a person whose trial, in respect of the same acts, has been finally disposed of in another Contracting Party, any period of deprivation of liberty served in the latter Contracting Party arising from those acts shall be deducted from any penalty imposed. To the extent permitted by national law, penalties not involving deprivation of liberty shall also be taken into account.”

Article 57: “Where a Contracting Party charges a person with an offence and the competent authorities of that Contracting Party have reason to believe that the charge relates to the same acts as those in respect of which the person’s trial has been finally disposed of in another Contracting Party, those authorities shall, if they deem it necessary, request the relevant information from the competent authorities of the Contracting Party in whose territory judgment has already been delivered.

The information requested shall be provided as soon as possible and shall be taken into consideration as regards further action to be taken in the proceedings underway.

Each Contracting Party shall, when ratifying, accepting or approving this Convention, nominate the authorities authorized to request and receive the information provided for in this Article.”

Article 58: “The above provisions shall not preclude the application of broader national provisions on the *ne bis in idem* principle with regard to judicial decisions taken abroad.”

<sup>45</sup> J. VERVAELE (2005) *The transnational ne bis in idem principle in the EU*, Utrecht Law Review, page 109. Schomburg points out that the application of a *ne bis in idem* rule in Europe exclusively 'between the Schengen/EU states' is nevertheless still 'rather arbitrary' (Schomburg, 952).

<sup>46</sup> E. WAGNER (1998) *The integration of Schengen into the framework of the European Union*, Legal Issues of European integration 25, no.2.

<sup>47</sup> Article 2(1) CISA.

<sup>48</sup> H. VAN DER WILT (2005) ‘The European Arrest Warrant and the Principle *Ne Bis In Idem*’, in Handbook on the European Arrest Warrant, eds. R. Blekxtoon & W. van Ballegooij (The Hague: T.M.C. Asser Press.). It is worth mentioning that in reality, this applies only to a very small group of individuals:

expression of an internationally applicable *ne bis in idem* rule in the way it is phrased.<sup>49</sup> Nevertheless, in Article 55 CISA the prohibition of Article 54 is basically watered down. If the Article 55 was not considered, the Convention would have shaped, for the Schengen countries, the first European legal area through which the *ne bis in idem* principle would relish an international application.<sup>50</sup> It must be underlined that, the state (when ratifying) must make a declaration, accepting or approving the CISA, to be able to rely on this article.<sup>51</sup>

Article 55 CISA stipulates that the *ne bis in idem* principle of Article 54 CISA does not apply in respect of: i) crimes committed in whole or in part in the territory of the second state to initiate the prosecution, ii) crimes affecting the states' "essential interests", and iii) crimes which have been committed by the officials of the (second) state, in the exercise of their duties.<sup>52</sup>

Oppositely to Article 14(7) ICCPR, Article 4P7 ECHR and Article 50 of the Charter, Article 54 CISA does not apply to multiple prosecutions within the same state, but only to a second prosecution in another Schengen state.<sup>53</sup>

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those who face criminal charges in several Member States. The link between Art. 54 CISA and the aim of free movement is therefore arguably somewhat artificial.

<sup>49</sup> P. HOET(2008) *Ne bis in idem - nationaal en internationaal : de rechtspraak van het Hof van Justitie en van het Hof van de Rechten van de mens getoetst aan de nationale rechtspraak*, ELS Belgium (Larcier Group) page 24; H. J. BARTSCH (2002) *Council of Europe ne bis in idem: the European perspective*, Eres, page 1167; J. L. DE LA CUESTA (2001) *Concurrent National and International Criminal Jurisdiction and the Principle NE BIS IN IDEM*, International Review of Penal Law Volume:72 Issue:3 , page 719.

<sup>50</sup> H. J. BARTSCH (2002) *Council of Europe ne bis in idem: the European perspective*, Eres, page 1168

<sup>51</sup> This information has not been published in the Official Journal, nor has it been made (centrally) available anywhere else. It appears from the case law of the ECJ that Austria is one Schengen state which has issued such a declaration (case C-491/U7, criminal proceedings against Vladimír Turanský, at para. 29). The judgment only mentions that this declaration was published in the Austrian legislative digest (BGBl. III of 27 May 1997, 2048).

<sup>52</sup> Contrary to Art. 55 CISA, the in 1987 the Convention on *Double Jeopardy* does not provide for a derogation in the event that the crime took place on the territory of the second Member State to considering prosecution. It was for this reason that the 1987 Convention on *Double Jeopardy* was considered in the Programme of measures to implement the principle of mutual recognition of decisions in criminal matters ([2001] OJ C 12110) as a possible 'template' for the revision of Art. 55 CISA. So far, Art. 55 CISA has not been revised, nor is the 1987 Convention likely to enter into force anymore. The issue of the derogations laid down in Art. 55 CISA was again addressed in question 21 of the Commission's Green Paper on conflicts of jurisdiction and the principle of *ne bis in idem* in criminal proceedings (COM (2005) 696 final), where the Commission suggested that Art. 55 CISA could perhaps be abolished, if replaced by a (binding) mechanism allocating criminal to the jurisdiction between the Member States. Those Member States which submitted responses to the consultation document did not react favorably to the idea of abolishing Art. 55 CISA.

<sup>53</sup> B. VAN BOCKEL (2016) *Ne Bis In Idem in EU Law*, Cambridge University Press, page 22.

## CHAPTER 2

# EUROPEAN *NE BIS IN IDEM* PRINCIPLE: ECtHR AND ECJ CASE LAW UNTIL GRANDE STEVENS AND AKERBERG

**Summary:** 2.1. Premises; 2.2. ECJ case law on the *Ne bis in Idem* principle prior *Akerberg Fransson* case; 2.2.1. The Objective Scope of Application of the principle; 2.2.2. Scope of Application *Ratione Materiae*: the Engel Doctrine; 2.2.3. *Res Iudicata* and Identity of the Facts (*Idem*); 2.3. The *Akerberg Fransson* Case; 2.3.1. The facts; 2.3.2. The Decision by the ECJ; 2.4. ECtHR case law on the *Ne bis in Idem* principle prior *Grande Stevens* case; 2.4.1. Scope of Application of the principle; 2.5. The *Grande Stevens* Case; 2.5.1. The facts; 2.5.2. The Decision by the ECtHR

### 2.1. Premises

The *ne bis in idem* principle and its dynamic jurisprudence from both the European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR) provide a perfect ground for further analyzing the differences between the European *ne bis in idem* and the US *double jeopardy*.

As the title suggests, this chapter will focus on the relationship between *ne bis in idem* in the ECJ and ECtHR case law. Yet, it will not only discuss such relationship underlining the different perceptions of the scope of application, but we will also take a closer look at two leading judgments, *Akerberg Fransson* and *Grande Stevens*, respectively delivered by ECJ and ECtHR. To be more specific, we will provide an examination of the impact that such judgments have had on the *ne bis in idem* principle.

There are various aspects of the scope of application of the *ne bis in idem* principle in EU law examined and special attention is given to the scope of application related to the guarantee *ratione materiae* in the case law of the ECtHR, which raises numerous potential questions and issues for EU law.

Over the last fifteen years, the ECJ has issued numerous judgments aiming to clarify the EU concept of *ne bis in idem* (first only with regard to Art. 54 CISA, and later also Art. 50 CFREU). In doing so, the ECJ has contemplated the case law of the ECtHR, mostly as regards the assessment of the criminal nature of a sanction. Especially, the ECtHR has given growing consideration to the ECJ case law in order to overcome previous instable interpretations and to outline *idem* according to the ECHR, notwithstanding that Protocol no. 7 ECHR refers to “offence” rather than facts.

As a result, there is clearly a constructive judicial dialogue, that has led to a substantial alignment of the case law of both European courts.

But the alignment just mentioned, nevertheless, changed soon given the questions raised in 2018 before the ECJ. Such questions regard one specific aspect of *ne bis in idem* in the economic and financial crime area: a “double track” enforcement regime that offers for the option to apply both administrative and criminal sanctions to the same conduct.

## **2.2. ECJ case law on the *Ne bis in Idem* principle prior *Akerberg Fransson* case: premises**

*Ne bis in idem* has become a complex principle of extensive relevance in EU law.

The practice of EU law, both at EU institutions level and that of national authorities, has provided many cases to mature the principle in areas such as competition, taxation, agriculture or the statute of the EU's civil servants. *Ne bis in idem* is everywhere in EU law, its influence covers every area of EU policy, yet the explanation of its exact contours is still open to large discussion.

The case law of the European Court of Justice lies at the heart of *ne bis in idem* in EU law. Its significance is not only due to the fact that it delivers the imposing interpretation of EU rules, including the principle of *ne bis idem*, but it is also significant because, regardless of its seeming lack of overall consistency, a general idea of the principle can be deduced from the sum of the ECJ's individual judgments. This codifying role of the ECJ's case law has become even more relevant after the entry into force of the Charter of Fundamental Rights of the European Union.

The ECJ has interpreted the *ne bis in idem* guarantee and with its decisions it has given relevant understandings into its scope, its relationship with the European Convention of Human Rights and with general principles of EU Law.

The following sub-paragraphs will depict the said case law and underline the ECJ's approach to *ne bis in idem* as an all-embracing principle of EU law.

### **2.2.1. The Objective Scope of Application of the principle**

The application of the *ne bis in idem* principle is generally limited to circumstances within one and the same State. This limitation is not a condition for the application of the *ne bis in idem* principle as such, but as an outcome of the hesitancy of states to accept the negative enforcement consequences of foreign *res iudicata*.

Various reasons have been mentioned in legal writings, amongst which the fact that acceptance of negative enforcement consequences of foreign decisions requires a high degree of confidence in other states, that self-interest might influence states to reconsider criminal prosecution (especially if the crime was committed in their territory or may have an effect on their important national interests, as reflected in Art. 55 CISA) and moreover that the *ne bis in idem* principle itself differs significantly from one state to another.

If one considers the problem of the international non-application of the *ne bis in idem* principle with regards to the general criminal law objectives, punishment and deterrence, the main problem is in the general lack of confidence states have towards the ability of other states in achieving a level of punishment and deterrence comparable to their own. This is comprehensible when, in cases in which the litigious act has cross-border elements for example aspects of the infringement cannot be taken into consideration in the other state proceedings. This could be due to a lack of jurisdiction, or to practical restraints in enacting an international investigation, gathering required evidence, and restraining the subject. Under these circumstances, it is highly likely that a foreign prosecution rules for a lower sentence than is deemed desirable. In the EU, such problems have been inscribed *inter alia* by the adoption and implementation of



mutual recognition instruments like the European Arrest Warrant<sup>54</sup> and the European Evidence Warrant,<sup>55</sup> and by promoting cooperation between networks such as Eurojust and Europol and national authorities' cooperation instruments.<sup>56</sup>

Another critical issue in the EU is the limitation, due to Member States national criminal laws and procedures, in the mutual approval of the full *ne bis in idem* consequences of each states' judicial decisions, as can be shown by the exception clauses in the European Arrest Warrant Framework Directive and the CISA.

As such, the role of the EU is restricted in harmonization in the field of so-called Euro-crimes, as well as in harmonization of criminal law with regards to some EU policies based on the competence provided for in Art. 83 TFEU.

The "complete" application of the *ne bis in idem* principle in EU law requires additional development of AFSJ, implementation of mutual recognition and the establishment of full mutual trust between Member States. Since none has been fully realized, some limitations on the application of the *ne bis in idem* principle in EU law may be thought justified, as confirmed by the Court in the *Spasic*<sup>57</sup> judgment.

At this point, it is worth mentioning the increasing criticism of the international non-application of the *ne bis in idem* principle. If an offence has been satisfactorily adjudicated in another jurisdiction, any further enforcement harms the states which allocate their state resources to unneeded prosecutions, not to mention the subjects who are penalized by double prosecution and penalties. Notwithstanding the evidence, if the possible approval of negative enforcement consequences of foreign *res iudicata* is set as

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<sup>54</sup> B. VAN BOCKEL (2016) *Ne Bis In Idem in EU Law*, Cambridge University Press, page 32.

<sup>55</sup> *Council Framework Decision 2008/978/JHA* on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters. Other mutual recognition instruments include Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty; Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions; and Council Framework Decision 2003/577/JHA on the execution in the European Union of orders freezing property or evidence.

<sup>56</sup> Among these are: Council Decision 2009/316/JHA of 6 April 2009 on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA; Council Decision 2005/671/JHA of 20 September 2005 on the exchange of information and cooperation concerning terrorist offences; Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union, and Council Framework Decision 2008/977/JHA on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters.

<sup>57</sup> Case C-129/14, *Zoran Spasic* EU:C:2014:586.

an example of the sovereignty of states, the argument becomes impervious given the complexity of weighing the interests of “sovereignty” against “justice”, or of “the individual”.

In the *Akerberg Fransson*<sup>58</sup> ruling, the ECJ upheld that the scope of the Charter coincides with EU law itself but only to that extent.

In spite of the importance of questions regarding the applicability of the Charter for the EU legal order, the actual impact of Charter rights in proceedings before national courts may be limited.

One explanation may be the large sections of the Charter which remain untouched by the case law of the ECJ, leaving much to the attitude of the national judiciary when applying Charter rights, or referring questions to the ECJ.

A further explanation could embrace cases like *Akerberg Fransson*,<sup>59</sup> the ECJ leaves the actual purpose of whether there has been an violation of a Charter right to the denoting court.<sup>60</sup> The reason for this may be part of a broader judicial strategy focused on ceding minimally its exclusive role as the EU’s highest constitutional court to the ECtHR, and simultaneously allowing the national judiciary to make its own decisions on fundamental rights issues regarding its citizens in situations under the Charter.

“In competition matters, questions of the objective scope of application of the *ne bis in idem* principle in EU law have long featured in the case law of the EU courts under the pretense of a particular interpretation of the element of “idem”.”<sup>61</sup> As a result, the question of the objective scope and the interpretation of the element of *idem* in that case law have been shuffled.

The jurisprudential progress in the field of competition law are primary for the development of the *ne bis in idem* principle in the EU legal order *inter alia* since the judgments in *Walt Wilhelm*<sup>62</sup> and *Boehringer*<sup>63</sup> were the first judgments in which the Court considered the *ne bis in idem* principle, and the applicability of the principle in the EU context was afterwards accepted by implication.<sup>64</sup>

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<sup>58</sup> Case C-617/10, *Akerberg Fransson*, EU:C:2013:280.

<sup>59</sup> *Ibid.*

<sup>60</sup> B. VAN BOCKEL (2016) *Ne Bis In Idem in EU Law*, Cambridge University Press, page 34.

<sup>61</sup> *Ibid.*

<sup>62</sup> Case 14-68, *Walt Wilhelm and others v. Bundeskartellamt*, EU:C:1969:4.

<sup>63</sup> Case 7/72, *Boehringer Mannheim v. Commission*, EU C: 1972:125.

<sup>64</sup> It is worth acknowledging that the first judgment in which the application *ratione materiae* of the *ne bis in idem* principle in competition matters was confirmed was the judgment of the

The *Walt Wilhelm* judgment regarded an agreement between a group of German undertakings. The German Competition Authority (Bundeskartellamt) had begun proceedings under German competition law, after the Commission had done likewise on the basis of (the then) Article 85 EC (now Art 101 TFEU). The Competition Chamber (Kartellsenat) of the Berlin Court (Kammergericht Berlin) posed several questions to the (then) European Court of Justice (ECJ) in preliminary ruling proceedings enquiring whether national authorities had the liberty to “apply to the same facts the provisions of national law” after the Commission had begun proceedings in the same case.

Furthermore, the ECJ was asked if the probability of its resulting in a double sanction forced by the Commission and by the national authority with jurisdiction in cartel matters condenses the acceptance impossible for one set of two parallel procedures.<sup>65</sup> The Court replied citing that Regulation 17/62 dealt exclusively with the competence of the authorities of the Member States in so far as it is their authority to apply the Treaty provision in instances where the Commission has not acted upon, and did not apply to instances in which national authorities apply national competition laws.

The Court states that, Community and national law on cartels contemplate lobbies from different point of view. While Article 85 (now Article 101 TFEU) in sight of the difficulties resulting in trade between the Member States, each body of national legislation takings on the basis of its exclusive considerations and considers cartels uniquely in that context. In the judgment, the Court stressed that Article 83 EC (now Article 103 TFEU) gives authorization to the Council “to determine the relationship” between national competition laws and the competition provisions from the Treaty, but that the Council had not made use of this particular competence in adopting Regulation 17/62.<sup>66</sup> Thus, the Member States were free in the application of national competition laws, with the important proviso that “if the ultimate general objective of the Treaty is to be honored, this parallel application of the national system can be permitted only so far as it does not damage the uniform application throughout the common market of the Community rules on cartels and of the full effect of the measures adopted in the implementation of those “rules””.<sup>67</sup>

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CFI in the PVC cartel cases (Joined Cases T-305/94, T-306/94, T-307/94, T-313/94, T-314/94, T-315/94, T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 PVC, EU:T:1999:80).

<sup>65</sup> Para. 3 of the *Walt Wilhelm* judgment.

<sup>66</sup> B. VAN BOCKEL (2016) *Ne Bis In Idem in EU Law*, Cambridge University Press, page 35.

<sup>67</sup> Para. 4 of the *Walt Wilhelm* judgment.

In following rulings in the cases of the *Cement Cartel*, the Court confirmed the Opinion of the Advocate General in articulating a “threefold identity” for the application of the *ne bis in idem* principle in competition matters: the “identity of the facts, unity of offender and unity of the legal interest protected”<sup>68</sup>.

In *Toshiba*,<sup>69</sup> the case concerning a worldwide cartel on the market for gas insulated switchgear active between 1988 and 2004, the Court reiterated this approach.

Retaining that “it is settled case-law that EU law and national law on competition apply in parallel”, and that “this situation has not changed with the enactment of Regulation No 1/2003”, the Court concluded that no infringement of the *ne bis in idem* principle had occurred.

But the judgment perhaps raised even more questions. As the Court justly points out, “the two decisions were adopted after Czech Republic accession to the EU, and so there can be no doubt that the situation falls within the scope of application *ratione temporis* of the *ne bis in idem* principle in EU law.”<sup>70</sup> However, it shows that neither the decision made by the Commission nor that of the Czech Competition Authority had been finalized by the time of ruling, so there had never been any infringement of the *ne bis in idem* principle. The problem is one of parallel procedures addressing different time periods when the cartel was in operation which are not an issue of *ne bis in idem* due to the fact that the principle requires finality of the previous decision. These types of situations could however trigger exemption of double fines under the prohibition of double punishment. In fact, where the Court declares that “the decision does not penalize the possible anti-competitive effects made by that cartel in the Czech Republic during the period prior to its accession to the Union”, the Court is making reference to the prohibition of double punishment and not to the *ne bis in idem* principle seeing that the latter applies regardless of any risk of double punishment. Moreover, the Court fails to give reasons why the entry into force of Regulation 1/2003 did not modify anything regarding the regulation of the relationship between national and EU competition law in view of the fact that the *Walt Wilhelm* judgment expressly refers to

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<sup>68</sup> Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 PC-217/00 P and C-219/00P, *Aalborg Portland and others v. Commission*, EU: T: 1999:80, para. 338; Opinion of Advocate General Colomer delivered on 11 Feb. 2003 in Case C-217/00 P, *Buzzi Unicem v. Commission*, EU: C:2003:85, para. 171.

<sup>69</sup> Case C-17/10, *Toshiba and Others*, EU: C:2012:72, para. 99.

<sup>70</sup> See ECtHR, *Gradinger v. Austria*, 23 October 1995, appl. no. 15963/90; Case C-436/04, *Leopold Henri van Esbroek*, EU:C:2006:165; Case C-297/07, *Bourquain*, EU: C:2008:708.

the fact that the Council had not make use of the competence laid down in Article 103 TFEU in bringing about Regulation 17/62, and said competence had been used by the Council in bringing about Regulation 1/2003.

Seeing the Charter has now become legally binding, the “unity of the legal interest protected” clearly attests the “scope of EU law” as further clarified by the Court in the *Akerberg Fransson*<sup>71</sup> judgment. Differently, the Court will have to find a method to distinguish between the scope of EU law itself, and the scope of the “legal interest protected” by EU law, something which may prove quite hard to do. The question is whether a given situation falls within the scope of the Charter or not.

It would appear from the *Akerberg Fransson* and *Melloni*<sup>72</sup> rulings that at least for Art. 101 TFEU there can be relatively no question that national competition law does fall within the scope of the Charter, even in situations not affecting trade between the Member States.

The motivations are similar to those already expressed by Advocate General Colomer in his Opinion in the *Cement cartel* cases. Although it cannot be stated that national competition law “implements” EU law directly, it does so indirectly. As expressly intended during the drafting of Regulation 1/2003, the same competition rules apply throughout the EU. Regardless of the degree to which national law is determined by EU law, the combined reading of the *Melloni*<sup>73</sup> and *Akerberg Fransson* rulings shows that the Charter applies to national law falling within the scope of EU law.

“For Art. 101 TFEU, Art. 3 Regulation 1/2003 entirely “determines” national competition law in situations in which an effect on trade between the Member States exists, however not in situations without effect on trade between the Member States.”<sup>74</sup> By consequence, there exists a partial determination of national competition law in regulation 1/2003, and by so, is adequate enough to trigger the applicability of the Charter. Furthermore, it must be noted that Regulation 1/2003 does determine national competition law in its entirety concerning the cartel prohibition due to it being unfeasible or undesirable, in light of the need for a level playing field, for a Member States to have two separate competition acts in force with different substantive cartel

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<sup>71</sup> Case C-617/10, *Akerberg Fransson*, EU :C :2013 :280.

<sup>72</sup> Case C-399/11, *Melloni*, EU:C:2013:107.

<sup>73</sup> *Ibid.*

<sup>74</sup> B. VAN BOCKEL (2016) *Ne Bis In Idem in EU Law*, Cambridge University Press, page 39.

rules for situations with and without effect on trade between the Member States. The drafting of Art. 3 Regulation 1/2003 aims to avoid such a situation.

For Art. 102 TFEU this might be another matter seeing the clear difference in treatment given to that provision in Art. 3 of Regulation 1/2003 when compared to Art. 101 TFEU however, it cannot be presupposed given general requirements such as the primacy, unity and effectiveness of EU law that this disposes a “carte blanche” to Member States to adopt and enforce laws prohibiting unilateral conduct in a way contrary to the meaning of Art. 102 TFEU, so it must be considered that EU law determines national law to a certain point, also where Art. 102 TFEU is concerned.

### **2.2.2. Scope of Application *Ratione Materiae***

Art 4 of Protocol no. 7 refers to “criminal proceedings”, which is reminiscent of the term “criminal charge” from Article 6 ECHR and its scope of application is accordingly defined by the “Engel criteria”, an autonomous concept under the Convention, adopted by the ECJ in the *Bonda* judgment.<sup>75</sup>

In *Bonda*<sup>76</sup>, a Polish court raised the question “whether the imposition of administrative sanctions in the framework of the Common Agricultural Policy fell within the scope of Art 50 CFR and, thus, could bar criminal proceedings related to the same facts.”<sup>77</sup>

In its valuation on the relevant sanction (the provisional barring from the advantage of an aid scheme), the Court of Justice mentioned the *Engel* criteria:<sup>78</sup> the sanctions were regarded as administrative sanctions (not criminal) and the relevant provisions and the sanction were not usually suitable but applied just to economic operators who had recourse to the related aid scheme. Hence, the “object and purpose of the sanction was not punitive, but preventive”.

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<sup>75</sup> *Engel and Others v. Netherlands*, ECtHR 8 June 1976, (Series A-22); Case C-489/10, *Bonda*, EU: C: 2012:319. In the *Bonda* judgment the CJEU gave its own rendering of the *Engel* doctrine with particular emphasis on the need to protect the own financial means of the Union.

<sup>76</sup> Case C-489/10 *Bonda* EU:C:2012:319.

<sup>77</sup> K. LIGETI & V. FRANSSEN (2017) *Challenges in the Field of Economic and Financial Crime in Europe and the US*, Hart Publishing, page 218.

<sup>78</sup> Case C-489/10 *Bonda*, para 37.

In conclusion, the sanction looked less severe because it disadvantaged the farmer only of the prospect of obtaining aid but did not cause any additional harm.<sup>79</sup>

For these explanations, the Court of Justice did not contemplate the sanction as “criminal”, and Art 50 CFR did not require the Polish court to suspend criminal proceedings.<sup>80</sup>

This valuation was reinforced by the general rules on the connection between administrative penalties in the framework of the Common Agricultural Policy and criminal sanctions.<sup>81</sup> These rules openly supplied for a cumulation of proceedings “if the administrative penalties were integral part of financial aid schemes and could be applied independently of any criminal penalties”.<sup>82</sup> Although, a better insight at the context, shows that coordination of administrative and criminal proceedings were seen as the rule instead of the exception.<sup>83</sup>

Furthermore, the concept of administrative penalties covers measures of an evidently punitive character (i.e. administrative fines).<sup>84</sup>

Given that the income of economic operators (producers, farmers) significantly relies on the benefits to be granted by financial aid schemes, it seems uncertain whether the ban from such an aid scheme can be seen as less severe than an administrative fine. So, the Court of Justice visibly preferred a restrictive consideration of the *ne bis in idem* principle in order to preserve the effectiveness of the double-track law enforcement system, i.e. a parallel application of criminal and administrative sanctions.

Conversely, the *Engel* criteria are not applied as such in EU competition law. Furthermore, the EU courts have never validated that competition fines are of criminal nature.<sup>85</sup> This might not be questionable seeing that criminal law was not part of the

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<sup>79</sup> Ibid paras 38-45.

<sup>80</sup> Ibid paras 45-46; in a previous decision, the Court came to the same conclusion, without citing the Engel Criteria; see Case C-150/10 *Beneo-Orafti* (2011) ECR I-6843, paras 69-74.

<sup>81</sup> Case C-489/10 *Bonda* (n43) para 35.

<sup>82</sup> Council Regulation (EC, Euratom) 2988/1995 of 18 December 1995 on the protection of the European Communities financial interests, (1996) OJ L 312/1 Art 6(5) ('Regulation 2988/1995').

<sup>83</sup> See Regulation 2988/1995 recital (10) Of the Preamble and Art 6(1)-6(4); see also J. TOMKIN, 'Article 50-Right not to Be Tried or Punished Twice in Criminal Proceedings for the Same Criminal Offence', in S. PEERS, T. HERVEY, J. KENNER, A. WARD (eds), *The EU Charter of Fundamental Rights-A Commentary* (Beck Hart Nomos, 2014) para 50.34.

<sup>84</sup> Regulation 2988/1995, Art S(1)(a).

<sup>85</sup> See Case T-83/91, *Tetra Pak v. Commission* (1994) ECR II-755, para. 235, Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95, *Cimenteries CBR and Others v. Commission*

competence of the EU. Consequently, any suggestion that an EU sanction could be prescribed as a criminal charge had to be averted.<sup>86</sup>

Analyzing the *Engel* criteria one by one, these are:

- i) the legal classification of the offence under national law,
- ii) the nature of the offence,
- iii) the degree of severity of the penalty that the person concerned risks incurring.

The *Engel* doctrine strongly suggests that charges against a subject are “criminal”, “a presumption which can be rebutted entirely, and solely if the deprivation of liberty cannot be proven significantly detrimental given their nature, duration or manner of execution”.<sup>87</sup> The maximum potential penalty provided by the relevant law must be taken into account when applying the criteria; the imposed sentence “cannot lessen the importance of what was initially at stake”.<sup>88</sup>

The first *Engel* criterion has small consequences. If an offence is classified as criminal under national law, it will inevitably be classified in the same means for the purposes of the Convention.

Instead, according to the Court, the second and third *Engel* criteria are “alternative and not necessarily cumulative. This, however, does not rule out a cumulative approach where separate analysis of each criterion guarantees a clear conclusion as to the existence of a criminal charge.”<sup>89</sup>

In applying the second *Engel* criterion, the Court will be concerned with the seriousness of the conduct itself and the manner in which the misconduct is classified in other Member States.<sup>90</sup> Besides other things, the Court examines whether the rule at issue is of a “general character”, applicable to all citizens and there so pertaining to the realm of criminal law in a broader sense, or a disciplinary rule which specifically aims to protect the qualities and/or integrity necessary for the exercise of certain professions.

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[2000] ECR II-0491, para. 717 and Case T-9/99, *HFB and Others v. Commission* [2002] ECR II-1487, para. 390.

<sup>86</sup> See A. DE MOOR VAN VUGT (2012) *Administrative Sanctions in EU Law*, 5 Review of European Administrative Law, pages 5-41.

<sup>87</sup> *Sergey Zolotukhin v. Russia*, ECtHR (GC) 10 February 2009, appl. no. 1493/03, para. 56.

<sup>88</sup> *Ibid.*

<sup>89</sup> *Putz v. Austria*, ECtHR 22 February 1996, (Reports 1996, 312), para. 31; *Sergey Zolotukhin v. Russia*, ECtHR (GC) 10 February 2009, appl. no. 1493/03, para. 53.

<sup>90</sup> In *Oznrnk* the Court for instance held it to be sufficient that the charges brought against the subject under provisions of administrative law were part of the criminal law in many Member States.



The third *Engel* criterion almost obliterates the second one because the Court has not been able to set a lower limit for its application, due to the difficulty in defining fine amounts as a “minimum threshold” because of the variation of circumstances between individual cases.

Noting this defect in the *Engel* doctrine, the Court could be tempted to set an even lower fine in cases in which there is difficulty in adopting a more principled stance on a particular aspect of the second *Engel* criterion. Until now the case law demonstrates that besides the deprivation of liberty, even a fairly low fine is enough to bring a case within the criminal law sphere for the purposes of the Convention.<sup>91</sup> The possibility of the revocation of a license falls under the third *Engel* criterion.

The extension of the *Engel* doctrine to the *ne bis in idem* principle has possibly far-reaching significances for national systems of law. The *ne bis in idem* principle involves no rule of conflict or priority between diverse legal rules or diverse types of proceedings within different jurisdictions, so that the application of the *Engel* doctrine to the *ne bis in idem* principle in practice demands full procedural coordination and/or concentration of tax, administrative and criminal proceedings.

In practice, the undesirable consequences are usually mitigated through *una via* rules, or by means of the coordination of enforcement efforts through a judicial network or government database.

A second conflict may be the requirement of a level of *ne bis in idem* protection under the Charter that, according to the ECJ, may not conform with the requirement of effectiveness of EU law under circumstances.<sup>92</sup>

### **2.2.3. *Res Iudicata* and Identity of the Facts (*Idem*)**

The principle of finality is a fundamental legal principle in its own right, aside from its purpose as a requirement for the application of the *ne bis in idem* principle.

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<sup>91</sup> The Court has consistently held that 'the relative lack of seriousness of the penalty cannot divest an offence of its inherently criminal character': *Ruotsalainen v. Finland*, ECtHR 16 June 2009, appl. no. 13079/03, para. 43.

<sup>92</sup> The *Akerberg Fransson* judgment has provided one example of this.

On various occasions it has been the subject of litigation before the ECJ. This case law regards the question of which parts of a judgment acquires formal finality. The ECJ has summarized its own case law on this point as follows:

“The principle of *res judicator* extends only to the matters of fact and law actually or necessarily settled by the judicial decision in question.”<sup>93</sup>

Maintaining the principle of mutual recognition, the ECJ has developed a semi-autonomous approach in its case law to the question of decisions to consider within the meaning of Art. 54 CISA.

In *Gozutok and Brugge*, the ECJ held that:

“Article 54 of the CISA cannot play a useful role in bringing about the full attainment of that objective unless it also applies to decisions definitively discontinuing prosecutions in a Member State.”<sup>94</sup>

According to ECJ, regardless of the nature or content of the decision, there has to have been a “substantive determination” of the facts and pleas of the case in order for a decision to acquire finality, with the exception of decisions to discontinue the prosecution for time reasons. Equally, the simple fact that a decision involves a determination of the facts is insufficient to acquire finality.

A police decision to halt an investigation does not trigger *ne bis in idem* protection if said decision cannot effectively bar further prosecution under national law, even if the decision was based on an evaluation of the facts of the case.<sup>95</sup>

Regarding competition matters, the ECJ has confirmed an annulment of a decision of the Commission by the Community courts on formal grounds does not prevent the Commission from adopting a second decision in a case which remedies the formal defect in the previous decision, as such a formal annulment cannot be regarded as an “acquittal within the meaning given to that expression in penal matters”<sup>96</sup>.

A final outcome cannot be guaranteed for all types of settlements in competition proceedings. Both the settlement procedure introduced by Article 10a of Commission Regulation 773/2004<sup>97</sup> and applications for leniency can result in rulings that are

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<sup>93</sup> Case C-462/05, *Commission v. Portugal*, EU:C:2008:337.

<sup>94</sup> Joined Cases C-187/01 and C-385/01, *Gozutok and Brugge*, EU:C:2003:87.

<sup>95</sup> Case C-419/07, *Criminal proceedings against Vladimir Turansky*, EU:C:2008:768.

<sup>96</sup> Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, *Limburgse VinylMaatschappij*, EU:C:2002:582.

<sup>97</sup> 2004 OJ L 123/18; see also the Commission Notice on the conduct of settlements in cartel cases.

conditional and enforceable against the subject, and that bar future prosecution when conditions are met.

Although commitments can be made binding on the undertaking by a Commission decision, that decision cannot substitute a decision which imposes a fine made by the Commission. Moreover, Article 9(2) Regulation 1/2003 provides that under special conditions, a Commission has the power to reopen a case, and that with regards to the same conduct, the national competition authorities or national courts may subsequently come to a finding of an infringement.

The element of *idem* is perhaps the most argumentative aspect of the *ne bis in idem* principle. Incongruities exist among the case law of the ECJ in competition matters and the cases on Art. 54 CISA.

As discussed earlier, the “threefold requirement” is not an *idem* in the true sense, but a limitation of the objective scope of application of the *ne bis in idem* principle.

The general rule that the Court articulated in the *Van Esbroeck*<sup>98</sup> judgment is that the element of *idem* is to be understood exclusively as the “identity of the material acts, understood in the sense of the existence of a set of concrete circumstances which are inextricably linked together”. The legal classification of the act and the nature of the “protected legal interest” are accordingly of no consequence.

This was subsequently confirmed and further elaborated by the ECJ in, *inter alia*, the *Van Straaten* and *Kraaijenbrink* judgments.<sup>99</sup>

The *Van Straaten* case dealt with the question whether the quantities of forbidden substances and the identities of accomplices had to be the same. According to the Advocate General, the objective element of *idem* regards both the applicable space and time where the facts took place, as well as to the subjects’ intentions. It would later result that not all facts need to be exactly identical; the fact that the amount as well as the identities of the accomplices varied would not alterate the objective action itself. The ECJ judgment referred to the relevant considerations from *Van Esbroeck* and noted out that the wording of Art. 54 CISA refers to the same “acts”.

According to the judgment, this “demonstrates that that provision refers only to the nature of the acts in dispute and not to their legal classification”. The Court sustained confirmation by the nature of Art. 54 CISA, as being a fundamental right and

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<sup>98</sup> Case C-436/04, *Van Esbroeck*, EU:C:2006:165.

<sup>99</sup> Case C-150/05, *Van Straaten*, EU:C:2006:614 and Case C-367/05, *Kraaijenbrink*, EU:C:2007:444.

its purpose within the context of the Schengen acquis, and that the central question is “whether a situation constitutes a set of facts which are inextricably linked together”.<sup>100</sup> It held that subsequently, the quantities of narcotic drugs or the identity of accomplices do not need to be matching, in order for there to be identity of facts.

In the *Kraaijenbrink* judgment the referring court asked ECJ to provide clarification to the question of to what extent the subjective intentions of the subject are relevant for a finding of “idem”. “The case concerned *Mrs Kraaijenbrink* who had been sentenced by a local district court in the Netherlands for “several offences; under Article 416 of the Netherlands Penal Code for receiving and handling the money of drug trafficking between October 1994 and May 1995 in the Netherlands”.

Three years later, she was sentenced by the criminal court at Ghent, Belgium for the offence of “exchanging sums received from trading narcotics in the Netherlands between November 1994 and February 1996 in Belgium “. <sup>101</sup>

In appeal, the Belgian court of cassation, stayed proceedings in order to ask the ECJ, firstly, whether *Mrs Kraaijenbrink*’s conduct for which she was convicted in Belgium and the Netherlands should be regarded as “the same acts” within the meaning of Art. 54 CISA in light of the fact that her underlying intentions were the same, and secondly, if this would ban a second conviction on a “subsidiary” basis, hence taking into account prior convictions for diverse acts, committed with the same intentions.

Although not much could be inferred by the ECJ from the order for reference as regards to the relevant facts, the Belgian court of cassation filed that if the defendant had already been prosecuted for these same acts on both counts in Belgium, these acts could have been interpreted as a single act for the purpose of the application of the *ne bis in idem* principle under Belgian criminal law.

Succeeding the Opinion of the Advocate General, the ECJ held that the “same acts” inside the denotation of Art. 54 CISA “must be understood as a set of concrete circumstances which are inextricably linked together”, and held that this complex connection does not rely only on the aims of the defendant. The same criminal intention “does not sufficiently indicate that there is a set of solid circumstances that are intricately linked together covered by the description of “same acts” within the meaning of Art. 54 of the CISA”.

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<sup>100</sup> Para. 41 of the judgment.

<sup>101</sup> B. VAN BOCKEL (2016) *Ne Bis in Idem in the EU Law*, Kluwer Law International, page 50.

The rule from *Kraaijenrink* is that, where the historical facts may provide the objective link between a given set of circumstances, the intentions of the subject, will provide a subjective link. The plain fact that there is a subjective link between a set of concrete circumstances is however insufficient.

### **2.3. The *Akerberg Fransson* Case**

It is now important to provide an analysis of the ruling of the EU Court of Justice in the *Akerberg Fransson* case<sup>102</sup> in which a Swedish fisherman was charged with tax offences in criminal court in Sweden even though he had paid a tax surcharge for undeclared VAT. The ruling, based on the *ne bis in idem* principle, as outlined in Article 50 of the EU Charter of Fundamental Rights, led to the Swedish Supreme Court decision to completely modify its practice of the law in a plenary ruling in June 2013. Equally important is the analysis of the possible impact of the Court of Justice ruling in the area of taxation as well as in criminal proceedings regarding the right not to be tried or punished twice for the same offence. These legal issues emphasize the intricate threefold relationship between EU law, European Convention of Human Rights law and national law.

Hans Akerberg Fransson was a self-employed fisherman who owned only one fishing boat and ran his financial activities as a sole trader, responsible for paying tax on his fishing business income as well as paying VAT.

He fished the expensive delicacy *vendace* in the Gulf of Bothnia, principally at the mouth of Kalix River north of Sweden. Vendace is full of roe, *Kalix ojrom*, an expensive delicacy and is also a protected designation of origin in the EU.

Mr. Akerberg Fransson had sold *Kalix ojrom* to buyers, primarily first-class restaurants in Sweden. His business operations did not involve any cross-border aspects; however, one receipt indicated he had sold a limited amount of eviscerated *vendace* as mink feed in Finland.

When the Swedish Tax Agency reviewed the bookkeeping and tax returns of Mr. *Akerberg Fransson*, they retained that there were some discrepancies regarding the sale of roe and therefore increased his 2004 and 2005 declared income by approximately

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<sup>102</sup> Case C-617/10 *Hans Akerberg Fransson*, judgment of 26 February 2013, ECR 2013:105.

SEK 500 000 and the VAT payable by approximately SEK 150 000 (ca € 17 000). In addition, the Swedish Tax Agency added a 40 % income tax surcharge and a 15 % VAT tax seeing that his tax returns were deemed unsatisfactory.

No appeal had been made by Mr. Akerberg Fransson and the tax surcharge had been paid and gained legal force by the time the case was brought to the Court of Justice. In spite of the fact that the Court of Justice had ordered him to pay a tax surcharge, Fransson was summoned to appear before the Haparanda District Court in 2009 on charges of serious tax offences and risked receiving a sentence of six to eight months imprisonment. Basing argumentation on the *ne bis in idem* principle, the counsel for the defense pleaded that the case had to be rejected.

“In December 2010, the District Court decided to stay the proceedings and request a preliminary ruling from the Court of Justice with regard to whether the Swedish policy of double procedures and sanctions could be regarded as being compatible with the prohibition against *ne bis in idem* in Article 50 of the Charter. In its request to the Court of Justice, the District Court stressed in particular that the tax surcharge partly concerned VAT.”<sup>103</sup>

As we know, the Charter became a legally binding European Union law on 1 December 2009 as part of the Lisbon Treaty and that the Charter retains the same status as the EU Treaties positioned at the highest legal level.

*Akerberg Fransson* was recognized as a significant case and was referred to the Grand Chamber; 11 judges participated in the ruling overseen by the President and Vice-President of the Court. The Member States had a restrictive view about tax sovereignty in both their written observations and oral hearing. Seven states agreed with the position of the Swedish Government that the Charter was not applicable seeing that the case regarded the application of tax law. Moreover, they “added that the sanctions for failure to declare VAT correctly should be regarded as lying outside the remit of EU law since the EU VAT Directive 17 lacks detailed rules regarding how these sanctions should be designed.”<sup>104</sup> Only Austria, had a different point of view and stressed that the *ne bis in idem* principle should be observed.

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<sup>103</sup> J. NERGELIUS & E. KRISTOFFERSSON (2015) *Human Rights in Contemporary European Law*, Hart Publishing, page 195.

<sup>104</sup> *Ibid.*, page 197.

Counsel for Mr. *Akerberg Fransson* emphasized that the freedom of Member States to define sanctions in reference to supporting the system for paying VAT could not include the freedom to disregard the *ne bis in idem* principle as stipulated in the EU Charter but rather, on the contrary must remain within its framework. The inquiries made by the Rapporteur, the Polish Judge Safjan and by Vice-President Lenaerts during the oral hearing demonstrate that the Court of Justice was highly interested in that aspect. The scope of the Charter is a crucial point of the case.

According to Article 51.1 of the Charter, it is applicable to the legal systems of the Member States exclusively when the Member States are implementing Union law. This Article shall be read in conjunction with Article 6.1 in the TEU (Treaty on European Union) which affirms the Charter “shall not extend in any way the competences of the Union”. The Court found these provisions signify that the applicability of the Charter is associated with the scope of Union law. It maintained that the fundamental rights are applicable in all situations governed by Union law, but not outside such situations.<sup>105</sup>

On this point one could note there is unquestionable ambiguity between language versions. While the English version refers to Article 51.1 of the Charter to “implementing Union law”, the Swedish version uses the expression “*tillämpa*” Union law which can be translated as apply Union law.

The *Akerberg Fransson* judgment appears to indicate that the Court of Justice comprehends implementation of Union law to mean application of Union law.

In the legal argumentation in the case, various parties involved expressed a narrow view of what was intended by “implementation” of a directive, however the Court decided favorably for a broader understanding of the scope of the Charter.

Therefore, every situation governed by Union law is protected by the fundamental rights guaranteed by the Charter however those situations lying outside the scope of Union law are not protected. The Court of Justice has made reference to its statements on the scope of Article 51.1 of the Charter in *Akerberg Fransson* in several cases following and it now constitutes established EU law today.<sup>106</sup>

What does that imply regarding VAT? While VAT legislation is based principally on the comprehensive VAT Directive in the Member States, Sweden

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<sup>105</sup> *Akerberg Fransson* paras 19, 20 and 21.

<sup>106</sup> See Case C-390/12 *Pfieger*, judgment of 30 April 2014 paras 31-34.

included,<sup>107</sup> the VAT Directive lacks any detailed provisions regarding the sanctions that Member States shall be put into effect when business firms do not declare VAT properly.

The Court remarked that the VAT Directive consists of provisions stating that every Member State is obliged to take all legislative and administrative measures necessary for ensuring complete collection of the VAT due on its territory as well as in the prevention of tax evasion.<sup>108</sup>

As well, the Court stressed that efficient VAT collection is consequential for the financial interests of the Union seeing that VAT revenue is a part of the its own resources. The Court ascertained that penalties such as tax surcharges and prosecution for a tax offence characterize implementation of the VAT Directive and therefore of EU law. Thus, the Court determined that the provisions of the Charter are applicable on the design of the VAT sanction systems in the Member States. Therefore, Member States must follow the Charter when designing sanctions to implement material provisions that have been set up in directives adopted by the European Union. Regarding this point, a crucial legal principle has been defined as a result of the *Akerberg Fransson* judgment.<sup>109</sup>

Undoubtedly, the judgment contradicted the ruling of the Swedish Supreme Court in 2011 in reference to the main issue.

The Court of Justice has unquestionably “settled on a relatively extensive interpretation of what constitutes Member State implementation of union law but it is clear that it does not lack support in previous case law”.<sup>110</sup>

It is crucial to point out that the VAT Directive specifically stipulates that business operators have an obligation to declare and pay VAT correctly. There is a certain amount of room for maneuver given to Member States regarding to the design of procedures and penalties to ensure the collection of VAT however they have the obligation to respect the EU legal principles of law of which include; *inter alia*, the principle of effectiveness, the principle of cooperation and the proportionality principle.

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<sup>107</sup> EU VAT Directive (n17).

<sup>108</sup> *Akerberg Fransson* paras 25.

<sup>109</sup> The comprehensive Opinion in the case by Advocate General Cruz Villalon took a more cautious view. His Opinion is engaging but was not followed by the Court and does not appear entirely coherent.

<sup>110</sup> J. NERGELIUS & E. KRISTOFFERSSON (2015) *Human Rights in Contemporary European Law*, Hart Publishing, page 198.



Noteworthy in case law are three early cases; *Louloudakis*<sup>111</sup> on punitive import provisions, *The Commission v Italy*<sup>112</sup> on “VAT amnesty” and *Profaktor Kulesza*<sup>113</sup> on the reduction of the extent of the right to deduct VAT.

In para 29 of the latter case, the Court of Justice indicates that Member States are able to define the sanctions which they deem appropriate for their state however, they must exercise that power in accordance with EU law and its general principles, and consequently in accordance with the principle of proportionality.

Taking into consideration this statement, the outcome in *Akerberg Fransson* should not be surprising.

The judgment in *Akerberg Fransson* was issued on the same day as the high-profile judgment in *Melloni*<sup>114</sup>, in which the Court of Justice established that the European Arrest Warrant Regulations regarding extradition to another Member State for criminal prosecution took precedence over the inconsistent rules adopted in the Spanish Constitution.

Unarguable was the preeminence of the Union law however, the Court made a decisive distinction between *Melloni* and *Akerberg Fransson*.

While it determined that the circumstances in *Melloni* to be wholly determined by EU law, it noted the contrary with *Akerberg Fransson* because much of the implementation was left to a national level. It emphasized that in such circumstances, national standards shall not compromise the level of protection provided for by the Charter or the preeminence, unity and effectiveness of European Union law. Nonetheless, national authorities and courts have the freedom to apply national standards of protection of fundamental rights and must guarantee that the level of protection provided for by the Charter as explained by the Court of Justice and the preeminence, unity and effectiveness of Union law is upheld and not compromised. More specifically, Sweden and other Member States are free to apply higher fundamental rights standards concerning tax law enforcement. The distinction is substantial from the point of view of constitutional law principles however irrelevant with regards to the legal situation in Sweden.

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<sup>111</sup> Case C-262/99 *Paraskeva Louloudakis v Elliniko Dimosio* ECR 2001-5547.

<sup>112</sup> Case C-132/06 *The Commission v Italy* ECR 2008 1-5457.

<sup>113</sup> Case C-188/09 *Profaktor Kulesza et al* ECR 2010 1-7639.

<sup>114</sup> Case C-399/11 *Stefano Melloni v Ministerio Fiscal*, judgment of 26 February 2013, ECR 2013:107.

There was a discussion prior to the plenary ruling of the Supreme Court in June 2013 concerning the statement by the Court of Justice in the *Akerberg Fransson* judgment (para 37) which stated that Article 50 in the Charter does not preclude the successive imposition of a tax surcharge and a criminal penalty provided that the surcharge is not criminal in nature. In fact, according to the final sentence of para 34 of the judgment, the opposite applied if the tax surcharge is criminal in nature and the Court of Justice clarified that it is a matter for the national court to determine whether this is the case. As has been ascertained, the Court of Justice had connected the issue of whether tax surcharges are criminal in nature to its own case law by making reference to its judgment in the *Bonda* case.<sup>115</sup> Even so, the Court of Justice made no mention to its ruling that the ECtHR had already held the Swedish tax surcharge to be of a criminal nature.

The Swedish language version of the *Akerberg Fransson* judgment, basically a translation, could be interpreted as meaning that the Court of Justice had declared that Haparanda District Court was obligated to perform an independent assessment to understand if the tax surcharge was of a criminal nature. At the same time, the Court corrected the Swedish text version of the judgment in an uncommon special ordinance (of May 7, 2013).

The revised text clearly stated that it was the responsibility of the District Court to decide whether there was cause to assess if the tax surcharge was of a criminal nature. On this point, one should take into account that the Court of Justice delivered a preliminary ruling and therefore it is always a matter for the national court to pass Judgment in each individual case based on the statements of the Court of Justice and in light of national circumstances of which the Court of Justice does not possess the same in-depth knowledge as the national court.

In addition, considerations should be made regarding the fact that the statements made by the Court of Justice in the *Akerberg Fransson* case are intended to be read and serve as guidance for legislation and application of the law in now all 28 Member States. The actual circumstances regarding the meaning of a tax penalty and a combination of penalties implied can differ naturally and result in a penalty in certain cases non-criminal in nature. This appears to be a motive for the observation made by

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<sup>115</sup> *Bonda* (n 43) para 35.

the Court of Justice that the national court determines the criminal character of the tax surcharge. Examples of different circumstances could encompass: a penalty rarely applied by courts or authorities in practice; legislation is written in a way that the penalty is easy to avoid; the amounts to be paid when the penalty is applied being only negligible; or that the penalty is actually a reasonable charge for late payment.

In its plenary ruling in June 2013, the Swedish Supreme Court made reference to prior standpoints and then embraced the position that Swedish tax surcharges are criminal in nature.<sup>116</sup>

To put it more clearly, the Supreme Court followed the approach developed in European law by the Strasbourg and Luxembourg courts.

#### **2.4. ECtHR case law on the *Ne bis in Idem* principle prior *Grande Stevens* case: premises**

The case law of the judicial authorities in Europe regarding the *ne bis in idem* principle is, as seen, rich and with various approaches. The European Court of Human Rights has advanced numerous approaches to evaluating parallel liability for administrative offense and criminal liability. Though, it must be held that the administrative tax offenses from their legal structure stand slightly outside the standard of the legal definition in public law.

Nevertheless, the issue in the ECtHR case law is to justify parallel administrative and criminal proceedings.

What will be observed further is that to implement the protection of the individual's rights, the European Court of Human Rights has read the term "criminal charge" in an independent way. This means that the Courts' interpretation does not follow the national meanings of the mentioned institutes, and the legal doctrine of such independent interpretation goes back to the decision of *Engel and Others v. the Netherlands*.

Regarding the term of "criminal charge" as the issue of the right to a fair trial, the ECtHR has reached its wide understanding thru its decision-making process.

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<sup>116</sup> See para 36 of the Decision.

Therefore, through the wide interpretations of the notions, the Court has comprised into this area also the concepts of administrative offenses and other disciplinary sanctions. The interpretation of the notion is independent from the national case law.

The core of the case law here gathered in relation to the application of the Article 4 of the Protocol no. 7 proves the presence of numerous approaches of the European Court of Human Rights to the matter of identity of acts in the retrial of complainants.

### **2.4.1. Scope of Application of the principle**

With regards to the material scope of application of the guarantee (*ratione materiae*), the ECtHR has firmly held that “the legal characterization of the procedure under national law cannot be the sole criterion of relevance for the applicability of the principle of non bis in idem under Article 4 of Protocol no. 7. Otherwise, the application of this provision would be left to the discretion of the Contracting States to a degree that might lead to results incompatible with the object and purpose of the Convention.”<sup>117</sup>

In *Nilsson v. Sweden*<sup>118</sup>, the Court ruled that the temporary suspension of a driving license was within the criminal law sphere because the suspension was not an “automatic” or “immediate and foreseeable” consequence of the subject’s conviction for a serious road traffic offence. Being there was a delay from the time of the subject’s conviction to the suspension of the subject’s driving license, the Court concluded that the measure must have been, at least partially, punitive in nature. It held that “prevention and deterrence for the safeguard of road users could not have been the only scope of the measure; retribution must have been a major consideration as well”<sup>119</sup>.

As previously seen, the principle of finality (*res iudicata*) is a fundamental legal principle in its own right, aside from its purpose as a requirement for the application of the *ne bis in idem* principle.

Not all judicial decisions are, by nature, able to acquire finality. The aim of some types of judicial decisions is not to settle a matter which is the subject of a prosecution, but rather to serve a diverse legal purpose. The case law before both Courts weighs the

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<sup>117</sup> *Sergey Zolotukhin v. Russia*, ECtHR (GC) 10 February 2009, appl. no. 1493/03, para. 78.

<sup>118</sup> *Nilsson v. Sweden*, ECtHR 13 December 2005, appl. no. 73661/01.

<sup>119</sup> *Nilsson v. Sweden*, ECtHR 13 December 2005, appl. no. 73661/01.

question in different ways of how to properly distinguish decisions that may or may not bring proceedings to a conclusion.

It is recognized case law before the ECtHR that a judicial decision is ultimate when it has acquired *res iudicata* in reference to the applicable rules under national law and has become binding.<sup>120</sup> “Such is the case when no more ordinary remedies are presented under the law, when all available remedies are exhausted, or when time limits have expired.”<sup>121</sup>

Decisions against which an ordinary appeal is still possible are thus excluded from the application of the *ne bis in idem* principle. The prospect of taking extraordinary remedies under national law yet does not affect the final nature of the decision.<sup>122</sup> It is irrelevant whether the decision in question concerns an acquittal or conviction; the sole question is whether the decision has become final.<sup>123</sup> Art. 4 of Protocol no. 7 does not obstruct the reopening of a case when the possibility to resume proceedings exists.

While there are differences in emphasis between the case law of the ECtHR and the ECJ in reference to the requirement of the finality of the previous decision, they have not arrived at any obvious discrepancies or incompatibilities between them.

In its case law, the ECtHR has had to deal with a diverse variety of questions of finality, *inter alia* in connection with extraordinary remedies written in many state laws, some of which were formerly in the sphere of influence of the Soviet Union.

In the case of *Nikitin v. Russia*, the applicant was acquitted from charges of “treason through espionage” and “aggravated disclosure of an official secret”.<sup>124</sup>

The Russian Procurator General was denied a request with the presidium of the Supreme Court to review the acquittal in supervisory proceedings. Later, the applicant challenged the Russian legislation, which agreed on a reexamination of a closed case and the annulment of an acquittal in supervisory review proceedings before the Russian constitutional court. He successfully appealed, and the relevant legislation was declared unconstitutional. As well, the applicant complained to the ECtHR, arguing that the Procurator General’s request for supervisory review proceedings breached Art. 4 of

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<sup>120</sup> *Sergey Zolotukhin v. Russia*, ECtHR (GC) 10 February 2009, appl. no. 1493/03, para. 107.

<sup>121</sup> *Ibid.*; see also: *Nikitin v. Russia*, ECtHR 20 July 2004, appl. no. 50178/99, para. 107.

<sup>122</sup> *Sergey Zolotukhin v. Russia*, ECtHR (GC) 10 February 2009, appl. no. 1493/03, para. 107.

<sup>123</sup> *Ibid.*, para. 111.

<sup>124</sup> *Nikitin v. Russia*, ECtHR 20 July 2004, appl. no. 50178/99.

Protocol no.7 due to the fact that it had rendered him liable to be tried again, creating the potential for a new prosecution.

In the following judgment, the ECtHR stated that in the Russian legal system at the time, a discharge such as in the case of *Nikitin* did not become “final” until the time limit for a request for supervisory review, which was one year, had expired. Nevertheless, since supervisory review was seen as an astonishing appeal given that it was not accessible to the defendant in a criminal case and its application was subjected to the decision of the authorized official, the ECtHR presumed that the actual acquittal had become ultimate for the purposes of Art. 4 of Protocol no 7.<sup>125</sup>

The ECtHR observed that Art. 4 of Protocol no 7 clearly differentiates amid a second prosecution or trial (prohibited by the first paragraph of the Article) and the resumption of a trial in exceptional circumstances (second paragraph). Article 4 § 2 of Protocol no. 7 clearly predicts the option that a person may have to accept prosecution on the same charges, in accordance with domestic law, where a case is reopened following the appearance of new evidence or the discovery of a fundamental defect in the previous proceedings.<sup>126</sup>

The ECtHR ruled that, in this case, the mere attempt by the prosecution to obtain a supervisory review was in itself not sufficient to consider that it had proved the applicant liable to be tried again. After all, this request was refused.

In addition, the prosecution’s request should be viewed as an attempt to reopen proceedings, instead of an attempt to hold a second trial.<sup>127</sup>

Concerning the element of *idem* (the most argumentative aspect of the ne bis in idem principle), ECtHR had many questions and uncertainties prior to the judgment of the Grand Chamber in *Zolotukhin*, the case law of the ECtHR on the interpretation of the notion of “the same offence” contained in Article of Protocol no 7. Varied approaches to the interpretation of the notion of *idem* could be pointed out in the case law.

After the initial, contending judgments in *Gradinger* and *Olivieri*, the ECtHR adopted an autonomous approach to the interpretation of “the same offence” by considering the question whether two or more offences share the same essential

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<sup>125</sup> Ibid., para. 39.

<sup>126</sup> Ibid., para. 45.

<sup>127</sup> Ibid., para. 47.

elements in *Franz Fischer* and several following judgments.<sup>128</sup> This approach lessened the protection guaranteed by the *ne bis in idem* principle contained in Art. 4 of Protocol no. 7 which caused legal uncertainty.<sup>129</sup>

Prior *Zolotukhin* there was the *Jussila* case. In the case regarding a fiscal surcharge for tax fraud imposed by the Finnish tax authorities, the ECtHR acknowledged that a denial of public hearing under Article 6 ECHR is acceptable by the ECtHR regarding cases in which a criminal charge does not result in a significant degree of stigma.<sup>130</sup> Rather, if the sanction regards a minimal criminal charge, a lighter procedure can be granted, hence leading to a situation in which the common criminal law guarantees are not as strictly applicable as they would be in a situation lying within the hard core of criminal law.<sup>131</sup>

The essential question exists whether this line of thought is applicable to EU competition law.<sup>132</sup> If the answer is positive, the *Jussila* ruling may take precedence in

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<sup>128</sup> *Gradingner v. Austria*, ECtHR 23 October 1995, appl. no. 15963/90; *Olivieri v. Switzerland*, ECtHR 30 July 1998, appl. no. 25711/94. *Franz Fischer v. Austria*, ECtHR 29 May 2001, appl. no. 37950/97.

<sup>129</sup> See: S. TRECHSEL, with the assistance of S.J. SUMMERS (2005) *Human Rights in Criminal Proceedings*, Oxford University Press, p. 394. See also: U.K. Law Report Commission, Law Com. No. 267, Cm. 5048, London 2001, pp. 29-32; and B. VAN BOEKEL (2010) *The Ne Bis In Idem Principle in EU Law*, Kluwer Law International, pages 191-201.

<sup>130</sup> A. DE MOOR VAN VUGT (2012) *Administrative Sanctions in EU law*, Review of European Administrative Law, page 41.

<sup>131</sup> K. LENAERTS, *Due Process in Competition Cases* (2013) I Neue Zeitschrift für Kartellrecht, 5, page 175. See also ECtHR, *Janosevic v. Sweden*, 21 May 2003 (Appl. No. 34619/97), para. 81. As stated by the ECtHR, the tax authorities are administrative bodies that cannot be considered to satisfy the requirements of Article 6(1) ECHR. Nevertheless, the ECtHR thought that the Contracting States should be free to empower tax authorities to impose sanctions like tax surcharges although they come to large amounts. Such a system is in harmony with Article 6(1) ECHR provided the taxpayer can bring any such decision affecting him in front of a judicial body that has full jurisdiction, including the power to repress the challenged decisions.

<sup>132</sup> This interpretation is very far-reaching, and it is doubtful that the *Jussila* line of case law can be switched in the context of double penalties in competition law by granting a broad margin of discretion to the decision taker. A confining interpretation based only on the stringency of the procedural guarantees required for a fair hearing in a 'criminal' case could be preferred. See ECtHR, *Jussila v. Finland*, 23 November 2006 (Appl. No. 73053/01), para. 43. Subsequently, "notwithstanding the consideration that a certain gravity attaches to criminal proceedings, which are concerned with the allocation of criminal responsibility and the imposition of a punitive and deterrent sanction, it is self-evident that there are criminal cases which do not carry any significant degree of stigma. There are clearly "criminal charges" of differing weight. What is more, the autonomous interpretation adopted by the Convention institutions of the notion of a "criminal charge" by applying the Engel criteria have underpinned a gradual broadening of the criminal head to cases not strictly belonging to the traditional categories of the criminal law, for example administrative penalties, prison disciplinary proceedings (*Campbell and Fell v. the United Kingdom*, 28 June 1984, Series A no. 80), customs law (*Salabiaku v. France*, 7 October 1988, Series A no. 141-A), competition law (*Societe Stenuit v. France*, 27 February 1992, Series A no. 232-A), and penalties imposed by a court with jurisdiction in financial matters (*Guisset v. France*, no. 33933/96, ECHR 2000-IX). Tax surcharges differ from the hard core of criminal law; consequently, the criminal-head guarantees will not necessarily apply with their full stringency".

justifying an inconsistent interpretation of the principal of *ne bis in idem* EU law in line with the nature and gravity of the criminal charge by distinguishing between hard core criminal law and soft criminal law.<sup>133</sup> As such, it is important to note the divergence of the interpretation of the “idem” between the ECJ and ECtHR resulting from *Zolothukin*.<sup>134</sup>

In this judgment, the ECtHR appropriately outlines its case law on the issue of identification of “idem”. The Court acknowledges that the variety of approaches which determines the identity of the offences an individual is being prosecuted for generates legal doubt and therefore, the ECtHR is responsible for providing a harmonized interpretation of the notion of the “idem” element of the *ne bis in idem* principle.<sup>135</sup>

As such, the Court examines different international instruments incorporating the *ne bis in idem* principle, some such as the CISA, referring to “same acts” and “same conduct” and others (Article 4 of Protocol no. 7) referring to “same offence”. Afterwards, the Court confirms that the use of the word “offence” in the Protocol does not justify a more restrictive approach for wordings such as “same acts” or “same conduct” seeing that the provisions of an international treaty like the Convention must be interpreted with regard to their object and purpose and also in accordance with the principle of effectiveness.

The ECtHR concluded that Article 4 of Protocol no. 7 must be regarded as prohibiting the prosecution or trial of a second “offence” seeing that it comes from identical facts or facts which are basically the same.<sup>136</sup> Finding the approach of the legal characterization of pertinent offences, for example, the “legal idem”, undermines the guarantee of the principle and thus renders the provision impractical and ineffective. The ECtHR stressed the irrelevancy of parts upheld or dismissed in the subsequent

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<sup>133</sup> T-138/07, *Schindler Holding* [2011] ECR II-4819, paras. 50-53. Here the General Court counts obviously on the *Jussila* approach in the context of competition law. This position is not entirely confirmed in appeal by the ruling of the ECJ delivered on 18 July 2013 in *Schindler* (Case C-501/11 P, *Schindler Holdings Ltd. and Others v. Commission* [2013], paras. 33-35). The ECJ, relying heavily on the *Menarini* case of the ECtHR but not taking in account the *Jussila* decision, stated that decisions adopted by the Commission imposing fines in competition matters are not contrary to Article 6 of the ECHR as interpreted by the ECtHR. It shall be remarked that the appellant (para. 25) recall the criteria set out in the judgment of the ECtHR in *Engel* and maintain that the General Court was not right in holding that the judgment of the ECtHR in *Jussila v. Finland* - according to which, for some categories ‘of infringements not forming part of the hard core of criminal law, the decision need not be adopted by a tribunal in so far as provision is made for full review of the decision's legality - was transposable to cartel proceedings.’

<sup>134</sup> ECtHR, *Zolotukhin v. Russia* 7 June 2007 (Appl. No. 14939/03).

<sup>135</sup> *Ibid*, para. 78.

<sup>136</sup> *Ibid*, paras 79-82.



proceedings, because Article 4 of Protocol no. 7 has a safeguard against being tried or being liable to be retried in new proceedings instead of a prohibition on a second conviction or acquittal.

In the end, the ECtHR stated that its investigation should concern facts which constitute a set of concrete circumstances involving the same defendant and inextricably linked together in time and space, the existence of which must be proven in order to secure a conviction or institute criminal proceedings.<sup>137</sup>

The reasoning of the Court in *Zolotukhin* was then reaffirmed in the case of *Lucky Dev. v Sweden*, by the ECtHR on 24 November 2014.<sup>138</sup>

## 2.5. The *Grande Stevens* case

In 2014, the European Court of Human Rights essentially confirming its precedents, but applying them in a new area, has concluded that, in this respect, market abuse rules violate the *ne bis in idem* requirement in *Grande Stevens and Others v Italy*.

The competent authority, the Companies and Stock Exchange Commission, imposed administrative fines on the applicant which the European Court of Human Rights considered to fall within the scope of the *ne bis in idem* principle.<sup>139</sup>

Consequently, criminal proceedings on the same facts were banned and the following conviction of the applicants by a criminal court was considered to be an obstacle of Art 4 Protocol no 7.<sup>140</sup>

The decision in *Grande Stevens* is noteworthy because Italy had made a reservation to Art 4 Protocol no 7 that the *ne bis in idem* principle had to only apply to offences, procedures and decisions qualified as “criminal” by Italian law.<sup>141</sup> The declaration was obviously envisioned to limit the scope of Art 4 and to avoid the European Court of Human Rights from spreading the approach based on the *Engel*

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<sup>137</sup> Ibid, paras. 83-84.

<sup>138</sup> ECtHR, *Lucky Dev. v. Sweden*, 27 November 2014 (Appl. No. 7356/10). See also, case ECtHR, *Bjorn Henriksson v. Sweden*, 19 January 2010 (Appl. No. 7396/10) and case ECtHR, *Tomasovic v. Croatia*, 18 October 2011 (Appl. No. 73053/01).

<sup>139</sup> *Grande Stevens and others v Italy*, paras 94-101, 222-223.

<sup>140</sup> Ibid, paras 224-228.

<sup>141</sup> For a list of the declarations and reservations to Protocol No 7 to the ECHR see <http://www.conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=117&CM=8&DF=26/11/2014&CL=GER&VL=1>.

criteria to the *ne bis in idem* principle. Nevertheless, the European Court of Human Rights considered the reservation as invalid under Art 57 ECHR given that the Italian government did not lay down the provisions of the domestic legal order that were left out from the scope of Art 4 Protocol no 7.<sup>142</sup> This verdict has far-reaching consequences since the European Court of Human Rights' reasoning applies to reservations of other Contracting States that are phrased in an correspondingly unspecific way.<sup>143</sup>

The *Grande Stevens* decision is very long and intricate; thus, before reading the judgment of the ECtHR a brief outline of the facts and the procedural history is necessary. In 2002 the Italian listed corporation Fiat (prior Chrysler-Fiat fusion) “negotiated a loan with a pool of banks that would have expired in 2005. At the expiration date, in case Fiat could have not repaid the capital, the banks would have obtained Fiat’s shares and offered them to existing shareholders.”<sup>144</sup> Due to technicalities, in the spring of 2005 it became obvious that Fiat wasn’t going to be able to repay the loan, “and the consequence would have been a dilution of the controlling shareholder”. In order to dodge this result, “several executives and consultants of the Fiat group negotiated an equity swap with physical settlement with Merrill Lynch: pursuant to the agreement Merrill Lynch would have delivered a certain amount of Fiat shares to the controlling shareholders, thus avoiding the dilution”. The Italian financial markets regulator, Consob<sup>145</sup>, started an infringement procedure against Fiat’s executives and consultants, among whom was Mr. *Grande Stevens*, “arguing that the equity swap agreement had not been properly and timely disclosed to the market, and that the group issued misleading communications to the market representing an unlawful manipulation.”<sup>146</sup> Many people got substantial administrative sanctions, up to 3 million euro, and provisional professional exclusions.

Market abuse and insider trading infractions, under Italian law at the time, and still now, could be sanctioned both with administrative and criminal penalty. Indeed, this circumstance was not explicitly authorized by the applicable European directive but

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<sup>142</sup> *Grande Stevens and others v Italy*, paras 210-211.

<sup>143</sup> In regard to the declarations made by France, Germany and Portugal, see *Grande Stevens and others v Italy*, para 204; by contrast, the Austrian declaration refers to criminal proceedings in the sense of its Code of Criminal Procedure.

<sup>144</sup> M. VENTORUZZO, P. H. CONAC, G. GOTO, S. MOCK, M. NOTARI (2015) *Comparative Corporate Law*, West Academic, page 615.

<sup>145</sup> Consob is the Commission charged, among other powers, with protecting investors and ensuring the transparency and development of the stock markets.

<sup>146</sup> Applicants were accused of infringing the Italian Financial Act, Article 187ter § 1.

did not appear to be explicitly forbidden either. So, the Italian legislature had provided both civil and criminal penalties. In this case, in 2008, while the administrative procedure and trials were still taking place, the prosecutors charged Mr. *Grande Stevens* and others with criminal violations of market abuse rules.

Lastly, the Italian Supreme Court, in 2013, absolved them based on the expiration of the statute of limitation, but at the same time “the accused sued the Italian government in the ECtHR in Strasbourg arguing a violation of due process requirements established by the European Convention of Human Rights and of the *ne bis in idem* principle.” The Court’s reasoning is announced on the impression that the “administrative” sanctions should, in fact, be considered criminal despite the “label” given to them by the legislature, considering their severity and their retributive and deterrence functions.

As a consequence, the Italian government had not respected neither the *due process* provision (Article 6) nor the *ne bis in idem* provision (Article 4, Protocol no.7) of the European Convention on Human Rights.

In accordance with the previous cases pursued by the Court, in order to establish the presence of a “criminal accusation” three criteria must be met: the qualification of the penalty under national law, the nature and the severity of the “sanction”.<sup>147</sup>

“As for the qualification of the penalty under Italian law, the Court recognizes that it is classified as an administrative sanction but underlines how this is not conclusive since the label given to a penalty by the national legislature cannot match to the substance of the penalty under the Convention.”<sup>148</sup>

Regarding the nature of the violations, the purpose of the examined provisions is to guarantee the integrity of financial markets and public trust in financial transactions. Consob amid its institutional goals contemplates investors’ protection and the transparency, good functioning and progress of stock exchanges. These are universal interests of the society generally protected with criminal sanctions. Furthermore, in the Court’s opinion the monetary penalties inflicted had mainly punitive and deterrence goals. Oppositely to what the Italian Government has claimed, the goals of the sanctions were not exclusively to reinstate a financial damage. What is notable is that the

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<sup>147</sup> *Grande Stevens and Others v Italy*, para 94.

<sup>148</sup> European Court of Human Rights, Press Release, 4 March 2014, ECHR 062 (2014) page 4.

penalties are imposed by Consob proportionally to the seriousness of the misbehavior, not to the damage produced to investors.<sup>149</sup>

In regards of the severity of the sanction that can be imposed, the Court complies with the Government that the monetary fines could not be replaced with a prison term. Nonetheless, Consob could inflict a monetary sanction up to 5,000,000 euro and, under particular terms, this amount could be tripled or raised up to ten times the dishonest gains. For the representatives of the implicated corporations, the infliction of the cited monetary sanctions establishes the provisional loss of their honor and, if the corporations are listed, a provisional incapacity to serve as directors or executives of the listed corporations from two months up to three years. Consob can as well forbid listed corporations from benefiting of the professional services of the violator up to three years and can demand professional organizations to exclude the violator. Eventually, the infliction of pecuniary sanctions indicates the confiscation of the profit of the violation and of the instrumentalities used to commit the infraction.<sup>150</sup>

However, it is worth to say that in this case the maximum sanctions have not been inflicted. Nevertheless, the criminal nature of a proceeding depends not on the sanction actually inflicted, but on the possible sanction. Moreover, in this case the petitioners have been punished with fines between 500,000 and 3,000,000 euro, and Gabetti, *Grande Stevens*, and Marrone have been deferred from the possibility of serving as directors and executives of listed corporations for a period between two and four months. This penalty influenced the professional standing of the accused, and seeing the fines sum, they were undeniably severe and had substantial economic results.

Given and said all the previous and seeing the amount of the sanctions, the Court concludes that these sanctions are criminal.<sup>151</sup>

“The Court had previously recognized that Article 4 of Protocol no. 7 of the Convention must be interpreted in the sense that it prohibits trying or judging a person for a second "violation" if it is predicated on the same facts of the ones of a previous prosecution.”<sup>152</sup>

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<sup>149</sup> *Grande Stevens and Others v Italy*, para 96.

<sup>150</sup> *Grande Stevens and Others v Italy*, para 97.

<sup>151</sup> *Grande Stevens and Others v Italy*, para 101.

<sup>152</sup> *Ibid*, para 219.

The protection of Article 4 of Protocol no. 7 applies when a conclusion has been accomplished.

The judgement on the new accusations is pointless because Article 4 of Protocol no. 7 defends against new prosecutions, and not only precludes a second guilty verdict.

“Notwithstanding the infliction of sanctions by the Consob, later partially confirmed in court, the district attorney initiated and continued the criminal prosecution even if the petitioners had to be considered already criminally sanctioned”.<sup>153</sup>

It was needed to be decided if the prosecution by the district attorney was based on the same facts on which the previous sanctions had been inflicted. Opposing to what the Government seems to think, it is insignificant that few of the elements of the statutory definitions for the infliction of the "administrative" although considered "criminal" as well by this Court and of the "criminal" sanctions are diverse (since, for example, the "criminal" violation, contrarily from the "administrative" one, entails intent), since the conduct is the same.

Consob contested the petitioners, essentially, for not having correctly acknowledged the renegotiation of the equity swap agreement with Merrill Lynch in the press releases of August 24, 2005. The accusations of the prosecutor are based on the identical facts.

Assessed from the Court this is obviously the same conduct of the same people on the same date, as established also by the Turin Court of Appeals. Therefore, the second prosecution regarded a "violation" based on the same conducts that led to the infliction of the first sanctions.<sup>154</sup>

This was enough to conclude that Article 4 of Protocol no. 7 was indeed violated.

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<sup>153</sup> Ibid, para 223.

<sup>154</sup> European Court of Human Rights, Press Release, 4 March 2014, ECHR 062 (2014).

# CHAPTER 3

## U.S. *DOUBLE JEOPARDY* CLAUSE: SUPREME COURT CASE LAW UNTIL *HUDSON*

**Summary:** 3.1. Premises; 3.1.1. The Fifth Amendment; 3.2. The U.S.: A Formal Approach; 3.3. *United States v. Halper*; 3.4. *John Hudson v. United States*.

### 3.1. Premises

As previously acknowledged in paragraph 1.1., *double jeopardy* has its origins in both Roman and canon law. More specifically, the phrase “life or limb”, which appears in the Fifth Amendment of the U.S. Constitution, has a literal meaning in English history. Let’s, therefore, first have an insight at how the U.S. protection was influenced from English history.

“In England, the concept of *double jeopardy* shares a common historical root with the right to a grand jury indictment.”<sup>155</sup> Just like the latter, the principle barring *double jeopardy*, in fact, originated from the conflict between Thomas Becket and Henry II.

Henry II<sup>156</sup> disliked the privilege of the clergy to prevent prosecution in civil court by declaring that they had been already judged in ecclesiastical courts. The last challenge to Becket from Henry II came in 1163, when he pursued to retry a clergy who had been discharged of the offense in the ecclesiastical court. Really, it is Henry’s violation of the *double jeopardy* prohibition that allegedly caused his feud with Becket, leading eventually to Becket’s murder.<sup>157</sup>

After the disagreement between Becket and Henry II, the route of *double jeopardy* was not so easy. One scholar stated that the rule against *double jeopardy* was “neither clearly defined nor applied”. Indeed, even the Church retrieved on the principle. Neither Becket’s successor, nor Pope Innocent III did not obstruct multiple punishment.

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<sup>155</sup> A. GARCIA (2002), *The Fifth Amendment: A Comprehensive Approach*, ABC-CLIO, page 25.

<sup>156</sup> A. LANE POOLE (1955) *From Domesday Book To Magna Carta 1087-1216*, at 200-02.

<sup>157</sup> See Z. N. BROOKE (1989) *The English Church and the Papacy*, Cambridge University Press.

In England, the *double jeopardy* ban was not practiced fairly after Becket's death. To a large range, this discrepancy echoed the mixture between civil and criminal law in England until very late in its legal history. Therefore, prosecutions were introduced both by private persons and by the authority of the king through indictment. The tendency to ignore the *double jeopardy* principle continued through the sixteenth and early seventeenth centuries. Inconsistently, until the second half of the seventeenth century, the *double jeopardy* principle in England had been detected mainly in the breach.<sup>158</sup> Such indifference towards the *double jeopardy* bar experienced a transformation during the second half of the seventeenth century thanks to a convergence of numerous factors. Persuasive writings from Lord Coke helped increase interest for the *double jeopardy* rule. Second, as the death penalty for criminal offenses increased quickly, the need for the restraining influence of *double jeopardy* increased as well. Lastly, the difference between the civil and the criminal ranges solidified, thus bringing into focus the modern role of *double jeopardy* as a rule envisioned to limit governmental tyranny.

Lord Coke's construction of the *double jeopardy* protection included four separate safeguards, prohibiting re-prosecution for the same offense upon either a prior acquittal, a prior conviction, a former pardon, and a previous conviction on a lesser-included offense.<sup>159</sup> These protections, though, were limited to those offenses that concerned the death penalty.<sup>160</sup> Therefore, this limit was founded on English laws which stated that upon a second conviction the defendant be smitten so that his neck break. Consequently, it can be clear how the phrase life or limb, which appears in the Fifth Amendment, "has a literal meaning in English history."

The *double jeopardy* bar appeared in this advanced stage in the American colonies. In the wide list of rights enumerated in the Massachusetts Body of Liberties of 1641, clause 42 stated, "No man shall be twice sentenced by Civil Justice for one the same Crime, offence, or Trespased."<sup>161</sup> Such provision underlines that the *double jeopardy* principle was significantly extended in

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<sup>158</sup> See generally M. L. FRIEDLAND, *supra* note 1, at 11-13 (citing intermittent barring of trials due to *double jeopardy* in the late seventeenth century); J. A. SIGLER, *supra* note 1, at 16-21 (tracing the emergence of the *double jeopardy* exception in English common law).

<sup>159</sup> E. COKE (1964) *The Institutes of The Laws Of England*, M. Flesher ed., London, W. LEE & D. PARKMAN.

<sup>160</sup> Coke also described the plea of *autrefois attaint*. See E. COKE, *supra* note 223, at 213.

<sup>161</sup> *Massachusetts Body of Liberties (1641)* clause 42.

America: it involved all criminal prosecutions and civil trespasses.

What is peculiar about the fate of *double jeopardy* in the American colonies is that the principle appears in no other instrument until it was incorporated in the New Hampshire Constitution of 1784.<sup>162</sup> Possibly the most obvious omission occurs in article 8 of the Virginia Declaration of Rights, perhaps the most comprehensive statement of criminal safeguards in the new nation.<sup>163</sup> None of the other Revolutionary constitutions incorporated *double jeopardy*. It is possible to guess that the notion was so deeply planted in the criminal tapestry that a written expression was superfluous. This explanation is backed up by scarce case law in colonial and Revolutionary times recognizing the protection in various manners. Another possible explanation is that although the right was not broadly recognized, it was viewed as “particularly dear” by James Madison, the father of the federal Bill of Rights.<sup>164</sup>

In the end, the clause materialized in the Fifth Amendment to the U.S. Constitution emerged from a convoluted path. First proposed as an amendment to the Constitution on June 8, 1789, to the House of Representatives, the *double jeopardy* principle was specified in the following language: “No person shall be subject, except in cases of impeachment, to more than one punishment or trial for the same offense.”<sup>165</sup>

This language aroused an objection by Representative Benson of New York because it was under inclusive. Benson recognized as fundamental the notion that a person’s life should not be placed in jeopardy more than once. Yet, he opposed language that apparently excluded the accepted tenet allowing a defendant to appeal a conviction. The use of the word trial in the proposed amendment would preclude the defendant from appealing a conviction because a reversal would need a second

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<sup>162</sup> N.H. CONST. OF 1784, Part. I, art. XVI.

<sup>163</sup> *Virginia Colonial Decisions: The Reports by Sir John Randolph And By Edward Barradall Of Decisions Of The General Court Of Virginia 1728-1741*, at B50 (R.T. Barton ed., 1909).

<sup>164</sup> See I. BRANT, J. MADISON (1950) *Father of The Constitution 1787-1800*.

<sup>165</sup> The Congressional Register and two contemporary newspapers printed this proposal with slightly different punctuation than the version printed in the Annals of Congress. In the former versions, a comma separates the words "one punishment" from the words "or one trial." See *The Complete Bill Of Rights: The Drafts, Debates, Sources, And Origins* 297 (Neil H. Cogan ed., 1997) [hereinafter *Complete Bill Of Rights*]. It is unclear which of these versions is accurate. It should be noted, however, that the Annals of Congress, formally titled *The Debates and Proceedings in the Congress of the United States*, were not published contemporaneously. Rather, they were compiled between 1834 and 1856, primarily from newspaper accounts. Speeches in the Annals are not presented verbatim, but are paraphrased.



trial for the same offense. Hence, Benson asked to strike the words "or trial" from the amendment. While Benson's proposal received some support, it was overcome by a wide margin in the House.<sup>166</sup>

Nevertheless, the amendment made its way to the Senate and after numerous adjustments and a conference committee among the House and the Senate to settle differences, the *double jeopardy* clause was included in Article VII of the proposed amendments passed by the Senate on September 9, 1789. That amendment stated that "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."<sup>167</sup> Ratified by Congress two weeks later, the *double jeopardy* principle would be rooted in the Fifth Amendment and eventually become a basis of much interpretational disagreement.<sup>168</sup>

### 3.1.1. The Fifth Amendment to the US Constitution

In the US, the *ne bis in idem* principle is enshrined in the *double jeopardy* clause of the Fifth Amendment to the U.S. Constitution, which recites that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb."<sup>169</sup> The concept which lies under the Clause is that "the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity."<sup>170</sup>

Since the *double jeopardy* protection was accordingly envisioned to protect people from the autocracy and power of the government, it does not protect them

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<sup>166</sup> The Senate's sessions were not open to the public at this time. Consequently, there are no reports of the Senate debates on the proposed amendments that became the Bill of Rights.

<sup>167</sup> *Webster Dictionary* defined the noun "limb" as "an extremity of the human body; a member, as the arm or leg," and the verb "to limb" as "[t]o dismember; to tear off the limbs."

<sup>168</sup> A. GARCIA (2002), *The Fifth Amendment: A Comprehensive Approach*, ABC-CLIO, page 27.

<sup>169</sup> *U.S. Const. amend. V*. The Court clarified the meaning of "the same offense twice" in 1932 in *Blockburger v. United States*, explaining that "[a] single act may be an offense against two statutes; and if the statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other." *Blockburger v. United States*, 284 U.S. 299, 304 (1932) (quoting *Gavieres v. United States*, 220 U.S. 338, 342 (1911)).

<sup>170</sup> *Hudson*, 118 S. Ct. at 499 (Stevens, J., concurring in judgment) (quoting *Green v. United States*, 355 U.S. 184, 187 (1957)).

from private suits brought by non-government parties.

The Supreme Court has established that the *Double Jeopardy Clause* protects individuals from being criminally prosecuted more than once for the same offense.<sup>171</sup> Protection from succeeding criminal prosecutions applies to any party who has already undergone a criminal prosecution for the same offense, no matter what the result of the first criminal prosecution was.<sup>172</sup> This protection is called protection from "multiple prosecutions." The Court has also stated that the *Double Jeopardy Clause* protects individuals from the imposition of "multiple punishments" for the same offense.<sup>173</sup> A constitutional prohibition on several punishments shows that civil sanctions imposed by the government (like criminal sanctions) are subject to the *Double Jeopardy Clause*.<sup>174</sup> Nonetheless, there is disagreement on this argument on the Court since Justices Scalia and Thomas have criticized the multiple punishment doctrine.<sup>175</sup> Others have realized that the multiple punishment doctrine is challenging from a textual perspective<sup>176</sup> and depending on the legislative history surrounding the ratification of the Constitution.<sup>177</sup>

The concept that the *Double Jeopardy Clause* protects against multiple punishments initiated in *Ex Parte Lange* case, in which the Supreme Court held that "if there is anything settled in the jurisprudence of England and America, it is that

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<sup>171</sup> See *North Carolina v. Pearce*, 395 U.S. 711,717 (1969).

<sup>172</sup> *Ibid.*

<sup>173</sup> *Ibid.*

<sup>174</sup> 2 See P. S. NOLAN, Comment, *Double Jeopardy's* Multipunishment Protection and Regulation of Civil Sanctions After *United States v. Ursery* (1997).

<sup>175</sup> 3 Most recently in the Hudson decision, Justices Scalia and Thomas indicate their disagreement with the notion of a prohibition against multiple punishments. See *Hudson v. United States*, 118 S. Ct. 488, 496-97 (1997) (Scalia, J., dissenting). See also *United States v. Ursery*, 518 U.S. 267, 297 (1996) (Scalia, J., concurring in judgment). Justice Scalia has provided a detailed analysis and criticism of the multiple punishment doctrine. See *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 798-805 (1994) (Scalia, J., dissenting).

<sup>176</sup>For example, the text "twice put in jeopardy of life or limb" suggests a protection only from successive criminal punishments, not protection from a civil punishment (such as a monetary fine or seizure of property). See B. L. SUMMER (1995) *Double Jeopardy: Rethinking the Parameters of the Multiplicity Prohibition*, 56 OHIO ST. LJ. 1595, 1605.

<sup>177</sup> Legislative history indicates that James Madison initially proposed the predecessor of the *Double Jeopardy Clause*, which stated that "[n]o person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence." The Senate revised the text to read that no person shall "be twice put in jeopardy of life or limb by any public prosecution." Much of the Senate's draft was incorporated into the Fifth Amendment as it exists today, and "only Madison's initial draft as proposed in the House used the term 'punishment,' and the reference to multiple punishments for the same offense is nowhere to be found in the Senate version or the final wording that exists today." Justice Frankfurter has also suggested that legislation providing for criminal and civil sanctions for the same conduct was common during the drafting of the Fifth Amendment, and that the drafters would have specifically prohibited "multiple punishments" had this been their intent.

no man can be twice lawfully punished for the same offence.”<sup>178</sup> As for the facts of the case, though, critics have found that using *Ex Parte Lange* as foundation for a *double jeopardy* doctrine against multiple punishments was a liability, stating that justification for the resolution of the case more rationally grew from the *Due Process Clause* of the Fifth Amendment.<sup>179</sup> Nevertheless, since *Ex Parte Lange*, the Supreme Court has indicated clearly that *double jeopardy* protection covers both successive criminal prosecutions and other successive punishments. Arguing that *double jeopardy* protection does not allow only multiple prosecutions, and not multiple punishments, Justice Scalia noted in *Kurth Ranch* that the Court has never found *double jeopardy* as an obstruction to imposing multiple punishments in strictly criminal proceedings. He concluded that government-imposed punishments are properly checked by other constitutional provisions; for instance, the *Due Process Clause*<sup>180</sup> keeps penalty within the boundaries set by the legislature, and the Cruel and Unusual Punishments and Excessive Fines Clauses<sup>181</sup> put substantive limits upon what those legislative limits may be.

Until 1989, the Supreme Court normally disregarded the multiple punishment doctrine, relying on the multiple prosecution doctrine for its *double jeopardy* assessment. Although the Court did contemplate that imposition of a civil sanction could be barred by the *Double Jeopardy Clause*, it did so within the analytical framework that the civil sanction imposed was not “essentially civil” but “essentially criminal”, and therefore instituted an illegal second criminal prosecution. It wasn’t until the late 1980’s that the Court explicitly invoked the prohibition against multiple punishments as an independent constitutional basis for a *double jeopardy* claim.

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<sup>178</sup> *Ex Parte Lange*, 85 U.S. 163, 168 (1873). See *Kurth Ranch*, 511 U.S. at 798-800 (Scalia J., dissenting) (discussing *Ex Parte Lange* and multiple punishments).

<sup>179</sup> *Ex Parte Lange* involved an individual sentenced to a year of imprisonment and a \$200 fine for stealing mail bags. See *Ex Parte Lange*, 85 U.S. at 164. The judge in the case was authorized by federal statute to sentence the defendant to either a fine or a prison term, and the petitioner pled for habeas corpus relief.

<sup>180</sup> No person "shall be ... deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

<sup>181</sup> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

### 3.2. The U.S.: A Formal Approach to the double jeopardy clause

Regardless of its narrow wording (“life or limb”), the *double jeopardy* clause applies to any kind of criminal sanction, regardless of whether they affect the life, limb, liberty or property of the offender.<sup>182</sup> Moreover, the exclusion of a retrial of criminal charges does not consider if the defendant has been convicted or acquitted.<sup>183</sup>

The interrogation whether the scope of the *double jeopardy* clause spreads beyond criminal proceedings *stricto sensu* and regards other types of punitive sanctions was first addressed by the Supreme Court in 1938 in the tax case *Helvering v Mitchell*.<sup>184</sup> “The defendant (Mitchell) was suspected of having filed a fraudulent tax return. He was acquitted in criminal proceedings, but in subsequent civil proceeding, Mitchell was not only ordered to pay the taxes he evaded, but also a fine of 50 per cent of the tax amount due.”<sup>185</sup>

Although Mitchell opposed that the fine was in breach of the *double jeopardy* clause, the Supreme Court stated that the *double jeopardy* clause did not apply to civil proceedings; the civil fine was part of civil proceedings even if it were envisioned as punishment. Thus, the application of the *double jeopardy* clause was subject to the statutory construction, specifically the Congressional commitment to deliver for either “civil” or “criminal” sanctions and proceedings.<sup>186</sup> Counting on these formal criteria, the Supreme Court entrusted the legislator to decide the legal and procedural framework of a sanction and, in so doing, delineate the scope of the *double jeopardy* clause.

The Supreme Court observed this formal approach over decades.<sup>187</sup> However, the Court recognized that in rare cases it could overrule Congressional designation of a sanction as civil, but it would entail “clearest proof” that the

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<sup>182</sup> *Jeffers v. United States*, 432 US 137, 155 (1977).

<sup>183</sup> *North Carolina v. Pearce*, 395 US 711, 717 (1969).

<sup>184</sup> *Helvering v. Mitchell*, 303 US 391 (1938).

<sup>185</sup> K. LIGETI & V. FRANSSSEN (2017) *Challenges in the Field of Economic and Financial Crime in Europe and the US*, Hart Publishing, page 212.

<sup>186</sup> *Helvering v. Mitchell*, 399, 404,405 US 391 (1938).

<sup>187</sup> *Rex Trailer Co v. US*, 350 US 148,150 (1956); *US v. One Assortment of 89 Firearms*, 465 US 354, 362, 363 (1984).

purpose and effect of a sanction are punitive and, thus, criminal in nature.<sup>188</sup> When judging the nature of a sanction, the Court used a list of criteria that have been used in other constitutional guarantees with a scope limited to criminal proceedings. The Court especially mentioned its ruling on the privilege against self-incrimination in *United States v Ward*.<sup>189</sup> These following listed factors, under the “Ward test”, could point out the criminal nature of a sanction:

“The sanction has historically been regarded as punishment.

-The sanction involves affirmative disability or restraint (such as imprisonment).

-The imposition of the sanction requires the finding of scienter.

-The sanction promotes the traditional objectives of punishment (retribution and punishment).

-The conduct to be sanctioned is already a crime.

-The sanction is not connected to an alternative (remedial) purpose or the sanction appears excessive in relation to the alternative purpose assigned.”<sup>190</sup>

Even so, given the high threshold (“clearest proof”), the formal classification of the sanction continued to be the key element. Nevertheless, this formal approach was overturned in *United States v Halper*.<sup>191</sup> Halper had run a medical laboratory and submitted 65 false Medicare claims to the government, defrauding it of \$585. He was sentenced of fraud and condemned to a fine of \$5,000 and to two years imprisonment. In subsequent civil proceedings, Halper was sued by the government for \$130,000. The amount surpassed the actual damages given that the law permitted the government to pursue \$2,000 for each false claim.<sup>192</sup>

The Supreme Court stated that the required damages lead to a second punishment and, therefore, would violate the *double jeopardy* clause.<sup>193</sup> The Court, in its reasoning, made a distinction between protection against a second criminal prosecution after conviction or acquittal and protection from double punishment for the same offence. While protection from double prosecution was connected to an exact

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<sup>188</sup> *US v. One Assortment of 89 Firearms*, 465 US 354, 362, 363 (1984).

<sup>189</sup> *Ibid* 362, 363; *United States v. Ward*, 448 US 435 (1989).

<sup>190</sup> *United States v. Ward*, 448 US 242, 249, 250 (1989); *Kennedy v. Mendoza Martinez*, 372 US 144, 168,169 (1963).

<sup>191</sup> *United States v. Halper*, 490 US 435 (1989).

<sup>192</sup> K. LIGETI & V. FRANSSEN (2017) *Challenges in the Field of Economic and Financial Crime in Europe and the US*, Hart Publishing, page 213.

<sup>193</sup> *United States v. Halper*, 490 US 452 (1989).

procedural framework (“and its labelling as “criminal” or “civil”), the perception of punishment was contemplated as depending on if the purpose of the sanction is remedial or punitive.<sup>194</sup> In so doing, the Court switched from its formal approach to a substantial approach. The sanction could not be considered as remedial but just punitive, given that the damages pursued by the government went way off the amount that might be considered an acceptable compensation for the what had been provoked by the defendant, and, as a result, the sanction had to be considered a second punishment that was forbidden by the *double jeopardy* clause.<sup>195</sup>

The approach given in Halper did not last for long. In *Hudson v United States*, in 1997, the Supreme Court overruled Halper and went back to its formal approach of the *double jeopardy* clause, primarily based on Congressional label of a sanction as “criminal” or “civil”.<sup>196</sup> In this case, the Office of the Comptroller of the Currency (OCC) was the qualified administrative authority that had imposed occupational debarment and financial penalties upon the defendant. Later, for the equivalent conduct a criminal investigation began, therefore it was questioned whether the *double jeopardy* clause prohibited the criminal prosecution.

The Supreme Court re-instated Mitchell and declared that the *double jeopardy* clause prohibited just multiple criminal punishment, and that it constituted a question of whether a sanction is “civil” or “criminal”. The Court’s opinion was that a substantive approach, differentiating “punitive” and “remedial” sanctions, appeared impossible since all civil penalties had at least some restrictive effect.<sup>197</sup> Moreover, the-Court specified that the Halper logic was unsuccessful because it necessitated an assessment of the second sanction really imposed and, thus, was unconceivable to examine a violation of the *double jeopardy* clause prior the second trial proceedings had been even concluded.<sup>198</sup> Undoubtedly, there isn’t such problem when criminal proceedings take place after punitive sanctions have been imposed in civil proceedings. The consequences of the *double jeopardy* clause, nevertheless, are not less uncertain because

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<sup>194</sup> Ibid 443.

<sup>195</sup> Ibid 452.

<sup>196</sup> *Hudson v. United States*, 522 US 93, 99 (1997).

<sup>197</sup> Ibid 102.

<sup>198</sup> *Hudson v United States* (n 15) 102; respectively, it was recommended not to mention to the sanction really imposed, but to object and purpose of the sanctions to be applied in the relevant civil proceedings; See J. A. COX (1994-1995) *Halper's continuing double jeopardy implications: A Thom by Any Other Name Would Prick as Deep*, 39 Saint Louis University Law Journal, pages 1235, 1273-99, 1255.

a prohibition on criminal proceedings, which may cause an inadequate “under-punishment” for serious crimes, seemed to be barely acceptable.<sup>199</sup> Yet again, protection from extreme sanctions could also be guaranteed by other constitutional guarantees (*due process* clause), likewise pertinent to civil proceedings.<sup>200</sup>

In *Hudson*, “debarment and penalty were formally classified as civil sanctions. Recalling its former case law, the Court conceded that this denomination could be overridden where an overall assessment of the sanction clearly reveals its punitive character”.<sup>201</sup> The debarment and the penalties were less strict sanctions and not in any way part of the traditional forms of criminal punishment. Nevertheless, the Court did not find, in the criminal charge of Hudson for the same conduct, sufficient evidence (“clearest proof”) to determine the criminal character of the sanctions imposed on him.<sup>202</sup>

To conclude, it is the formal classification of the sanction as criminal that cares, not the nature. Therefore, the *double jeopardy* clause does not protect a person from double sanctioning subsequent to parallel proceeding in different legal framework.<sup>203</sup>

### 3.3. *United States v. Halper*

The opinion in *United States v. Halper*, 490 U.S. 435 (1989), noted the first time the *double jeopardy* clause was applied to a sanction without first deciding that it was criminal in nature. In that occasion, Irwin Halper was condemned of violating “the criminal false claims statute based on his submission of 65 inflated Medicare claims each of which overcharged the Government by \$9.”<sup>204</sup> He was sentenced to two years” imprisonment and got a

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<sup>199</sup> K. LIGETI & V. FRANSSEN (2017) *Challenges in the Field of Economic and Financial Crime in Europe and the US*, Hart Publishing, page 214.

<sup>200</sup> *Hudson v United States* (n 15) 102, 103.

<sup>201</sup> *Ibid* 99, 100, 103 .

<sup>202</sup> *Ibid* 104, 105.

<sup>203</sup> Justice Souter, concurring, in *Hudson v United States* (n 15), pointed, after all, to the increasing pertinence of civil penalties, and awaited the Court's power to override congressional to be used more often than in the past.

<sup>204</sup> *Halper*, 490 U.S., at 437.

fine of \$5,000. The Government then brought an action against Halper under the civil False Claims Act, 31 U.S.C. §3729-3731.”<sup>205</sup>

The corrective provisions of the False Claims Act stipulated that a violation of the Act accomplished one “liable to the United States Government for a civil penalty of \$2,000, an amount equal to 2 times the amount of damages the Government sustains because of the act of that person, and costs of the civil action.”<sup>206</sup> Given Halper’s 65 separate violations of the Act, he happened to be debtor for a penalty of \$130,000, despite the fact he actually deceived the Government of less than \$600.<sup>207</sup>

The Court held that a penalty of this importance would disregard the *double jeopardy* clause in light of Halper’s previous criminal conviction. As the *Halper* Court saw it, any sanction that was so overpoweringly disproportionate to the damage created that it could not “fairly be said *solely* to serve the remedial purpose” of compensating the Government for its loss, was thought to be explainable only as “serving either retributive or deterrent purposes.”<sup>208</sup>

The examination enforced by the *Halper* Court differed from the traditional *double jeopardy* doctrine in two key respects. First, the *Halper* Court neglected the opening question: whether the successive punishment at issue is a "criminal" punishment. Instead, it put its attention to whether the sanction, careless of whether it was civil or criminal, was so grossly incommensurate to the damage caused as to constitute "punishment."<sup>209</sup> In this way, the Court underlined a single *Kennedy* factor, whether the sanction appeared extreme in relation to its non-punitive purposes, to dispositive status.<sup>210</sup> Nevertheless, as it was emphasized in *Kennedy* itself, no single factor should be taken in consideration as controlling, as they might often point in differing directions. The second noteworthy departure in *Halper* was the Court’s decision to

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<sup>205</sup> N. DEMLEITNER, D. BERMAN, M. L. MILLER, R. F. WRIGHT (2013) *Sentencing Law & Policy: Cases Statutes & Guidelines*, Aspen Publishers Third Edition, page 835.

<sup>206</sup> *Halper*, 490 U.S., at 438 (citing 31 U.S.C. § 3729 (1982 ED., Supp. II) amended in 1986 to require that the civil penalty be assessed at not less than \$5,000 and not more than \$10,000; requiring also a sum three times the damages suffered by the government, with some exceptions)).

<sup>207</sup> *Halper*, 490 U.S., at 437, 438 (alteration in original). See 18 U.S.C. § 287 (1994). See also *Halvering v. Mitchell*, 303 U.S. 391, 399 (1938).

<sup>208</sup> *Ibid.* at 456.

<sup>209</sup> *Halper*, 490 U.S., at 447-448.

<sup>210</sup> *Ibid.* at 449.



evaluate the "character of the actual sanctions imposed," rather than, as *Kennedy* demanded, assessing the "statute on its face" to predispose whether it provided for what amounted to a criminal sanction.

As successive cases have showed, *Halper's* test for defining whether a particular sanction is "punitive" and accordingly subject to the strictures of the *double jeopardy* clause, was demonstrated impracticable. Since then it was acknowledged that all civil penalties have some disincentive effect.<sup>211</sup>

### 3.4. *John Hudson v. United States*

During the early and mid-1980's, petitioner John Hudson was the chairman and controlling shareholder of the First National Bank of Tipton and the First National Bank of Hammon.<sup>212</sup> At the same time, petitioner Jack Rackley was president of Tipton and a member of the board of directors of Hammon, and petitioner Larry Baresel was a member of the board of directors of both Tipton and Hammon.<sup>213</sup> An investigation of Tipton and Hammon brought the Office of the Comptroller of the Currency to arrive at the conclusion that petitioners had used their bank positions to issue a series of loans to third parties in violation of several federal banking statutes and regulations.<sup>214</sup> As reported by the OCC, those loans, although nominally made to third parties, when actually made to Hudson in order to enable him to ransom bank stock that he had committed as collateral on defaulted loans.<sup>215</sup>

On February 13, 1989, OCC issued a "Notice of Assessment of Civil Money Penalty". The notice presumed that petitioners had violated 12 U.S.C. §84(a) (1) and

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<sup>211</sup> See Department of Revenue of *Montana v. Kurth Ranch*, 511 U.S. 767, 777 n.14 (1994) Applying a *Kennedy-like* test before concluding that Montana's dangerous drug tax was "the functional equivalent of a successive criminal prosecution"; *United States v. Ursery*, 518 U.S. 267, 284-285 (1996) Civil in rem forfeitures do not violate the *Double Jeopardy* Clause. If a sanction must be "solely" remedial (i.e., entirely nondeterrent) to avoid implicating the *Double Jeopardy* Clause, then no civil penalties are beyond the scope of the Clause. It is important to observe that some of the ills at which *Halper* was aimed are established by other constitutional provisions. The Due Process and Equal Protection Clauses already take care of persons from sanctions which are totally irrational. The Eighth Amendment protects against excessive civil fines, as well as forfeitures. The further safety produced by extending *double jeopardy* protections to proceedings heretofore believed to be civil is more than compensated by the confusion created by trying to tell the difference between "punitive" and "nonpunitive" penalties.

<sup>212</sup> *Hudson v United States*, 118 S. Ct. 488 (1997) (No. 96-976).

<sup>213</sup> *Ibid.*

<sup>214</sup> *Ibid.*

<sup>215</sup> *Hudson v United States*, 118 S. Ct. 488, 492 (1997), *aff'g* 92 F.3d 1026 (10<sup>th</sup> Cir. 1996).

375b and 12 CFR §31.2(b) and 215.4(b) by causing the banks with which they were associated to make loans to nominee borrowers in a way that illegally allowed Hudson to obtain the actual advantage of the loans. The notice also assumed that the illegal loans resulted in losses to Tipton and Hammon of almost \$900,000 and led to the collapse of those banks.<sup>216</sup> Nonetheless, the notice contained no allegation of any harm to the Government as a result of petitioners' conduct. After considering the size of the financial resources and the honest intentions of applicants, the gravity of the violations, the history of prior violations and other matters OCC assessed penalties of \$100,000 against Hudson and \$50,000 each against Rackley and Baresel. On August 31, 1989, OCC issued as well a "Notice of intention to Prohibit Further Participation" against each petitioner.<sup>217</sup> The aforementioned notifications, which were announced on the equal allegations that formed the basis for the prior notices, advised petitioners that OCC planned to exclude them from further participation in the conduct of any insured depository institution.<sup>218</sup>

In October 1989, petitioners concluded the OCC proceedings against them by each engaging in a "Stipulation and Consent Order". Such consent orders provided that Hudson, Baresel, and Rackley would pay assessments of \$16,500, \$15,000, and \$12,500 respectively. Furthermore, each petitioner agreed not to take part in any way in the affairs of any banking institution if not with the written authorization of the OCC and all other relevant regulatory agencies.<sup>219</sup>

In August 1992, petitioners were accused in the Western District of Oklahoma in a 22-count indictment on charges of conspiracy, abuse of bank funds, and making false bank entries.<sup>220</sup> The violations charged in the accusation counted on the same lending transactions that formed the basis for, the prior administrative actions brought by OCC. Petitioners asked to remove the indictment on *double jeopardy* grounds (and the trial court granted the motion).<sup>221</sup>

It was broadly identified that the *double jeopardy* clause does not ban the imposition of all additional sanctions that could, be described as punishment. The clause

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<sup>216</sup> *Hudson v United States*, 118 S. Ct. 496.

<sup>217</sup> Explicit language in each agreement indicated it did not preclude "any right power, or authority of any other representatives of the United States, or agencies thereof, to bring other actions deemed appropriate".

<sup>218</sup> See supra note 240.

<sup>219</sup> *Ibid.*

<sup>220</sup> *Ibid.*, Joint Appendix at 6-38.

<sup>221</sup> *Hudson v United States*, 14 F.3d 536, 538 (10<sup>th</sup> Cir. 1994).

preserves only against the imposition of multiple criminal punishments for the same offense, and only if it occurs in successive proceedings.<sup>222</sup>

To determine if a specific punishment is criminal or civil is, at least at first, a matter of statutory construction. A court must first ask if the legislature, in establishing the penalizing mechanism, specified in one way or another a preference for one or the other. Even when the legislature has shown an aim to establish a civil penalty, it has been examined further whether the statutory scheme was so punitive either in purpose or effect as to alter what was obviously intended as a civil into a criminal penalty.<sup>223</sup>

In this latter conclusion, the factors listed in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963), provide useful signs, such as: ( 1) whether the sanction involves an affirmative disability or restraint; (2) whether it has historically been regarded as a penalty; (3) whether it comes into play only on a finding of scienter; (4) whether its operation will promote the traditional aims of punishment- retribution and deterrence; (5) whether the attitude to which it applies is already a crime; (6) whether an alternative purpose to which it might realistically be connected is assignable for it; and (7) whether it seems extreme in relation to the alternative purpose assigned.<sup>224</sup> Yet it is valuable to drag attention to the fact that these factors must be measured in relation to the statute on its face, and "only the clearest proof " will suffice to supersede legislative intent and transform what has been defined a civil remedy into a criminal penalty.<sup>225</sup>

Putting into force traditional *double jeopardy* principles to the facts of this case, it is clear that the criminal pursuit of these petitioners would not breach the *double jeopardy* clause. It is quite clear that Congress intended the OCC money penalties and debarment sanctions imposed for violations of 12 U.S.C. §84 and 375b to be civil in nature.<sup>226</sup> In regards for the money penalties, both §93(b) (1) and 504(a), which permit the imposition of monetary penalties for violations of §84 and 375b correspondingly, explicitly provide that such penalties are "civil." While the provision authorizing debarment includes no language explicitly naming the sanction as civil, it is meaningful that the authority to issue debarment orders is conferred upon the appropriate Federal

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<sup>222</sup> *Hudson v United States*, 118 S. Ct. 496 (1997).

<sup>223</sup> *Ibid.* at 491.

<sup>224</sup> *United States v Ward*, 448 US 242, 249, 250 (1989); *Kennedy v Mendoza Martinez*, 372 US 144, 168,169 (1963).

<sup>225</sup> See *supra* note 246.

<sup>226</sup> See *Hudson*, 118 S. Ct. at 493 and 495 (quoting *United States v. Ward*, 448 U.S. 242, 248 (1980)). This is the first part of the two-part test established under *Ward* and affirmed in *Hudson*.

banking agencies.<sup>227</sup> It is primarily evident that such authority was discussed upon administrative agencies and showed the Congress intention to provide for a civil sanction.<sup>228</sup>

There is not much indication, that usually is requested, hinting that “either OCC money penalties or debarment sanctions are so punitive in form and effect as to render them criminal” despite the opposite intention of the Congress. To begin with, neither money penalties nor debarment has been viewed as punishment in history. It was for long time accepted that annulment of a privilege voluntarily approved, such as a debarment, “is characteristically free of the punitive criminal element.”<sup>229</sup>

Secondly, the punishments charged do not include an "affirmative disability or restraint," as that term is generally assumed. Compared to the punishment of imprisonment, the fact that petitioners have been prohibited from further partaking in the banking industry, is unquestionably incomparable. Third, neither sanction comes into play "only" on a finding of scienter. The provisions under which the money penalties were appointed consent for the charge of a penalty against any individual "who violates" any of the fundamental banking statutes, with no concern to the violator's state of mind. Fourth, the attitude for which OCC sanctions are imposed could also be criminal. This fact is not enough to explain the money penalties and debarment sanctions criminally punitive, especially in the *double jeopardy* context.<sup>230</sup>

Finally, it might be acknowledged that the imposition of both money penalties and debarment sanctions will inhibit others from imitating the petitioners' behavior, a traditional goal of criminal punishment. Yet the simple occurrence of this purpose is unsatisfactory to render a sanction criminal, since deterrence may serve civil as well as criminal goals. Just observe how, the sanctions underlined here, while intended to discourage future misconduct, also serve to encourage the stability of the banking industry.<sup>231</sup>

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<sup>227</sup> N. DEMLEITNER, D. BERMAN, M. L. MILLER, R. F. WRIGHT (2013) *Sentencing Law & Policy: Cases Statutes & Guidelines*, Aspen Publishers Third Edition, page 836.

<sup>228</sup> *Hudson v United States*, 118 S. Ct. 495 (1997).

<sup>229</sup> *Helvering v Mitchell*, 303 U.S. 391, 399 (1938).

<sup>230</sup> See *United States v. Dixon*, 509 U.S. 688 (1993) (rejecting "same-conduct" test for *double jeopardy* purposes).

<sup>231</sup> *Hudson v United States*, 118 S. Ct. 496 (1997).

In conclusion, there simply is very little evidence that OCC money penalties and debarment sanctions are criminal. The *double jeopardy* clause was consequently no constrain to their trial on the undecided indictments.

## CHAPTER 4

### RECENT APPROACH ON THE *NE BIS IN IDEM*

#### PRINCIPLE: ECtHR, ECJ & US FEDERAL COURTS CASE LAW IN COMPARISON

**Summary:** 4.1. Upcoming decisions on the European *Ne Bis in Idem* in ECtHR case law; 4.1.1. *A & B v Norway*; 4.2. Upcoming decisions on the European *Ne Bis in Idem* in ECJ case law; 4.2.1. The case of *Luca Menci*; 4.2.2. *Garlsson Real Estate and Others*; 4.2.3. Joint cases *Di Puma and Zecca*; 4.2.4. Observations of the ECJ's analysis; 4.3. Upcoming decisions on the US *Double Jeopardy* in U.S. Federal Courts case law.

#### 4.1. Upcoming decisions on the European *Ne Bis in Idem* in ECtHR case law

Some national laws of the Contracting States of the European Convention on Human Rights provide for the possibility of imposing two penalties for the same fact, respectively, on one hand, administrative, or rather, fiscal and on the other hand, criminal. This dual-track sanction exemplifies a very complex, discussed issue on the applicability of the *ne bis in idem* principle provided for by Art. 4 of Protocol no. 7 of the ECHR<sup>232</sup>.

Once again, in the verdict of *A & B v. Norway* on 15 November 2016<sup>233</sup>, the Grand Chamber of the Court of Strasbourg addressed the issue, asking the national courts to assess the compatibility of dual proceedings in light of the judgment of substantive and temporal connection sufficiently similar between the two types of

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<sup>232</sup> *European Papers*, Vol. 2, 2017, No 1, *European Forum, Insight* of 18 April 2017, pages 243-250.

<sup>233</sup> ECtHR, November 15, 2016, nos. 24130/11 and 29758/11, *A and B v. Norway* [GC].

sanctions. After confirming its orientation on the "criminal" nature of tax fraud<sup>234</sup>, the Court determined the *ne bis in idem* principle to be inadmissible seeing there was a sufficient "in substance and in time" connection between the two criminal and administrative proceedings<sup>235</sup>. In other words, the prohibition of the dual-track is not applicable if it is a "coordinated reaction" of the national legal system, by means of two proceedings, facing the same unlawful act. This is an important judicial ruling, however not a true *revirement* because, as we shall see, although the Court had ruled similarly in precedent, these latter judgments seemed to have been superseded by recent jurisprudence. The interpretation of the *ne bis in idem* principle that is consolidated in the judgment in question could constitute a valid clarification for some national jurisdictions to overcome the difficulties they encounter in applying this principle. Such could be the case for the offences of market manipulation and insider dealing provided for by Italian law.<sup>236</sup> The European Court found the *ne bis in idem* principle incompatible with the criminal-administrative dual-track for market manipulation. On the contrary, with regard to the case of insider dealing, the Constitutional Court declared inadmissible the question of legitimacy, asserting the contrast with the *ne bis in idem* principle as interpreted by European jurisprudence. In light of the criterion of "sufficient connection" between the two proceedings recovered by the European Court, it is foreseeable, that the national jurisprudence will be called on again to assess whether the dual-track in these matters is compatible with the Art. 4 of Protocol no. 7 ECHR.

Concerning the criterion of "sufficiently close connection, in substance and in time" the Court made reference to past decisions, stating that a connection must exist between the two proceedings (one administrative, and the other, criminal), in order to exclude the violation of Art. 4 of Protocol no. 7 ECHR. In fact, it has repeatedly stated that the prohibition of *ne bis in idem* occurs with reference to two consecutive proceedings where a second trial follows a first one that has already been determined, and in the presence of dual-parallel proceedings, when one of them concludes with a definitive sentence. It is worth pointing out the main jurisprudential cases of this

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<sup>234</sup> Ibid, par. 139.

<sup>235</sup> Ibid, par. 154.

<sup>236</sup> With regard to the case of market manipulation, this is governed by Articles 185 and 187 ter of Legislative Decree no. 58/1998 (T.U.F.) which respectively provide for the crime of market manipulation (Article 185) and the similar administrative offense (Article 187b). With reference to the case of abuse of privileged information, the national legislator has provided for a similar regime under Articles 184 and 187 bis of the T.U.F. which regulates the criminal offense and the administrative offense, respectively.

orientation. For example, in *Nilsson v. Sweden*<sup>237</sup>, in declaring inadmissible the appeal contesting the violation of the *ne bis in idem*, the Court ruled that in the presence of a sufficiently close connection between the two proceedings, a double trial with the application of two separate sanctions constitutes a violation of Art. 4 of Protocol no. 7 ECHR. Similarly, in *Hakka v. Finland* the Court excluded a violation of the *ne bis in idem* principle, given that the two sanctions had been imposed in non-consecutive but "sufficiently coordinated" proceedings. Thus, in the *Nykanen v. Finland*, the Court reiterated the necessity to verify whether there is "sufficiently close connection between them, in substance and in time". In that case, it must be excluded that the applicants "were tried or punished again for which they were finally convicted in breach of Art 4, para. 1 of Protocol no. 7 to the Convention ". In the cases *Shibendra Dev v. Sweden*<sup>238</sup> and *Lucky Dev v. Sweden*, the Court again adheres to this criterion in order to ascertain the compatibility of the dual-track in tax matters with Art. 4 of Protocol no. 7 ECHR. Instead, the European Court found a violation of Art. 4 of Protocol no. 7 ECHR without making any verification as to the existence of a substantive and temporal connection between the two proceedings in the *Zolotukhin v. Russia* and *Grande Stevens v. Italy* rulings.

#### **4.1.1. A & B v. Norway case**

In the present judgment, the Court ruled on two joined cases. In the first case, the applicant appealed, complaining that there had been a violation of the principle of *ne bis in idem*, given that he had been convicted of the crime of tax fraud with a final judgment after the parallel administrative proceeding (with an administrative sanction equal to thirty percent of the amount not declared) had already become definitive. In the second case, the applicant was charged a surcharge of thirty per cent in an administrative proceeding in light of statements made in the parallel criminal proceedings which had already become final. The Norwegian Supreme Court (Høyesterett) had adhered to the jurisprudence of Strasbourg on the matter, modifying

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<sup>237</sup> ECtHR, December 13, 2005, n. 73661/01, *Nilsson v. Sweden*.

<sup>238</sup> ECtHR, 21 October 2014, n. 7362/10, *Shibendra Dev v. Sweden*.

the orientation of the prevailing national jurisprudence in the matter of dual-track sanctions<sup>239</sup>.

The first fact the Court is called to rule on is that concerning the notion of "criminal proceedings" used in Art. 4 of Protocol no. 7 ECHR, particularly if it is equivalent to that of a "criminal charge" pursuant to Art. 6 ECHR. The Court observes that the two rules in question imply different assessments of substantive and procedural law<sup>240</sup> remembering that a distinction had been used in recent judgments by way of autonomous criteria to define the concept of "criminal proceedings". Considering not only the terminological differences between the two rules but also the absence of an European consensus (in legislation or procedures of the Contracting States), as well as by the margin of appreciation granted to States in criminal matters. The Court proceeds to state that since the *Zolotukhin v. Russia* ruling in 2009, it has utilized the *Engel* criteria. The reasons behind this choice have been identified in the consideration that the principle of *ne bis in idem* mainly concerns the right trial, which is also the object of Art. 6 ECHR<sup>241</sup>. This process of alignment and convergence of the interpretation of the two rules is justified by the need to promote "internal consistency and harmony" between the different provisions of the Convention. Indeed, the Convention "must be read as a whole".

The second matter concerns the conventional legitimacy of the dual-track system in light of the criterion of "sufficiently close connection, in substance and in time" between the two proceedings, considering the ambiguity and non-homogeneity of the bearings of this definitive criterion in previous jurisprudence. As a preliminary point, the Court recalls that, according to settled case law, the Contracting States enjoy procedural autonomy, since they are free "to choose how to organize their legal system, including their criminal-justice procedures ". This autonomy is expressed in the choice of the means necessary to pursue the conclusion established by the rule of Art. 4 of Protocol no. 7 ECHR. In essence, this rule does not prevent the State from identifying

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<sup>239</sup> A and B [GC], Par. 20: "Article 4 of Protocol No. 7 must be understood as prohibiting the prosecution or trial of a second 'offense' in so far as it arises from the same facts or facts which are substantially the same. [...] The Court's inquiry should therefore focus on those facts which constitute a set of concrete factual circumstances involving the same defendant and [are] inextricably linked together in time and space ".

<sup>240</sup> Ibid, par. 106.

<sup>241</sup> *A e B v. Norway* [GC], par. 107.



the most appropriate forms of sanctioning for socially offensive conduct, through separate proceedings that, however, form "a coherent whole".

The discretion of the States (which is expressed in an obligation of means and not of results) does not go so far as to allow an accumulation of sanctions to entail excessive sacrifice for the person involved. Regarding this point, the Court is competent in determining whether the national measures adopted essentially incur a risk or if, on the contrary, they constitute a product of a system "enabling different aspects of the wrongdoing to be addressed in a foreseeable and proportionate manner forming a coherent whole, so that the individual concerned is not thereby subjected to injustice"<sup>242</sup>.

Therefore, although Art. 4 of Protocol no. 7 ECHR does not prohibit States from sanctioning the facts of tax evasion through the double obligation of administrative sanctions (even if they qualify as substantially criminal under the Convention) and criminal, at the same time the dual-track sanctions must conform to the conventional principles and guarantee a "connection in substance and in time" between the two procedures. This connection, in fact, constitutes a "useful guidance" in order to reconcile and safeguard opposing needs: on the one hand, the interest of the individual not to be tried and sanctioned twice; on the other hand, the interest of the State in punishing conduct that integrate a criminal offense or a tax offense, as the case may be. The Court thus enhances the criterion of "sufficiently close connection in substance and time", stating that this criterion is not satisfied in the hypothesis in which "one or other of the two elements - substantive or temporal - is lacking"<sup>243</sup>. It follows, therefore, that the two proceedings must be coordinated between them both from a substantive and temporal point of view, and that the burden of proving that the imposition of double sanctions imposed by different authorities in separate proceedings does not violate Art. 4 of Protocol no. 7 ECHR, as "closely connected in substance and in time".

Otherwise, in the presence of two proceedings "combined in an integrated manner so as to form a coherent whole" the verification of whether one of the two proceedings ended with a definitive sentence loses relevance, since one of the conditions for application of Art. 4 of Protocol no. 7 ECHR, is the duplication of proceedings. Lastly, the Grand Chamber states that at the optimal level: "the surest

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<sup>242</sup> Ibid, par. 122.

<sup>243</sup> Ibid, par. 125.

manner of ensuring compliance with Art. 4 of Protocol no. 7 is the provision, at some appropriate stage, of a single-track proceeding enabling the parallel strands of legal regulation of the activity concerned to be brought together, so that the different needs of the society in responding to the offence can be addressed within the framework of a single process"<sup>244</sup>. In this regard, therefore, it indicates which factors need to be present in two proceedings in order to maintain a "sufficient substantive and temporal connection". Firstly, the two proceedings must pursue complementary purposes and must relate, in concrete and not abstract terms, to the same conduct. The double proceedings, then, must be a foreseeable consequence, "both in law and in practice", of the same conduct. Indicative of the existence of a "sufficient connection" between the two proceedings and that they continue by an adequate interaction between the competent authorities. This interaction must then continue during the second trial proceedings, in the findings and in the declarations made in the first of the proceedings. Finally, it will be necessary to verify whether the sanction imposed in the first proceeding is also taken into consideration in the second proceeding, so as to avoid that the convicted subject must bear an excessive burden and at the same time to ensure that he is subjected to an overall penalty proportional to the conduct.

Explained in general terms the conditions under which the prohibition of *ne bis in idem* is integrated, the Court applied the aforementioned principles to the present case.

The Court recalls the different aims which the (Norwegian) national system pursues by imposing on the one hand, administrative and tax sanctions and on the other, criminal sanctions<sup>245</sup>. The former has a deterrent and compensatory purpose, as opposed to criminal sanctions which typically have a punitive purpose. In any case, the dual-track sanctioning imposed by the Norwegian system does not violate the prohibition of *ne bis in idem* for two sets of reasons. The first concerns the possibility of being subjected to two different lawsuits with the cumulative application of two sanctions. The second, the grounds on which a sentence is based, results from the existence of a close connection between the two parallel proceedings to which the two applicants had been subjected. Indeed, the evidence used in one of the two proceedings had also been used in the other, and the total sanction inflicted was proportional to the proven conduct

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<sup>244</sup> Ibid, par. 130.

<sup>245</sup> Ibid, par. 144.

seeing that a similar proceeding had been taken into consideration with similar application of tax sanctions inflicted<sup>246</sup>.

For these reasons, the Court found that "in different proceedings, there was nevertheless sufficient access between them, both in substance and in time, to consider them as forming part of an integral scheme of sanctions under the Italian tax law." In this context, therefore, it is not possible to state that the applicant was "tried or punished again [...] for an offense for which he had been [...] finally convicted" in violation of Art. 4 of Protocol no. 7 ECHR.

With the ruling in question, the Grand Chamber has definitively restricted the scope of application of the principle of *ne bis in idem*, given that, beyond the applicative assumptions stated, the Art. 4 of Protocol no. 7 is not violated in all those cases in which there is "sufficiently close connection, in substance and in time" between the two procedures.

In addition, the Court did not provide a precise and punctual definition of "criterion of sufficient substantive and temporal connection", limiting itself to a series of indicators from which to infer the existence of a connection between the two lawsuits. Therefore, the criticism advanced by Judge Pinto, the only dissenter who considers the criterion vague and arbitrary, is not entirely wrong, seeing that the presence and content of the indicators on which it is constructed is left to discretion. Neither the divisive nor cumulative nature of the various indicators pronounced emerges from the sentence. Undoubtedly, a circumstance the European Court will have to clarify. It is uncertain whether this evolution in policymaking will be followed by a corresponding development of jurisprudence of the Court of Justice in the interpretation of Art. 50 of the Charter of Fundamental Rights of the European Union.

#### **4.2. Upcoming decisions on the European *Ne Bis in Idem* in ECJ case law: premises**

The application of the *double jeopardy* or *ne bis in idem* principle in the framework of administrative sanctions has gone a long way and is up to this day open to

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<sup>246</sup> Ibid, par. 146.

discussion. In four recent judgments, the Court of Justice of the European Union has remarked the use of this principle.

The controversial cases deal with the imposition of administrative sanctions (i.e. fines and bans on holding office) and criminal sanctions (i.e. fines and imprisonment) on the same persons in the framework of insider dealing, securities market manipulation and non-payment of VAT. The ECJ's approach, each delivered on 20<sup>th</sup> March 2018, delivers helpful explanation on the extent of recent case law from the European Court of Human Rights.<sup>247</sup>

In Case C-524/15 *Menci* the Italian tax authorities imposed an administrative penalty on Mr. Menci for unsuccessfully paying VAT in 2011. Criminal proceedings were then brought against Mr. Menci in Italy regarding equal acts.

Case C-537/16 *Garlsson Real Estate SA v Commissione Nazionale per le Società e la Borsa (Consob)* contemplated the imposition of criminal and administrative sanctions on Mr. Ricucci for market manipulation. Mr. Ricucci appealed the administrative penalty, disputing that he had already been convicted and sentenced for the same acts in criminal proceedings.

Joined Cases C-596/16 and C-597/16, *Di Puma and Zecca* involved administrative fines forced on Mr. Di Puma and Mr. Zecca regarding numerous cases of insider dealing. Mr. Di Puma and Mr. Zecca appealed those fines, "claiming that they had already been subject to criminal proceedings for the same acts giving rise to those fines, and that the courts had acquitted them on the basis that the acts constituting the offence had not been established."<sup>248</sup>

#### **4.2.1. The *Luca Menci* case**

Four years after *Grande Stevens*, the Court dealt with the principle of *ne bis in idem*, once again, in the case of *Luca Menci*.

Mr. Menci did not pay VAT regarding transactions made by his company in 2011, causing the start of administrative proceedings and a consequent prosecution,

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<sup>247</sup><http://www.drslp.com/blog/financial-services-and-criminal-proceedings-ecj-clarifies-approach/>.

<sup>248</sup> <https://www.lexology.com/library/detail.aspx?g=dadb2c3a-acd6-4a93-ae6f-62ddfe7ef8db>.

which began after the conclusion of the first litigation and the payment of the first installment of the VAT assessment and a surcharge of 30%.<sup>249</sup>

Seen that Italy permitted the imposition of a criminal sanction together with an administrative penalty, perhaps also of a criminal nature, the domestic court questioned if that system was compatible with Article 50 of the Charter, considering Article 4 of Protocol no 7 ECHR and its connecting case law in the ECtHR<sup>250</sup>. The national court was unquestionably conscious of the revolution in the approach of the Court.

As previously seen, the same exact issue was dealt with and interpreted by the ECJ in *Akerberg*. But following the change in the ECtHR's approach concerning *ne bis in idem* and homogeneous clause in Article 52 (3) of the Charter, uncertainty arose regarding what this meant for the EU. Would the ECJ follow the ECtHR's consideration in *A & B Norway*, or would it preserve its position, therefore keeping a higher level of protection?

Notably, the path taken by the ECJ in *Menci* did not rigorously adopt neither of these outcomes. It rather presented an explanation that shows how possible it is the application of double criminal penalties for the same acts in VAT disputes, confining the scope of the safeguard conferred by Article 50 of the Charter.

The *Menci* judgment by ECJ started with the examination of the criminal nature of the administrative penalty<sup>251</sup>, and even if it acknowledged that the case should be subject to the domestic court's analysis, the Grand Chamber's investigation appeared to powerfully show that the tax surcharge imposed by the Italian authority was, after all, a criminal sanction<sup>252</sup>.

It followed to the assessment of the presence of the same offence, estimating that the proceedings were, indeed, based on the identical "set of concrete circumstances which are inextricably linked together" and have become final releasing or condemning the same individual<sup>253</sup>. In *Menci*, the second proceedings drove to the applicant's conviction.

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<sup>249</sup> *Luca Menci* (n3) paras 11-12.

<sup>250</sup> *Ibid* paras 16.

<sup>251</sup> Applying the relevant criteria in *Akerberg* and in *Bonda* as it went through the analysis of each of the three aspects.

<sup>252</sup> *Luca Menci* (n3) paras 26-33.

<sup>253</sup> *Luca Menci* (n3) paras 34-39.

Thus far, the ECJ had typically acted in accordance with the approach set in *Akerberg*. Nonetheless, it did not stop after concluding that both proceedings were criminal. It continued with the option of justifying a limitation to Article 50 of the Charter<sup>254</sup>. The ECJ placed such option on the horizontal clause in Article 52(1), CFREU; article that was seen as the most intricate provision of the Charter.<sup>255</sup>

Articulated in seven paragraphs, it is a “clause that regulates the functioning of the rights within the Charter (internal regulation) and its relationship with other sources of law related to the protection of human rights in Europe (external regulation)”.<sup>256</sup>

The ECJ recognized in *Spasic*<sup>257</sup> that the rights and freedoms protected in the Charter could be object of restrictions, according to Article 52(1), and this provision was called upon, once again, in *Menci*.<sup>258</sup>

It appears that the Charter appoints multiple conditions to which the limitations of the rights therein are based on. Consequently, the limitation must “(i) be subject to formal legality; (ii) respect the essence of the rights and freedoms; (iii) be proportionate, which comprises the evaluation of the necessity of the restraint; and (iv) if it openly meets the objectives of general interest or the need to protect the rights and freedoms of others”. This last prerequisite appears to indicate circumstances where the conflict of fundamental rights needs to be outweighed. Moreover, it indicates that these prerequisites are accruing, apart from the general interest and the urge to protect the rights of others, which appear to be enforced alternatively. The first condition regards the legality of the limitation. The ECJ, in *Menci*, stated that the Italian system permitting parallel criminal and administrative proceedings, although the latter is criminal in its nature, was prescribed under national legislation and, thus satisfied prerequisite of legality.<sup>259</sup>

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<sup>254</sup> *Luca Menci* (n3) para 40-64.

<sup>255</sup> X. GROUSSOT AND I. OLSSON, *Clarifying or Diluting the Application of the EU Charter of Fundamental Rights? – The Judgements in Åkerberg Fransson and Melloni* from 26 February 2013 in C. BROKELIND (2014) *Principles of Law: Function, Status and Impact in EU Tax Law*, IBFD, page 62.

<sup>256</sup> *Ibid*.

<sup>257</sup> *Spasic* (n55) para 5-6.

<sup>258</sup> Article 52(1) CFREU: ‘Any limitation on the exercise of the rights and freedoms recognized by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others’.

<sup>259</sup> *Ibid* para 42.

Regarding the above-mentioned prerequisite, it appears to satisfy a rigorously formal aspect, meaning that although a limitation to the principle of *ne bis in idem* is sustained by law, it shouldn't defer with one of the remaining conditions. And according to the doctrine of the supremacy of EU law, in this last case, the differing national rule should be set apart to prevent a rupture of the Charter and, subsequently, infringement of non-*double jeopardy*.

The second prerequisite is the respect for the core of the rights and freedoms of the Charter. Such prerequisite implies that there is a more intricate issue and that it requires an in-depth analysis, which wasn't the case in *Menci*.

The ruling limited its assessment of the core of *ne bis in idem* to a shortened paragraph, stating that, according to the Court, the core elements of Article 50 are respected given that the national legislation “allows the duplication of proceedings and penalties only under conditions which are exhaustively defined, thereby ensuring that the right guaranteed is not called into question”<sup>260</sup>.

Under the Italian law, the fixed conditions which subject a person to double proceedings and penalties are: failure to pay VAT and that the sum surpasses 50.000 EUR for each tax period<sup>261</sup>.

Examining such rule, it is difficult to arrive to the outcome given by the Court that protection of the core of *ne bis in idem* cannot be doubted. The indicated conclusion gives the impression that the requirement of respect for the core of the right is simply a formal one, that will be satisfied as far as the national provision defines full conditions for the application of double criminal and administrative penalties. Looks like here the Court gives a chance to Member States to circumvent the principle of *ne bis in idem* by purely providing a condition of failure to pay VAT until a deadline, for example. But, the Court's conclusion calls for more inquiry.

Hence that, in this case, the right not to be criminally punished twice regarding the same facts, must be additionally analyzed, given what Article 52(1) of the Charter sincerely wants to preserve when it mentions the “essence of a right”. Therefore, we might ask, what is indeed the essence of the principle of *ne bis in idem*?

As we recall from the first chapter, in early roman time the concept of *ne bis in idem* was viewed as the exclusion of punishing twice for the same offence an individual

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<sup>260</sup> *Menci* (n3) para 43.

<sup>261</sup> *Ibid* para 7.

that was already found innocent<sup>262</sup>. This is the foundation for the analysis of what the principle tries to guarantee.<sup>263</sup>

Generally, we have seen that the outset for the analysis of if the principle of *ne bis in idem* applies or not to a specific case, is the valuation of the criminal nature of the administrative penalty, considering that the absence of two sanctions which are criminal in nature dismisses the scope of the principle's protection. Thus, there should be the analysis of the *bis* and *idem*, subsequently to the recognition of double criminal proceedings.

The best way to disclose this principle is that it denies multiple penalties towards the same person for the same crime. *Ne bis in idem* is not valid once there aren't any of these components.

When it comes to concurrent criminal and administrative punishments, the decision in *Akerberg* is, as matter of fact, crucial, since it facilitates the application of the principle even more.<sup>264</sup>

So, in this regard, the question that arises is the following: is it likely that any restraint to one of the three components of the principle of *ne bis in idem* still respects its essence? Apparently, the answer seems to be positive. When would there be, then, a limitation to Article 50? A precise example of the application of a legitimate limitation is shown in *Spasic*. Indeed, the ECJ looked at this judgement in its ruling in *Menci*, but just to affirm that a restriction to the principle may be allowed under Article 52(1)<sup>265</sup>. It did not illustrate how the two cases are connected.<sup>266</sup>

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<sup>262</sup> Ibid (n5).

<sup>263</sup> As previously underlined, the three 'key components' of the principle of *ne bis in idem*, are (i) 'if both proceedings were criminal in nature', (ii) 'if the offence was the same in both proceedings' and (iii) 'if there was a duplication of proceedings. The last component is divided into three subcomponents, containing (a) 'if the first decision was final', (b) 'if there were new proceedings' and (c) 'if the exception in the second paragraph is applicable'.

<sup>264</sup> The basis of the *Akerberg* ruling is that double-track systems are compatible with Article 50 of the Charter, as long as both penalties are not criminal in nature. This looks like it's the core of *ne bis in idem* in cases regarding a double-track system: the administrative penalty cannot be criminal.

<sup>265</sup> *Menci* (n3) para 40.

<sup>266</sup> *Spasic* regarded the interpretation of the *ne bis in idem* principle in Article 54, CISA in view of Article 50 of the Charter and in respect of police and judicial cooperation in criminal matters. The CISA gives a further condition to the application of the principle, i.e. the enforcement condition. As per this condition, the first decision must have 'been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party' so that the *double jeopardy* protection can apply. Since this requirement is not found in Article 50 CFREU, the German court question whether it was compatible with the Charter. In its argument, the ECJ applied Article 52(1) of the Charter, finding that, despite of the provision on *ne bis in idem* in the Charter was wider than the one in the CISA, the fact



The difference among *Spasic* and *Menci* is that in the first, the restriction of the principle of *ne bis in idem* does not entirely avoid its application but instead establishes a requirement that if the penalty is not charged in the State that first judged, the other State may prosecute the person and execute the sentence. It still reassures that the person does not have two penalties enforced towards them. The restraint is confirmed by the collaboration between the Member States and since there are various instruments in EU Law that coordinate the enforcement requirement, is not applied indistinctively<sup>267</sup>. Consequently, the “finality” subcomponent is limited: just once the penalty started to be enforced, the proceeding becomes indeed final. Therefore, the protection of *ne bis in idem* will still apply, even if the Member State cannot enforce anymore the penalty under its laws. Another valuable reason for permitting this limitation, is that it includes the criminal punishment for the same offence in diverse Member States, which can conveniently erupt to double or no punishment at all. The ECJ was capable to “find that the restriction as proportionate<sup>268</sup> and that it met the general interests of the Union, by safeguarding the implementation of the Area of Freedom, Security and Justice (AFSJ)”<sup>269</sup>.

On the contrary, in the *Menci* case, the “criminal” element is completely ignored, given that the limitation to the principle of *ne bis in idem* avoids it from being applied at all in cases concerning concurrent VAT overload that is authentically criminal and a formally penal sanction.

Even though Italian law agrees on the application of the criminal sanction to a certain quantity of unpaid VAT, nothing prevents Member States to establish lower amounts, given that this was one of the two “exhaustively defined conditions” that the Court recognized, without conceding more explanations.

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that the first decision must, at least, be in the process of enforcement, accomplishes all the limitation elements in Article 52(1).

In this case, the Court actually performed an analysis of the requirement respect for the essence of the right, overcoming that the execution covenant only intended to secure that the person did not benefit from unpunishment in case the first sentence was not really enforced by the sentencing State.

No damage to the key components comes from this limitation. In fact, this restraint supposes that the State which provided the first sentence has taken all means needed to enforce the penalty. If the sentencing State has done so, which is the regular and foreseen path after the imposition of a sanction, the circumstance of a second trial and conviction in another Member State will be impeded by the principle of *ne bis in idem*. If for any cause, however, the enforceability of the punishment has not taken place, the execution condition seeks the assurance of being punished.

<sup>267</sup> *Spasic* (n55) para 66-70.

<sup>268</sup> *Ibid* para 60.

<sup>269</sup> *Ibid* paras 62-64.

The ECJ's argument in *Menci* on the respect for the essence of *ne bis in idem* is a superficial one and allows Member States to elude the level of protection linked to the principle.<sup>270</sup>

The outcome of this analysis is that, in *Menci*, the Italian law provided a limitation that does not respect the essence of the right not to be tried twice.

Regarding the “criminal” component of such right, it is difficult to envisage a circumstance in which parallel proceedings for the imposition of a criminal sanction and an essentially criminal tax surcharge will carry out such qualification. This assumption comes from the *Akerberg* premise, which states that there cannot be subsequent sanctions of a criminal nature. This indeed seems to be the essence of the *ne bis in idem* principle.

Before analyzing the third requirement, the ECJ took into consideration the fourth one, i.e. “the limitation meets objectives of general interest recognized by the EU”. This requirement appears to be quite commonly accepted. And the general interest, in such matter, is to assure the collection of VAT income matured by the States and conveyed to the EU. This interest derives, finally, from Article 4(3) TEU<sup>271</sup> and the obligation of Member States to take all relevant actions to ensure that all duties that arise from EU law are performed.<sup>272</sup>

The third requirement is that the limitation must be subject to the principle of proportionality.<sup>273</sup> The ECJ linked the strict requirement of the limitation in the

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<sup>270</sup> Especially in regards to *Akerberg*.

<sup>271</sup> Article 4 (3) TFEU: Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardize the attainment of the Union's objectives.

<sup>272</sup> In *Åkerberg* (paras 24-31) the Court considered this reasoning to settle that VAT issues fall into the scope of EU law and accentuated the obligation of preserving the financial interests of the Union and Article 325 TFEU: 1. The Union and the Member States shall counter fraud and any other illegal activities affecting the financial interests of the Union through measures to be taken in accordance with this Article, which shall act as a deterrent and be such as to afford effective protection in the Member States, and in all the Union's institutions, bodies, offices and agencies. 2. Member States shall take the same measures to counter fraud affecting the financial interests of the Union as they take to counter fraud affecting their own financial interests.

<sup>273</sup> This was what AG Sánchez-Bordona defined as the ‘reason’ why the limitation in Article 52(1) does not apply in *Menci*. In a few words, he affirmed that the limitation would only occur if it was essential for all Member States. It has been determined in *Åkerberg* that the parallel system can endure, as long as both penalties are not criminal in their nature, which signifies that a limitation isn't required. Indeed, his conclusion was that, if Member States have the option of adopting a single-track system in which diverse penalties can be imposed towards the same individual for the same acts, without interfering with *ne bis in*

proportionality requirement of Article 52(1) CFREU to the fact that the national legislation gave “clear and precise rules allowing individuals to predict which acts or omissions” would outcome in dual punishment<sup>274</sup>. Once more, it designated the two terms provided by Italian law which generate the application of the criminal sanctions in parallel with tax surcharge<sup>275</sup>.

The ECJ’s way to proceed iterates the content of the requirement on the “respect for the essence of the right” and does not talk about necessity at all.<sup>276</sup>

The ECJ carried on the analysis of whether the aggravations tolerated by the individual, as a result of the duplication of proceedings, do not overtake what is rigorously necessary for the accomplishment of the goal pursued by the rule, which in this occasion is the VAT collection. As per the Court’s examination, such condition requires that national law offers coordination rules to assure strict necessity of such additional derogation. Additionally, there should be rules to assure that the strictness of the imposed punishments match to the severity of the crime. The Court recognized that the Italian provisions met these conditions<sup>277</sup>.

That judgement was based on Article 21 of the Italian Legislative Decree 74/200<sup>278</sup> on VAT and direct taxes. Nonetheless, the article previously quoted does not blend with the Court’s reasoning. The Italian Legislative Decree at article 21, in fact, states that the administrative sanction will only be enforceable in case of dismissal or discharge concerning the criminal prosecution. Still, this does not exclude a case like *Menci*.

It undoubtedly follows from Article 20 of the such legislation, that the different sanctions are processed before different authorities and that the administrative proceedings might not be interrupted to await on the result of the criminal charges. The

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*idem*, it is pointless to limit that principle in double-track systems. So, the solution has previously been found in *Åkerberg*, which allows concurrent proceedings, as far as they are not criminal in nature.

<sup>274</sup> Opinion of AG Sanchez- Bordona, para 49.

<sup>275</sup> *Luca Menci* (n3) paras 49-51.

<sup>276</sup> The AG’s opinion looks like it’s the commensurate answer to the necessity requirement. In fact, the restraint cannot be considered as ‘necessary’ if it does not regard all Member States. His analysis shows that there are other possible ways to achieve the same result, by enforcing a single-track system or coordinating the implementation of both proceedings, in such a way that they are actually considered as one.

<sup>277</sup> *Ibid* paras 53-57.

<sup>278</sup> Legislative Decree No 74, of 10 March 2000 adopting new rules on offences relating to direct taxes and value added tax, pursuant to Article 9 of Law No 205 of 25 June 1999, (GURI No 76 of 31 March 2000) p 4.

article clearly designates the autonomy of the proceedings, although the conclusion of the administrative one is subject to the outcome of the criminal results<sup>279</sup>. It looks obvious that there is no synchronization between the proceedings to assure that the result is preserved to what is firmly needed.

Moreover, the Court indicates that the deliberate payment of the tax penalty sums ponders on the criminal sanction as an alleviating component.<sup>280</sup> Possibly, such statement does not guarantee that the further detriment of the duplication of penalties is attenuated to the firmly required level. As far as emphasized by the ECtHR in *Maresti*<sup>281</sup>, this credit system, as specified by the doctrine<sup>282</sup>, does not affect the fact that the applicant was trialed twice for the same offence<sup>283</sup>.

This individual guarantee against the State is, basically, the protective scope that both the ECJ and ECtHR have built through their case law that looks like broke down after such long endurance.

The ECJ's conclusion, thus, was that national legislation that after applying an administrative penalty of a punitive nature, permits the imposition of a criminal charge for the non-payment of VAT, does not infringe Article 50 of the Charter, since such rule:

1. "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,"
2. "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"

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<sup>279</sup> Ibid, Article 20: The administrative proceedings for the control of taxes for the purpose of setting the amount to recover and the proceedings before the tax court may not be suspended during the criminal proceedings covering the same facts or facts on the determination of which the outcome of the conclusion of the proceedings depends.

<sup>280</sup> *Menci* (n4) para 56.

<sup>281</sup> *Maresti v Croatia* Appl no 55759/07 (ECtHR 25 June 2009).

<sup>282</sup> V. WATTEL (2016) *Ne Bis in Idem and Tax Offences in EU Law and ECHR Law*, Cambridge University Press, page 172.

<sup>283</sup> A uniform conclusion is reached by AG Sánchez-Bordona's Opinion, according to whom this mitigation does not lessen the punitive effect of the tax penalties. Continuing, the simple fact that these measures can be adopted in certain situations, is not enough to concern the limitation rule in abstract assures that the results of duplicate penalties will not surpass what is severely essential to accomplish the objective of protecting the financial interests of the EU.

3. “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.”<sup>284</sup>

After its confident position in *Akerberg*, the ECJ’s arguable *Menci* ruling leaves wide space for incertitude.<sup>285</sup>

The main assumption for the *Menci* ruling involved the ECJ’s interpretation of Article 52(3) of the Charter<sup>286</sup>. Such clause, also mentioned as the homogeneity clause, since it establishes a commitment about the interaction between the corresponding rights in the Convention and the Charter and their interpretation, is quite significant in the EU order. The degree of such commitment, yet, has been the center of many discussions.

The inquiry concerning the connection among the two instruments and the interpretation of equivalent rights by the ECJ, has been confronted by such court in prior cases, where it has said that, as far as the Union has not acceded to the ECHR, this last is not an instrument that has officially merged into EU law<sup>287</sup>. In a previous case, the ECJ had already ruled that, forasmuch as the rights are equivalent in the ECHR and the CFREU, it is only required to mention to the right in the Charter<sup>288</sup>.

It appears that in *Menci* it would also be problematic to avoid interpretation of this provision, since the mentioned inquiry notably inquires how Article 50 CFREU has to be interpreted considering Article 4, Protocol 7 of the ECHR and its related case law. Specifically, how should these they relate, acknowledging the change in the ECtHR’s interpretation on *ne bis in idem* in *A & B Norway*? In fact, the Court’s variation is what enraged the Italian inquiry to the ECJ.

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<sup>284</sup> *Menci* (n3) para 63.

<sup>285</sup> It is not evident if the ECJ has cut out the ‘respect for the essence of the right’ requirement or whether it is entailed in these terms that such a requirement is being satisfied with or, even, if these regimes are a substitute for Article 52(1). The Court began by applying that Article, but turn into an assemble of its own, mixing up the requirements from the Charter with what seems to be an adapted proportionality test.

<sup>286</sup> Article 52(3) CFREU: ‘In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection’.

<sup>287</sup> Joined Cases C-217/15 and C-350/15 *Massimo Orsi and Luciano Baldetti* (2017) ECLI:EU:C:2017:264, para 15.

<sup>288</sup> Case C-199/11 *Otis and Others* (2012) ECLI:EU:C:2012:684.

Distinct views have been disclosed concerning the interpretation of Article 52(3) of the Charter, even before *Menci*.<sup>289</sup>

The debate regarding the EU's agreement to the ECHR is more inclined into a political issue and it constitutes a delicate topic for the Union, which after creating a wide body of case law on the authority and autonomy of EU Law,<sup>290</sup> exposed its defensive instincts against the option of being bound by another Court. It shows that it is not in the EU's intent to be bound by an external judicial body, which would also be the case if Article 52(3) were to be treated as binding the ECJ to the case law of the ECtHR.<sup>291</sup>

Concerning the ECJ's line in respect of Article 52(3), in *Akerberg*, it kept itself quite concerning the case law of the ECtHR and, indirectly, appealed the application of the *Engel* criteria placing it in the national Court's responsibility to decide if the surcharge was a criminal one or not. It did not cite that this was the criteria advanced in the case law of the Court, instead it referred to its own case law citing *Bonda*.<sup>292</sup>

The ECJ not alluding to the ECtHR in *Akerberg* provoked diverse views regarding it. On one side, it has been discussed that the CJEU wanted to deliver a restricted meaning to the homogeneity clause in Article 52(3) of the Charter and,

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<sup>289</sup> Given that its direct interpretation was avoided in *Akerberg*.

<sup>290</sup> The doctrine of supremacy and autonomy of EU Law has as its landmark decision in Case C-26/62 *Van Gen den Loos v. Netherlands* (1963) ECLI:EU:C:1963:1, where it was stated that "the Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals, independently of the legislation of Member States. Community Law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community".

<sup>291</sup> X. GROUSSOT (2016) *Ne Bis in Idem EU and the ECHR Legal Orders: A Matter of Uniform Interpretation* in B. VAS BOCKEL (eds), *Ne Bis in Idem in EU Law*, Cambridge University Press, page 73. Groussot and Ericsson explain their disagreement in contrast with the binding effect of the homogeneity clause. Apart from the fact that there were unnumbered vain pursuits to include in Article 52(3) an explicit referral to 'the case law of the ECHR', paragraph 7 starts that "the explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the Courts of the Union and of the Member States". 'The explanations' are the Explanations relating to the Charter of Fundamental Rights, an instrument advanced by the drafters of the Charter with clarifying notes on each Article. According to the explanations, Article 52(3) comprises the case law of the ECtHR as well when it denotes the interpretation of the meaning and scope of corresponding rights. Yet, it is questioned that since Article 52(7) only entails that due regard be given to the explanations, the ECJ can proceed from the case law of the ECtHR when interpreting equivalent rights. Basically, what the previous authors oppose is that the intention of the legislator, since it does not directly mention to the case law of the ECHR in the body of the Charter but instead citing it in the explanations, did not mean to bind the ECJ's interpretation of fundamental rights to the case law of the ECHR.

<sup>292</sup>In *Bonda* the ECJ explicitly addressed the jurisprudence of the Strasbourg Court and the *Engel* criteria.

therefore, didn't quote the Convention<sup>293</sup>. On the other hand, it has been stated that *Akerberg* “cleverly indirectly aligns the ECtHR’s criteria for the determination of a criminal charge with that of the Charter”<sup>294</sup> and that the “Charter reinforced the impact of the ECHR”<sup>295</sup>. The second opinion appears to be more suitable, since it is obvious that the ECJ indirectly referenced the ECtHR in *Engel*.

Hence, the European Union’s Judicial Cooperation Unit released a document with a summary and direction on the application of the principle of *ne bis in idem* in criminal matters relating to the case law of the ECJ. Such paper states that the decision of *Akerberg* declares that the ECJ aligned interpretations with the ECtHR<sup>296</sup> and decided to adopt a “minimalist interpretation” of Article 52(3)<sup>297</sup>. Therefore, to keep a little detachment from the ECtHR, the ECJ did not directly address its case law to the Convention, but silently used the *Engel* criteria, yet being certain that complete focus is on the Charter. This is mentioned by the doctrine as the “relative autonomy” interpretation, which appears to be the one adopted by the ECJ concerning the homogeneity clause<sup>298</sup>.

The ECJ, in *Akerberg*, given that it had already done so in *Bonda*, did not need to expressly acknowledge the case law of the ECtHR.

The response regarding Article 52(3) arrived in the *Menci* judgment. The binding effect of the Convention was rejected since the ECJ declared that, as long as the concurrence to the Convention has not come into effect, the last cannot be regarded as an “instrument which has been formally incorporated into EU law”<sup>299</sup>. Moreover, the ECJ addressed “the explanations” of the Charter, which stated that the provision of Article 52(3) is envisioned to guarantee the essential uniformity between the ECHR and the Charter, without touching the autonomy of Union Law<sup>300</sup> and the

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<sup>293</sup> X. GROUSSOT (2016) *Ne Bis in Idem EU and the ECHR Legal Orders: A Matter of Uniform Interpretation* in B. VAS BOCKEL (eds), *Ne Bis in Idem in EU Law*, Cambridge University Press, page 81.

<sup>294</sup> BROKELIND, see supra note 270 (n 59).

<sup>295</sup> S. DE VRIES, U. BERNITZ, S. WEATHERILL (2015) *The EU Charter of Fundamental Rights as a Binding Instrument: Five Years Old and Growing*, Bloomsbury Publishing, page 168.

<sup>296</sup> EUROJUST, *The Principle of Ne Bis in Idem in Criminal Matters in the Case Law of the Court of Justice of the European Union* (n 155) page 24.

<sup>297</sup> GROUSSOT (2016) *Ne Bis in Idem EU and the ECHR Legal Orders: A Matter of Uniform Interpretation* in B. VAS BOCKEL (eds), *Ne Bis in Idem in EU Law*, Cambridge University Press, page 86.

<sup>298</sup> Ibid 86-87.

<sup>299</sup> *Luca Menci* (n 3) para 22.

<sup>300</sup> Ibid para 23.

ECJ. Consequently, the Court's examination should rely on the instruments of EU legislation and, particularly, the Charter<sup>301</sup>.

At the end of *Menci's* judgment, after the Court's finalized analysis, the homogeneity clause was used to say that Article 4, Protocol 7 ECHR must be taken into consideration<sup>302</sup>. The contemplation was simply that the ECtHR had stated as well that a repetition of criminal proceedings did not overstep the Convention, although based on the test of an appropriately close connection in substance and time<sup>303</sup>.

Although it might seem like the ECJ's effort to prove the preservation of uniformity between the two legislations, it is questionable that the ECJ has in fact kept such coherence because what it truly wants to be demonstrating is that the reading of *ne bis in idem* by the ECtHR has been reformed, and the ECJ went along, and even if based on completely different grounds, this shows uniformity.

After all, we can derive that currently the ECJ is not bound by the ECtHR, and that an independent interpretation of the homogeneity clause must be recognized. Therefore, it can be concluded that the ECtHR's adoptions do not have a binding effect, and it is undisputable that the wording of Article 52(3) and "the explanations" to the Charter specify an assurance concerning consistency between the two, as long as that ECJ does not bound these rights in a way that impacts negatively the autonomy of EU law and of the ECJ. This implies the consideration that the Convention is prior to the Charter and that rights like the principle of *ne bis in idem* had previously been applied in the ECtHR's case law.

*Menci's* case is surely going to generate changes to the current situation of parallel imposition of criminal and administrative penalties regarding VAT. So, it is no wonder if Member States all of a sudden feel free to apply tax surcharges with a punitive nature in addition to criminal sanctions. Seen that ECtHR and the ECJ have followed different patterns, another matter that might arise concerns the application of different rules and standards throughout the Member States. The answer cannot lie in the scope of territorial application of the principle of *ne bis in idem* since the Charter's application is limited both to circumstances that exceed the country's borders and that involve another Member State. *Menci* is the perfect example case of the Charter's action

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<sup>301</sup> Ibid para 24.

<sup>302</sup> Ibid para 60.

<sup>303</sup> Ibid para 61.



within the territorial scope of a single State. Additionally, other matters could arise, like: how the Member States should shape their systems of concurrent sanctions; which line should the Member States assume, given that *A & B Norway* and *Menci* both regarded VAT penalties and both Court's decisions may be applied in internal situations; if diverse rules would apply for cases concerning VAT and for cases relating to other types of tax surcharges. It is important, and it becomes clear in practical situations, that the two Courts are aligned. Therefore, the purpose of Article 52(3) of the Charter shows a clear form.

In conclusion, it is here indorsed that *Menci* reformed *Akerberg*, since it is hard to imagine how the two judgements can coexist. If *Akerberg* affirmed that double-track system does not breach the Charter, as far as both penalties are not of a criminal nature, and *Menci* declares that concurrent penalty systems do not breach the Charter, even if both sanctions are criminal, and as long as the limitation satisfies some circumstances, then *Akerberg* has been lost. The rulings are not corresponding and instead, they appear to be conflicting.

#### **4.2.2. *Garlsson Real Estate and Others***

The following case<sup>304</sup> interested Consob – the Italian securities market regulator investigation into securities market alteration. Concluding its analysis, Consob sentenced that Mr. Stefano Ricucci and two companies under his direction, Magiste International and Garlsson Real Estate, had a role in market manipulation with the aim of drawing attention to the securities of RCS MediaGroup SpA for personal economic reasons. On 9 September 2007, at the end of the administrative proceedings, the three parties were fined jointly and severally by Consob for 10.2 million EUR for market manipulation. On 2 January 2009, the fine was decreased to 5 million EUR by the Italian Court of Appeal, which also granted leave to appeal to the Italian Court of Cassation. At the same time, on 10 December 2008, in separate criminal processes, the Rome District Court condemned Mr. Ricucci of market manipulation for the same conduct and sentenced him to imprisonment for four years and six months. However,

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<sup>304</sup> Case C-537/16, *Garlsson Real Estate SA v Commissione Nazionale per le Società e la Borsa (Consob)* 20 March 2018.

the sentence was afterwards reduced to a term of three years and then deceased because of a pardon. The criminal sentence became final. During his on-going appeal of the administrative fine before the Court of Cassation, Mr. Ricucci affirmed that he had already been finally condemned and sentenced for the same actions in criminal proceedings in 2008. Because of this, the Italian Court of Cassation decided to refer the following two questions to the ECJ for a preliminary ruling:<sup>305</sup>

- “Does Article 50 of the Charter of Fundamental Rights of the European Union, interpreted in the light of Article 4 of Protocol no 7 to the ECHR, the relevant case-law of the European Court of Human Rights and national legislation, preclude the possibility of conducting administrative proceedings in respect of an act (unlawful conduct consisting in market manipulation) for which the same person has been convicted by a decision that has the force of *res judicata*?”

- “May the national court directly apply EU principles in connection with the *ne bis in idem* principle, on the basis of Article 50 of the Charter, interpreted in the light of Article 4 of Protocol no 7 to the ECHR, the relevant case-law of the European Court of Human Rights and national legislation?”

The core of the first question basically is, since Mr. Ricucci has already been convicted of an offence in criminal proceedings, would subjecting him to and convicting him in administrative proceedings for the same offence embody a violation of the *ne bis in idem* principle?<sup>306</sup>

Regarding the second question, the ECJ is being asked to decide whether the Charter is directly applicable. For more *rationale*, EU law separates between legislative tools that are straight away applicable and legislative tools that require further acts of

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<sup>305</sup> *Garlsson Real Estate SA v Commissione Nazionale per le Società e la Borsa (Consob)* para 20 (1)(2).

<sup>306</sup>The question is slightly more complex. First, what really is relevant in the question is not really the conduct of proceedings or the decision to issue fines, but more so if the relevant provisions of national law granting for the possibility of duplicated proceedings and duplicated fines are discordant with the Charter. The Directive in question consents for, and Italian legislation explicitly provides for a split system under which a person can be subjected to both criminal and administrative proceedings and fines for the offence of market manipulation. Following, there is a jurisdictional question. The ECHR is an international treaty, therefore its provisions apply to national legislation directly. By contrast, being an instrument of EU law, the provisions of the Charter only apply in respect to EU law. In this case there was no issue of jurisdiction since the provisions of national law in question had been consequent from Italy's transposition into national law of the EU's Market Abuse Directive (Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse)).

implementation by the EU Member States. The meaning of the differentiation is that legislation having direct applicability builds a right of direct effect on individuals, i.e. that an individual can use EU legislation to carry out the rights given under it against a Member State (vertical direct effect) or against another individual (horizontal direct effect). On the contrary, if the legislation is not directly applicable, it does not create direct effect and, unless transported into national law, an individual would not be able to enforce the right granted by that legislative instrument against a Member State. Instead, in this case, the individual in question should be able to bring an action against the Member State in question for non-implementation.

The Court polarized its attention on whether the two sets of proceedings and sanctions are criminal in their nature and if they related to the same conduct (*idem*).

First off, assumed that the term of incarceration handed down by the Rome District Court to Mr. Ricucci clearly established a criminal sanction, it was a matter for the court to decide whether the parallel administrative proceedings and the fine imposed on Mr. Ricucci were also criminal in their nature. In its evaluation, the ECJ applied the *Engel*<sup>307</sup> criteria.

The proceedings were classified as administrative and not criminal under national law, although, under the *Engel* test this alone is not determinative, and the other two criteria must be taken into consideration. Therefore, the ECJ stated that, since the Italian legislation provides for a weighty administrative fine of between 20,000-5,000,000 EUR (with possible increase) for this offence, the punishment isn't simply restitutionary and has a punitive aim to it, suggesting a criminal nature.<sup>308</sup> The court also thought that the penalty had a high degree of harshness and stated that the offence is consequently possible to be of a criminal nature.<sup>309</sup> Secondly, the ECJ found that, given that the administrative fine of a criminal nature related to the same underlying conduct of the criminal conviction imposed on Mr. Ricucci, this would lead to think that the conduct in question relates to a set of concrete circumstances which are inevitably associated together and lead to the conviction of Mr. Ricucci. Thus, the *idem* part of the test was also met.<sup>310</sup>

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<sup>307</sup> *Engel and Others v The Netherlands*, nos. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72.

<sup>308</sup> Case C-537/16 *Garlsson Real Estate SA v Commissione Nazionale per le Società e la Borsa (Consob)* para 34.

<sup>309</sup> *Ibid* para 35.

<sup>310</sup> *Ibid* para 39.

Given the afore mentioned, the court concluded that it looked like the national legislation at issue permitted the opportunity of repeating proceedings against an individual who has already been finally convicted, by that constituting a limitation of the *ne bis in idem* principle.<sup>311</sup>

Once arrived at the conclusion that the Italian legislation came out to create a limitation on the *ne bis in idem* principle, the ECJ then considered whether the limitation may be justified by the criteria under Article 52(1) of the Charter.<sup>312</sup>

It was not in discussion that the legislation constituting the limitation appeared to fulfill the first two canons. Moreover, the ECJ affirmed that it also seemed to fulfill a goal of common interest in wanting to safeguard the integrity of the financial markets of the EU. Additionally, it would help to enhance public confidence in financial instruments so far as the duplicated criminal proceedings pursue complementary objectives relating to different aspects of the same unlawful conduct at issue.

Nevertheless, in order to fulfill the principle of proportionality, it is necessary that the double proceedings and penalties do not surpass what is allowed and necessary to obtain the objectives legitimately chased by that legislation. For these reasons, where there is a choice between different appropriate measures, recourse must be had to the least taxing and the detriments caused must not be disproportionate to the objectives pursued. Considering this, “the court noted that the proportionality of the legislation in question cannot be called into question by simply by the fact that the EU Member State chose to provide for the possibility of duplication of penalties, because Article 14 of the Market Manipulation Directive itself provides for the possibility of such duplication and a finding to the contrary would deprive the EU Member State of that freedom of choice.”<sup>313</sup> Moreover, the ECJ also stated that, with concern to its rigid necessity, the legislation at issue clearly sets out the situations in which market manipulation can be subject to a duplication of criminal proceedings.

Lastly, the ECJ indicated that the legislation must also assure that the difficulties for the individuals concerned resulting from the duplication are restricted to what is

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<sup>311</sup> Ibid para 41.

<sup>312</sup> Ibid para 43.

<sup>313</sup> Ibid para 49.

rigorously necessary in order to achieve the aim of general interest. In this respect, the court considered two significant criteria for assessment.<sup>314</sup>

First, the ECJ realized that this condition implies the existence of rules assuring coordination so as to reduce to what is rigorously necessary the additional disadvantage together with the duplication for the concerned individuals. In this context, the ECJ established that “the obligation for cooperation between Consob and the judiciary required under national law is liable to reduce the resulting disadvantage of the duplication of proceedings for the person concerned”.

Second, the ECJ noted that the national laws must assure that the hardness of the sum of all the penalties imposed conforms to the hardness of the offence concerned and does not exceed the seriousness of the chosen offence. Concerning this requirement, the ECJ noted that, “in case of a criminal conviction following criminal proceedings, the bringing of administrative proceedings of a criminal nature exceeds what is strictly necessary in order to reach a target of general interest in so far as the criminal conviction is such as to punish the offence committed in an effective, proportionate and dissuasive manner.”<sup>315</sup>

In accomplishing its decision, the court acknowledged a number of factors. First of all, the ECJ recognized that market manipulation accountable to be subject to a criminal conviction must be of a certain gravity and that the penalties comprise a prison sentence as well as a criminal fine that coincides to that provided for in respect of the administrative fine.<sup>316</sup>

As reported by the ECJ, it looked like the act of bringing proceedings for an administrative fine exceeds what is strictly needed in order to accomplish the aim of general interest in so far as the criminal conviction is such as to punish the offence in question in an effective and proportionate manner.

Second, the ECJ noticed that the Italian legislation affirmed as well that, if a fine has been charged in administrative proceedings, any fine imposed in criminal

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<sup>314</sup> Ibid para 53.

<sup>315</sup> Ibid para 55-56.

<sup>316</sup> Under the relevant legislation, the financial penalties for the criminal offence were established at between EUR 20,000 and EUR 5,000,000, but a court can increase the fine by up to three times the amount or up to an amount ten times greater than the proceeds or profit obtain from the offence. The financial penalties for the administrative offence were established at between EUR 100,000 and EUR 25,000,000 with a possibility to be increased by the court.

proceedings must be defined to the part in excess of the penalty or sanction imposed by the administrative fine.

The ECJ noted that, since the legislation did not foresee for the opposite circumstance in which any administrative fine imposed is restricted to the part in excess of the criminal penalty, the legislation does not guarantee that the seriousness of all punishments imposed are limited to what is strictly needed in relation to the severity of the offence concerned.<sup>317</sup>

Subsequently, the court held that Article 50 of the Charter does not allow the possibility of bringing administrative proceedings of a criminal nature against an individual in respect of illegal conduct for which the same individual has already been finally convicted in so far as this conviction is enough to discipline that offence in an effective and proportionate manner.<sup>318</sup>

As for the second question, the ECJ restated that it is a set principle under pre-existing case law that provisions of primary law which impose precise obligations not demanding any further action on part of EU Member States for their application generate direct rights in respect of the person concerned. Thus, the provisions of Article 50 of the Charter are straightly applicable to individuals.<sup>319</sup>

### **4.2.3. Joint cases *Di Puma and Zecca***

The joint cases of *Di Puma and Zecca*<sup>320</sup> regarded several cases of insider trading.

In at least one instance, Mr. Zecca, an employee from a big accountancy firm, shared with Mr. Di Puma insider information concerning the takeover of a company and as a result of which Mr. Di Puma bought stocks in the target.

On 7 November 2012, Consob imposed administrative fines on both individuals in regard to this behavior. In due course, the two appeals ended up before the Court of

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<sup>317</sup> Case C-537/16 *Garlsson Real Estate SA v Commissione Nazionale per le Società e la Borsa (Consob)* para 60.

<sup>318</sup> *Ibid* para 63.

<sup>319</sup> *Ibid* para 64- 68.

<sup>320</sup> Joined Cases C-596/16 and C-597/16, *Di Puma and Zecca*, 20 March 2018.

Cassation. It was debated that for an absence of evidence regarding the same underlying conduct as that covered by the administrative decision in question, Mr. Di Puma had already been subjected to, and acquitted in, criminal proceedings.<sup>321</sup>

In view of the *ne bis in idem* principle, the ECJ experienced the similar judgement as in *Garlsson* and concluded likewise that the proportionality test had not been met.

In this case, the court held that “the bringing of proceedings for an administrative fine of a criminal nature clearly exceeds what is necessary” in order to accomplish the general interest’s objective of protecting the entirety of the financial markets where a final criminal judgment of absolution had already concluded that the acts capable of forming insider trading had not been established.

The court also stated that this finding does not exclude the reopening of criminal proceedings in the event that there is evidence of new discovered facts or if there has been a fundamental shortfall in the past proceedings which could influence the result of the criminal judgment, as provided for under the ECHR.<sup>322</sup>

#### **4.2.3. Observations on the recent ECJ’s case law**

The first result is that, even if each of the cases were pretty much decided on their related facts and the specific framework of the applicable national legislation, the core of the ECJ’s evaluation is the following: (i) administrative penalties (regarding financial services) are most likely of a criminal nature; (ii) a double track national system providing for parallel administrative and criminal penalties embodies a

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<sup>321</sup> The legal situation in question was thus slightly more intricate, even if for these purposes the analysis approximately followed the same lines. In brief, Article 14(1) of the Market Abuse Directive entails that, without prejudice to the right to impose criminal sanctions, Member States must ensure that appropriate administrative measures can be taken, and administrative sanctions can be imposed on individuals for market abuses. This provision had been implemented into national law. Distinctly, an instrument of Italian legislation specifies that, in certain conditions, a final judgment in criminal proceedings has the force of *res judicata* in civil or administrative proceedings relating to a legitimate right or interest recognition of which depends on establishing the same material facts as those which were the subject of the criminal proceedings. Basically, it was claimed that national legislation, by which criminal proceedings confer the force of *res judicata* on matters required to be adjudicated administratively under EU law, were in conflict with that provision of EU law in so far as the national legislation prohibited such adjudication. Having addressed this question (there was no conflict), the ECJ then also analyzed the facts in the case in light of Article 50 of the Charter.

<sup>322</sup> Article 4 Protocol no 7: Right not to be tried or punished twice.

restriction of the *ne bis in idem* principle; and (iii) such a restriction will only be acceptable if the EU Member State in question gives a clear legal framework for it, as well as setting out how the administrative and criminal proceedings can be run in parallel with less additional difficulty for the defendant and how any parallel penalties are to be limited by reference to each other so that they do not overdo the severity of the offence committed.

It can also be underlined that the ECJ usually takes into account criminal proceedings and sanctions to be more severe than administrative proceedings and sanctions (of a criminal nature).<sup>323</sup> Moreover, the court also expects that, where there is a choice of various suitable measures, recourse must be the least onerous and the disadvantages caused must not be uneven to the aims pursued.<sup>324</sup> This conclusion advocates that a higher load would need to be met to legitimize the bringing of administrative proceedings after that criminal proceedings have already been conducted, than it would be the reverse way. Yet, this does not consider the fact that, generally speaking, when national systems offer for both administrative and criminal offences relatively to the same conduct, criminal proceedings generally necessitate the fulfilment of a higher criminal burden of proof and further elements to the offence, for example, a subjective element such as relevant intent. The implication of this could be noticed in the outcomes of the *Di Puma and Zecca* cases.

In arriving at the conclusion that the parallel proceedings seemed to infringe the *ne bis in idem* principle for the reasons exposed above, the ECJ made two comments.

Firstly, under the relevant Italian legislation, Consob was free to take part in the criminal proceedings and was moreover obliged to send to the judicial authorities the documents gathered during its investigation.

Second, that the criminal proceedings could be reopened, where new evidence appears, regarding new or newly revealed facts. Nevertheless, irrespective of the actual facts, applying the ECJ's arguing, it would not seem unlikely that the criminal trial could have lead into the acquittal of the defendants since the prosecution could have failed to meet a higher onus of proof required to prove the criminal offence; or that the prosecution could have failed to set out a further element to the criminal offence that is

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<sup>323</sup>See case C-524/15 *Luca Menci*, paragraph 45.

<sup>324</sup> *Ibid*, paragraph 46.



not essential to be satisfied for the administrative offence. “Having failed to establish this higher threshold and the matter becoming *res judicata* by virtue of not having been appealed by the prosecution meant that the Consob was precluded from imposing the administrative fine, even though: (i) the administrative proceedings had been started first in time; (ii) the administrative decision had been imposed (but did not become final) before the criminal decision; and (iii) the administrative offence may well involve a substantially lower evidentiary threshold.”

Hence there are numerous results to this outcome. Like for example it could lead to a circumstance in which public authorities may be incentivized to postpone the conduct of any criminal proceedings until the administrative decision has become final before starting the conduct of criminal proceedings.

Considered that it could, in diverse jurisdictions, take several years to use all avenues of appeal, this may well take to a circumstance in which a person is subjected to over a decade of duplicative litigation regarding a single offence. Perhaps, such result would instead call in favor of the introduction of a temporal element to the proceedings, like the one set out in *A & B v Norway*.

#### **4.3. Upcoming decisions on the US *Double Jeopardy* in U.S. Federal Courts case law**

It appeared to be clear that from the U.S. perspective it is the formal classification of the sanction as criminal that cares, not the nature. The *double jeopardy* clause does not protect a person from double sanctioning subsequent to parallel proceeding in different legal framework.<sup>325</sup> So, for instance, when administrative sanctioning conflicts with criminal law principles as a violation of double jeopardy, the *rationale* normally given is that it is civil law.

Within the cases *United States v Halper* and *Hudson v United States*, the Supreme Court analyzed the *double jeopardy* issue and came to opposite conclusions. In the first decision, *United States v Halper*, the court extended the scope of the *double jeopardy* doctrine in cases of parallel civil and criminal proceedings. In the second,

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<sup>325</sup> See supra para 3.1.

*Hudson v United States*, the Court overruled *Halper* and assumed a narrower interpretation of *double jeopardy* protection.<sup>326</sup>

It appears that *Hudson* has had quite an impact given that, since then, no Supreme Court decisions have overruled it or have since then changed U.S.'s approach to the issue at stake.

Moreover, all Federal Courts, up to this day, have issued rulings referring to the Supreme Court's ruling in *Hudson* and, therefore, that *double jeopardy* "protects only against the imposition of multiple *criminal* punishments for the same offence", and that whether a sanction is civil, or criminal is a "matter of statutory construction".<sup>327</sup>

There needs to be an evaluation of the statute "on its face" and "only the clearest proof" will serve to overrule legislative intent and change what has been considered a civil remedy into a criminal penalty.<sup>328</sup>

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<sup>326</sup> M. VENTORUZZO (2015) *When Market Abuse Rules Violate Human Rights*: Grande Stevens v. Italy and the Different Approaches to Double Jeopardy in Europe and the US, 16 EUR. BUS. ORG. L. REV. 159.

<sup>327</sup> See, e.g., *In re Jaffe*, 585 F.3d 118, 121 (2d Cir. 2009) (*per curiam*) (no double jeopardy bar because attorney disciplinary proceeding was a civil remedial matter); *Seale v. INS*, 323 F.3d 150, 159-60 (1st Cir. 2003) (no double jeopardy bar to deportation proceeding after conviction for assault because deportation civil); *Students for Sensible Drug Policy Found. v. Spellings*, 523 F.3d 896, 900-02 (8th Cir. 2008) (no double jeopardy bar because statute suspending financial aid for students convicted of drug-related offenses civil); *U.S. v. Van Waeyenberghe*, 481 F.3d 951, 957 (7th Cir. 2007) (no double jeopardy bar to criminal prosecution for mail fraud, wire fraud, and money laundering after civil action by SEC); *Ledford v. Thomas*, 275 F.3d 471, 474 (5th Cir. 2001) (*per curiam*) (no double jeopardy bar to prosecution for drug possession following partial payment of controlled substances tax because tax payment civil); *U.S. v. Simpson*, 546 F.3d 394, 397-98 (6th Cir. 2008) (no double jeopardy bar to criminal punishment for administrative prison sanction because Congress intended sanction to be civil), *amended by* 2009 U.S. App. LEXIS 24182 (6th Cir. 2009); *Myrie v. Comm'r*, 267 F.3d 251, 262 (3d Cir. 2001) (no double jeopardy bar to 10% surcharge on purchases from prison commissary because legislature intended surcharge as civil remedy); *Brewer v. Kimel*, 256 F.3d 222, 230 (4th Cir. 2001) (no double jeopardy bar to criminal prosecution for DUI following administrative revocation of driver's license because revocation intended to be civil); *Kornman v. SEC*, 592 F.3d 173, 188(D.C. Cir. 2010) (no double jeopardy bar to SEC debarring convicted investment adviser because revocation of granted privilege not criminal punishment). But see, e.g., *Dep' of Revenue*, 511 U.S. at 784 (double jeopardy bars imposition of tax on marijuana that is "fairly characterized as punishment"); *De La Teja v. U.S.*, 321 F.3d 1357, 1364 (11th Cir. 2003) (no double jeopardy bar to deportation proceedings because deportation civil); *Smith v. Dinwiddie*, 510 F.3d 1180, 1188-89 (10th Cir. 2007) (no double jeopardy bar to termination of parental rights proceeding because legislature intended proceeding to be civil and remedy was not so severe as to constitute criminal penalty); *Moor v. Palmer*, 603 F.3d 658, 660 (9th Cir. 2010) (no double jeopardy bar to revocation and subsequent denial of parole for same parole violation because revocation merely continuation of original punishment).

<sup>328</sup> *Hudson*, 522 U.S. at 100 (internal citation omitted); see also *U.S. v. One Assortment of 89 Firearms*, 465 U.S. 354, 364-66 (1984) (no double jeopardy bar to civil forfeiture proceeding because no "clearest proof" that sanction was so punitive as to transform civil remedy into criminal penalty); see, e.g., *U.S. v. Candelaria-Silva*, 166 F.3d 19, 43 (1st Cir. 1999) (no double jeopardy bar to civil forfeiture of property because forfeiture intended to be civil in nature absent "clearest proof" to contrary); *Porter v. Coughlin*, 421 F.3d 141, 146-49 (2d Cir. 2005) (no double jeopardy bar to prison disciplinary proceeding because state intended sanction to be civil, sanction connected to nonpunitive purpose of maintaining order, and

The clause does not apply to administrative proceedings such as disciplinary, probation, parole or bond revocation hearings.

For instance, in *Moor v. Palmer*<sup>329</sup>, settled thirteen years after *Hudson*, the question of whether consider Moor's *double jeopardy* claim failed since parole revocation is not a criminal penalty for violating the terms of parole.

In 1994, Moor had pled guilty of using a minor in the production of pornography in a Nevada State Court. Sentenced to a term of life with the opportunity of parole after five years, he was released on parole in 2000. Two years later, Moor was arrested for violating certain terms and conditions of his parole. Therefore, he was found guilty of parole violations by the Parole Board and thus it was revoked. Moreover, it was determined that Moor could be considered for parole after three years. In 2005, he was denied parole and so challenged the denial in his federal habeas petition.

Moor argued that "he was punished twice for the same parole violations-once in 2002 when his parole was revoked, and then again in 2005 when he was denied parole for another three years-in violation of the *double jeopardy* clause."<sup>330</sup>

On the grounds of *Hudson*, in 2010, the U.S. Court of Appeals 9<sup>th</sup> Circuit stated that the revocation of Moor's parole in 2002 was not the type of criminal punishment that would trigger the protections of the *double jeopardy* clause.

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sanction not excessive in light of events); *Myrie v. Comm'r*, 267 F.3d 251, 262 (3d Cir. 2001) (no double jeopardy bar to surcharge on purchases from prison commissary because 7 *Kennedy* factors not fulfilled and no "clearest proof" to override legislative intent); *Brewer v. Kimel*, 256 F.3d 222, 230 (4th Cir. 2001) (no double jeopardy bar to administrative license revocation because state intended revocation to be civil, and no "clearest proof" that revocation was so punitive as to transform civil remedy to criminal punishment); *Bickham Lincoln-Mercury, Inc. v. U.S.*, 168 F.3d 790, 794 (5th Cir. 1999) (no double jeopardy bar to civil tax sanctions because sanctions intended to be civil in nature absent "clearest proof" to contrary); *Cutshall v. Sundquist*, 193 F.3d 466, 472-76 (6th Cir. 1999) (no double jeopardy bar to sex offender registration following sentence because legislature did not expressly declare registration to be punitive and 7 *Kennedy* factors not fulfilled); *U.S. v. Van Waeyenberghe*, 481 F.3d 951, 958 (7th Cir. 2007) (no double jeopardy bar to criminal prosecution for mail fraud, wire fraud, and money laundering after civil action by SEC because "clearest proof" SEC fines and disgorgement were not criminal punishment); *Reiserer v. U.S.*, 479 F.3d 1160, 1163-65 (9th Cir. 2007) (no double jeopardy bar to monetary penalties imposed by IRS because 7 *Kennedy* factors not satisfied and evidence does not show "clearest proof" to override legislative intent); *Smith v. Dinwiddie*, 510 F.3d 1180, 1188-90 (10th Cir. 2007) (no double jeopardy bar to termination of parental rights proceeding because legislature expressed preference for treating proceedings as civil, and 7 *Kennedy* factors not satisfied); *U.S. v. Mayes*, 158 F.3d 1215, 1223-24 (11th Cir. 1998)(no double jeopardy bar to punishment following prison disciplinary sanctions because, though most factors suggest sanctions are criminal, 7 *Kennedy* factors are "neither exhaustive nor dispositive," and safe prison administration requires finding sanctions are civil); *DiCola v. FDA*, 77 F.3d 504, 508 (D.C. Cir. 1996) (no double jeopardy bar to occupational debarment because lack of "unmistakable evidence of punitive intent" by Congress).

<sup>329</sup> *Moor v. Palmer*, 603 F.3d 07-16045 (9th Cir. 2010).

<sup>330</sup> *Ibid* para A.

Moreover, in *Students for Sensible Drug Policy Found. v. Spellings*<sup>331</sup>, decided on April 29<sup>th</sup> 2008, there was an in-depth referral to *Hudson* and the *Ward* test in response to the “students” that sued for an injunction and a declaratory judgment that 20 U.S.C. § 1091(r) was unconstitutional because it violated the *double jeopardy* clause.

20 U.S.C. § 1091(r) suspends eligibility for student loans following a conviction for enumerated drug offenses. In particular “a student who is convicted of any offense under any Federal or State law involving the possession or sale of a controlled substance for conduct that occurred during a period of enrollment for which the student was receiving any grant, loan, or work assistance shall not be eligible to receive any grant, loan, or work assistance”.<sup>332</sup>

In citing *Hudson*, the district court here conveyed that section 1091(r) did not explicitly state if it is a civil remedy or a criminal penalty, but that the section expressed in terms of “suspension of eligibility,” rather than “penalty or “punishment.”

Eligibility is decided by an administrative agency, which is “prima facie evidence that Congress intended to provide for a civil sanction.”<sup>333</sup> Moreover, after completion of a drug rehabilitation program the student had the chance to resume eligibility, and the section was mainly intended to rise access to college and make it more affordable. Thus, nothing suggested that Congress envisioned to create anything other than a civil remedy, while students opposed that the primary purpose of section 1091(r) was deterrence.

But, following *Hudson*, these were not the “clearest proof” necessary to override legislative intent since “all civil penalties have some deterrent effect. If a sanction must be “solely” remedial to avoid implicating the *double jeopardy* clause, then no civil penalties are beyond the scope of the clause.”<sup>334</sup>

Section 1091(r) contains different non-punitive aims, such as rehabilitation, school safety, a drug-free society, and ensuring tax dollars are spent on students who obey the laws. Goals that are “plainly more remedial than punitive.”

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<sup>331</sup> *Students for Sensible Drug Policy Found. v. Spellings*, 523 F.3d 07-115 (8th Cir. 2008).

<sup>332</sup> *Ibid* para 1.

<sup>333</sup> *Hudson*, 522 U.S. at 103, 118 S. Ct. 488; *Morse*, 419 F.3d at 835.

<sup>334</sup> *Hudson*, 522 U.S. at 102, 118 S. Ct. 488.

Lastly, in defining whether the statutory scheme was so punitive in purpose or effect, the court examined the several factors outlined in *Kennedy v Mendoza-Martinez*, with a clear negative outcome as to transform it in a criminal penalty.

It, therefore, appears that *Hudson* remains, to this day, the case law that its referenced to when a matter of *double jeopardy* concerning civil remedies come up.

## CONCLUSIONS

In light of this analysis we can unquestionably observe how the principle of *ne bis in idem* or *double jeopardy* has come a long way.

The protection against double prosecution is part of the common constitutional principles both in the EU and the U.S. The rationale depends on the *res iudicata* of final decisions and the principle of legal certainty.

The scope of this principle, though, varies suggestively in different jurisdictions, and the explanations for these differences are connected to the different traditions of law enforcement.

In Europe, the normative context is much more intricate compared to the U.S. one, because the *ne bis in idem* principle is a fundamental part of the national criminal justice systems, national constitutions especially, the EU Charter of Fundamental Rights and Protocol no. 7 to the European Convention on Human Rights.

Given that the phrasing and content of Art. 50 CFR are primarily based upon Art. 4 Protocol no. 7 ECHR, the case law on this last provision was the starting point for the legal analysis of the EU legal framework.

Protocol no. 7 ECHR was ratified by the majority of EU Member States and the *ne bis in idem* principle is outlined in its Art 4. Just like the *double jeopardy* clause, the scope of the European provision is restricted to criminal proceedings, and the question emerges how to judge whether a sanction and the matching proceedings are criminal or not.

The European Court of Human Rights has established a concept of criminal charge that is mutual to all procedural rights under the Convention and its protocols. Therefore, the concept “charged with a criminal offence” in the ECHR has the identical meaning as the phrase “criminal proceedings” in Art 4 Protocol no. 7.

Accordingly, the scope of application *ratione materiae* of the *ne bis in idem* principle has to be determined using the *Engel* criteria.

Although the criteria are rather alike to those applied in the *Ward* test of the U.S. Supreme Court, the substantive criteria (nature of the offence, severity of the penalty)

visibly outweigh the formal classification (first criterion). “The European Court of Human Rights explicitly rejected a purely formal approach that refers to the legal characterization under national law and, thereby, allows the Contracting States a great deal of discretion in defining the scope of application of the *ne bis in idem* principle, a discretion that bears the inherent risk that the understanding of the national legislator might be incompatible with the object and purpose of the Convention and the Protocol.”

In opposition to the U.S. Supreme Court, the European Court of Human Rights does not depend on formal classification only, but first and foremost on substantive criteria and the starting point to determine the criminal nature of a sanction is way lower than the standard applied by the U.S. Supreme Court (“clearest proof”).

Subsequent to its substantive approach, it was established an extensive concept of “criminal proceedings” that comprehended not only criminal punishment *stricto sensu*, but also further punitive sanctions.

In *Zolotukhin v Russia*, as seen, administrative sanctions for minor unlawful conduct were contemplated to “fall within the scope of the *ne bis in idem* principle because these sanctions were aimed at deterrence and punishment and the potential maximum penalty of 15 days imprisonment is sufficiently severe to be considered a “criminal” sanction.”

Thus, the imposition of an administrative sentence banded criminal prosecution concerning the same facts.

The extensive interpretation of Art 4 Protocol no. 7 conforms to the well-established case law on the procedural rights under ECHR that were thought to be applicable to administrative fines and tax surcharges. This perception has then been confirmed in *Grande Stevens and Others v Italy*, where the regulatory framework of sanctions on market manipulation was the point in question.

Even though it was quite clear that a solid basis was built through the case law of *Akerberg Fransson* and *Grande Stevens & Others v Italy*, for the principle’s operation within the EU, the extremely argumentative and recent decision in *Menci*, together with *Garlsson Real Estate & Others* and *Di Puma & Zecca*, show a torsion on the current status of *ne bis in idem*.

The ECJ drifted from its established position, i.e. the double-track systems did not breach Article 50 of the Charter, affirming that both penalties were not criminal in

nature, and applied Article 52(1) to observe that double punitive sanctions could occur aiming to safeguard the financial interests of the Union such as, for example, the gathering of VAT.

Through *Menci*, the battle against the VAT fraud becomes noticeable. It became clear that, due to the political pressure of the Member States, the ECJ would try to conform the parallel penalty system with the Charter.

Article 52(1) of the Charter does give the chance of restricting the rights and freedoms therein, while the circumstances in the case of *Luca Menci* do not seem to meet the requirements for such limitation. Instead of leading an accurate analysis on the right not to be punished twice, the Court examined on the surface the requirements of Article 52(1) and the conclusion appeared to be that the criminal nature of the VAT surcharge could be accepted. The result is a step backwards, on the level of protection, of the *ne bis in idem* and the overruling of *Akerberg*.

Additionally, the consistency between the ECtHR and the ECJ has been lost and consequently each court has got different opinion on the approach to the application of double penalties in dual-track systems in respect of VAT surcharges.

The main reaction envisaged from *Menci*, concerning the interpretation of corresponding rights in the Convention and the Charter left space for discussions. The new approach to *ne bis in idem* and tax surcharges is sure, and the Member States are going to surely deal with problems because of the application of the Convention or the Charter, since both can be triggered in internal situations.

Taking into consideration that both Courts have decreased their level of protection, it is yet unknown if they will coordinate after adopting these new approaches, given that while the ECtHR based its findings on the “sufficiently close connection in substance and time” test and the ECJ accepted national rules on the limitation of *ne bis in idem*, without considering if the essence of the principle has been respected. As can be seen, the judgement in *Menci* has brought lot of uncertainty.

Overall, we can conclude that the ruling in *Menci* has decreased the safeguard in respect of the rights of the tax payer and the prohibition of disincentive and punitive VAT surcharges cumulated with criminal sanctions with the EU legal order.

In the U.S., we came to the conclusion that it is the formal classification of the sanction as criminal that cares, not the nature. Consequently, the *double jeopardy* clause



does not protect a person from double sanctioning subsequent to parallel proceeding in different legal framework.

Nevertheless, the dichotomy of criminal proceedings and civil proceedings controls the sphere of the *double jeopardy* clause. As civil proceedings offer a procedural framework for an assortment of different sanctions, including remedial as well as punitive sanctions, it is mostly hard to contemplate these proceedings as criminal, in the sense that they induce a legitimate expectation that a final decision on the case will bar criminal proceedings.

Whether a sanction is criminal or civil is a “matter of statutory construction” and is contingent to whether the legislature envisioned “expressly or impliedly” to create a criminal or civil penalty, and if the statutory structure was so punitive either in purpose or effect as to turn what was undoubtedly meant as a civil remedy into a criminal penalty. These inquiries entail an estimation of the statute “on its face” and “only the clearest proof” will serve to overrule legislative intent and transform what has been denominated a civil remedy into a criminal penalty.

After broadening the scope of the *double jeopardy* doctrine in *Halper*, in 1997 that *Hudson* not only overruled *Halper* and adopted a narrower interpretation of the principle, but it set the grounds for a perspective that stands, to this day.

For almost twenty years now, the *Hudson* ruling has been referenced to in any and every matter concerning *double jeopardy* and parallel sanctioning, showing most of all, consistency.

Analyzing *Grande Stevens* and *Hudson* and all the latter cases has been, not only very interesting, but brought together the apparently distant fields of market abuse and protection of human rights. And apparently, if on one side a stabilization has been reached, on the other, uncertainty spreads to what the future holds, due to a continuous vision change.

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