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THE *NE BIS IN IDEM* PRINCIPLE IN THE JURISPRUDENCE OF THE EUROPEAN COURTS

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Set-up and introduction of the study.

The study at hand provides a wide-ranging examination of the processes of evolution of the *ne bis in idem* principle within the intertwined EU and ECHR legal orders. The essential features of such fundamental right of the individual – deep-rooted in the Western model of social aggregation since ancient times – have been shaped by the persistent jurisprudential "call and response" between the two supranational jurisdictional authorities requested of the supervision upon the respect of basic human rights among the "Old Continent".

Indeed, the focal point of the present work is going to be the entangled judicial interplay between the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR) and how the different hermeneutical standpoints offered by the two European Courts incisively affect the concrete application of the prohibition of double jeopardy across different EU policy sectors. Moreover, a specific remark will be embarked in relation to the implications that the judicial dialogue established between the Luxembourg and the Strasbourg regime will generate towards the EU fundamental rights system of legal protection. Particularly, a triple-headed form of jurisdictional coordination shall be detected in this sense: namely, the complex interaction between the interpretative outputs stemming from the settled case-law of the two highest European Courts and the scrutiny of legitimacy performed by national constitutional courts.

As a matter of fact, the "waltz" between the CJEU and the ECtHR involves also domestic judicial bodies, in the view of incentivizing the development of more advanced minimum standards of legal protection of fundamental rights. The platform of the judicial dialogue on the principle of *ne bis in idem* between the various courts operating within the European legal framework provides a hint of the complex phenomenon of the "constitutional" balancing on human rights protection that, albeit occurring in a fragmented system, is deployed on a European-wide level.

A consistent part of the countless interpretative approaches on the ban on double prosecution or punishment crawling the case-law of both two European Courts is reviewed during the course of the survey and, throughout the various

chapters of the work, the *ne bis in idem* rule will be exposed as a sort of idealistic "proof of the pudding" for mechanisms of fundamental rights protection under Union law.

Proceeding in an orderly fashion, in Chapter I the peculiar *"ratio"*, the scope application and the constitutive traits of the principle are showcased and evaluated. Besides, the two differentiated dimensions of the guarantee are presented: the "procedural" and "substantial" facets of the prohibition of double jeopardy are dissected in order to shed light on the different levels on which the foreclosure effect of *ne bis in idem* is effectively unfolded, by always having in mind that they represent two sides of the same coin though, synergistically aimed at shielding the individual against detrimental repercussions deriving from dual punishment.

Hereinafter, the topic of the reception of the principle within the European legal area will be addressed, by peculiarly dwelling on the different normative sources that over time have bestowed the principle of *non bis idem* within the European Community: an extensive analysis will be laid down on Article 54 Convention Implementing the Schengen Agreement (CISA), Article 50 of the Charter of Fundamental Rights of the European Union (EUCFR) and Article 4 of Protocol no. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). Against the background delineated by the legal instruments establishing the right to not be punished twice, some of the more heated questions regarding the application and the interpretation of the "European" prohibition of double jeopardy are also explored therein. More specifically, the work tables the contentious notions of "*matière pénale*" and "same facts" and the theoretical propositions set out by the European judges with the purpose of dictating univocal guidelines for national interpreters when assessing litigations that may potentially lead to the disregard of the defendant's *ne bis in idem* right.

With particular regards to the concept of "criminal matters", the fulcrum of the survey in Chapter II is anticipated, since the delimitation of the boundaries of the criminal law realm was first provided by the Strasbourg Court which, in the *Engel* ruling, outlined the parameters for the ascertainment of the penal nature of offences and sanctions. Afterwards, these criteria were implemented in the *Bonda*

judgement by the CJEU, which had raised the hopes for the concrete creation of a communication bridge between the two European Courts.

However, as further portraited in Chapter II, the relationship between the jurisprudence of the CJEU and the ECtHR has been perpetually intermittent to the point where it has been raised the legitimate doubt of whether the necessary alignment between the interpretative standings of the two supranational judges would be truly the only remedy to the structural glitches of the apparatus of European fundamental rights safeguard. Furthermore, the so-called "homogeneity clause" from Article 52(3) of the EU Charter of Fundamental Rights will be placed under a magnifying glass: this rule governs the relationship between the Union and the Convention legal orders and it is often recalled as one of the most feasible instruments plugging the fragmentation and the vacuums of legal protection caused by the dynamic nature of the European jurisprudence on fundamental rights. In effect, given the shortcoming of a common and endorsed European *ne bis in idem* standard, the protection of the guarantee enshrined thereto is usually delegated to the two supranational judges, which may encounter some problems of "miscommunication" materializing the instances where one Court may ignore or refuse to refer to the findings of the other Court established in its related case-law.

This is what occurred in the famous *Åkerberg Fransson* incident – which will be resumed in more than one occasion in this study –, where the EU Court of Justice bluntly manifested its interpretative autonomy *vis-à-vis* those cases in which Charter rights corresponding to rights envisaged in the ECHR are involved. Although the European Union has not acceded yet to the Convention legal order and, thereby, the ECHR does not constitute a legal instrument formally binding towards the EU, it is nonetheless true that the relationship between the EU law and the Convention has become strongly "internalized" within the Union legal sphere.[1]

The minimalist reading by the ECJ of Article 52(3) – which secures the equal degree of legal protection ensured by the Charter rights compared with that afforded by the Convention on corresponding rights –, taken by often omitting recalls to the Strasbourg jurisprudence, would have noticeable constitutional

[1] B. VAN BOCKEL, *Ne Bis in Idem in Eu Law*, Alphen aan den Rijn, Cambridge: Cambridge University Press, 2016, p. 2.

involvements on European fundamental rights law. This attitude perfectly depicts the difficulties faced by the Court of Justice in attaining a doctrinal coherence in the field of human rights tutelage, especially in reconciling the pluralism of different standards of legal protections supplied by the Charter itself, the Convention and also by national constitutional traditions.[2] However, the plurality of human rights standards of protection may not always constitute a drawback for the requirements of effectiveness of justice, because the dynamic – rather than static – application of fundamental rights law might determine the genesis of higher gradient of legal safeguard within a domestic legal system, something that might not be achieved in a perfectly uniform and standardized environment of legal safeguard. Therefore, the multiplicity of sources of rights warranty can theoretically represent a powerful drive behind the developments of increasingly sophisticated European parameters of fundamental rights protection. This astonishing conclusion can be drawn from the ruling delivered by the CJEU in the *Spasic* case, where it distinctly appears from the judicial interplay between the Strasbourg, Luxembourg and German constitutional court how the absence of a harmonised level of human rights protection does not fundamentally undermine the legal safeguard provided for the European citizens.

Finally, in Chapter III and IV it is cumulatively discussed the problem of the compatibility between national sanctioning frameworks authorizing the commonly renowned "double-track" punitive system and the prohibition of double jeopardy. The punitive duplication methodology has been exploited over the years by national legislators, in particular in those legal areas demanding a trenchant repressive and dissuasive sanctioning reaction to illicit conducts threatening legal assets of sensitive importance like the integrity of equity markets or the due collection of VAT revenues, that can significantly affect the Union's financial interest. As a matter of fact, the main stages that witnessed the conspicuous implementation of the twin-track system – grounded on the contextual imposition of criminal sanctions as well as administrative ones converging on the same behaviour – have been surely the tax law field and the market abuse sector.

[2] B. VAN BOCKEL, *op.cit.*, p. 10.

In the work at stake a retrospective on the most remarkable judgements issued on the topic by both the CEJU and the ECtHR is going to be undertaken: from the call-back to the *Engel* criteria made by the Strasbourg Court in the *Grande Stevens* judgement, in order to unveil the "substantially penal" character of (formally) administrative penalties and, accordingly, declaring the infringement of Article 4 of Protocol no. 7 to the Convention, to the jurisprudential "*revirement*" selected by the same ECtHR in the *A & B* decision, where the absoluteness of the *ne bis in idem* guarantee was called into question.

Moreover, the review embraces also the route chosen by the CJEU in the view of "metabolizing" the hermeneutical content of the *A & B* judgement: thus, the three preliminary references jointly assessed on 20 March 2018 in relation to the *Di Puma*, *Menci* and *Garlsson Real Estate* cases are going to be put under screening. Finally, a concluding remark will be appointed upon the last relevant decision promulgated by the ECtHR in *Nodet* on the longstanding debate over the coherency of the sanctioning combination towards the principle of *ne bis in idem*. Throughout the entire arc of the jurisprudential upheavals between the two European Courts on the prohibition of double jeopardy some questions have remained, in any case, unsolved.

Head and shoulders above the rest, the issue of the fragile equilibrium between the satisfaction of the individual demands of actual legal protection, colliding with the national and supranational interest of predisposing and enforcing efficient measures to combat the spread of criminal phenomena endangering Union's economic values, still represents a theme worthy of discussion.

For the sake of the study at hand, we are going to ultimately identify the feasible solutions available for national legislators in order to break the trend of the persistent violation of the *ne bis in idem* right, with the purpose of ensuring that it will be reinstated as a fundamental right of the European citizen secured with a full-blown legal protection.

CHAPTER I

THE *NE BIS IN IDEM PRINCIPLE*: ORIGINS, SOURCES AND SCOPE OF APPLICATION.

SUMMARY: 1. Historic origins, semantic classification and *ratio* of the *ne bis in idem* guarantee. 2. The reception of the *ne bis in idem* in the European legal area: the multidimensional nature of the institution. 2.1. Article 54 of the Convention Implementing the Schengen Agreement. 2.2. Article 50 of the Charter of Fundamental Rights of the European Union. 2.3. Article 4 of Protocol no. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms. 3. Scope of application of the *ne bis idem* within the European legal framework: the problem of a mutual trust between Member States of the European Union in accepting reciprocal judicial decisions. 3.1. The material scope of application of the guarantee: the "*matière pénale*" and the *Engel* criteria. 3.2. Follows: The subjective and temporal scope of application of the guarantee. The principle of finality. 3.3. The identity of the facts: the notion of "*idem factum*".

1. Historic origins, semantic classification and *ratio* of the *ne bis in idem* guarantee.

The principle of *ne bis in idem* is a cornerstone of modern law: it hinders the possibility of a defendant to be prosecuted twice on the grounds of the same offence, act or facts. [1]A preliminary survey should be made on the history of the *ne bis in idem* principle, enclosed in a Latin *"brocardo"* of ancient origins.[2] As a matter of fact, this principle is rooted in Roman law, where the formula "*ne/non bis in idem"*,

[1] B. VAN BOCKEL, *Ne Bis in Idem in Eu Law*, Alphen aan den Rijn, Cambridge: Cambridge University Press, 2016, p. 13.

[2] A. CONCAS *Il significato della locuzione latina "ne bis in idem*" in www.diritto.it, 2.03.2015: "It is a brocard (a brocard is a synthetic legal maxim n.d.r.) that expresses a principle of the right, usually present in the legal systems, under which a judge may not express himself two times on the same action, if the judged thing has formed".

which translates as "not twice for the same thing"[3] or "the prohibition of a second judgment for the same fact", implies that a lawsuit cannot be filed twice for the same "thing" – namely, for an "*idem factum"* between the same parties ("*bis de eadem re ne sit action"*). In the criminal field, it means that no one may be prosecuted for the same acts for which he has already been judged ("*non debet bis puniri pro uno delicto"*).

Traces of the principle could be found in the prayer of *"Demosthenes Adversus Leptinem"* (355 B.C.) and in the *"Corpus iuris civilis justinianeo"* (529-534 A.D.).[4] Indeed, the principle has a reference to the main two procedural situations within the ancient Roman judicial procedure, marked with the terms "*litis contestation"* and "*res judicata"*. The first term is thought to design the moment when the parties have allowed their dispute to be resolved through a judicial court: the lawsuit is extinguished and, therefore, cannot be pursued again. The other term reflected the final and definitive force of the judgment. Once the ruling was

[3]M. KOSTOVA *Ne/non bis in idem. Origine del "principio"* in http://www.dirittoestoria.it. N.11-2013,http://www.dirittoestoria.it/11/note&rassegne/Kostova-Ne-non-bis-in-idem-origine-principio.htm. The author also claims: "A provenance of the *ne bis in idem principle* from Greek law is very likely, since Greek society, as is well known, has influenced the Romans for many centuries. When they had decided to write what would later be the XII Tables, a delegation was sent to Greece to study the legislative system of Athens, and precisely the laws of Solon. In the sources you will find a very curious detail that is important for the opinion expressed here. Hermodorus of Ephesus, exiled from his country, "communicated his knowledge to the legislators of Rome". Hermodorus is mentioned by Cicero in his Tusculanae as princeps Ephesiorum. Pliny the Elder wrote that Hermodorus had been "*legum interpres"* and his statue was placed in the Comitium. In the Enchiridion the jurist Pomponio defined Hermodorus 'legum auctor' of the laws, composed by the decemviral college. Before his exile, Hermodorus had had a good friendship with Heraclitus (535-475 B.C.), who according to the sources had really valued him very highly. It thus appears possible that Hermodorus shared Heraclitus' ideas on the laws governing the Universe. In particular, that Heraclitus' theory of continuous motion, "everything flows, you can't immerse yourself twice in the same river", was the basis for the creation of a practical and convenient way to decide within public relations, pertaining to the sphere of jurisdiction, that is so important for the life of a society. It is conceivable that the repetition of the procedure, expressed in Latin using the verb *agere*, has been considered in contradiction with the aforementioned universal rule - *panta rei* […]."
The author follows up by stating that, in accordance to the Heraclitus' vision of the universe:
"The right of complaint is exercised and after the contested "*litis*" this right is extinguished, because the parties allow the judge to decide his dispute, i.e. the effect of the "death" of the complaint came (*extinctio actionis*) and this own cause the impediment to repeat the same complaint.
"Eternal movement" is a reality that can undoubtedly be represented in various ways or images - in Greek philosophy as "*panta rei"*, in Roman law as *ne bis in idem*, in contemporary physics theory as vibrant strings. Otherwise said, they are examples of identification of the same reality. There are many more, almost innumerable ways or images of the eternal movement. Therefore, one can still say that the *ne bis in idem* principle expresses universality in the legal field".

[4] B. NASCIMBENE: *Ne bis in idem, diritto internazionale e diritto europeo* in https://www.penalecontemporaneo.it, 2.05.2018.

delivered, the same trial could no longer be initiated or continued - from there, the expression *"res judicata pro veritate accipitur"*. Putting it another way, *litis contestatio* and *res judicata* ensured the effectiveness of the ban on double prosecution.

The first statement in Common Law of an equivalent principle to the Roman one dates back to the 12th century dispute between the Archbishop of Canterbury Thomas Becket and King Henry II, with the former arguing that clerics condemned by ecclesiastical courts were exempt from further punishment by the king's judges.[5] The king's judges, indeed, began to apply this maxim as a principle of law. Becket, on the other hand, was inspired by Saint Jerome (391 A.D.) according to whom "God does not judge twice for the same offence".

In the Medieval age, the principle was affirmed by Bartolo da Sassoferrato and, whereas, in the Modern age, is established by the Constitution of many Countries, as one of the most considerable conquests of the constitutionalism of democratic matrix, and even in various instruments of international law.[6]

As we have seen, the principle of *ne bis in idem* has a long story and exists in national legal systems in different forms: as a constitutional guarantee, as a rule of criminal procedure and as a guarantee in extradition law.[7] On top of that, such universally recognized rule of law enucleates the requirement that prosecution must be based on pre-existing legislation: in other terms, *ne bis in idem* is strictly connected with the rule of law, which would become illusory if a defendant could be prosecuted continually for various legal aspect of the same misconduct. [8] The *ne*

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[5] A. CONCAS *Il significato della locuzione latina "ne bis in idem"* in www.diritto.it 2.03.2015: "In the criminal field this means that an accused person cannot be tried twice for the same offence ("*double jeopardy*" in Anglo-Saxon common law)".

[6] See P. COSTANZO – L. TRUCCO, *Il principio del "ne bis in idem" nello spazio giuridico nazionale ed europeo*, in www.consultaonline.it, Fascicolo III, 2015; Also See. L. MINGARDO, *Bis de eadem re ne sit actio*, in *Il diritto come processo. Principi, regole e brocardi per la formazione*, Milan, 2013, p. 177 ff.

[7] B. VAN BOCKEL, *op. cit*., p. 13.

[8] E. A. SEPE *Il principio del ne bis in idem nella evoluzione della giurisprudenza delle Corti europee e della Corte costituzionale* in *Diritto e pratica tributaria internazionale* n. 4/2018. "The *ne bis in idem* principle is a general principle of criminal law present in many legal systems. In some legal systems it is recognised that as a principle of a constitutional nature, as the clause prohibiting the *double jeopardy* of the Fifth Amendment to the Constitution of the United States of America. In other jurisdictions, the prohibition of double judgment, in its procedural and substantive sense, as a right not to be penalised to be judged twice for the same fact, is a concept which, however, implies and underpins fundamental principles that belongs to all democratic

bis in idem guarantee, thus, is related to the "very essence of the right to a fair trial" and also to the legitimacy of a state, due to the fact that it enshrines the guarantee of legal certainty, that upholds the final and decisive authority of judicial decision enforced under the jurisdiction of a country.[9] Moreover, the shield of legal certainty provided by the *ne bis in idem* precludes that the legal process itself would become entirely arbitrary if legal proceedings could be repeated indefinitely.[10] Therefore, it is ought to be recalled the distinction, often theorized in continental law tradition between the ne bis in idem intended as an "individual right" and its role as "guarantee of legal certainty' – as spotted before –, provided the undeniable interoperability between these two profile of the principle.[11]

Intended in the former acceptation, the principle avoids that the individual is subjected to abuses and distortions of the state's "*jus puniendi"* (namely, "right to punish"). In this sense, another logically linked "*rationale"* is detected: the guarantee to ensure the "fair administration of criminal justice", since the additional burdens caused by the repeated prosecution of the same defendant entails the duplication of legal representation's costs, coercive measures to the person and property, and psychological expenses deriving from the submission to new sanctioning procedures.[12] It is necessary to point out that, *ne bis in idem* is generally acknowledged to belong in the "rule" semantic category rather than to the "principle" legal class. Indeed, there is no universally recognized customary international law rule providing for a transnational protection versus double jeopardy in international disputes[13]. As examined in further details in this Chapter,

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states. Firstly, the principle of "legal certainty", that shall be respected also by means of the decisions of the judicial bodies. Then, the right of the individual under criminal proceeding to not being exposed indefinitely to the punitive claim or allegation for the same fact. Finally, the principle of "procedural economy" in order to avoid waste of time and resources for the establishment of already defined events".

[9] B. VAN BOCKEL, *op. cit*., p. 14.

[10] B. VAN BOCKEL, *op. cit*., p. 14. On the point the author recalls P.SELZNICK, P. NONETTE and H. VOLLMER *Law, Society and Industrial Justice* (Transaction Publishers, 1980): "The function of the rule of law is the restraint of public authority through the rational principle of civic order, which aim is to minimize the arbitrary element in legal norms and decision".

[11] See B. VAN BOCKEL, *op. cit*., p. 143; also A. CONCAS, *op. cit*., underlines that "in some countries, such as the United States, Canada, Mexico and Argentina, this right is constitutionally guaranteed".

[12] B. VAN BOCKEL, *op. cit.*, p. 13.

the international application of the prohibition of repeated proceedings depends on peculiar legal instruments affording protection against double prosecution. Such devices are structured usually in connection with extradition procedures or other form of judicial cooperation between States in enforcing criminal law.

On this stage, it is essential to linger in front of the content and the intrinsic purposes pursued by the foreclosure effect of the guarantee. As regards to criminal law matters, *ne bis in idem* may be conceived as the result of a refusal of the so-called "inquisitorial system" which did not admit a principle with such wide foreclose effects, since the judgment, according to that viewpoint, was always "perfectible" and no limitation had to be placed on the power of the inquisitorial-judging body. Instead, in the commonly known "accusatory system", certain terms, frames and forms must be respected, and the *ne bis in idem* represents a legal safeguard perceived as indispensable within this judicial structure. Before analysing the particular polyhedral conformation of the "*ratio"* of the principle under scrutiny, it is necessary, first of all, to further educate on the real meaning of the prohibition of double jeopardy, since its framing can hide conceptual pitfalls generated by the polyvalent structure that characterizes it. In fact, authoritative orientations within the legal doctrine usually refer to "more and different" *ne bis in idem* principles. In effect, its normative fragmentary nature, deriving from the multiple declinations that the principle assumes in different areas of law, cannot permit the achievement of conceptual unity in respect to this guarantee.

Anyhow, a preliminary distinction between "substantial" and "procedural" *ne bis in idem* is certainly noteworthy, insofar as from this outlook the polyfunctional nature of the principle can be analysed better, even if understood in a unitary key. It is fundamental to highlight that the presence of a double soul within the principle at hand, permits to outline its composite *ratio*: it is possible indeed to identify different and autonomous *ne bis in idem*, each of which is featured with its own legal purpose, that, however, remains in connection to the others.

The *ratio* of the principle within its substantive connotation coincides with the need to avoid the duplication of the criminal sanction with respect to the illicit conduct. In this light, the principle fulfils the request of individual justice, pursuant

to the condition of proportionality in the sanctioning treatment enforced towards the defendant. [14]

On the other hand, the principle on a mere procedural level shall be understood as the ban on the opening of a new set of proceedings (or on the continuation of an already initiated prosecution) in relation to a misconduct which has been already sentenced by judgement become final. Such configuration of the principle is prodromal to the rationalization of times and procedural resources and is aimed at ensuring legal certainty in judicial situations. Therefore, on this stage, *ne bis in idem* satisfies necessities of "meta-individual" protection rather than offering a legal protection calibrated on the single individual, as in turn afforded by the substantive counterpart of the guarantee.

Nevertheless, it appears deceitful – in the light of the reconstruction of the principle's unique *ratio*- affirming that the procedural *ne bis in idem* is totally extraneous to any profile of protection exclusively related to the individual. As a matter of fact, it prevents the worsening of the legal position of the defendant, already definitively convicted or acquitted, before judicial authorities and, above all, it hinders the subjection of the same individual to an unconditional series of trials. Hence, from this standpoint, the principle secures the defendant from falling into a condition of uncertainty and instability with regards to his own judicial situation under the legal order. This profile of "individual" legal protection granted by *ne bis in idem* has the objective of preserving individuals from repeatedly living the traumatic experience of being subjected to a criminal procedure, that probably constitutes the prominent facet of the right as dissected in this Chapter by virtue of the breakdown operated on the relevant international legal provisions establishing the principle.

[14] A. TRIPODI *Ne bis in idem e reati tributari*, in A. CADOPPI, S. CANESTRARI, A. MANNA, M. PAPA, *Diritto penale dell'economia*, Tomo I, Torino, 2016, p. 669 ff. where – by recalling It. Cost. Court 31.5.2016, dep. 21.7.2016, n.200, the authors clearly clearly states that: "[…] finally, the Italian Constitutional Court, following the evolution of its own jurisprudence, has emphasized the inherent principle (of "juridical civilization") of "procedural" *ne bis in idem* to the sphere of the rights of the individual, in relation to the necessity of avoiding that "the same juridical situation can become the object of jurisdictional statues in perpetuity" and, therefore, that the individual is exposed to the "spiral of repeated criminal initiatives for the same fact".

2. The reception of the *ne bis in idem* in the European legal area: the multidimensional nature of the institution.

The recognition of the *ne bis in idem* right within the EU legal order represented a long and complex process. Indeed, the original Treaties establishing the European Community did not included in any manner a legal rule providing for the *ne bis in idem* guarantee or, in general, for any other fundamental rights.[15]

The effective absence of legal instruments formally instituting a sphere of fundamental rights' protection on the Community level led to the autonomous creation of a solid set of guarantees –which includes the *ne bis in idem* principle – by the jurisprudence of the CJEU. These primordial fundamental rights were conceived as integrating the so-called "general principles of Union law", which were then formally embraced by the Community through their codification in the Nice Charter (EUCFR) and by means of other legal instruments implemented by the EU law, such as the European Arrest Warrant.

As a matter of fact, the prohibition of double jeopardy, under certain circumstances, can be used as a legal ground for the non-enforcement of a European Arrest Warrant: the principle not only triggers a European wide bar to double proceedings against the same person and concerning the "same fact", but also prevents the surrender of the defendant himself requested on the execution of a European Arrest Warrant.[16] However, it is necessary to deploy how the *ne bis in idem* guarantee can preclude the execution of such legal instrument. Article 3 no. 2 of the framework decision on the EAW dictates that the national judicial authority requested to surrender the defendant is obliged to refuse to give execution to the warrant whenever the requested individual has been definitively sentenced by a domestic court of a EU Member State with regard to the "same fact", for which the EAW was issued. In any event, it is mandatory that the sentence must have been

[15]B. VAN BOCKEL, *op.cit.*, p. 15. According to the author "the initial absence of a fundamental rights instrument in Community law may reflect a decision to leave the protection of European citizens in the hands of the Member States, assuming that economic integration would not carry any real fundamental rights relevance."

[16] H. SATZGER, *International and European criminal law* (2018), p. 161.

served or, at least, must be in the process of being served. Moreover, the domestic judicial authority must refuse to execute the European Arrest Warrant even whether the judgment can no longer be executed under the legal order of the sentencing Member State.[17]

It is interesting to note that Article 3 no. 2 of the framework decision at hand is connoted by the same wording of Article 54 CISA, which – as we will see shortly- represents the main normative provision establishing the *ne bis in idem* principle under international law.[18] In fact, perhaps the most relevant passage in the reception of principle of *ne bis in idem* within the European legal framework is constituted by the incorporation of the Schengen Agreement into the Union legal order by way of the Treaty of Amsterdam, which enforced a transnational *ne bis in idem* guarantee especially in the Area of Freedom, Security and Justice (the so-called AFSJ).[19]

In addition to the European Arrest Warrant, other instruments containing the *ne bis in idem* rule were adopted over time in the Union legal order, thereby determining the coexistence of a number of differently worded *ne bis in idem*

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[17]Article 3 of the framework decision on the European Arrest Warrant: «Grounds for mandatory non-execution of the European arrest warrant. The judicial authority of the Member State of execution (hereinafter "executing judicial authority") shall refuse to execute the European arrest warrant in the following cases: 1. if the offence on which the arrest warrant is based is covered by amnesty in the executing Member State, where that State had jurisdiction to prosecute the offence under its own criminal law; 2. if the executing judicial authority is informed that the requested person has been finally judged by a Member State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State. 3. if the person who is the subject of the European arrest warrant may not, owing to his age, be held criminally responsible for the acts on which the arrest warrant is based under the law of the executing State ».

[18] H. SATZGER, *op. cit.*, p 161, reckons that "as expressly stated by the ECJ the ground for non-enforcement of a European arrest warrant contained in the framework decision is to be interpreted in the same way as art. 54 CISA, due to their common objective. This does, however, not clarify which judicial authority is competent to decide on whether this ground for non-enforcement is given and, in particular, whether the requirement of "the same act" is fulfilled. As this is an autonomous term of Union law, its substance must be determined by the ECJ. The application of the set requirements to a concrete case must, however, be left to the national authority of the executing Member State which has to verify on a case-by-case basis whether the requirements for the enforcement of the warrant, as transposed into national law, are met"; on the issue, also *Twice in jeopardy, in 75 Yale Law Journa*l, 1965, p. 261.

[19] B. VAN BOCKEL, *op. cit.*, p. 15. The author quotes in a note B. DE WITTE, *The past and future role of the European Court of Justice in the Protection of Human Rights*, in *The EU and Human Rights*, ed. P. ALSTON with N. BUSTELO and J. HEENAN (Oxford: Oxford University Press, 1999), 878 *et seq.*

provisions, which operate in different parts of EU law as well as within the legal framework of the Council of Europe, thanks to its Conventions.

In general, all Member States of the European Union acknowledge the principle that nobody can be tried or even punished twice for the same misconduct.[20] Due to the general approval of the principle in question within the national legal system of almost all Member States, we can safely assume that the ne bis in idem is part of the commonly known "general principles of EU law".

Not to mention that it has also been codified in Article 50 of the Charter of Fundamental Rights of the European Union (EUCFR). However, even though each national legal order within EU, as well as the European Union itself, have officially endorsed the legal prohibition of double punishment, this does not imply that the institution of sanction proceedings against an illicit act in one Member State would bar a second trail in another.[21] Furthermore, it is neither possible to affirm that a sanction inflicted by a EU body (for instance, on the ground of the violation of antitrust rules) has a foreclosure effect towards the prosecution of the same conduct carried out by domestic judicial authorities of the Member States.[22]

The topic of how the autonomy of national legal systems restrains the application of the *ne bis in idem* principle, as established under Article 50 EUCFR, solely on explicating its internal effect within the respective national legal order will be a topic of further discussion in Paragraph 3.2. On this stage, we should limit our examination in recalling that, pursuant to the principle of "mutual recognition" from Article 82 TFEU, a judicial decision enacted by national courts in one Member State shall be recognized and respected in every other State of the European Union.[23]

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[20] H. SATZGER, *op. cit.*, p 148 quotes BVerfG, Decision of 17th January 1961, 2 BvL 17/60 and *Roxin/Schünemann*, Strafverfahrensrecht, $ 52 para. 6: "In the words of the BVerfG on the *ne bis in idem* rule, as enshrined in art. 103 (3) GG, protects an «offender, who has been already punished or finally acquitted, against repeated prosecution and punishment due to the same act». According to German law, the first final criminal judgment creates a comprehensive bar to proceedings for any subsequent trial concerning the same facts".

[21] H. SATZGER, *op. cit.*, p 148. In note, the author recalls the following judgements by the Court of Justice: ECJ Judgment of 5th May 1966, Joined Cases C-18/65 and C-35/65 *Gutmann* ECR 1966, 103, 149; ECJ, Judgment of 13th December 1984, Case C-78/83 *Usinor* ECR 1984, 4177, paras 12 *et seqq.*

[22] H. SATZGER, *op. cit.*, p 148.

[23] Article 82(1) and 82(2) of the Consolidated version of the Treaty on the Functioning of the European Union: « 1. Judicial cooperation in criminal matters in the Union shall be based on the

However, the judicial practice has demonstrated that it is not always easy to apply the principle and this has raised the question if it is really possible to talk about a prohibition of double jeopardy effectively applicable throughout the European Union and whether the *ne bis in idem* principle can be included among the so-called "general and common principles of the EU law". Anyhow, such issue will be disclosed in Chapter II of the thesis at hand.

By virtue of the fact that the ne bis in idem principle is "carved" in several international instruments, it might be reasonable to assert that it is featured by a multidimensional nature. Originally, the principle under discussion, was established in the International Covenant on Civil and Political Rights of 1966, finding as its main stage of application the context of judicial police cooperation in the criminal law field between the ratifying Countries.[24] The ICCPR played a delicate role in ensuring the respect of the bar of double punishment, since the *non bis in idem* rule was not included in the original draft of the European Convention on Human Rights (ECHR).[25] In effect, it was quite astonishing that an essential

principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States in the areas referred to in paragraph 2 and in Article 83. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures to: (a) lay down rules and procedures for ensuring recognition throughout the Union of all forms of judgments and judicial decisions; (b) prevent and settle conflicts of jurisdiction between Member States; (c) support the training of the judiciary and judicial staff; (d) facilitate cooperation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions.

2. To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States. They shall concern: (a) mutual admissibility of evidence between Member States; (b) the rights of individuals in criminal procedure;(c) the rights of victims of crime; (d) any other specific aspects of criminal procedure which the Council has identified in advance by a decision; for the adoption of such a decision, the Council shall act unanimously after obtaining the consent of the European Parliament. Adoption of the minimum rules referred to in this paragraph shall not prevent Member States from maintaining or introducing a higher level of protection for individuals »; in this sense, See J. LELIEUR, *"Transnationalising" Ne Bis In Idem: How the Rule of Ne Bis In Idem Reveals the Principle of Personal Legal Certainty*, in *Utrecht Law Review*, Vol. 9, No. 4, 2013, p. 199-200 and p. 203 ff.

[24] The *ne bis in idem* principle is not only established in various existing international legal agreements, but it is also deeply rooted in national constitution of several countries. Indeed, G. CONWAY, *Ne bis in idem in international law*, in *Int. Crim. Law Review*, 2003, p. 219, makes a catalogue of the countries all over the world that have officially implemented the guarantee in their domestic constitutions. For instance, it should be mentioned Article 103(3) of the German GG: « No one may be punished more than once for the same action under general criminal law ».

[25] J.A.E. VERVAELE, *The transnational ne bis in idem principle in the UE. Mutual recognition and equivalent protection of human rights*, in *Utrecht Law Review*, 2005, 1(2), pp. 100-118: «There

right such as the one granting the prohibition of repeated punishment suffered by the same individual was ejected by the most important - at least, at that time - international legal agreement concerning the safeguards of fundamental and undeniable rights of the person.

Anyhow, later on in 1986, by virtue of the additional Protocol no. 7, the *ne bis in idem guarantee* was formally introduced within the Convention framework, with almost exactly the same wording of the corresponding provisions from the ICCP.[26] The inclusion of the prohibition of double jeopardy in the roll-call of fundamental rights enshrined in the ECHR has determined the reality that the Strasbourg regime has effect also towards this guarantee.

Over the course of time, Countries adhering to the Convention tried on multiple occasion to put restraints to the operability of the *non bis in idem* safeguard, by invoking arguments based exclusively on the formalities of provisions granting the right object of discussion. Thereby, the ECtHR was often called upon to ensure the concrete implementation of the ne bis in idem rule with the purpose of tackling these "formalistic" assumptions based on the sheer wording of the normative provisions and shifting the attention on the substantial content of such rules. Effectively, as we will later observe in Paragraph 3.1, the ECtHR censured national legal systems' provisions envisaging sanctionary mechanisms – being the most contentious the so-called "double track" track sanctioning system implemented towards market abuse crimes and tax law violations – which are based on the supposition that the *non bis in idem* right is merely confined to the sole cases where an individual has been the recipient of two different criminal punishment

is no mandatory rule of international law (*ius cogens*) imposing a duty to respect the *ne bis in idem* principle between States. The application of the principle depends on the content of international treaties. We do find treaty-based *ne bis in idem* provisions, both in human rights treaties and in bilateral or multilateral treaties dealing with judicial cooperation in criminal matters. The *ne bis in idem* principle is established as an individual right in international human rights legal instruments, such as the International Covenant on Civil and Political Rights of 19 December 1966 (Article 14 (7)). The European Convention on Human Rights (ECHR) does not contain such a provision and the former European Commission on Human Rights denied the existence of the principle as such under Article 6 of the ECHR, without however precluding in absolute terms that certain double prosecutions might violate the fair trial rights under Article 6 ECHR».

[26] However, N. NEAGU, *The ne bis in idem principle in the interpretation of European Courts: towards uniform interpretation*, in *Leiden Journal of International Law*, 2012, p. 955, underlines that the legal principle under consideration can be interpreted with different perspective shades and various adjustments, in dependence of the international legal instruments that have established it.

concerning the same misconduct. This statement finds its genesis on the idea that the bar of dual proceedings against the same subject should be limited only to "criminal law matters", intended in their strict and technical sense.

The ECtHR, being questioned upon the definition of the boundaries of the "*matière pénale*", decided to extend the operability of the *ne bis in idem* principle also in the event where the individual has suffered a double sanction, one criminal and the other administrative, both inflicted on the ground of the same illicit conduct.[27]

The multidimensional value of *ne bis in idem* is given by the fact that it represents an essential pier of fundamental rights' protection on both the Community and Conventional level.[28] On this point, it should be stressed the difference between the guarantee established under Article 50 of the EU Charter of Fundamental Rights, that precisely ensures both a national and a transnational application of the prohibition of double punishment with regards to the "same fact", and Article 4 of Protocol no. 7 to the Convention, which whereas acknowledges and limits the *ne bis in idem* right only to one-country situations.

This is explained by the intrinsic legal nature of the Nice Charter which, for all purposes, is included amongst the Union's primary law sources and, accordingly, has direct applicability and deploys its direct effects within the legal order of all Member States. Hence, the inclusion of *ne bis in idem* in the EU Charter made sure that the guarantee in question has no longer been confined – likewise it was originally proposed in the ECHR - only within the boundaries of national territories and has insured its conversion, in turn, into an inalienable right of the European citizen, with a European wide application.[29]

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[27] The enlargement of the concept of "criminal law matters" and the consequences arising out or in connection with this notion towards the sanctioning mechanisms - and their compatibility with the *ne bis in idem* - solidly established in the legal tradition of different European Countries will be subject to supplementary discussion in Paragraph 3.1 too.

[28] A. TRIPODI, *Ne bis in idem e reati tributari*, cit., p. 669- 672. The author stresses the aspect that the *ne bis in idem* principle is connoted by a "multifunctional value", not only due to the different levels of application of the guarantee, – namely, its operability on both a Community and Conventional level - that determines the subjection of the evaluation of double punishment situations to the jurisdiction of both the CJEU and the ECtHR, but also by virtue of the two different "souls" within the principle itself: thus, the "procedural" and the "substantive" *ne bis in idem.*

[29] M.L. DI BITONTO, *Il ne bis in idem nei rapporti tra infrazioni finanziarie e reati,* in *Cass. pen.*, 2016, p. 1335 ff.

Furthermore, it must be made clear that within the context of the European Union the non-double punishment guarantee from Article 50 EUCFR can be theoretically "sliced" into two sections: the "horizontal" *ne bis in idem*, whose foreclosure effect is directed towards the domestic judicial authorities of all Member States, which are precluded from issuing another judgements against an individual already sentenced with a definitive decision previously delivered by another Member State's national court; moreover, the "vertical" *ne bis in idem*, aimed at blocking the commencement (or the continuation) of a second sanctioning procedure to which an individual is forced to undergo before a supranational judicial tribunal - such as the CJEU or the ICC (International Criminal Court) – whether already prosecuted before a domestic court of a Member State.[30]

Accordingly, it is plain that the *ne bis in idem* legal protection lies on multiple levels of safeguard - namely, the national, Union and Conventional - and that the interplay between each "layer" of legal security depends on the various dynamics that characterize the interaction between structurally different models and patterns of human rights protection. In this case, we are specifically referring to the "multi-level" system of legal protection of fundamental rights, which in the European legal area comprises various standards of protection, originating from the internal legal order of each Member State, - especially, granted under national constitutions - and from the EU and the Convention framework.

In Chapter II, the survey on the methods of protection of the *ne bis idem* right – and, more generally, of all fundamental rights of the individual – afforded

[30] This distinction is deeply undertaken by, J.A.E. VERVAELE, *op.cit*, pp. The Author also underlines that the "vertical" acceptation of the *ne bis in idem* guarantee is deployed even towards other supranational sanctioning bodies and that its application is not restricted solely to criminal matters, but can be even detected intriguing instances of the operability of the non-dual punishment right in the field of competition law: "The EC has administrative sanctioning powers in the field of competition and far-reaching powers to harmonize national administrative sanctioning in many EC policies. The ECJ has had occasion to address the issue of *ne bis in idem* in the field of competition. Already in 1969, the ECJ held in *Wilhelm v. Bundeskartellamt* that double prosecution, once by the Commission and once by the national authorities, was in line with regulation 17/6219 and did not violate the *ne bis in idem* principle, given the fact that the scope of the European rules and the national rules differed. However, if this would result in the imposition of two consecutive sanctions, a general requirement of natural justice demands that any previous punitive decisions be taken into account in determining any sanction which is to be imposed (*Anrechnungsprinzip*). It is now fixed case law of the ECJ to confirm the ne bis in idem principle as a general principle of Community law, which means that it is not limited to criminal sanctions, but that it also applies in competition matters".

by the legal instruments and institutions presently operating in the European continent, will be conducted from the outlook of the judicial cooperation between the Luxembourg court and the Strasbourg court, casting an in-depth look to the normative provisions governing the interpretative coordination between the two different jurisdictional regimes – first and foremost, the so-called "homogeneity clause" established by Article 52(3) of the Charter of Fundamental Rights of the European Union.[31]

In this setting, the first solution for ascribing legal protection at international level to the right not to be subjected twice to prosecution or punishment on the ground of the same illicit conduct was found in the form of Article 54 of CISA (the Convention on the Implementation of the Schengen Agreement), which, as we will better examine shortly in the following paragraph, has represented the turning point within the process of rooting of the *ne bis in principle* in the European legal framework – in keeping with the aim of free movement and with a close link to extradition rules - and has "spawned" a considerable bulk of jurisprudential decisions and hermeneutical readings on the guarantee at hand.[32]

2.1. Article 54 of the Convention Implementing the Schengen Agreement.

Despite the fact that the original Schengen Agreement of 1985 and the CISA of 1990 – together known as the "Schengen Agreements" – were concluded outside of the European Community framework, since they were stipulated between the first five "original Schengen-group Countries" (Belgium, the Netherlands, Germany, France and Luxembourg), there is no doubt that their draft was conceived with having in mind the ambitious project of European integration and with the

[31] On the point, it should be mentioned M.L. DI BITONTO, *Il ne bis in idem nei rapporti tra infrazioni finanziarie e reati*, cit., p. 1343 ff. in which it is stated that the process of the legal European integration and harmonization in the field of criminal justice is currently standing before a crossroads: as a matter of fact, the author observes that "[...] from the solution of an eminently technical-legal issue, which concerns the need to ensure full effectiveness of the fundamental right to the *ne bis in idem*, it follows that it is possible to offer the markets reliable and foreseeable rules[...]", that shall obviously provide for sanctioning mechanisms that activate in the event of breaches of financial legal rules.

[32] B. VAN BOCKEL, *op cit.*, p. 15-16.

purpose of creating a safe inter-State network through which the free movement of persons, money and goods could be brought successfully forward.[33]

As a matter of fact, the "Schengen Agreements" are connoted by a twofold purpose: first, building up an open wide custom union where the free circulation of individuals, financial resources and commercial products is facilitated by the abolishment of border checks. Second, at the same time, fulfilling the necessity of enhancing the transnational enforcement of criminal law via police cooperation, extradition, mutual assistance in criminal law issues and through the cross-boarders enforcement of judgements.[34]

With particular regards to this latter aspect, before the implementation of the 1985 and 1990 Schengen Agreements within the Community framework by virtue of what was decided during the EU Intergovernmental Conference of 1996 – where the Schengen *acquis* was formally incorporated in the commonly known Third Pillar of the European Union and which established the acceptance of the Schengen legal framework into the EU legal order[35]– it should be borne in mind that the goal of creating a single European area of justice exposed the need for a "comprehensive transnational *ne bis in idem*", since both the Communitarian and national *ne bis in idem* principles were only applicable within their respective legal order and, thereby, they were not applicable to judgements issued in other Member States.[36]

Indeed, before the reception of the Schengen Agreements in the European Community it was not sure that any criminal sentence in a Community's country was capable of hindering the commencement or the continuation of new criminal proceedings in any other country of the EC.

The necessity of a primeval mechanism of recognition of the judicial effects of a final judgement delivered in any of the States of the European Community was

[33] B. VAN BOCKEL, *op cit.*, p. 22.
[34] B. VAN BOCKEL, *op cit.*, p. 22 ff. The author in a note specifies that "The European Arrest Warrant has since replaced the extradition provisions of the Schengen-agreements"; See also M. LUCHTMAN, *The ECJ's Recent Case Law on Ne Bis In Idem: Implications for Law Enforcement in A Shared Legal Order* in *Common Market Law Review* 55, 2018, p. 1724.
[35] B. VAN BOCKEL, *op cit*., p. 22 also points out that "Three years later, the Schengen *acquis* was successfully 'hijacked' by the EU with the entry into force of the Treaty of Amsterdam. and became secondary law".
[36] H. SATZGER, *op. cit.*, p. 149-150.

particularly felt at that time, especially in relation to the theorization of a transnational *ne bis in idem* principle which represents one the various manifestation of the principle of mutual recognition between Member States codified later on in Article 82 TFEU. Before the entry into force of the Schengen Agreements, there have been efforts towards the introduction of a comprehensive and transnational bar on double prosecution and punishment that can be found in international treaties stipulated between States of today's European Union.

It is possible to refer, for example, to the 1987 "Convention between the Member States of the European Communities on Double Jeopardy", which was implemented around the same time as the Schengen Agreements were ratified and constituted an international treaty open for accession by the EC States. Anyhow, the Convention at hand did not go down very well in terms of participation and involvement by the European countries, but it is still worth of a due mention since its wording, concerning the recognition of a cross-boarders *ne bis in idem*, was really similar to the CISA of 1990, apart from the lack of the intergovernmental exceptions that featured the CISA and its supranational target and design.[37] But only the Convention Implementing the Schengen Agreement – in force since 1995 – can be regarded as the most sophisticated and well-developed expression of an internationally applicable *ne bis in idem* right and as having the greatest impact on the European scene on the ways of shaping the general legal standards of protection of the guarantee against double prosecution or punishment. Indeed, with special consideration to the jurisprudence formed around Article 54 CISA – particularly, a primary importance should be conveyed to the CJEU case law – it is possible to claim that it has massively contributed to the creation of an "European" *ne bis in idem* principle.[38] Article 54 of the Convention reads as follows: «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

[37] B. VAN BOCKEL, *op cit.*, p. 22.
[38] B. VAN BOCKEL, *op cit*., p. 23. On the point the author recalls that the provision actually refers to acts in general rather to criminal offences: "Although, it must be admitted that this is to a significant degree due to the fact that it refers to 'acts' rather than 'offences' ".

or can no longer be enforced under the laws of the sentencing Contracting Party».[39]

Contrarily to the pure national bar of double jeopardy established under almost all European States domestic constitution and internal legislation, as it is apparent from the provision at hand, we can confidently say that the CISA introduced for the first time in Europe the idea of a transnational *ne bis in idem*. In contrast to its future equivalent Article 50 of the Charter of Fundamental Rights of the European Union – object of examination in the following Paragraph – which also provides for a comprehensive transnational *ne bis in idem*, Article 54 CISA does not dispense with the so-called "element of enforcement", required in addition to the existence of a final judgement in order to trigger the application of the guarantee.[40]

Even though, it is generally acknowledged that Article 50 EUCFR and Article 54 CISA co-exist; the supplemental enforcement element represents the principal difference between the two provisions both securing on a transnational and cross-boarders level the *ne bis in idem* right. The co-existence between the provisions is also proven by the peculiar scope of application of *ne bis in idem* under the Charter system which coincides with the range of situations where, pursuant to Article 51(1) EUCFR, Member States « are implementing Union law », and being the receivers of its effects, «[…] the institutions and the bodies of the Union» (and, of course also Member States themselves).[41]

However, after the Charter's entry into force and by virtue of the Amsterdam Treaty, it is not exaggerated to argue that Article 54 CISA has been superseded by Article 50 of the Charter, even though the former keeps on preserving its effect as

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[39] *The Schengen acquis - Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders*, in *Official Journal* L 239 , 22/09/2000 P. 0019 – 0062.

[40] Article 50 of the Nice Charter states that: « 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 ».

[41] Article 51(1), entitled "Scope", dictates that: « The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers ».

a legal act in the guise of EU secondary law, whilst the Charter, on the other hand, in accordance to Article 6(1) TFEU forms a fundamental part of Union's primary law.[42] This raises the question about how the co-existence and the interplay between the two provisions entrenching the comprehensive and transnational *ne bis in idem* principle in Europe are exhibited.

As a preliminary observation, it should be pointed out that Article 54 CISA was not conceived by its drafters as reflecting a specific supranational human rights ambition or project. In reality, Article 54 CISA is pervaded by a "spirit of intergovernmental cooperation between States", rather than the desire of achieving the supranational enforcement of fundamental rights of the person.[43]

Concerning the relationship between Article 54 CISA and Article 50 of the Nice Charter it has been already stressed how their main difference is given by the presence of the enforcement element in the wording of Article 54 CISA, which contrarily to the "finality" requirement - which will be discussed later in Paragraph 3.2. - and the *"idem factum"* criterion, is not included in the Charter's provision on *ne bis in idem*. Because of this divergence, over the years the compatibility between the two supranational provision has been highly contested in several fashions by the international legal doctrine.

Notwithstanding the aforementioned lack of uniformity, the ECJ in the *Spasic* judgement acknowledged the relevance of the enforcement requirement for the application of the *ne bis in idem* principle in the EU legal order, at least in the Area of Freedom, Security and Justice (AFSJ), by underlining that Article 54 CISA - even though it was substantially encompassed within the Charter's scope with the entry into force of the Amsterdam Treaty – it is effectively compatible with the

[42] Article 6 TFEU states: « 1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.
The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions. 2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties. 3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law ».
[43] B. VAN BOCKEL, *op cit.*, p. 23.

EUCFR and that it continues to apply.[44] By stating this, the CJEU clearly affirmed that the enforcement criterion shall be abided by also in those situations falling within the range of application of Article 50 of the Charter which, in practical terms, has "incorporated" Article 54 CISA.[45] However, as it is was highlighted by the CJEU in *Spasic,* it ought to say that the Charter's rule has not completely replaced and obliterated the Schengen's provision, since the rigorous enforcement requirement is considered as indispensable for the activation of the guarantee of the bar on double punishment. Consequently, it appears that the transnational application of the *ne bis in idem* principle continues to be governed by the "stricter" provision represented by Article 54 CISA, in accordance to its interpretation provided by the CJEU.[46]

However, it could be argued that the stringent requirements set out by Article 54 CISA may be incompatible with Article 52(2) EUCFR, which contained the so-called "homogeneity clause" – that will be the primary topic of debate in Chapter II.

This latter provision was originally conceived with the intent of preventing modification of the legal standards of human rights' protection already guaranteed by the Charter, which is enucleated among the founding Treaties of the Union. At any rate, Article 52(2) by establishing that « the right recognised by this Charter

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[44] On the point, See *The Principle of Ne Bis in Idem in Criminal Matters in the Case Law of the Court of Justice of the European Union* in www.eurojust.europa.eu/doclibrary/Eurojust-framework/caselawanalysis (September 2017); again See also H. SATZGER, *op. cit.,* p. 151, where the author underlines that others have argued that, conversely, Article 50 of the Charter totally supersedes, in every aspect, Article 54 CISA. This determines the result that "[…] the transnational application of *ne bis in idem* would no longer be dependent on any enforcement element." Moreover, the author follows up by claiming that the "proponents of this view argue that in an area in which fines, sentences suspended on probation and custodial sentences will be mutually recognised and can be executed in a Member State other than that where the judgment was delivered, there is no further need for such an element. As far as it is applicable, the European arrest warrant would eliminate the danger that a suspect could evade punishment by fleeing to another Member State. Still, the notion of a single area of justice, in which the enforcement element could be dispensed with […] continues to be an illusion. The instruments of mutual recognition of sentences and decisions are not - and perhaps never will be - coordinated to the extent that a comprehensive system will evolve". Furthermore, the author brings the illustrative examples of the European Arrest Warrant, that is considered to not be "[…] applicable to all criminal convictions in an EU Member State. In cases where the perpetrator escapes to another EU country, the complete removal of the enforcement element might have the - undesirable - consequence that merely the fact of the suspect's "having been convicted" elsewhere would prevent criminal proceedings in the host state"; in this sense, also M. LUCHTMAN, *op. cit*., p. 1732-1733.

[45] ECJ, Judgment of 27th May 2014, Case C-129/14 PPU *"Spasic"*, paras 55 et seqq.

[46] H. SATZGER, *op. cit.,* p. 152.

which are based on the Community Treaties or the Treaty on European Union shall be exercised under the conditions and within the limits defined by those Treaties », implies that the word "Treaties" in this context is exclusively referred to EU primary law, among which is not included the CISA.[47] In fact, when the Schengen *acquis* was transferred within the Union legal framework, it was accorded to the provision under the CISA a rank below EU primary law, – which consists of the Union's founding Treaties to which is assimilated the Charter – representing therefore a source of secondary law. Nonetheless, Article 50 of the Charter presents a structural flaw: the principle of *ne bis in idem* as envisaged in its wording, similarly to any other fundamental rights' normative provision, is framed in very broad terms.[48] Hence, it is possible to affirm that *the ne bis in idem* right from Article 50 EUCFR requires a further definition and a subsidiary characterization by virtue of the always legally valid Article 54 CISA.

Furthermore, Article 54 CISA with its enforcement requirement can not be deemed as an illegitimate limitation to the *ne bis in idem* right from Article 50 EUCFR, in so far as the further condition to be fulfilled does not collide with the homogeneity clause under Article 52 of the Charter. Such express stipulation of the enforcement element was considered by the ECJ in the *Spasic* case as an admissible limitation on the exercise of a Charter's right that does not violate what proclaimed in Article 52 EUCFR, provided that it does not disregard the essence of the *ne bis in idem* right and the principle of proportionality in human right's restriction provided by law.[49] In addition to this, the international judicial practices have shown that legal limitations on the exercise of fundamental rights represent a phenomenon which is intrinsic and immanent within the framework of the EU Charter. Accordingly, since the restriction imposed on the *ne bis in idem* right from

[47] Article 52 of the Charter, as named "Scope of guaranteed rights" also states that: « […] 2. Rights recognised by this Charter which are based on the Community Treaties or the Treaty on European Union shall be exercised under the conditions and within the limits defined by those Treaties. 3. 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 »; See the comment on the provision by H. SATZGER, *op. cit.*, p. 152.

[48] H. SATZGER, *op. cit.*, p. 152.

[49] ECJ, Judgment of 27th May 2014, Case C-129/14 PPU "Spasic", paras 55 et seqq., as commented by H. SATZGER, *op. cit.*, p. 152.

Article 50 EUCFR by the enforcement element requested by Article 54 CISA was estimated by the CJEU itself as not conflicting and as covered by Article 52 EUCFR – whose main purpose is, at the same time, to ensure the highest possible degree of human rights protection and to guarantee the minimum legal standard of fundamental rights safeguard – we can fairly say that Article 54 CISA and its related case-law are still valid and relevant on the transnational application of the *ne bis in idem* guarantee within the European legal framework. In other terms, the intricated issue about the continued operability of the enforcement criterion established under Article 54 CISA on the *ne bis in idem* principle was solved with a positive response by the ECJ, because the requirements of human rights tutelage laid down by Article 52 of the EU Charter – namely, the compliance with the homogeneity clause – are respected by the provision deriving from the Schengen Agreements.

After all, the main objective of the enforcement requirement under Article 54 CISA, as pointed out by the Court of Justice in the *Spasic* ruling , is not only to prevent the impunity of persons definitively convicted within the EU, but also to ensure legal certainty through the respect for decisions issued by public bodies which have become final.[50]

It is now time to deliver on the normative structure of Article 54 CISA, provided that such analysis is useful for a better comprehension of the other two legal provisions ensuring the respect of the *ne bis in idem* right in Europe – thus,

[50] ECJ, Judgment of 27th May 2014, Case C-129/14 PPU *"Spasic"*, para. 77.as commented in *The Principle of Ne Bis in Idem in Criminal Matters in the Case Law of the Court of Justice of the European Union* in www.eurojust.europa.eu/doclibrary/Eurojust-framework/caselawanalysis (September 2017). This document deals with the main questions brought to the attention of the ECJ with the preliminary reference in *Spasic* and also the Court's reply: "Is the enforcement condition of Article 54 CISA compatible with Article 50 Charter? Yes. The CJEU's main arguments: The Explanation relating to the Charter as regards Article 50 expressly mention Article 54 CISA amongst the provisions covered by the horizontal clause in Article 52(1) Charter (para 54); The enforcement condition of Article 54 CISA constitutes a limitation of the right enshrined in that Article within the meaning of Article 52 Charter (para 55); The enforcement condition fulfils all the criteria included in Article 52 Charter (para 56 ff.);The restriction is provided for by law (para 57); The restriction respects the essence of the *ne bis in idem* principle (paras 58-59); The restriction is proportionate: it is appropriate for attaining the objective of preventing the impunity of persons (paras 60-64);The restriction is necessary: even though there are numerous EU instruments that facilitate cooperation between the Member States in criminal matters, they do not lay down an execution condition similar to that of Article 54 CISA and thus not capable of fully achieving the objective pursued. (paras 65-72); […] The *effet utile* of Article 54 CISA requires that this provision also encompasses situations where two principal punishments have been imposed and the wording of Article 54 CISA does not exclude this (paras 80-81)".

the aforementioned Article 50 EUCFR and Article 4 of Protocol 7 to the ECHR. The prohibition of double punishment under the Schengen legal framework operates on the condition that a threefold requirement is met: first, the proceedings must have been finally disposed of within a Contracting State; second, such disposal must occur in relation to the "same acts"; third, the enforcement requirement discussed above must be satisfied.

Before dissecting in detail these three conditions, it urges to remember that previously to the incorporation of the Schengen *acquis* into the Union legal order by virtue of the Treaty of Amsterdam – which implemented the so-called "Schengen Protocol" – the interpretation of the *ne bis in idem* rule from Article 54 CISA was handled by the national courts of the States adhering to the Schengen deal. Yet this choice led to deceitful and abnormal application of prohibition of *bis in idem*. However, after the entry into force of the Lisbon Treaty, the CJEU was delegated of having jurisdiction to deliver preliminary ruling on references coming from national courts of Member States regarding the interpretation and the application of Article 54 CISA.

The interventions by the Court of Justice have been particularly fruitful and useful for the clarification on the regulatory meaning of the various requirements provided for by the provision in question. As concerns the condition of the "final disposal of the trial", the Court specifies in its decision on the joined cases *Gozatok* and *Brügge* that a trial shall be considered as "finally disposed of", within the meaning of Article 54 CISA when the judgement has the legal value for ultimately terminating proceedings and whether it is issued by a public sanctioning authority (not necessarily a judicial one or a court) belonging to the criminal justice system.[51] Thereby, it can be deduced that the CJEU set out an expansive interpretation of Article 54 CISA by considering that a decision coming from a non-judicial body can be capable of definitively ending criminal proceedings.

The reason for this is that the ECJ's hermeneutical approach is strictly adherent to the general principles for the interpretation of the EU Treaties' provisions, which compel the Court to place the greatest weight on the purposes of

[51] ECJ, Judgment of 11th February 2003, Joined Cases C 385/01 *"Gozatok"* and 187/01 *"Brügge"* ECR 2003, I-1345, para, 28 ff.

the *effet utile* of Article 54 CISA, consequently favouring the interpretative standpoint that best permits to achieve the objectives of the Union's Treaties.[52] Therefore, to grant the highest form of protection of the *ne bis in idem* right, the Court reckons that it can be reached only by extending the bar on double prosecution or punishment also to the criminal proceedings instituted before non-judicial authorities. Besides, the Court, in various points within its case-law, also remarks the necessity of a punitive effect of the delivered decision, that shall constitute a further indication of the final nature of the disposal of proceedings. For instance, such characteristic can be detected in relation to obligations to fulfil financial sanctions (i.e. fines).

In any case, for the purpose of the application of the *ne bis in idem* guarantee, it must, at any rate, still be verified in concrete terms and with no presumptions that the trial was effectively finally disposed of by the judgement, in accordance to Article 54 CISA. Moreover, the ECJ in the *Van Straaten* judgement observed that the *ne bis in idem* preclusive effects can be also triggered not only in cases of conviction of the defendant, but also when the individual has benefited from the acquittal granted by a final ruling.[53] Indeed, in the case at hand the Court underlined how Article 54 CISA explicitly refers solely to a "disposal", by not specifying anything on the necessity whether the final judgement must positively ascertain the criminal liability of the defendant. Whereas, the dilemma on whether the judicial (or non-judicial) acquittal that terminates proceedings can be indifferently based on legal or factual grounds (or assessments) appears as a somewhat dark and unclear topic, that the Court has approached only in a tentative way, but without providing a univocal response to the question.[54]

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[52] H. SATZGER, *op. cit.*, p. 154.

[53] ECJ, Judgment of 28th September 2006, Case C-150/05 *"van Straaten*" ECR 2006, 1-9327, paras. 54.

[54] ECJ, Judgement of 10th March 2005, Case C-469/03 "*Miraglia"*, ECLI:EU:C:2005:156 represents a clear instance of how the factual assessment of a case was depicted as a minimum requirement to be met. Precisely, the Court recognized that the questioned decision – whose capability ending proceedings was disputed – did not activate the foreclosure effect of *ne bis in idem*, since the prosecutor, by not making any statement in relation to the merits of the case, had decided not to pursue the prosecution on the sole ground that criminal proceedings against the defendant had been initiated in another Member State in respect of the same acts.

In summary, from the ECJ's outlook, a disposal must be considered as "final" only « whether further prosecution is definitively barred and where the respective decision is given only after a determination has been made as to merits of the case».[55] This evaluation was provided by the Court in the *Mantello* ruling, where it was observed that the capability of a decision of terminating criminal proceedings and finally closing the investigation procedure shall be ascertained on the grounds of the national law of the Members States, under whose jurisdiction the sentence was issued. By virtue of the recently- proposed ruling in *Kossowski*, the ECJ attempted to realize a judicial coordination between Article 54 CISA and Article 50 EUCFR on the legal significance of the "final disposal requirement".

The combined provisions expose the necessity of the satisfaction of a twofold condition so that the foreclosure effect of *ne bis in idem* can operate: firstly, the ultimate ban on a second prosecution – as remarked beforehand by the Court in *Mantello* – must be verified on the basis of the domestic legislation from the Member State where the alleged final sentence has been delivered. Secondly, the Court highlights the indispensability of a determination on the merits of the case by the national prosecutor that must be conducted before the sentence is issued.[56]

Yet, the Court denied the qualification as a "final disposal" – in the sense of Article 50 of the Charter in conjunction with Article 54 CISA – whenever it emerges from the judgement's declaration of reasons that the criminal proceedings were closed without a previous correct and detailed performance of investigative procedures. On this point, the Luxembourg judge reckons that a clear symptom of a biased investigative action is represented by the instance where neither the victim nor the potential witnesses have been interviewed at all. In addition to this, it should be noted that only the judgement – either inflicting a conviction or granting an

[55] H. SATZGER, *op. cit.*, p. 156 ff. In note, ECJ, Judgment of 16th November 2010, Case C-261/09 *"Mantello"* ECR 2010, 1-11477, para. 46 with remarks by *Böse*, HRRS 2012, 19. Moreover, the Author on the *Mantello* case specifies: "The Court explained that whether a person has been "finally" judged is to be determined exclusively with reference to the law of the issuing state. […] By determining the final nature of the decision in question solely with reference to the domestic law of the issuing state, the Court implements the principle of mutual recognition in its purest form. As has been shown above, mutual recognition is a flexible concept ("waiver-concept") which does not necessarily imply a 100% recognition of the standards and decisions of another state if there is good reason for doing so. Here the Court neglects the central function of the *ne bis in idem* principle to protect the individual concerned, as it derives from art. 50 CFR."

[56] ECJ, Judgment of 29th June 2016, Case C-486/14 *"Kossowski"*.

acquittal – delivered within the judicial context of a criminal sanctioning procedure is entitled to produce the *ne bis in idem* foreclosure effect.

As previously highlighted, the Court of Justice in the *Bonda* judgement, by referring to the jurisprudence of the ECtHR and, specifically, to what established in the *Engel and others v. the Netherlands* case, confirmed that the criminal nature of a judicial measure is determined by the legal qualification of the offence under national law, by the very nature of the offence and by the nature and degree of severity of the penalty that the defendant is liable to incur.[57]

The result of this autonomous interpretative understanding of criminal sanctions by the CJEU is that the ban on dual punishment can be invoked also in the case of a conduct that integrates only an administrative offence in a Member State, in which the act was first prosecuted and sanctioned by an administrative authority, and that, simultaneously, is recognized as criminally punishable under the criminal legislation of another Member State.

Regarding the second requirement that allows the *ne bis in idem* preclusion to be brought about, thus that the "final disposal" of the case shall occur on the "same acts", we must limit ourselves to remember that the CJEU, by mirroring the most recent hermeneutical approach adopted by the ECtHR in *Zolotukhin*, developed an autonomous concept of the *idem factum* requirement under Article 54 CISA, thereby resolving all the discrepancies and dispelling all the doubt about the meaning of the "same acts" element of the *ne bis in idem* provision in the Schengen framework.[58] As will be shown later in further details in Paragraph 3.3, the ECJ in the *Van Esbroek* and in the *Van Straaten* judgements, because of the lack of harmonization of national criminal law among EU Member States, decided to reject the subjection of the "Union" *ne bis in idem* provision to the requirement of identity of the legal qualification of the act under both criminal justice systems of the Member States claiming jurisdiction to rule on the case.[59] In turn, the Court

[57] *Engel and Others v. Netherlands*, ECtHR 8 June 1976; and ECJ, Judgment of 5th June 2012. Case C-489/10 *"Bonda"*, EU:C:2012:319; See also H. SATZGER, *op. cit.*, p. 156.
[58] *Zolotukhin v.Russia*, ECtHR 10 February 2009.
[59] See ECJ, Judgment of 9th March 2006, Case C-436/04, *Van Esbroeck*, ECLI:EU:C:2005:630; and See ECJ, Judgment of 28 September 2006, Case C-150/05 *Jean Leon Van Straaten v Staatder Nederlanden and Republiek Italië*, EU:C:2006:614

proclaimed that the sole relevant element for ascertaining the existence of an *idem factum* prosecuted under two different national jurisdictions is the following: the misconduct of the defendant must appears as one single act from an "historical-materialistic" perspective.[60] As a matter of fact, the Court in its reasoning elaborated such peculiar test in order to verify if the acts *sub judice* form « a set of facts that are inextricably linked together in time and space and in relation to subject-matter ».

In Paragraph 3.3 the spatial-temporal requirement theorized by the ECJ in *Van Esbroeck* - and reiterated in *Van Straaten* – will be dissected in further details, but, on this stage, it should be added to what has been said up until now that the Court in the *Kraaijenbrink* decision has firmly clarified that the sole presence of an identical criminal intention, if devoid of any spatial or temporal connection between the two conducts, would not by itself determine the configuration of an *idem factum* hypothesis and, accordingly, bring about the *ne bis in idem* preclusive effect in the sense of Article 54 CISA.[61]

It is now necessary to undertake the review of the real differential element between the two provisions enshrining the comprehensive transnational ne bis in idem operating in the European continent. We are speaking about the aforementioned "enforcement element", expressly included within the wording of Article 54 CISA, which - as stated earlier - it is still legally valid and relevant, notwithstanding the entry into force of Article 50 of the Charter.

From the reading of the Schengen's provision it is possible to enumerate three different instances where the enforcement requirement is satisfied, so that the ban on dual proceedings can apply: the first scenario regards the case where a penalty «has been enforced», which occurs every time the judicial enforcement has been completed – e.g. when the prison term has been served or the fine has been paid. The second case concerns a sanction that is « actually in the process of being enforced », that happens whenever the execution of a sentence has already been commenced but has not terminated yet (for instance, when the serving of a custodial sentence has been suspended due to the entrusting of a period of probation

[60] H. SATZGER, *op. cit.*, p. 158.
[61] ECJ, Judgment of 18th July 2007, Case C-367/05 "*Kraaijenbrink*", ECR 2007, I-6619.

granted to the condemned). Finally, the third case of the presence of the enforcement element envisaged in Article 54 CISA arises when the sentence « can no longer be enforced under the laws of the sentencing Contracting Party »: this hypothesis typically occurs when the expiry of the limitation period blocks the enforcement of the decision taken in one Member State. Even in this latter case, the sentence is considered as "already enforced" for the purposes of the preclusion towards a second criminal proceeding against the same person and concerning the "same acts".[62]

The main issue that the Court had to deal with regard to the operability of the enforcement element under Article 54 CISA concerned the infliction of cumulative sanctions (for instance, a fine imposed alongside with imprisonment). In the *Spasic* judgement, the ECJ stated that, for the objective of the *ne bis in idem* guarantee to apply, it is not necessary that the enforcement of every single portion of the penalty has already been initiated. Indeed, the combined penalty should be deemed as a unique and overall sanctioning response, where generally the sole custodial sentence, among all partial sanctions, needs to be already enforced for the aim of the foreclosure effect.[63] Precisely, in *Spasic* the Court pointed out that the enforcement condition is not fulfilled insofar as only the financial sentence has been discharged, but the custodial sentence has not been served yet.

Lastly, we can legitimately deduce from this extensive study on Article 54 CISA that the main aim of such normative provision is to create a suitable model for a trans-European *ne bis in idem* principle capable of granting the maximum level of protection for the freedom of movement. [64] Indeed, Article 54 CISA was drafted with the purpose of providing the safe exercise of free movement rights by the

[62] H. SATZGER, *op. cit.*, p. 160 analyses in depth the debate about whether Article 54 CISA with the terms «can no longer be enforced» demands at least the existence of the "legal" – not necessarily "factual"- possibility that, at some point, the enforcement would become possible. The author, by recalling ECJ, Judgment of 11th December 2008, Case C-297/07 *"Bourquain*" ECR 2008, 1-9425, paras 43-47, states that: "The ECJ had to deal with this issue in the recent case C-297/07 "Bourquain": The fugitive B had been convicted *in absentia* by a French court (in Algeria) in 1961 of desertion and wilful homicide. According to French law, however, enforcement of the sentence would have required new proceedings in the presence of B. After 20 years in which B had not been seized, the statute of limitations for enforcement expired, resulting in the sentence becoming finally unenforceable. Consequently, the penalty imposed by the French court in 1961 had never been enforceable."

[63] ECJ, Judgment of 27th May 2014. Case C-129/14 PPU *"Spasic"*.

[64] H. SATZGER, *op. cit.* 161.

European citizens, even for those individuals that have been convicted in one Member State. In fact, they should be able to move freely across the European countries without living with the fear of being repeatedly subjected to criminal prosecution in another Member State. The wish of crafting such a safe single European area of justice is indicative of the intergovernmental character of the provision and illustrates the reality that the Schengen Agreements are certainly connected to the principle of mutual judicial recognition among Union's Members States.[65]

2.2. Article 50 of the Charter of Fundamental Rights of the European Union.

Entered into force on 1 December 2009, the Nice Charter has become the primary reference amongst the EU's constitutional rules.[66] By virtue of its insertion amongst the fundamental rights secured under the Charter, the ne bis in idem guarantee has benefited from a further profile of legal protection granted by Article 50 EUCFR. As a matter of fact, the prohibition of double jeopardy has been stretched beyond the confines of the mere territorial application of the right, beforehand limited only to "internal "situations occurring within the jurisdiction of one single Member State. Therefore, the principle has acquired a trans-European dimension and this event marked the extension of the legal tutelage, already afforded by Article 4 of Protocol no. 7 to the ECHR on a domestic level, also on the Community stage.[67]

Article 50 of the Charter states 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». From a first glance to its reading, it is possible to immediately notice how

[65] See *The Principle of Ne Bis in Idem in Criminal Matters in the Case Law of the Court of Justice of the European Union* in www.eurojust.europa.eu/doclibrary/Eurojust-framework/caselawanalysis (September 2017), p. 6: "The CJEU stated that Article 54 CISA necessarily implies that the Contracting States have mutual trust in each other's criminal justice systems and that they recognise the criminal law in force in the other States even when the outcome would be different if their own national law were applied (*Gözütok* and *Brügge, Van Esbroeck, Gasparini, Bourquain, Kossowski*). The decision at stake of the first State has, however, to constitute a final decision including a determination as to the merits of the case (*Kossowski*)."

[66] In B. VAN BOCKEL, *op. cit*., p. 104.

[67] M.L. DI BITONTO, *op. cit.*, p. 1340 ff.

Article 50 EUCFR is succinctly worded, especially if compared to the other two provision ensuring the ne bis in idem right in Europe, namely Article 54 CISA and Article 4 of Protocol 7. The most plausible reason justifying the shortness of the Charter's provision in its wording has been retrieved in the intent of the drafter to capture in a minimalistic fashion the spirit of the principle of *ne bis in idem*, with the will also to prevent interpretative clashes with the other European *ne bis in idem* provisions.

The relationship between the three provisions and the additional characteristics of the principle at stake are not directly addressed by Article 50 EUCFR itself, but rather by the Explanatory Memorandum issued by the authority drafting the Nice Charter – thus, the Bureau of the Convention – and by the Venice Commission, which respectively held that the *ne bis in idem* principle under the Charter «applies not only with the jurisdiction of one State but also between the jurisdictions of several Member States» [68] – plus, making a clear reference to Articles 54 to 58 CISA – and that the Charter is undoubtedly «inspired by the

[68] *Explanations relating to the Charter of Fundamental Rights*, OJ C 303, 14.12.2007, p. 17–35 (BG, ES, CS, DA, DE, ET, EL, EN, FR, GA, IT, LV, LT, HU, MT, NL, PL, PT, RO, SK, SL, FI, SV) Special edition in Croatian: Chapter 01 Volume 007 P. 120 – 138. Here it is stated that: "Article 4 of Protocol No 7 to the ECHR 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 the penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case. 3. No derogation from this Article shall be made under Article 15 of the Convention". The '*non bis in idem'* rule applies in Union law (see, among the many precedents, the judgment of 5 May 1966, Joined Cases 18/65 and 35/65 *Gutmann v Commission* [1966] ECR 149 and a recent case, the decision of the Court of First Instance of 20 April 1999, Joined Cases T-305/94 and others *Limburgse Vinyl Maatschappij NV v Commission* [1999] ECR II-931). The rule prohibiting cumulation refers to cumulation of two penalties of the same kind, that is to say criminal-law penalties. In accordance with Article 50, the *'non bis in idem'* rule applies not only within the jurisdiction of one State but also between the jurisdictions of several Member States. That corresponds to the acquis in Union law; see Articles 54 to 58 of the Schengen Convention and the judgment of the Court of Justice of 11 February 2003, C-187/01 *Gözütok* [2003] ECR I-1345, 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. The very limited exceptions in those Conventions permitting the Member States to derogate from the *'non bis in idem'* rule are covered by the horizontal clause in Article 52(1) of the Charter concerning limitations. As regards the situations referred to by Article 4 of Protocol No 7, namely the application of the principle within the same Member State, the guaranteed right has the same meaning and the same scope as the corresponding right in the ECHR."

ECHR», albeit it cannot be denied that unquestionable differences exist «between the two instruments, relating both the wording and the scope of the rights».[69]

From the reading of both Article 50 EUCFR and its relative Explanations, it can be drawn, first of all, that its "subjective" scope of application entails the individual that has been already convicted (or even acquitted) by a final judgement.[70] Secondly, it can be concluded that, even though Article 50 remains silent on the territorial scope of the guarantee, the Explanations attached to the provision clarify that the principle applies to both internal and inter-State situations and that the *acquis* of the Charter corresponds and overlaps the one of the Schengen Agreements. This implies that when the overall dual proceedings take place in one single Member State, provided that the case falls within the range of application of EU law, certainly Article 50 EUCFR will apply in its "internal" dimension.[71]

In other terms, this scenario will occur only whether the two proceedings have as their object the infringement of an EU harmonized legal rule. Moreover, even in legal fields only partially governed by Union law, Article 50 EUCFR applies, leaving the discretion to the national judge to choose which standards of protection should be implemented, insomuch as it affords a greater protection. The domestic interpreter will decide between two options: the common and general European standard of human rights protection – thus, the *ne bis in idem* rule from Article 50 EUCFR – or the internal one. This ruling was established by the CJEU in the seminal decisions delivered in the *Melloni* and *Åkerberg Fransson* cases, which will be topic of study in Chapter II. Finally, a more intriguing scenario is represented by the situation where a proceeding is initiated in a Member State, whilst the other in a non-EU State. The CJEU has been reluctant in its case law in recognizing the application of the *ne bis in idem* principle when a final judgement

[69] European Commission for Democracy through law ('Venice Commission'), Opinion 256/2003, 18 December 2003, www.venice.coe.int/webforms/documents/?pdf=CDL-AD (2003)022-e, cited in a note by B. VAN BOCKEL, *op.cit.*, p. 19.

[70] See ECJ, Judgment 28 September 2006, C-467/04, *Gasparini and Others*, ECLI:EU:C:2006:610, paras. 36-37 In this preliminary reference requested on the interpretation of Article 54 CISA, – where a Spanish court asked the CJEU whether the ne bis in idem was invokable by two defendants that had not been subjected to any judgement in Portugal, since their prosecution was time-barred- the Court considered that Article 54 CISA does apply only to those individual that have been finally disposed of in a Contracting Party.

[71] Opinion of Advocate General Kokott, 15 December 2011, in ECJ, Judgment of 5th June 2012. Case C-489/10 *"Bonda"*, EU:C:2012:319.

was rendered by a third country. Moreover, the operability of the guarantee is also more questionable if we consider the situation where the case concerns a legal area falling within the EU competence (e.g. competition law). However, the most recent approach of the CJEU on the issue in *Showa Denko v. Commission*, has seen the denial of the applicability of the *ne bis in idem right* from Article 50 EUCFR in the cases where the third State intervenes within its own jurisdiction.[72]

Lastly, the final conclusion that can be enucleated from the combined reading of Article 50 of the Charter and its related Explanations is that the discrepancies between the Charter's rights and other fundamental provision in EU law can be solved in the light of Article 52 of the Charter which, by virtue of its "horizontal clause", provide for the list of the « very limited exemptions […] permitting the Member State to derogate from the *non bis in idem* rule » set out therein. [73] Particularly, concerning the interplay with the same guarantee enshrined in Article 4 of Protocol no. 7 to the Convention, it is specified also that the application of the ban on dual proceedings within the jurisdiction of the same Member State, « the guaranteed right has the same meaning and the same scope as the corresponding right in the ECHR ».[74]

However, the reliance on the homogeneity clause from Article 52 of the Charter does not represent the only available alternative to resolving potential conflicts between fundamental rights provisions under EU law. As a matter of fact, there are, in theory, other feasible pathways for the CJEU to deal with such thorny issue, from the recourse to the hierarchy of legal norms within the Union legal order to the employment of extensive or integrative interpretations between different European provisions. [75]

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[72] ECJ, Judgment of 29 June 2006, Case C-289/04 P, *Showa Denko v Commission*, ECLI:EU:C:2006:431, as stated in paras. 55 ff.
[73] *Explanations relating to the Charter of Fundamental Rights*, OJ C 303, 14.12.2007, p. 17–35 (BG, ES, CS, DA, DE, ET, EL, EN, FR, GA, IT, LV, LT, HU, MT, NL, PL, PT, RO, SK, SL, FI, SV) Special edition in Croatian: Chapter 01 Volume 007 P. 120 – 138.
[74] *Explanations relating to the Charter of Fundamental Rights*, OJ C 303, 14.12.2007, p. 17–35 (BG, ES, CS, DA, DE, ET, EL, EN, FR, GA, IT, LV, LT, HU, MT, NL, PL, PT, RO, SK, SL, FI, SV) Special edition in Croatian: Chapter 01 Volume 007 P. 120 – 138.
[75] B. VAN BOCKEL, *op.cit.*, p. 20.

As regards the principle of *ne bis in idem* this troublesome hermeneutical scheme was faced for the first time in the *Spasic* judgement that will be object of a depth examination in Chapter II.

Anyway, it must be recorded that, by virtue of the entry into force, the Charter of Fundamental Rights of the European Union currently forms a part of legally binding primary EU law, which entails that now Article 50 EUCFR is featured with direct applicability within the domestic legal order of EU Member States. This further complicates and exacerbates the already intricate situation, by giving rise to other interlocutory questions such as how the dry text of Article 50 of the Charter affects the already existing European *ne bis in idem* provisions in Union law. Without considering the "weight" placed on national judges, now forced to adeptly juggle between three different legal standards of fundamental rights protection, namely the national, Union and Convention one, with the further duty to disapply the internal legal rule conflicting with the EU law rule, in order to maintaining the compliance of the domestic legal system with the Union's purposes and objectives.

Furthermore, the potential dyscrasias and mismatches between the standards set out by Article 50 EUCFR and Article 4 of Protocol no.7 ECHR, even though they can be theoretically overcome by resorting the homogeneity clause from Article 52 of the Charter – by virtue of which the Charter's rule implements as its minimum benchmark the content of the Conventional rule –, it should be emphasised that some communication problems occurred amongst the CJEU and the ECTHR regarding the interpretation of the *ne bis in idem* rule and about the highest possible standards of protection to be adopted in concrete terms.

This is precisely what has occurred in the *Toshiba* and *Åkerberg Fransson* cases in which the CJEU did not make any reference to the ECtHR case law for the interpretation of the ne bis in idem principle provided for by Article 50 of the Charter.[76] Specifically, in the latter ruling the Court of Justice, in the view of the need to also consider the requirements relating to the relationship between domestic law and EU law, in interpreting Article 50 EUCF has departed from the hermeneutical reading provided by the ECtHR on the corresponding principle

[76] B. VAN BOCKEL, *op.cit.*, p. 77 ff.

enshrined in Article 4 of Protocol 7, by not mentioning at all neither the Strasbourg jurisprudence on the point nor even the Convention provision itself, and by submitting a substantially stringent readout of the rule. Instead, the ECJ opted for remaining completely detached from any standpoint taken in the ECtHR jurisprudence and held that the solely viable legal parameter capable of ensuring the effective European-wide respect of the prohibition of double criminal proceedings is the one established under the Charter framework, in its "autonomous" and "independent" interpretation provided by the ECJ itself.[77]

Such restrictive reading of the guarantee – accompanied by not even an attempt by the CJEU to achieve a fair balance between the two different standard of protection, namely the Union and the Convention one – was justified by the Court under Paragraph 44 of the *Åkerberg* sentence by claiming that, as long as the European Union has not acceded to the ECHR framework yet, «the latter does not constitute [...] a legal instrument which has been formally incorporated into European Union law», despite the reality that the fundamental rights enshrined in the Charter are equally granted and specularly correspond to rights protected under the Convention.[78] Perhaps, the most crucial passage in the *Åkerberg* ruling is given by the closure of the same paragraph where the Court dictates that EU law cannot affect in any manner the relationship between national legal systems of EU Member States and the ECHR, as regards both its ratification and concrete application within

[77] As properly examined in Chapter II, this crucial passage is contained in the famous Paragraph 36 of the ECJ, Judgment 26 February 2013, Case C-617/10, *Åklagaren v. Åkerberg Fransson*, ECLI:EU:C:2013:105, which is recalled by B. VAN BOCKEL, *op.cit.*, p.82 ff and also by R. CONTI, *Gerarchia fra Corte di Giustizia e carta di Nizza-Strasburgo? Il giudice nazionale (doganiere e ariete) alla ricerca dei "confini" fra le Carte dei diritti dopo la sentenza Aklagaren* (Corte Giust., Grande Sezione, 26 febbraio 2013, causa C-617/10), in www.dirittocomparati.it, on 6 March 2013. Specifically, the authors both resort what stated by AG Cruz Villalòn in Opinion of Advocate General Cruz Villalòn in *Åkerberg Fransson*, delivered on 12 June 2012, that were – albeit only partially - retrieved by the Court in ruling on the case.

[78]ECJ, Judgment 26 February 2013, Case C-617/10, *Åklagaren v. Åkerberg Fransson*, ECLI:EU:C:2013:105, para. 44: « As regards, first, the conclusions to be drawn by a national court from a conflict between national law and the ECHR, it is to be remembered that whilst, as Article 6(3) TEU confirms, fundamental rights recognised by the ECHR constitute general principles of the European Union's law and whilst Article 52(3) of the Charter requires rights contained in the Charter which correspond to rights guaranteed by the ECHR to be given the same meaning and scope as those laid down by the ECHR, the latter does not constitute, as long as the European Union has not acceded to it, a legal instrument which has been formally incorporated into European Union law. Consequently, European Union law does not govern the relations between the ECHR and the legal systems of the Member States, nor does it determine the conclusions to be drawn by a national court in the event of conflict between the rights guaranteed by that convention and a rule of national law»

the national territory. Moreover, the Court made the clear point that Union law can under no circumstances force national judges to accord prevalence to a Convention rule over a national one, in the event of their conflict, since EU law is not entitled to influence domestic courts in drawing any predetermined conclusion on the point.

This scenario is made more complicated by the direct applicability of Article 50 EUCFR in Member States' national legal order, given its affiliation to EU primary law. Therefore, the national judge will have the hard task of delving into the insidious "labyrinth" constituted by the tangled system of European provisions envisaging the *ne bis in idem* rule, with the consequence of a dangerous and undue widening of the judicial discretion of national interpreters.[79] And the situation is even worsened if we consider the case of cumulative sanctions' infliction, since on the issue of the compatibility of the "double track" sanctioning system with the *ne bis in idem* principle not only can be registered hints of discord between the interpretations provided by the CJEU and the ECtHR - albeit in *Bonda* the Luxembourg judge tendentially reiterated what already established by the Strasbourg judge in *Engel* - but also the spinous consequences deriving from the direct application of Article 50 can be detected.

Indeed, as it will be reviewed in Chapter III, the consolidated orientation in the ECtHR jurisprudence since the Grande Stevens judgement, which is inclined to preclude any criminal prosecution or punishment of a conduct already sanctioned by an administrative authority, flanked by the direct applicability of the Union's ne bis in idem provision could lead to a paradoxical situation where a criminally

[79] E. SCAROINA, *Costs and Benefits of the Dialogue among Courts in Criminal Matters. The path followed by the national case-law after the Grande Stevens sentence between disorientation and re-discovery of the fundamental rights*, in *Cass. Pen.*, 2015, p. 2910 ff. The author visualizes the imagine of a "labyrinth", through which the national judge is forced to dodge all the pitfalls represented by the conflicting interpretative approaches taken by the two European Courts. In fact, it is stated that: "In a very short space of time, in fact, there have been four pronouncements that address, in different tones and in different ways - and raising quite peculiar problems - the question, now indeed inescapable, of the comparison with the principles laid down by the ECHR and, above all, with those translated into living law by the ECtHR, in relation to the need, on the one hand, to not multiply the moments of sanctions in relation to the same conduct and, on the other, to ensure compliance with the guarantee of the *fair trial* in the event of the imposition of criminal penalties. […] The impression that one gets from their examination is that even the last strip of legality invoked by the above mentioned doctrine, that is the one that most directly affects the choices of the individual, the predictability of judicial decisions, risks being compromised because of the objective difficulty of the judge [...] to find his way in the "labyrinth" represented by the by now very articulated system of rules of European origin, with the consequent uncontrolled widening of judicial discretion."

punishable act would be exclusively and uniquely judged by an administrative body. This would determine without any doubt that the violation of the "fair and equitable trial" guarantees established under Article 6 of the Convention, whose standards of protection are not adequately satisfied by an administrative judicial procedure.

Not even mentioning the fact that the fulfilment of the safeguard's patterns afforded by criminal procedural law is rendered unreasonably dependant on the aleatory and uncontrollable circumstance that an administrative sanction has not been imposed against the same defendant yet. Moreover, the *ne bis in idem* foreclosure effect brought about by a mere administrative sanction of the "same facts" would imply that the criminal judge is obliged to make a step back before an administrative judgement that, although become final, most of the time cannot fulfil the requirements of effective and proportionate legal protection demanded by EU law.[80]In the end, it is evident how the direct applicability of the *ne bis in idem* principle from Article 50 of the Charter in the event of the infliction of cumulative sanctions against the same illicit conduct, with the effect of barring the criminal prosecution of the same defendant, shall be counterbalanced with the general Union's purpose of ensuring an effective crime repression within the European area of justice, that undisputedly cannot be fully achieved by means of sole administrative penalties.

2.3. Article 4 of Protocol no. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Although the *ne bis in idem* principle has been already officially envisaged in Article 14(7) of the International Covenant on Civil and Political Rights of 1966 – from which the drafters of the Additional Protocol no. 7 to the Convention have clearly found inspiration – and notwithstanding the fact that the international legal doctrine has traditionally evaluated the prohibition of double jeopardy as entailed, albeit not in an explicit fashion, within the meaning of Article 6 ECHR, there was

[80] On the controversial drawbacks caused by the "direct applicability" feature of Article 50 EUCFR, See M.L. DI BITONTO, op. cit., p. 1340 ff.; also See E. SCAROINA, *op. cit.*, p. 2914 ff.

the felt need for an express recognition of the guarantee also within the Convention framework. The main reason that led to the writing out of Additional Protocol no. 7 may be retrieved from the assumption that the internal dimension of the *ne bis in idem* guarantee was only mildly established by Article 14(7) ICCPR, without any powerful supranational recognition on the European stage. Indeed, the provision from ICCPR succinctly states that «no one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country».[81]

Such economy of words has been deemed as uncapable of conferring a strong protective force to the provision and, since Article 6(1) ECHR was not enough by itself for affording a comprehensive self-enforceability to the ban on double punishment, the introduction of a specific conventional provision was inescapable.[82] Whence Article 4 of Protocol no. 7 that, to all intents, forms a constitutive part of the ECHR from the moment of its ultimate adoption on 22 November 1984, on will of the Steering Committee for Human Rights during the 347th meeting of the Minister's Deputies.[83]

Even though it was finally opened for signature, the Protocol has not been ratified yet by all Member States of the Council of Europe, consequently unfolding a noticeable lack of consensus among the EU States with regards to the *ne bis in*

[81] Article 14 (1) and 14 (2) ICCPR in its whole wording appears to establish a guarantee seemingly corresponding to the right to a fair trial from Article 6(1) ECHR. Indeed, the provision reads as follows: « All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children. 2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law».

[82] Article 6(1) ECHR: «In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice ».

[83] B. VAN BOCKEL, *op cit.*, p. 16.

idem rule. Nonetheless, it may not be totally wrong to sustain that this gap is - albeit partially – closed by the widespread trans-European operability of Article 50 EUCFR, at least in those situations coming under the range of Union law.[84] Against this background, Article 4 of Protocol no. 7 to the Convention is constituted by three paragraphs, the first of which dictates that «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».

From the reading of the provision, it can be immediately deduced the main difference between the Convention and Charter provisions currently enshrining the principle of *ne bis in idem* in Europe: while, on the one hand, Article 50 EUCFR has both national and transnational operability – thus, it can apply in order to bar repeated proceedings not only within the jurisdiction of the same single Member State, but also in a cross-boarders context – on the other hand, the preclusive effects of Article 4 of Protocol no. 7 are produced exclusively towards judicial situations having a mere domestic dimension, without hindering the commencement or the continuation of second proceedings under the jurisdiction of another Contracting Country.[85]

In any case, it is preferable to read Article 4 in conjunction with its Explanatory Report, that sets out further specifications about the intrinsic logics of the provision. Above all, the Report at point 27 confirmed the foregoing conclusions by declaring that «the words "under the jurisdiction of the same State" limit the application of the article to the national level» and leaving, in turn, the government of the guarantee's applicability at transnational level to several other «Council of Europe conventions».[86] Directly from the sheer reading of the Report, it is easy to highlight the imbalances between the two *ne bis in idem* provisions, even without taking into account any jurisprudential autonomous approach from

[84] B. VAN BOCKEL, *op cit.*, p. 17.
[85] See *The Principle of Ne Bis in Idem in Criminal Matters in the Case Law of the Court of Justice of the European Union* in www.eurojust.europa.eu/doclibrary/Eurojust-framework/caselawanalysis (September 2017).
[86] *Explanatory Report to the Protocol No. 7 to the Convention for the protection of human rights and fundamental freedoms,* in *European Treaty Series, n. 117,* at point 27, https://rm.coe.int/16800c96fd.

the two European Courts' case-law on the interplay between the Charter rights *vis-à-vis* the Convention rights.

In spite of the fact that the absence of a total agreement among Member States in giving full recognition to the ban on double proceedings, as intended in the Convention framework, represents a daunting problem to be tackled by the ECtHR and, although one may argue that the mere "internal" application of Article 4 of Protocol no. 7 would shrink the operability of the guarantee object of this study – thereby, generating leaks in the European-wide fundamental rights' tutelage system[87] – , it is undisputed that the *ne bis in idem principle* continues to be a safeguard of unquestionable importance and this is proven by the fact that it is placed amongst those conventional rights that cannot be derogated – pursuant to the third paragraph of Article 4 itself - neither even "in time of war or other public emergency".[88]

From the wording of Article 4 of protocol no. 7, it is possible to notice that the guarantee operates only with regard to "criminal proceedings" and, in accordance to what established at point 31 of the Report, the preclusion applies exclusively with the purpose of "freezing" those proceedings instituted for securing a conviction. In effect, the Explanatory report points out how the ban's *ratio* is uniquely avoiding the reopening of proceedings that would determine a variation *"in pejus"* of the procedural situation of the defendant, without affecting in any

[87] *The Principle of Ne Bis in Idem in Criminal Matters in the Case Law of the Court of Justice of the European Union* in www.eurojust.europa.eu/doclibrary/Eurojust-framework/caselawanalysis (September 2017). The document, on the contrary outlines that, even though the two provisions under examination presents evident discrepancies, the Court of Justice in its case law has highlighted on multiple occasions that the Charter right and its corresponding Convention rights have the "same scope and meaning"(here, are cited the *ÅkerbergFransson and M.* judgments9. Moreover, it is pointed out how is mandatory to respect the degree of legal protection granted by the Convention, provided that Article 50 of the Nice Charter entails a right exactly corresponding to the one established under Protocol 7. Here, should be recalled the ECJ, Judgement 5 April 2017, Case C-217/15 "*Orsi and Baldetti*", ECLI:EU:C:2017:264.

[88] Article 4(3) of Protocol 7 states: « No derogation from this Article shall be made under Article 15 of the Convention ». Here it seems useful to recall the wording of Article 15 (1)ECHR for a better understanding of the question « In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law »; see also B. VAN BOCKEL, *op cit.*, p. 16. According to the author this "forms an indication of its importance".

manner the (re)institution of «proceedings in favour of the convicted person or any changing of the judgement to the benefit of a convicted person».[89]

Moreover, perhaps the most critical profile of Article 4 is constituted by the fact that it does not requires the "criminal" nature of the offence subjected to double proceedings: in the light of point 28 of the Report it seems not «necessary […] to qualify the offence as "criminal"» in the view of the activation of the bar towards a second proceeding against the same defendant. [90] In other terms, the Report shows how Article 4 is not aimed at forestalling the subjection of an individual to a judicial action featured with a different character in respect of the one which ended with the conviction of the same person.

Along these lines traced by the Explanatory Report, the ECtHR in its jurisprudence has systematically enlarged the scope of application, which now covers various sectors of law, other than criminal justice, such as tax and administrative law. Particularly, the unsolicited presence of the criminal character of the misconduct object of repeated proceedings in order to trigger the *ne bis in idem* preclusion resulted in the censorship of various European legal systems insofar as the provided for "double track" punitive procedures, aimed at sanctioning the same illicit conduct that simultaneously constitutes a criminal and an administrative or tax offence. The issue of the compatibility between dual track punitive mechanism and the prohibition of a *bis in idem* will be further analysed in the light of two seminal rulings delivered by the ECtHR: the *Grande Stevens and others v. Italy* decision and *Nodet v. France* judgement, respectively discussed in depth in Chapter III and Chapter IV.

On this stage, the survey is circumscribed to the scope of the *ne bis in idem* guarantee in the Convention system which comprises both the right "not to be tried

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[89] *Explanatory Report to the Protocol No. 7 to the Convention for the protection of human rights and fundamental freedoms,* in *European Treaty Series, n. 117,* at point 31, https://rm.coe.int/16800c96fd: « Furthermore, this article does not prevent a reopening of the proceedings in favour of the convicted person and any other changing of the judgment to the benefit of the convicted person ».

[90] *Explanatory Report to the Protocol No. 7 to the Convention for the protection of human rights and fundamental freedoms,* in *European Treaty Series, n. 117,* at point 28, https://rm.coe.int/16800c96fd: « It has not seemed necessary, as in Articles 2 and 3, 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 in the text of the article itself».

and punished twice" on the ground of the same illicit act. Provided that this twofold protection is connoted by two appreciably different guarantees, it should be now evidenced how they are distinguished from each other.

The preclusion of a "double punishment" inflicted to the same person may be considered as granting a very limited protection to the benefit of the defendant, because it does not avoid that a second prosecution takes place, but it only prevents the accumulation of sanctions in relation to an *idem factum.* Accordingly, it does not avert that a person is forced to live twice the burdensome experience of judicial prosecution, irrespective of the expected outcome of the second proceeding that might not conclude with the infliction of second penalty against the same individual. In turn, the ban is directed solely towards the imposition of cumulative penalties with respect of an "identical" offence, within the meaning described in the present work hereinafter. Instead, the ban on "double prosecution" is aimed at blocking the institution of any new judicial trial whether the judgement terminating a first proceeding on the same factual circumstances has become final and acquired the value of *"res judicata"*, since no more judicial remedies are available to challenge that sentence.

This second guarantee is believed of having a greater protective value in comparison to the prohibition of double penalty, since the former tackles the bringing of new sets of proceedings regardless of whether or not a sanction was issued in result of the first trial or independently from the nature of the penalty – namely, if it was a custodial or financial sentence – or the legal criteria applied for its determination, in terms of duration or monetary quantity. This was the ruling by the ECtHR in the *Franz Fischer* judgement, in which the Court in paragraph 29 of the sentence declared the following statement: «The Court repeats that Article 4 of Protocol No.7 is not confined to the right not to be punished twice but extends to the right not to be tried twice».[91]

[91] *Franz Fischer v. Austria*, ECtHR 29 May 2001, appl. No. 37950/97, para. 29. Here follows the full reading of the sentence: «However, the Court considers that these differences are not decisive. As said above, the question whether or not the non bis in idem principle is violated concerns the relationship between the two offences at issue and can, therefore, not depend on the order in which the respective proceedings are conducted. As regards the fact that Mr Gradinger was acquitted of the special element under Article 81 § 2 of the Criminal Code but convicted of drunken driving, whereas the present applicant was convicted of both offences, the Court repeats that Article 4 of

The other major difference between Article 4 of Protocol no. 7 ECHR and Article 50 of the Charter can be extrapolated from the second paragraph constituting the conventional provision: «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 ».

As resulting from above normative dictate, the Convention provides for an exception to the enactment of the ne bis in idem ban since it permits the initiation *ex novo* of a second trial or the re-opening of an already concluded proceeding on the same conduct – on which the *res judicata* has been formed – in the event of the certified presence of "new or newly discovered facts", or whether it has been ascertained in the previous proceedings a "fundamental defect" capable of potentially affecting the legal outcome of the trial. This possibility that a *"novum"* may justify a derogation from the compelling and rigorous application of the *ne bis in idem rule* is not recognized at all in the Charter's provision concerning the corresponding guarantee.[92] Hence, it constitutes a further profile of divergence in respect of the conventional rule which, instead, expressly contemplates this option, in addition to the wider field of applicability of the safeguard that cover both national and cross-boarders situations.

Finally, we close this general overview on the principle of *ne bis in idem* laid down in the ECHR system by mentioning that, similarly Article 50 EUCFR,

Article 4 of Protocol no. 7 does not demand the actual enforcement of the imposed sanction (or that the judgement is in the process of being enforced). Indeed, contrary to what requested by Article 54 CISA which calls for the fulfilment of the enforcement requirement, the provision from Protocol 7 makes its application

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Protocol No. 7 is not confined to the right not to be punished twice but extends to the right not to be tried twice. What is decisive in the present case is that, on the basis of one act, the applicant was tried and punished twice, since the administrative offence of drunken driving under sections 5 (1) and 99 (1)(a) of the Road Traffic Act, and the special circumstances under Article 81 § 2 of the Criminal Code, as interpreted by the courts, do not differ in their essential elements ».

[92] As pointed out in the previously quoted *Explanatory Report to the Protocol No. 7 to the Convention for the protection of human rights and fundamental freedoms,* in *European Treaty Series, n. 117,* https://rm.coe.int/16800c96fd, at point 31 it is specified that the "the term "new or newly discovered facts" includes new means of proof relating to previously existing facts."

conditional upon the instance that the defendant limits its request only to the case where the defendant has been "finally acquitted or convicted" in the aftermath of a judicial proceeding.

3. Scope of application of the *ne bis idem* within the European legal framework: the problem of a mutual trust between Member States of the European Union in accepting reciprocal judicial decisions.

The operability of the *ne bis in idem* is traditionally limited to events that occur within the same State and under one single national jurisdiction. Such limitation is the consequence of the unwillingness of domestic legal systems in accepting the negative effects deriving from the enforcement of foreign *res judicata*. The problem does not lie with the application of the *ne bis idem* principle as such or *per se* but is the outcome of the general lack of confidence that States have in the capability of other States to ensure a level of punishment and deterrence that is comparable to their own.

Within the EU legal order, this issue has been addressed *inter alia* through the establishment of the principle of mutual recognition, which is implemented by means of legal instruments like the European Arrest Warrant and by furthering the cooperation between legal policy authorities like Europol and Eurojust[93]. But here the focus is on the fact that in the EU, due to the physiological differences between national criminal law and procedures among Member States, some difficulties in the willingness of Member State to mutually accept the "whole package" of the consequences of *ne bis in idem* in terms of recognizing each other's judicial

[93] B. VAN BOCKEL, *op. cit.*, p. 31 ff.; See 2002/584/JHA: *Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision*, in *Official Journal L 190 , 18/07/2002 P. 0001 – 0020,* in http://data.europa.eu/eli/dec_framw/2002/584/oj; Moreover, other relevant legal acts intertwined with the principle of mutual recognition should deserve a mention. Among them, on this stage, we should recall the Framework Decision 2008/978/GAI in matter of exchangeability and reciprocal admissibility of evidence or also the Framework Decision 2009/829/GAI on the mutual recognition of conviction judgement and of rulings – either definitive or precautionary – ordering the limitation of non-custodial freedoms. Lastly, it should be mentioned the EU Directive 2014/41/EU governing the regarding the European Investigation Order in criminal matters and the EU Directive 2014/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union.

decisions persist. This can be evidenced, for instance, by the exception clauses in the European Arrest Warrant Framework Directive. In effect, one of the mandatory grounds for refusal to execute the warrant is represented by the case in which the requested person has been already convicted in a Member State for the criminal offence for which the "EAW" was issued and the individual has already served the sentence imposed in that Member State. Thus, because of the guarantee effect produced by the *ne bis in idem* principle, if there is a case of potential illegitimate double-punishment, the Member States must refuse to execute the European Arrest Warrant.[94]

The problem of the absence of a proper mutual trust between the Member States is aggravated by the issue that EU's power of legal (criminal) harmonization is limited only to the area of the "Euro-crimes" and to national criminal law only concerning some EU policies falling within the competence provided for in Art.83 TFEU.[95]

Consequently, the implementation of the principle of mutual recognition in the European criminal law field requires a considerable level of judicial cooperation between Member States, starting from giving full effect to the *ne bis in idem* principle under Union law. However, this objective is far from being fully realized,

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[94] This is what expressly established by Article 3 of *Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States:* « The judicial authority of the Member State of execution [...] shall refuse to execute the European arrest warrant » whenever «if the executing judicial authority is informed that the requested person has been finally judged by a Member State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State ». Article 3 of the Framework Decision on the "EAW" put down the conditions under which a Member States must compulsorily refuse to surrender the subject who, on the ground of the same allegation, has already been judged and the sentence has been effectively been served or it is in the course of being served (or it can be no longer served). Article 4 of the same Framework Decision provided for, instead, the hypothesis where the national judicial body has the mere faculty – not the pregnant obligation – to give execution to the EAW: « The executing judicial authority may refuse to execute the European arrest warrant: […] where the person who is the subject of the European arrest warrant is being prosecuted in the executing Member State for the same act as that on which the European arrest warrant is based; where the judicial authorities of the executing Member State have decided either not to prosecute for the offence on which the European arrest warrant is based or to halt proceedings, or where a final judgment has been passed upon the requested person in a Member State, in respect of the same acts, which prevents further proceedings; if the executing judicial authority is informed that the requested person has been finally judged by a third State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing country ».

[95] B. VAN BOCKEL, *op. cit.*, p. 32.

especially due to the enduring limitation on the application of the principle at stake within the normative mechanisms characterizing EU legislation.

In order to light a glimmer of hope about solving this question, it is seminal to look at CJEU's jurisprudential development regarding the establishment of *ne bis in idem* in the EU legal order *inter alia*. *Walt Wilhelm* and *Boehringer* were the first judgements in which the prohibition of double jeopardy was concretely taken into consideration by the ECJ.[96] From there, the applicability of the principle in the EU context was accepted by implication, even though its formal and definitive recognition did happen by virtue of the Charter of Fundamental Rights of the European Union, which became legally binding after the ratification of the Treaty of Nice.

Furthermore, the CJEU did not stop its evaluation on the principle to the mere implicit acceptance of its importance but went even further by delineating the range of application of the safeguard. Indeed, as pointed out in the *Åkerberg Fransson* judgement[97], the Court dictates that the "scope of the Charter" as laid down in Art. 51 EUCFR – which is discussed in further details in the following Chapter – coincides with the legal scope of the EU law' itself and its extent does not go beyond than that.

In this section, we will focus in particular on the different scopes of operability of the right, namely the material, subjective and temporal ranges covered by its legal effects, with a specific reference to the "principle of finality" that represents a significant legal principle on its own, but on this stage serves as a mandatory condition to which the application of *ne bis in idem* is subordinated.

3.1 The material scope of application of the guarantee: the "*matière pénale*" and the *Engel* criteria.

The term *"matière pénale"* is a syntagma that appears in the French version of Article 6 of the ECHR. In English, the other original language of the Convention, the concept is rendered by the term "*criminal charge*". In the German version, the

[96] Case 14-68 *Walt Wilhelm and others v. Bundeskartellamt*, ECLI:EU:C:1969:4. and Case 7 -72 *Boehringer Mannheim v. Commission*, ECLI:EU:C 1972:125.
[97] Case C-617/10, *Åkerberg Fransson*, ECLI: EU:C: 2013:280.

translation is "*strafrechtliche Anklage*" and in the Italian version *"accusa penale"*. Following the entry into force of the Convention, the development of a concept of "criminal matters" appeared to be a mandatory way of giving recognition and a new impulse to fundamental human rights protection, in accordance with the objectives of the Convention.

The aforementioned *"matière pénale"* has always been, and remains, not only an elegant instrument for the recognition of fundamental human rights, but also a primary key to the legal approximation and rapprochement between the Contracting States, characterized by widely different cultures and legal systems.

It is commonly recognised that the "*ratione materiae*" of *non bis in idem* principle coincides with the criminal law sphere. However, this recognition is the result of an impervious process of doctrinal and jurisprudential evolution and is not an element that should be taken for granted.

In a Multi-state legal system, such as the European one, in which the single national legal order proceeds on its behalf to define the criminal area, the European Court of Human Rights has imposed its own perspective. As a matter of fact, leaving to the individual domestic judicial orders and legislators an uncontrolled room of manoeuvre in defining the boundaries of the criminal law area, which coincides with the (material) range of application of the *ne bis in idem* principle, would have caused detrimental effects towards the achievement of the purposes of the Convention.[98]

This has been duly confirmed by the ECtHR in the *Zolotukhin v. Russia* decision at paragraph 52, in which the Court, regarding the delimitation of material scope of application of the *ne bis in idem*, has dictated 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 4.1

[98] A. GENISE *Divieto di ne bis in idem della CEDU e riflessi applicativi* Articolo 27/04/2015 in https://www.altalex.com. As the Author points out, art 4 Protocol 7 ECtHR introduced "the so-called *ne bis in idem in criminal matters*, i.e. the prohibition for Contracting States to punish two or more times a person for the same act. The first problem to be overcome by interpreters was that related to the delimitation of the notion of "criminal matters": when a sanction should be deemed as having a criminal character for the purposes of the article in question. On this point, the Court of Strasbourg considered to be applicable the so-called *Engel* criteria, developed in an old decision of 1976 and progressively refined most recently, with the *Grande Stevens v. Italy* decision of 4 March 2014."

of Protocol No.7 ». The Court wanted to stress this point and in addition to this held that founding the legal operability of *ne bis in idem* exclusively on the formal qualification of the charge in accordance to domestic procedural rules would be disruptive since the recognition of the guarantee in concrete cases « would be left to the discretion of the Contracting States to a degree that might led to results incompatible with the object and purpose of the Convention ».[99]

On this regard, the undersigned reckons that for acquiring the most comprehensive knowledge on the inner logics of the modern *ne bis in idem* is seminal to review the jurisprudential approaches by the European Courts on the notion of "criminal matters". The first ground for the development of this concept was art. 6 ECHR, which provides for the *"droit à un procès équitable"*, whose main purpose is preventing the guarantees of a fair trial from being circumvented by a State by simply removing the sanction from its own domestic criminal law rules. Then, this safeguard was extended also to other legal arrangements and principles established by the Convention and related to the right to a fair and equitable process.

In the past, in order to delimit the concept of "criminal matter", it was considered preferable to adopt a "nominalistic" (or formal) criterion, whereby it must have considered as "criminal" only what the national legislator qualifies as such. In other terms, if an infraction under national law is not catalogued as a crime, it falls outside the spectrum of application of the Convention.

The so-called "*Engel* criteria" have determined the widening of the notion of *"matière pénale*" and the drastic shift from the aforementioned formal approach, anchored on the mere normative data, to the "substantialist" one[100], which relies on the analysis *de facto* of the concrete intrinsic characteristics of the criminal offence at stake, in relation to the interests or values protected by the criminal law provision and the relative criminal sanctions envisaged in it. After all, the Court of Strasburg

[99] *Zolotukhin v.Russia*, ECtHR 10 February 2009, para. 52: « The Court reiterates that the legal characterisation 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 § 1 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 ».

[100] On the point, See G. COFFEY, *Resolving conflicts of jurisdiction in criminal proceedings: interpreting ne bis in idem in conjunction with the principle of complementarity,* in *New Journal of European Criminal Law*, 2013, p. 60 ff.

has always showcased the character of the Convention as a "living instrument", as "living law": such international instrument should be consequently interpreted in a dynamic way, in line with the evolution of social phenomena, so as to extend, wherever possible, its own legal guarantees (especially, Art. 6 and 7 ECtHR) to the widest range of cases conceivable.[101]

The ECtHR, thereby, has decreed the prevalence of the substance of the charges, determined by the nature of the relative offence and by the intensity of the specific sanction adopted so as to punish that infringement , rather than their formal vest, meant as the legal qualification of the charge under national law.[102]

Accordingly, it is not sufficient the sole formal normative qualification of the infringement as "criminal" by the national legislator, variable of course from one legal system to another among the European framework, but it is also necessary that the infraction is blessed by a certain nature and the penalty has an afflictive and intimidatory force.[103]

The mentioned guiding principle has been lastly reaffirmed by the Court in the *Grande Stevens and others v. Italy* decision, which reminds that since the *Engel and others v. the Netherlands* case of 8 June 1976, three parameters – one formal

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[101] F. GOSIS, *La nozione di sanzione penale nella Cedu* in *La tutela del cittadino nei confronti delle sanzioni amministrative tra diritto nazionale ed europeo*, Torino, 2014, in https://www.giappichelli.it*:* the document in question makes a crystal clear reference to *Deweer* v. *Belgium*, ECtHR 27 February 1980. The Court of Strasburg there dictates: «However, the prominent place held in a democratic society by the right to a fair trial […] prompts the Court to prefer a "substantive", rather than a "formal", conception of the "charge" contemplated by Article 6, par. 1 (art. 6-1). The Court is compelled to look behind the appearances and investigate the realities of the procedure in question ». Moreover, *Micallef v. Malta*, ECtHR 15 January 2008, is recalled : « Article 6 reflects the fundamental principle of the rule of law which underpins the whole Convention system and is expressly referred to in the Preamble to the Convention … a restrictive interpretation of Article 6, § 1 would not correspond to the aim and the purpose of that provision ». See also D. BIANCHI, *Il problema della "successione impropria": un'occasione di (rinnovata?) riflessione sul sistema punitivo, in Riv. it. dir. proc. pen*., 2014, p. 322 ff. and p. 341 ff.: the author assumes that against such «panpenalistic guarantee» («garantismo panpenalistico») it is not possible to use arguments relating to the efficiency of administrative functions or to its alleged essentiality for the supreme interests of the State.

[102] F. POLEGRI *Il principio del ne bis in idem tra sanzioni amministrative e sanzioni penali - il principio del ne bis in idem al vaglio della Corte Costituzionale: un'occasione persa.* in *Giur. It.*, 2016, 7, p. 1712 ff.

[103] F. PALAZZO *Il limite della political question fra Corte Costituzionale e corti europee. Che cosa è "sostanzialmente penale"?* www.giappichelli.it. The author reckons that especially the element of the sanction (thus, the penalty) is the key for answering the so called *"political question"* of the substantive choices of criminalisation. Indeed, the legislator shall make fall under the coverage of punishment those misconducts that violate certain individualistic or "publicistic" interests. For this reason, they are considered worthy of being subjected to criminal sanction treatment.

and two substantive – have already been considered capable of revealing the substantial criminal essence of a particular offence, notwithstanding the *nomen iuris* adopted by the national legislature.[104]

As a matter of fact, the ECtHR finally clarified the scope of application of Art.4 of Protocol no. 7, by recalling the three criteria, commonly known as "*Engel* criteria"[105], which were also accepted by the CJEU in the *Bonda* judgement. The "Engel criteria", whose primary objective is to scrutinize which proceedings fall outside of the scope of the notion of "criminal charge", are as follows: the legal classification of the offence as criminal under national law, the very nature of the offence and the degree of severity of the penalty that the person concerned risks incurring. [106] If these alternative requirements are met, the charges against a subject are presumed as criminal. [107]

The issues concerning the qualification of the nature of "allegation" and the concept of "criminal prosecution" and "punishment", referred to in Articles 6 and 7 of the ECHR, are among the first questions that have been brought to the attention of the ECtHR.[108] In this regard, the Court decides to apply, even regarding the contentious matter of *ne bis in idem*, the three parameters developed in the 1970s in the *Engel* case, without such a choice having been questioned any longer or turned down by its own subsequent decisions. So far, the Court of Strasbourg, however, regarding these parameters - which are used to ascertain the criminal nature of accusations - has claimed that they can be used alternatively. In simple terms, the three Engel criteria are alternative to each other and not necessarily cumulative. But it is necessary to claim that only the first criterion, based on the

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[104] F. MUCCIARELLI *Illecito penale, illecito amministrativo e ne bis in idem: la Corte di Cassazione e i criteri di stretta connessione e di proporzionalità* in www.penalecontemporeneo.it, 17.10.2018.

[105] *Engel and Others v. Netherlands*, ECtHR 8 June 1976; and ECJ, Judgment of 5th June 2012. Case C-489/10 *"Bonda"*, EU:C:2012:319. Here, the CJEU gave its own "version" of the Engel doctrine with particular emphasis on the need to protect the financial means and resources of the Union.

[106] B. VAN BOCKEL, *op.cit.*, p. 40.

[107] *Zolotukhin v.*Russia, ECtHR 10 February 2009: «the presumption of criminality to which the Engel doctrine led to can be 'rebutted entirely exceptionally, and only if the deprivation of liberty cannot be considered appreciably detrimental given their nature, duration or manner of execution »

[108] P. COSTANZO–L. TRUCCO, *Il principio del "ne bis in idem" nello spazio giuridico nazionale ed europeo*, in www.consultaonline.it , Fascicolo III, 2015.

legal classification of the charge within the domestic legal order, appears as sufficient for qualifying an offence as criminal.

This criterion, as a matter of fact, has been deemed as "one way only", in the sense that if national law classifies a given offence as criminal, then the guarantees envisaged by the ECHR shall be applied and respected.[109] Otherwise, it will be necessary that the charge will be regarded as criminal in the light of one of the other two (substantive) criteria, because, according to the Court, the second and the third criteria are alternative to each other. [110]

However, in the following judgements, the same Court has conserved the faculty or discretion to decide whether to use the two substantive criteria cumulatively «when deemed as useful and necessary»[111]: thus, it is conceived as a last resort to be resumed by the Court if the separate analysis of each of them does not allow to draw a clear conclusion about to the existence of an accusation configurable within the sphere of criminal matters.[112]

The *Engel* doctrine formulated by ECtHR is a solid focal point within the case law of Strasbourg and it has also been expressly accepted within the European Union, with perfect lexical and semantic superimposition.[113]

As alluded above, the "first Engel criterion" is constituted by the verification of the formal qualification (or vest) of the misconduct – i.e. as a criminal or as an

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[109] F. POLEGRI *Il principio del ne bis in idem tra sanzioni amministrative e sanzioni penali - il principio del ne bis in idem al vaglio della Corte Costituzionale: un'occasione persa*. in *Giur. It.*, 2016, 7, 1711. Accordingly, the Author considers that if the first criteria of the *Engel* theory is fulfilled, therefore "the game is over": undoubtedly, the offence shall be deemed as criminal.

[110] Therefore, there is not a shadow of a doubt that the latter two criteria have a *subsidiary* function with respect to the *formal* one. Accordingly, A. GENISE *Divieto di ne bis in idem della CEDU e riflessi applicativi* Articolo 27/04/2015 in https://www.altalex.com: "The ECHR therefore considers that a penalty should be regarded as criminal if it is qualified as such by the rule which provides for it and that, in absence of this formal requirement, the judge shall take into account, in a *subsidiary* way, the nature of the infringement or of the nature, purpose and gravity of the penalty (Case C-199/92 *Hols v Commission*; judgment of 8 June *1976 Engel and Others v Netherlands* cited above; judgment of 21 February 1984 *Ozturk v Germany)".*

[111] *Grande Stevens and others v. Italy*, ECtHR 4 March 2014. Upon this fundamental sentence shall be cited, above all, A. ALESSANDRI, *Prime riflessioni sulla decisione della CEDU riguardo alla disciplina italiana degli abusi di mercato*, in *Giur. comm*., 2014, I, 855 ff.

[112] *Jussila v. Finland*, ECtHR 23 November 2006.

[113] ECJ, Judgement 20 March 2018, Case C-524/15, *Menci*, ECLI:EU:C:2018:197. The CJEU in assessing the «criminal nature of proceedings and sanctions [...] three criteria are relevant. The first consists in the legal classification of the offence under national law, the second in the nature of the offence and the third in the degree of severity of the penalty which the person concerned risks incurring».

administrative one – within the national legislation of States. It is not even necessary to specify that the first *Engel* parameter is the formal one. However, the legal classification as criminal under domestic law is of little consequence. Indeed, if an offence is classified as criminal in one Contracting State, it will be likewise classified for the purposes of the ECHR. This implies that the sole "first Engel criterion" is far from being sufficient to portray the criminal nature of an allegation, even though it can be used as a simple starting point, suitable to provide, at most, an indication of such criminal connotation, in the process of an evaluation carried out by the same Strasbourg court.[114]

This is confirmed by the famous ruling in the *Grande Stevens and others v. Italy*, in which the Court condemned Italy, finding that there had been an infringement of the rules of the Convention, even though it underlined that « the market manipulations ascribed to the applicants do not constitute a criminal offence under Italian law ».[115] In applying the "second *Engel* criterion", the Court will, amongst other things, focus on the scale of potential addressees of the sanctions. In other words, the Court examines whether the rule at issue is featured with "general character", namely it is applicable to all citizens and therefore qualified as a rule of criminal law, or a mere "disciplinary rule", which specifically aims to ensure the protection of the quality for the exercise of specific professions.[116]

The disciplinary rules are typically administrative regulations that discipline "particular and concrete" cases, and are therefore addressed only to certain social groups or subjects[117]. On the contrary, for the recognition of their criminal nature, a rule must discipline a "general and abstract" situation and it must provide for an *erga omnes* protection of legal goods, values and interests belonging to the public

[114] On the point see *Öztürk v. Germany*, ECtHR 21 February 1984, and, also, again, *Grande Stevens and others v. Italy*, ECtHR 4 March 2014.
[115] *Grande Stevens and others v. Italy*, ECtHR 4 March 2014.
[116] B. VAN BOCKEL, *op. cit*., p. 41.
[117] In *Engel and Others v. Netherlands*, cit., the Court confirmed that the domestic provision under scrutiny provided for military disciplinary sanctions and, as such devoid of criminal nature within the domestic legal order of the Contracting State. Therefore, ECtHR formulated two substantive criteria in order to classify given measures as criminal penalty. First of all, the "nature" the measure and its "purpose": if it has a deterrent and afflictive goal and it has a general character (i.e. abstract traceability to all citizens), it certainly will have a criminal nature. Alternatively, the Court shall retrace the "severity" of the measure, i.e. the particular significance of the *malum* which may be in abstract inflicted (specifically, it shall consider the maximum of the penalty).

community, also in the light of the common denominator of the different domestic laws of each Contracting States[118]. In order to sum up, the more specific a rule is, in terms of the category of persons it potentially applies to, the greater the likelihood that the ECtHR will consider that rule as merely disciplinary, rather than belonging to the realm of criminal law.[119] For instance, in *Grande Stevens and others v. Italy*, the Court claimed that the Italian rules criminalizing market manipulation has the "general" aim to safeguard the proper functioning and transparency of financial markets and to protect the public faith in the reliability of those markets.[120]

Hence, provided that the rule at issue had not a disciplinary character, but actually a general range of application, consequently it had criminal nature, in the view of the ECtHR reasoning. In addition to this, it is not marginal to ascertain the function of the sanctioning rule itself [121]: the Court excludes the criminal nature of the legal rule at issue if it has the sole purpose of compensation, and not a preventive, repressive and deterrent aim, typically inherent of criminal sanctions.[122]

The "third *Engel* criterion" is aimed at ascertaining the entity of the sanction, in terms of afflictive significance, for which the relevant benchmark is represented by the maximum of the penalty, envisaged in abstract by the legislator.

In cases in which the law prescribes the imposition of custodial sanctions, the ECtHR will unquestionably presume the criminal nature of the charge.[123] However, even the provision of financial penalties would not prejudice the possibility of classifying the sanctions as "criminal" wherever is possible to proceed

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[118] A. GENISE *Divieto di ne bis in idem della CEDU e riflessi applicativi* Articolo 27.04.2015 in https://www.altalex.com.

[119] B. VAN BOCKEL, *op.cit*., p. 41, recalling *Demicoli v. Malta*, ECtHR 27 August 1991, points out that the Court held that if the subject is in a particular position(in this case, a politician), this does not remove the prosecution from the criminal sphere if the same legal provision could by "its nature" also apply to others.

[120] *Grande Stevens and others v. Italy*, ECtHR 4 March 2014. According to the ECtHR, the Italian market rules serve the "general interest of society" typically protected by criminal law, and therefore belong to the sphere of criminal law for the purposes of the Convention. It means that the Court's focus is on the nature of the legal rule at issue and on the question whether the it is of a "specific character" rather than on the question if the *subject* belongs to a specific group, or profession in applying the second *Engel* criterion.

[121] *Öztürk v. Germany*, ECtHR 21 February 1984.

[122] In *Grande Stevens*, the Court, also on the basis of the analysis of the function of the rule, qualified the sanctioning rule in the case at hand as criminal.

[123] By the same ECtHR, *Zolotukhin v. Russia, Žugić v. Croazia*, ECtHR 31 May 2011, *e Ezeh e Connors v. United Kingdom*, ECtHR 9 October 2003.

with the imposition of alternative custodial sentences or the insertion of the offender into the criminal record.[124] As a matter of fact, the case law of the Strasbourg court so far shows that not only the deprivation of liberty, but also a mere fine may be sufficient to include a case within the criminal law area for the purposes of the Convention.[125] For instance, even the possibility of the withdrawal of a license falls under the third Engel criterion, and even the ban on practicing certain legal or political profession, if extended for a long period of time, can be deemed as a criminal sanction.[126]

What really matters here is whether the sanction has an «at least partly punitive and deterrent character», as resulting from the temporal circumstances of its adoption. [127]Moreover, it is mandatory to assess whether the penalty can be regarded as an "immediate and foreseeable" consequence of the subject's misconduct and if the sanction has a serious impact on the individual, even though it does not lead to the imprisonment or any other form of deprivation of the liberty of the individual.[128] This orientation has been consistently upheld by the Court in *Routsalainen v. Finland,* in which it has been stated that «the relative lack of

[124] In this sense, ECtHR, *Žugić v. Croazia.*
[125] V. CITRARO *Il giudicato sulla sanzione amministrativa sostanzialmente penale dichiarata incostituzionale* in https://deiurecriminalibus.altervista.org: On the perspective of the author, so as that a sanction can be considered as *"substantially criminal"* within the meaning of the ECHR, "it must contain at least one of these characters: the rule that imposes the sanction must be addressed to the generality of the associates and must pursue a preventive, repressive and punitive purpose, and not merely compensatory one; the sanction at hand that is likely to be imposed must involve for the perpetrator of the offence a significant sacrifice, even of a purely economic nature and not necessarily consisting in the deprivation of personal liberty".
[126] *In Nilsson v. Sweden*, ECtHR, 13 December 2005, the Court found that the temporary suspension of the driving license of the subject belonged to the criminal law sphere in that case because the suspension was not an "automatic" or "immediate and foreseeable" consequence of the subject's conviction for a serious road traffic offence. Because some time passed between the time of the conviction and the moment his driving license was suspended, the Court concluded that the measure must have been, "at least in part", punitive*;* See also *Matyjek v. Poland*, ECtHR 30 May 2006. In the case at stake, the Court considered that a ban from taking certain government positions was sufficiently serious to constitute a criminal charge, even though not accompanied by a fine or any other form of punishment. The reason for this was, according to the ECtHR, that the «ban on practicing certain political or legal professions for a long period of them may have a very serious impact on a person, depriving him or her of the possibility of continuing professional life. […] This sanction should thus be regarded as having at least partly punitive and deterrent character».
[127] B. VAN BOCKEL *op.cit.* p. 42.
[128] B. VAN BOCKEL *op.cit.* p. 41 ff.

seriousness of the penalty cannot divest an offence of its inherently criminal character».[129]

The main problem with the "third Engel criterion" is given by the fact that the Court has not set a "minimum threshold" for criminal sanctions for its application, due to the differences in circumstances between individual cases. This point represents the weakness of the Engel doctrine as a whole, because in practice the third Engel seems to obliterate the second one and could tempt the Court to set the threshold for a minimum criminal fine ever lower in cases where is difficult to adopt the "second *Engel* criterion".

In order to draw the conclusions, it is essential to underline that the *"matière pénale"* is obviously a concept of relationship: the items (thus, goods, values or individual/public interests) of criminal safeguard cannot be identified *per se,* by reasons of their immanent features or peculiar legal content. Instead, they can be conceived only in relation to the penalty envisaged for them by law. In short, it is the criminal sanction that determines what deserves to be included under the coverage of punitive treatment. And such "relational" scheme, typical of "criminal matters", is also redundantly adopted by the case-law of the Strasbourg Court.[130]

It is possible to retain that, among the three *Engel* criteria – thus, national classification of the offence, nature of the offence, penalty –, used by the Court to identify, from time to time, whether a case belongs to the criminal law sphere, it is certainly the third and last criterion, related to the nature and degree of the sanction, that marks the boundaries of *"matière pénale"* and allows the classification as "criminal" of the offence at stake. Ultimately, the idea of "criminal matters" is conceivable only in relation to the notion of criminal sanction.[131]

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[129] *Routsalainen v. Finland, ECtHR,* 16 June 2009.

[130] F. PALAZZO, *op.cit.*, : "It is interesting to note that even in the most recent case law of the CJEU has been highlighted that the punitive, repressive and deterrent nature of the sanction surely condition the legislative selection of the interests or values to be protected by criminal law. Therefore, it will inevitably condition also the *substantia*l nature of the infringement carried out as described in the criminal law provision."

[131] In order to extrapolate the nucleus of the three criteria, I reckon it is useful to retrieve the exact wording of the Court in deciding upon the *Engel* case: « […] it is necessary
first of all, to know whether the provisions defining the offence in question, according to the legal system of the resistant state, belong to the sphere of criminal law, disciplinary law or both together. However, this is only a starting point. The indications thus provided have only a formal and relative value and should be examined in the light of a common denominator derived from the laws of the various Contracting States. The intrinsic nature of the offence is a factor of greater importance. […]

There is, in sum, a "game of mirrors", whereby only with the effective correspondence between the nature of the protected interest and the nature of the sanction, it is possible to detect the proper use of *"matière pénale"* as the criterion for the solution of the so called "political question" regarding the substantive choices of criminalisation enacted by national legislators.[132]

Indeed, the legislator shall include under the umbrella of punishment those illicit conducts that violate certain individual or public interests. For this reason, they are considered worthy of being subjected to criminal sanction treatment.

A decisive topic regards the fact that do exist regulations in force in several European countries concerning certain criminal offence (e.g.: insider trading or market manipulation) that generate a physiological duplication of the sanctioning activity, triggering a phenomenon of *"*procedural *ne bis in idem*". Eventually, it may well turn out to happen that criminal proceedings are instituted after the outcome of the administrative sanction procedure, concerning the same *factum*, has become final (or vice versa), without representing a violation of the *ne bis in idem* prohibition, whose recognition, as largely discussed above, is related only to criminal matters *strictu sensu*. Hence, a large degree of autonomy between administrative and criminal sanction shall be recognized. Anyhow, it may undisputedly occur that sanctions, which formally have an administrative vest under domestic law, end up having substantially a criminal nature, within the meaning of Art. 7 ECHR[133], in accordance with the qualification criteria laid down in the settled

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However, the Court's survey does not stop here. Such a scrutiny would be in general illusory if it did not take into account also the level of severity of the sanction that the accused is in danger of suffering. […] All deprivations of liberty which are applied as sanctions belong to the sphere of criminal law, with the exception of those which, by their nature, duration or duration or mode of execution are not significantly afflictive. »

[132] F. PALAZZO, *op. cit.*, consequently, states that: "Hence, a charge is considered as having "criminal" character only in relation to the punitive, repressive and deterrent connotation, which are typical features of criminal sanctions, of the penalty. In short, the idea of *"matière pénale"* is not even thinkable, except in reference to the criminal sanction. This, after all, confirms the obvious axiom that the criminal dimension of liability is not given «by the object, but by the way of protection»".

[133] *Guide on Article 7 of the European Convention on Human Rights: No punishment without law: the principle that only the law can define a crime and prescribe a penalty*, Updated on 31 August 2019 in https://www.echr.coe.int : "Article 7.1 of the Convention – *No punishment without law* (*Nullum crimen nulla poena sine praevia lege poenali*): «No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed».

case-law of the ECtHR, since the Engel judgement of 9 June 1976. The issue of the cumulative application of both administrative and criminal sanctions for the same offence, which is at the heart of a massive body of ECtHR's jurisprudence, first and foremost starting from the *Grande Stevens* incident, will be under survey in Chapter III.

At this stage, it ought to be just remembered that the Court of Strasbourg, in several occasions, for the purposes of the application of the guarantee of due process anchored in Art. 6 ECHR, had labelled as «substantially criminal» sanctions which are formally qualified as administrative in the domestic legal system of the Contracting State, since the Court ascertained the presence of at least one of the three Engel criteria, that entail the requalification of the legal nature of a sanction.[134] Furthermore, it must be observed that the attraction of an administrative sanction in the field of criminal matters, by virtue of the *Engel* criteria, carries with it only the guarantees provided for by the relative provisions of the Convention. Nevertheless, the definition of the range of application of further additional protections foreseen by national law remains within the margin of appreciation enjoyed by each adhering

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Regarding the concept of "criminal offence" ("*infraction*" in the French version), the Guide states that it has an autonomous meaning, like "criminal charge" in Article 6 of the Convention. The three criteria set out in the case of *Engel and Others v. the Netherlands*, as more recently reaffirmed in *Jussila v. Finland*, for assessing whether a charge is "criminal" within the meaning of Article 6 must *also* be applied to Article 7 (*Brown v. the United Kingdom* , *Société Oxygène Plus v. France*, *Žaja v. Croatia*): classification in domestic law, the very nature of the offence (it is the most important criterion, see *Jussila v. Finland)* and the degree of severity of the penalty that the person concerned risks incurring." Besides, concerning the notion of "penalty", the Guide at hand entails some general consideration upon it: "the concept of "penalty" set out in Article 7 § 1 of the Convention is also autonomous in scope *G.I.E.M. S.R.L. and Others v. Italy*. In order to ensure the efficacy of the protection secured under this article, the Court must be free to go beyond appearances and autonomously assess whether a specific measure is, substantively, a "penalty" within the meaning of Article 7 § 1. The starting point for any assessment of the existence of a "penalty" is to ascertain whether the measure in question was ordered following a conviction for a "criminal offence". However, that criterion is only one of the relevant criteria; the lack of such a conviction by the criminal courts is not sufficient to rule out the existence of a "penalty" within the meaning of Article 7, as stated in *G.I.E.M. S.R.L. and Others v. Italy.* Indeed, other factors may be deemed relevant in this respect: the nature and aim of the measure in question (particularly its punitive aim), its classification under domestic law, the procedures linked to its adoption and execution and its severity […]. However, the severity of the measure is not decisive in itself, because many non-criminal measures of a preventive nature can have a substantial impact on the person concerned […]. For instance, the specific conditions of execution of the measure in question may be relevant in particular for the nature and purpose, and also for the severity of that measure and thus for the assessment of whether or not the measure is to be classified as a penalty for the purposes of Article 7 § 1".

[134] *Ziliberberg v. Moldavia. ECtHR 1 February 2005; moreover, Engel and Others v. Netherlands*, ECtHR 8 June 1976, and *Öztürk v. Germany*, ECtHR 21 February 1984.

State.[135] In any case, this corresponds to the nature of the European Convention which set out a legal system aimed at guaranteeing a common minimum threshold of protection, in a subsidiary function with respect to the guarantees established by the national Constitutions of Contracting states. For this reason, if a penalty, being expression of the punitive power of a State, even though it represents an administrative sanction, eventually grants a higher degree of protection as compared to the one offered by a conventional provision, then the *Engel* criteria will do not apply, but rather the own criteria of national legislations will come into play. [136]

From this point of view, the ECtHR highlighted that the principle of *ne bis in idem* also operates with reference to punishments conceived in a substantial sense and not only in their formal acceptation, except, obviously, for the cases in which the national legal system expressly provides different indications – namely, wherever a domestic legal system uses its own criteria or national standards of protection for the fundamental *ne bis in idem* right.

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[135] *Engel and Others v. Netherlands*, ECtHR 8 June 1976. The Court dictates: «The Convention undoubtedly allows States, in the exercise of their functions of guardians of the public interest, in order to maintain or establish a distinction between the criminal law and disciplinary law, and to determine the relevant boundary, but only on certain conditions. The Convention leaves the States free to designate as a criminal offence an act or omission which does not constitute a normal exercise of any of the rights conferred by itself. […] This choice, which has the effect of rendering Articles 6 and 7 applicable, it is not, in principle, subject to the Court's ». In any event, the Court also points out that « […] the opposite choice is subject to more stringent limits. If Contracting States were allowed to classify an offence at their discretion as a disciplinary offence, instead of criminal, or to prosecute the perpetrator of a mixed criminal offence on a disciplinary ground, instead of the criminal one, the applicability of fundamental provisions such as the following Articles 6 and 7 would be subject to their sovereign will. Such a broad possibility of choice would be incompatible with the objectives and content of the Convention. The Court therefore has jurisdiction, in accordance with Articles 6, 17 and 18, to determine whether the disciplinary matter doesn't actually invade the criminal sphere. In short, the autonomy of the concept of criminal operates in a one-way only [...]». Besides, specific attention shall be regarded to the evaluation of the seriousness of the offence. On such perspective The Court of Strasburg in *Öztürk v. German* states as follows: «The fact that a minor offence that is very unlikely to damage the reputation of the author does not place itself outside the scope of application of art. 6. In fact, there is nothing to suggest that the concept of criminal offence of which the Convention speaks necessarily implies some degree of seriousness or intensity[...]. Moreover, it would be contrary to the object and purpose of Article 6, which protects the right to a fair court and trial of "anyone who is subject to criminal prosecution", if the State would be permitted to remove a whole category of offences solely on the ground that they are classified as minors.».

[136] V. CITRARO *Il giudicato sulla sanzione amministrativa sostanzialmente penale dichiarata incostituzionale* in https://deiurecriminalibus.altervista.org.

This is the case, for instance, of the Italian criminal legal system, which is mainly structured on the principle of formal legality under Article 25 of the Italian Constitution[137], which represents one of the hard core and irremovable constitutional principles, that may trigger the implementation of the so-called "*teoria dei controlimiti*", which consists in the application of Italian constitutional standards of fundamental rights protection that do not give way to the application of those standards established under EU or ECHR law.[138]

In a nutshell, the innovative breadth of ECHR jurisprudence is not limited only on merely imposing a substantive perspective, capable of attracting to the criminal law field all afflictive sanctions (or sanctions that are more similar to the "penalistic" paradigm), regardless of whatever their legal label effectively is. In reality – and here lies perhaps one of the aspects which are less understood today and at the same time more innovative – the Convention also requires national courts to implement a new and much broader (and substantial) concept of sanction able to ensure full and vast protection for citizens.[139]

According to a rule already made explicit in the *Engel* case – where the character bluntly disciplinary of the sanction was contrary to a traditional concept of criminal law –, a measure must be appreciated as criminal even in the case that it is featured by a non-punitive content and purpose in strict sense, but, for example, by a restorative aim or by a goal of concrete care of public interest (as precisely as administrative sanctions). The gravitation of the sanction around the criminal sphere does occur only when the precondition of the significant seriousness of an offence, intended in terms of actual damage of a legal interest safeguarded by legal regulations, is truly met.

A conclusion seems to be certain: the criminal sanction such as conceived by the Court may possibly lack of a directly punitive character, since the element of the severity of harmful legal consequences suffered by the perpetrator of the

[137] Art. 25 of the Italian Constitution: « No one may be diverted from the court of origin established by law. No one may be punished except by a law which has entered into force before the event of the commission of the fact. No one may be subject to security measures except in the cases provided for by law ».
[138] F. MINISCALCO *Ne bis in idem: i recenti approdi giurisprudenziali* http://www.salvisjuribus.it 23.02.2018.
[139] F. MINISCALCO, *op.cit.*

unlawful conduct might be *per se* sufficient for converging into a criminal qualification. In other words, a measure taken by the public authorities is a criminal sanction under the ECHR even if it is devoid of all the main substantive characters traditionally attributed to the latter (in particular, the afflictive and deterrent purpose), since it suffices the satisfaction of the alternative criteria of the gravity of the *malum* inflicted as a result of an ascertained disruption of the legal order[140]. It is curious that the seriousness of the potential injury suffered by the author of illicit behaviours appears also in the North American judicial experience as one of the main criteria of identification of administrative procedures that demand guarantees of fair trial, typical of criminal proceedings: the Supreme Court of the United States of America in 1970, in the *Goldberg v. Kelley* case, affirmed, right before the *Engel* decision, that «the extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be condemned to suffer grievous loss».[141] The Court here opted for an extensive interpretation of the due process clause enshrined in the fifth and fourteenth Amendment of the United States Constitution by expanding and furthering the benefit in question also to administrative proceedings.[142]

In the end, it is easy to understand how the European Courts are not concerned with outlining a particularly rigorous notion of criminal sanction, whose conceptual borders remain wooly: at any rate, the administrative sanctions – whether or not they fall within the scope of *"matière pénale"* – would still require

[140] For a clear valorisation of the element of gravity because in theory more consistent with the ratio of the distinction, in art. 6 ECHR, between civil and criminal matters, see C. FOCARELLI, *Equo processo e Convenzione europea dei diritti dell'uomo. Contributo alla determinazione dell'ambito di applicazione dell'art. 6 della Convenzione*, Padova, 2001, p. 320 ff. The gravity profile prevails in the concrete development of ECHR jurisprudence also according to G. DE VERO, *La giurisprudenza della Corte di Strasburgo, in Delitti e pene nella giurisprudenza delle Corti europee*, a cura di G. DE VERO and G. PANEBIANCO, Torino, 2007, p. 11 ff.
Furthermore, the selection of the alternative criteria of the gravity (or seriousness) of the detrimental consequence deriving from the offence does not appear to be isolated: the Supreme Court of Canada in 1987 *Wigglesworth* case, also retained that a pecuniary sanction pecuniary not formally criminal but of substantially criminal gravity (likewise to *Engel* also in this case, a disciplinary sanction imposed on a member of armed corps) should be assisted by criminal guarantees, being the criteria of the criminal "nature" of the penalty certainly alternative to the criteria of the gravity (or seriousness) of the same penalty.

[141] *Goldberg v. Kelley*, 397 US 254, 263, Supreme Court of the United States, 23 March 1970.

[142] Nobody shall be « […] deprived of life, liberty, or property, without due process of law».

guarantees similar to the ones the criminal penalties reclaim.[143] Nevertheless, the mechanism of equalization of criminal sanctions, in the narrowest sense, to "substantially criminal" sanctions, as structured by the ECtHR, has demonstrated to be a viable expedient capable of filling and plugging, at least temporarily, loopholes and gaps in the due process protection regime within the European legal framework.

3.2. Follows: The subjective and temporal scope of application of the guarantee. The principle of finality.

With regards to the temporal scope of application of *ne bis in idem*, the principle has not generated many interpretative doubts for the two European Courts in their respective case law. The leading criterion in outlining the temporal scope of the guarantee is given by the chronological collocation of the second trial. As a matter of fact, the CJEU in ruling upon the *Van Esbroeck* case held that if the first conviction occurred before the entry into force of the Schengen Agreements in that Member States, Article 54 CISA will still apply, insofar as the CISA was in force in the Member State in question by the time the second prosecution had been initiated against the same defendant and in relation to the same facts. For a better comprehension of the temporal criterion theorized by the Court, it can be considered

[143] F. GOSIS, *op.cit*, analyses in details the problem of the compatibility of the criminal qualification of sanction and the concrete achievement of public interests. "The judges of Strasbourg has confirmed on multiple times the logical and juridical compatibility between afflictive-deterrent purposes of a penalty and, instead, purposes of care and restoration of the public interest: especially with regard to the confiscation of criminal assets, the Court expressed the view that the concept of criminal sanction under ECHR well tolerates such coexistence of different legal aims". In effect, care of the public interest can not only mean its preventive protection *(ex ante*), but also direct restoration of an injury already suffered (*ex post*). This conceptual amplitude has been clear since the 1995 *Welch* judgment, where ECtHR states that «Indeed, the purposes of prevention and restoration are compatible with a punitive purpose and can be seen as constituting elements of the very concept of penalty».
The author also sets out that such acknowledgement can be also retrieved in ECJ's *Menci* decision: « a penalty featured by repressive purposes has a criminal nature within the meaning of Article 50 of the Charter [...] the only circumstance that it also pursues a preventive aim is not such as to preclude its classification as a criminal sanction. In fact [...], it is inherent in the very nature of criminal sanctions, which tend to the repression as much as to the prevention of unlawful conducts. On the other hand, a measure that is limited to compensating the damage caused by the infringement in question is not characterized by a criminal nature». In substance, it may be concluded that the first among the substantive criteria established since the Engel case (so, the punitive character of the sanction) does not conflict with realistically restorative prospects.

useful to examine the concrete elements of the case and the consequent assumptions made by the Luxembourg judicial board.

In the case at hand, Van Esbroeck was sentenced by a Norwegian court with the custodial sentence whose duration was five years of imprisonment, with the accusation of having illegally imported narcotic drugs into the Norwegian national territory. After serving part of his sentence, the release was granted to the benefits of the convicted, who was also escorted back to Belgium. Here, not so late from his return in his homeland, a new set of proceedings were brought against Van Esbroeck, the result of which consisted in a second conviction to one year's prison term on the ground of the correspondent charge of illegally exporting narcotic drugs out of the Belgium's territory. The judgement was challenge before a Belgian Appeal Court and also upheld before the Supreme Court, by pleading the violation of the defendant's *ne bis in idem* right granted by Article 54 CISA.[144]

The primary question that the Court had to solve with regard to the preliminary reference brought before its attention was whether the preclusive effect of the guarantee enshrined in Article 54 CISA are produced also towards criminal proceedings initiated in a Member State against an individual, whose illicit conduct had already been punished in a different Member State, despite the fact the Schengen Agreements were not yet in force within the legal order of that country at the time of the first conviction of that same subject.[145]

The response delivered by the Court consisted in confirming the application of Article 54 CISA, provided that the Convention was in force in Belgium at the time of the verification of the conditions for the operability of the *ne bis in idem* right carried out by the Belgian court, before which the second proceedings were instituted. The ECJ deployed its reasoning by arguing - respectively, in paragraphs 20 and 21 of the judgement - that Schengen *acquis* does not envisage any *ad hoc* provision specifying the effects in time of the guarantee from Article 54 CISA or the extent covered by the its temporal scope and, besides, that the barring effect of the provision at hand can be brought about only in the case where criminal

[144] See ECJ, Judgment of 9th March 2006, Case C-436/04, *Van Esbroeck*, ECLI:EU:C:2005:630.
[145] Case C-436/04, *Van Esbroeck*, as commented *in The Principle of Ne Bis in Idem in Criminal Matters in the Case Law of the Court of Justice of the European Union* in www.eurojust.europa.eu/doclibrary/Eurojust-framework/caselawanalysis (September 2017).

proceedings are instituted for a second time against the same defendant in another Member State.[146]Basically, the ECtHR reiterated the same interpretative in its ruling upon the *Gradinger* case by declaring that the ban on double punishment from Article 4 of Protocol no. 7 operates on the condition that the second trial is terminated after the date of the entry into force of Additional Protocol 7 to the Convention.[147]

Concerning the subjective scope of application of the *ne bis in idem* right, the CJEU by virtue of the *Gasparini* ruling – which is recorded as the sole case until now brought before either European Court questioning the issue – set out a response to the dilemma of who can benefit from the foreclosure effect of the prohibition of double jeopardy (provided that natural persons are involved).[148] The court declared that the guarantee from Article 54 does not apply in favour of persons other than those who were effectively under trial and had been disposed of by a judgement become final within a Member State. Accordingly, the preclusion is not extended towards those who were merely subjected to investigative procedure performed by judicial authorities of that Member State or that escaped their attention.[149]

Furthermore, the Court of Justice in the *Orsi and Baldetti* judgement, dealing with an interpretative doubt aroused by an Italian judicial authority with regards to the compliance with Article 50 EUCFR of the domestic provision allowing the cumulation of criminal and tax penalties for the same conduct - namely, a VAT non-payment -, specified on paragraph 17 that the Charter's *ne bis in idem* assumes that «it is the same person who is the subject of the penalties or

[146] ECJ, Judgment of 9th March 2006, Case C-436/04, *Van Esbroeck*, ECLI:EU:C:2005:630, paras. 20-21.
[147] *Gradinger v. Austria*, ECtHR 23 October 1995, appl. No. 15963/90 as commented by B. VAN BOCKEL, op. cit., p. 43 where the author highlights a slight difference between the interpretative approach of the two European Courts on the issue: "A minor difference appears to be that in Van Esbroeck, the CJEU appears take into account the time at which the second proceedings *where brought*, whereas in *Gradinger* the ECtHR held that Article 4 of Protocol no. 7 ECHR applied if the second proceedings *reached their conclusion* after the date of entry into force of that provision."
[148] B. VAN BOCKEL, op. cit., p. 43.
[149] B. VAN BOCKEL, op. cit., p. 43.; see also *The Principle of Ne Bis in Idem in Criminal Matters in the Case Law of the Court of Justice of the European Union* in www.eurojust.europa.eu/doclibrary/Eurojust-framework/caselawanalysis (September 2017) on the ruling in Case C-467/04, *Gasparini and Others*, ECLI:EU:C:2006:610.

criminal proceedings at issue».[150] The Court noted that the tax sanction was imposed on two companies featured with legal personality, whilst the two defendant were natural persons. Thus, the combined criminal and tax penalties were addressed to two distinct persons – intended, respectively, as a "legal" and a "physical" entity. Accordingly, it was inescapable that the Court proclaimed the non-fulfilment of the requirement for the application of the prohibition of a *bis in idem*, namely the condition demanding that who must subjected to penalties and criminal proceedings must be the same – "natural" - person. [151] To put it into a different wording, the *ne bis in idem* principle does not apply whenever the administrative (in this case fiscal) penalties are levied on a company and the criminal trial has been fostered against a "natural" subject, even in the case where the latter acts as the legal representative of the former. Moreover, in the judgement it is stressed the profile of the irrelevance of the fact that Mr. Orsi and Mr. Baldetti acted - in an illicit fashion - in the vest of legal representatives of the companies receiver of tax sanctions, since for the purposes of the operability of the safeguard granted by *ne bis in idem* the Court clearly dugs its heels over the issue.[152]

Now, the focus of this study should be shifted on the requirement of "finality", which is essential for the operability of the *ne bis in idem* principle. This condition has been subject of numerous litigations within the jurisprudence of the European Courts and for the purposes of the thesis at hand it should be review the relevant rulings concerning the commonly known "principle of finality".

First of all, a necessary premise ought to be made: not all judicial decisions can trigger the foreclosure effect of *ne bis in idem*. As a matter of fact, some judgements are not strictly prodromal to definitively settle a controversy brought before a court but are aimed at serving a distinct legal end. The ECtHR in

[150] ECJ, Judgement 5 April 2017, Case C-217/15 "*Orsi and Baldetti*", ECLI:EU:C:2017:264, para 17: « The application of the *ne bis in idem* principle guaranteed in Article 50 of the Charter presupposes in the first place, as the Advocate General stated in point 32 of his Opinion, that it is the same person who is the subject of the penalties or criminal proceedings at issue.»

[151] ECJ, Judgement 5 April 2017, Case C-217/15 "*Orsi and Baldetti*", ECLI:EU:C:2017:264, paras. 21-22.

[152] ECJ, Judgement 5 April 2017, Case C-217/15 "*Orsi and Baldetti*", ECLI:EU:C:2017:264, para. 23 states that: « In that regard, the fact that criminal proceedings have been brought against Mr Orsi and Mr Baldetti in respect of acts or omissions committed in their capacity as legal representatives of companies which were subject to tax penalties is not capable of calling into question the conclusion reached in the previous paragraph ».

Zolotukhin clarified that a judgement can be considered as "final" insofar as - according to the traditional conception of the topic – it has acquired the value of "res judicata". This legal effect is produced when the judicial decision has become irrevocable, meaning that it cannot be challenged any more by any further ordinary remedy, available under national law, or in the case where the parties have exhausted such remedies or have permitted the time-limit to expire without availing themselves of them.[153]

Moreover, the sentences against which an ordinary appeal can still be presented before a national court are, consequently, excluded from the scope of application of the *ne bis in idem* guarantee. Whereas, extraordinary remedies are not taken into consideration in the evaluation of whether or not proceedings have reached a final conclusion.[154]

It is also important to underline that the ban from Article 4 does not preclude the re-opening of the proceedings on the same case, if the trial shall be resumed due to the "evidence of new or newly discovered facts", as clearly indicated by the second paragraph of the conventional provision itself.[155]

In the *M*. judgement, the ECJ mirrored the statement provided by the ECtHR case law and further elaborated that the possibility under national law of resuming

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[153] This has been clearly stated by the Court in *Zolotukhin v. Russia*, ECtHR (GC), 10 February 2009, appl. No. 1493/03, paras. 107-108 « The Court reiterates that the aim of Article 4 of Protocol No. 7 is to prohibit the repetition of criminal proceedings that have been concluded by a "final" decision […]. According to the Explanatory Report to Protocol No. 7, which itself refers back to the European Convention on the International Validity of Criminal Judgments, a "decision is final 'if, according to the traditional expression, it has acquired the force of res judicata. This is the case when it is irrevocable, that is to say when no further ordinary remedies are available or when the parties have exhausted such remedies or have permitted the time-limit to expire without availing themselves of them'"[…].Decisions against which an ordinary appeal lies are excluded from the scope of the guarantee contained in Article 4 of Protocol No. 7 as long as the time-limit for lodging such an appeal has not expired ». On the point, the same considerations were made by the CJEU in ECJ, Judgement 5 June 2014, Case C-398/12 – "*M.*", ECLI:EU:C:2014:1057.

[154] *Zolotukhin v. Russia*, ECtHR (GC), 10 February 2009, appl. No. 1493/03, para. 108 on the point states that:« On the other hand, extraordinary remedies such as a request for the reopening of the proceedings or an application for extension of the expired time-limit are not taken into account for the purposes of determining whether the proceedings have reached a final conclusion. Although these remedies represent a continuation of the first set of proceedings, the "final" nature of the decision does not depend on their being used ».

[155] *Zolotukhin v. Russia*, ECtHR (GC), 10 February 2009, appl. No. 1493/03, para. 108, finally dictates that « it is important to point out that Article 4 of Protocol No. 7 does not preclude the reopening of the proceedings, as stated clearly by the second paragraph of Article 4 ».

the investigative action, whether the new evidenced has been rendered available, does not hinder the previous decision from bringing objections towards the value of a "final" ruling.[156] Besides, a crucial step in the ascertainment of the fulfilment of the "finality requirement" is represented by the evaluation of whether the ruling definitively bars further prosecutions under the domestic law of the European State where the first set of criminal proceedings were instituted.

In *Kossowski*, the Court of Justice held that the final character of a decision shall be assessed on the grounds of the internal legislation of the State under whose jurisdiction the ruling at stake was delivered.[157] In this last judgement the Court specified that the event where the questioned judgement was enacted by a mere prosecuting authority or whether no penalty at all was inflicted - as the outcome of the sanctioning procedure - are not relevant in the light of the assessment of the preclusive force of the judgement at stake, since these two factors do not constitute indicators of the fulfilment of the finality condition.

For the purposes of the foregoing assessment, any national prosecuting authority is entitled to demand and obtain any kind of legal information regarding the final value of the contested decision from the national court of the Member State that issued that sentence. Indeed, mutual trust between European jurisdictions necessitates the cooperation among domestic authorities, precisely in the form of the Member State that "comes for second" in ruling upon the case shall accept the legal value of a decision already become final in another Member State.[158] Always in the *Kossowski* ruling, the Court pointed out that the evaluation of the factual circumstances of the case set out by a national tribunal in a first trial can always be challenged, by pleading its incompatibility with the general objectives crystallized in the founding Treaties of the Union and also with the finalities of Article 54 CISA, which was drafted with the intent of promoting crime prevention within the Area of Freedom, Security and Justice (AFSJ) and, additionally, ensuring a safe

[156] ECJ, Judgement 5 June 2014, Case C-398/12 – "*M.*", ECLI:EU:C:2014:1057 as commented in *The Principle of Ne Bis in Idem in Criminal Matters in the Case Law of the Court of Justice of the European Union* in www.eurojust.europa.eu/doclibrary/Eurojust-framework/caselawanalysis (September 2017).
[157] ECJ, Judgment 29 June 2016, Case C-486/14 – "Kossowski", ECLI:EU:C:2016:483.
[158] ECJ, Judgment 29 June 2016, Case C-486/14 – "Kossowski", ECLI:EU:C:2016:483, para. 51.

environment where European citizens are enabled of exercising their free movement rights.

Lastly, the conclusive point driven home by the Court in its reasoning on the *Kossowski* case concerns another symptomatic element of the "final" nature of a judicial decision capable of standing in the way of further prosecutions: namely, the adequate determination of the case with regard to its merits, which mandatorily requires that due investigations were undertaken by prosecuting authorities with the purpose of gathering detailed evidence, upon which the decision - whose *res judicata* force is disputed – was taken.[159] In addition to this, it is noted that the condition is not met whether, during the investigation procedure, it had not been possible to proceed with the interview of neither the victim nor the potential witnesses - or even neither the accused person- , in order to certify the validity of their statements.

The Court firmly stresses this profile and depicts how the mutual judicial recognition mechanism outlined in Article 82 TFEU, can function only under the circumstance that the second ruling State, on the basis of the documents provided by the prosecuting authorities of the first Member State, verifies that the decision on the case issued by the competent judicial authority of the latter constitutes an ultimate appraisal on the illicit conduct committed by the same defendant, provided that the first decision entails a complete determination as to the merits of the criminal charge.[160]

[159] Particularly, the Court reckoned that the application of Article 54 CISA demands that the first decision was given "after a determination has been made as to the merits of the case". Consequently, in light of the purpose of Article 54 CISA, as analysed in conjunction with the objective Article 3(2) TEU, this requirement is not fulfilled whether the prosecuting authority did not "undertake a more detailed investigation for the purpose of gathering and examining evidence". Moreover, the condition is not met whether the "prosecuting authority does not proceeds with the prosecution solely because the accused refuses to give a statement" or whether "it had not been possible to interview both the victim and the accused in the course of the investigation and therefore not been possible to very the statements made by [them]".

[160] ECJ, Judgment 29 June 2016, Case C-486/14 – "Kossowski", ECLI:EU:C:2016:483, para. 52.

3.3. The identity of the facts: the notion of "*idem factum*".

As illustrated in the previous sections, the assurance of the compliance with *ne bis in idem* principle at national level is based on a formal legality approach. For instance, within the Italian legal order, the safeguard of the individual, aimed at avoiding the submission to more criminal proceedings for the same fact, is strongly anchored to the principle of legality pursuant to Article 25 of the Italian Constitution and to the conception that the *ne bis in idem* guarantee must exclusively focus on criminal proceedings and penalties.[161]

On the contrary, on both EU and conventional level, the *ne bis in idem* is interpreted by their respective Courts in a different perspective, characterized by a conception of substantial legality, and therefore under a broader acceptation. In this regard, we must anticipate by now that the notion of substantial punishment was firstly theorized by the ECtHR in several fundamental cases submitted to is attention, concerning the cumulative imposition of formally administrative sanctions, issued by specific independent administrative authorities, and criminal sanctions. Indeed, it has been widely acknowledged over time, since the *Grande Stevens* judgement, that the ECtHR has the tendency to qualify, as a substantial penalty, the sanctions imposed by some independent administrative authorities which, albeit formally, the national legal system included in the category of administrative sanctions.

Particularly, the Court, approaching the *Grande Stevens* controversy, equated them to criminal law sanctions as intended in strict sense and, on multiple occasions, detected in the forthcoming cases brought under its jurisdiction the existence of double substantial criminal punishment's instances.

However, this is a topic that will be object of due examinations in the following Chapters of the thesis at hand.

Once established the fact that within the European legal framework, as deeply analysed in the preceding sections, actually different layers and patterns of

[161] Art. 25 of the Italian Constitution: « No one may be diverted from the court of origin established by law. No one may be punished except by a law which has entered into force before the event of the commission of the fact. No one may be subject to security measures except in the cases provided for by law ».

legal protection of the *ne bis in idem* principle co-exist – thus, a more "formal" safeguard ensured by national legal systems and a more "substantive" one theorized by both the ECtHR and ECJ jurisprudence – it ought to be noted that, given the necessary involvement of national and European Courts, it is possible to enucleate both national and supranational jurisprudential approaches that sometimes converge and sometimes diverge on the definition of the requirements for the application of the *ne bis in idem* guarantee.

The national and European case-law debate on the *ne bis in idem* principle has historically focused on two crucial aspects: the concept of "criminal matters" (*"matière pénale", see Supra)* and the interpretation of the term "same fact" (*"idem factum")*, concerning the prohibition of a second criminal trial. With regard to the *"matière pénale"* profile, in addition to what already widely stated in Paragraph 3.1, it should be pointed out that the CJEU and the ECtHR have implemented a very ample concept of "criminal matters", highlighting how, in addition to formal penalties, which represent the cornerstone of criminal law in each national system, due consideration must also be given to those penalties as conceived in the substantive sense: therefore, those penalties which, although not formally qualified as criminal, effectively have a substantially afflictive, punitive and deterrent content, due to the particular nature of the violation or to the imprisonment or semi-detention measures adopted in practice.[162]

In relation to the interpretation of the "same fact", by taking as a common benchmark the Italian criminal system, it is in necessary to mention that the *ne bis in idem* principle is established in Italy under Article 649 of the Italian Code of Criminal Procedure[163]: it dictates that the individual who has been already accused, acquitted or convicted with a final sentence, which has become irrevocable, cannot again be subjected again to criminal proceedings for the same fact, with the

[162] On this point, the Court of Justice held that, also with regard to such substantive penalties, the principles of due process laid down in Article 6 of the ECHR must be respected and the guarantees of a fair trial must be significantly expanded.

[163] Article 649 of the Italian Code of Criminal Procedure: « The defendant acquitted or sentenced by a sentence or criminal decree that has become irrevocable may not be subject to criminal proceedings again for the same fact, not even if this is considered otherwise in terms of title, rank or circumstances, without prejudice to the provisions of articles 69 paragraph 2 and 345. If, despite this, criminal proceedings are reopened, the judge in every state and level of the trial pronounces a sentence of acquittal or no further proceedings, stating the case in the operative part».

clarification that such prohibition operates also in the case where the same fact is considered differently in respect of the title, for the degree or for the circumstances of the alleged criminal offence.

The jurisprudential orientation, both Italian and European, in several successive decisions over the years has been committed with tracing the correct hermeneutical coordinates about the meaning to be attributed to the idem factum.

On this point, unlike what has concerned the meaning attributed to *"matière pénale",* there is a unanimous agreement on the concept of "same fact".

Indeed, the majority Italian jurisprudential approach and the ECtHR case law are on the same wavelength in affirming that, the foreclosure (or inhibiting) effect of the *ne bis in idem* operates in relation to the «historical nucleus» (or «core») of the fact. In other words, what is definitively relevant is the identity between the cases taken into consideration in the different judgements, from the point of view of the conduct (active or omissive) and, in the case of offences considered as material, from the physical object on which the conduct fell; thereby, it is not necessary to have a full correspondence of all the constituent elements of the abstract criminal offence, as envisaged under the provision, in order to be able to consider one fact as "the same" with respect to another fact already subject of judgement.[164]

However, before reaching this conclusion it is necessary not to omit the analysis of some fundamental passages - in doctrine and in jurisprudence - which have contributed to rendering the element of *idem* perhaps the most debated topic and aspect related to the *ne bis in idem right* in recent years. In particular, it is necessary to review the inevitable influence that the two European Courts have exercised in the definition of the identity of facts and the judicial dialogue established between the Italian and the European Courts on this issue.

In fact, in Italy there have been two major interpretative approaches towards the *idem* concept among the Italian legal thought: on the one hand, the doctrine that, by welcoming an interpretation more inclined towards the protection of the

[164] G. CONSO, V. GREVI, M. BARGIS *Compendio di procedura penale*, ottava edizione, p. 956. Here the author sets the example that a new trial for intentional or aforethought homicide cannot be instituted against the person already acquitted of the charge of unwilful homicide.

individual, argued that in order to ascertain the meaning of i*dem*[165], it is necessary to take into account only the conduct under judicial prosecution.

On the other hand, the Italian judicial case law conversely gives priority to the requirements of substantive justice and assesses the identity of the fact only in those cases when there is historical-naturalistic correspondence in the configuration of the crime, as considered in all its constituent elements abstractly delineated in the scheme of the criminal law provision. Accordingly, it is possible to detect the existence of an *idem*, not only when the sole conduct of the offences are corresponding, but also when but also the event, the causal link, the circumstances of time, place and person, in their legal dimension as well as historic, do correspond.[166]

Furthermore, it is necessary to retrieve the principles outlined by the ECtHR and the CJEU on the topic at stake, since they represent the main term of comparison used by the Italian Constitutional Court in 2016, when declaring the partial unconstitutionality of Article 649 of the Italian Code, regarding the part where it excludes that the fact is the same for the sole circumstance that there is a formal concurrence between the offence already judged by a judgment that has become final - thus, carrier of *res judicata* value by virtue of its irrevocability - and the crime for which the new set of criminal proceedings have been initiated.[167] This

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[165] P. P. RIVELLO *La nozione di "fatto" ai sensi dell'art.649 c.p.p. e le perduranti incertezze interpretative ricollegabili al principio del* ne bis in idem, in *Riv. it. dir. proc. pen.*, 2014, p. 1410 ff.

[166] On the point, it is seminal to recall the ruling delivered by the Italian *Corte di Cassazione*, *Sezioni Unite*, Judgment no. 34655, 28 June 2005, *Donati* case; see, M. BRANCACCIO, *Ne bis in idem, percorsi interpretativi e recenti approdi della giurisprudenza nazionale ed europea* (relaz. orientativa del Massimario Penale n. 26/17) in www.cortedicassazione.it, 2017, p. 17 ff.

[167] Italian Constitutional Court, Judgement of 21-07-2016, n. 200, as commented by da B. LAVARINI, *Il "fatto" ai fini del ne bis in idem tra legge italiana e Cedu: la Corte costituzionale alla ricerca di un difficile equilibrio, in Processo penale e giustizia*, 2017, p. 58 ff. Precisely, the Court in the ruling above stated as follows: « there is [...] no logical reason to conclude that the fact, although assumed in the sole empirical dimension, is limited to action or omission, and does not include, instead, also the physical object on which the gesture falls, if not also, at the extreme limit of the notion, the naturalistic event that resulted, i.e. the modification of reality induced by the behaviour of the agent ». As established in *Redazione (a cura di), Eternit: la Consulta dichiara l'illegittimità costituzionale dell'art. 649 c.p.p., ma il giudizio a quo può riprendere,* in *Giurisprudenza Penale Web*, 2016, 7-8, the inner content of the sentence of the Italian Constitutional Court – on the renowned *"Eternit"* case – registers a peculiar reading of the notion of "same facts" under cumulative proceedings: indeed, the acceptation of "historical fact" is not limited to the concept of "conduct", with the latter being a certain component of the former though. But, "historical fact is also the death of a person, it is also the injuries that he or she sustains, in the manner in which these injuries have actually occurred as a result of the conduct. Historical facts are

judgement made more and more evident the divergence between the interpretative approaches from the Italian courts and the European ones on the guarantee.

The ECtHR's orientations on the issue have been for a long time highly fluctuating and it is possible to spot three different judicial standpoints within its case law. The first is represented by the ruling in *Gradinger v. Austria,* relating a car accident caused by driving in a state of alcoholic intoxication that resulted in the murder of a person, in which the Strasbourg judging board recorded an infringement of the prohibition of double jeopardy from Article 4 Protocol no. 7 ECHR, since the decision of the administrative authority and the one issued by the Austrian criminal courts had as their object an identical conduct, in the sense of its "material" profile.[168] In this judgement, the ECtHR set out a peculiar outlook on the *idem factum* concept, based on the sheer identity of the conduct, giving no relevance at all to the reality that the normative rules applied in the case at hand had different purpose, nature and incriminating logic.[169]

The absence of a linear judicial path in ECtHR interpretative evolution is confirmed by a second ruling issued by the Court in the *Oliveira v. Switzerland*, concerning the violation of road traffic regulations too that caused health damage suffered by a driver.[170] In this case, the ECtHR, by reversing its foregoing ruling in *Gradinger*, held that there was not a breach of Article 4 Protocol No 7 ECHR, despite the fact that, like in *Gradinger*, the accused was sanctioned by an administrative sanction and then with a conviction by the criminal court, relating to the same conduct under allegation. In *Oliveira*, the *ne bis in idem* failed to successfully operate, according to the Court's reasoning, due to the fact that there were several offences committed by a single act, i.e. integrating a hypothesis of formally concurrent offences.[171]

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therefore the conduct, the event and the causal link, provided they are evaluated from an empirical and not legal point of view".

[168] *Gradinger v. Austria*, ECtHR 23 October 1995, appl. No. 15963/90.

[169] On the point See, R. CALÒ, *La dimensione costituzionale del divieto di doppio processo*, in *Giur. It*., 2016, p. 2240 ff.

[170] *Oliveira v. Switzerland*, ECtHR 29 May 2001, appl. no. 37950/97, as commented in B. VAN BOCKEL, *op. cit*., p. 47.

[171] Particularly, in the present case, the defendant had been sentenced to an administrative sanction by means of a judgment by a local administrative authority for not adjusting the speed of the vehicle to the conditions of snowy road, and subsequently sentenced by the criminal court for negligent injury. According to the ECtHR this hypothesis represented a "*concours idèal d'infractions".*

Hence, the institution of criminal proceedings in respect of one of the two alleged offences should not be considered precluded, even though the concurrent act had been already sanctioned by means of an administrative penalty. This ruling determined a real shift of direction compared to the preceding orientation deriving from *Grandiger* because, from now on, the element of the "historic" conduct is no longer relevant for the identification of the *idem factum*: solely the formal legal qualification of the illicit conduct represents the ground on which the judge shall assesses whether a fact is *idem* in respect of another.

The third position implemented by the Court and symbolizing the ensuing switch of view in its hermeneutical path is represented by the judgment *Franz Fischer v. Austria*, in which the ECtHR reiterated that that Article 4 Protocol No. 7 ECHR does not hinder the establishment of a plurality of trials in instances of formal concurrent crimes.[172] However, the ECtHR strongly highlighted at the same time the need to ascertain on a case-by-case basis whether such concurrency of crimes is genuine and effectively existing, or whether there is, in reality, a single offence that is differently legally named, but that on a substantial level represents the same offence already prosecuted in another trial, since it is characterized by the « same essential elements ».[173] On these findings, the Court states that in order to establish the identity or diversity of the fact subject to double proceedings it is not enough to assess whether the crimes for which the person has been prosecuted are nominally different (i.e. have a different formal normative qualification). Instead, what really requires to be verified is whether the two offences are connoted by the same essential elements.

The different hermeneutical approaches adopted by the ECtHR over the years regarding the contentious interpretative knot of *idem factum* manifested the need for an enlightening intervention by the Court. This necessity was fulfilled in

[172] *Franz Fischer v. Austria*, ECtHR 29 May 2001, appl. No. 37950/97.
[173] R. CALÒ, *La dimensione costituzionale del divieto di doppio processo*, in *Giur. It*., 2016, p. 2240 ff. The author comments the ECtHR's ruling in *Franz Fischer v. Austria*. In the case at hand the ECtHR, as noted by the author, being again requested to decide on a traffic murder case, opted to consider the subjection of the same person at two different prosecutions, being the first one related to the murder committed behind the wheel of his car and the second for drunk driving, constituting by itself an autonomous violation of the Italian Traffic Code, as integrating a an infringement of the prohibition of double jeopardy laid down in Article 4 of Protocol 7 to ECHR, inasmuch as the two trial have as object an *idem factum* characterised by the same essential elements.

2009 by the Grand Chamber's ruling in the *Zolotukhin v. Russia* case:[174] the Strasbourg court, with the purpose of identifying a common interpretative ground within the Convention framework on the *idem factum*'s debate, compared and reviewed its various preceding pronouncements. In that judgment, the Court, excluding the viability of its formalistic and regulatory approach theorized in *Oliveira* , since this latter orientation would have led to an excessive weakening of the preclusive effects produced by the *ne bis in idem* ban, claimed that the concept of *idem factum*, notwithstanding the wording of Article 4 Protocol 7, does not refer to the crime intended in its legal perspective, but on the contrary, it is necessary to take into consideration the naturalistic conception of the *factum*: this is what really activates the preclusion of a double punishment, whenever the criminal charges arise from the « same concrete circumstances relating to the same author and inextricably linked to each other in space and time » - as promptly specified in paragraph 84 of the judgement's draft.[175]

Accordingly, the ECtHR in *Zolotukhin* ultimately defined the scope and meaning of *the ne bis in idem* right, as envisaged under the Convention framework, extrapolating a "self-sufficient" and autonomous concept of *idem factum* which could serve as a "lantern" for national judges in assessing the existing identity between the facts object of dual proceedings. In this sense, the Court departed from its previous statements in both *Grandiger* - where it gave predominant relevance to the mere conduct in determining the identity of facts - and *Oliveira*- in which it stated, instead, that the sole formal normative qualification of the illicit conduct permits to identify the *idem factum* between two proceedings. Whereas, in the *Zolotukhin v. Russia* case the Court opted for aligning its reasoning with its interpretative approach in the *Franz Fischer* case, conferring more importance, in order to trigger the application of the *ne bis idem* guarantee, to the requirement of

[174] *Zolotukhin v. Russia*, ECtHR (GC), 10 February 2009, appl. No. 1493/03.

[175] See *Zolotukhin v. Russia*, ECtHR (GC), 10 February 2009, appl. No. 1493/03, para. 84: «The Court inquiry should therefore focus on those facts which constitute a set of concrete factual circumstances involving the same defendant and inextricably linked together in time and space, the existence of which must be demonstrated in order to secure a conviction or institute criminal proceedings». Moreover, it should be recalled the reading of para. 82 of the same judgement: « Accordingly, the Court takes the view that Article 4 of Protocol No. 7 must be understood as prohibiting the prosecution or trial of a second "offence" in so far as it arises from identical facts or facts which are substantially the same ».

the common characterization by the « same essential elements » of the two offences.[176]

It is essential to note that the Strasbourg ruling board no longer deviated from the interpretative standing established in *Zolotukhin*, which can be thereby deemed as the main guiding hermeneutical approach towards the heavily disputed notion of *idem factum*. The specification that the facts under survey in two different proceedings are identic and superimposable, in so far as the concrete circumstances defining the conduct are inextricably linked in time and space, confers to the historical-naturalistic notion of the fact a decisive role in outlining the concept of *idem factum*. The standpoint adopted by Strasbourg, since *Zolotukhin*, is perfectly specular to the view expressed on the matter by CJEU, which was over time requested to rule upon the of identity of facts too.[177] From my personal reading of the issue, it appears useful for the purposes of the paper at hand underlining that, also as according to the Court of Justice, the sole relevant criterion for the identification of an infringement of *ne bis in idem* principle is the requirement of the identity of material facts, i.e. the overlapping of concrete circumstances temporally and spatially connected to each other, with no relevance at all recognized to the formal legal qualification of the conducts under examination.[178]

As a matter of fact, the ECJ in *Van Esbroek* and *Van Straaten* judgements declared that the *idem factum* shall be understood in the following fashion: it indicates a historic conduct carried out in one single space and timeframe, but also

[176] R. CALÒ, *La dimensione costituzionale del divieto di doppio processo*, in *Giur. It.*, 2016, p. 2240 ff. in which the author points out how the Court of Strasbourg with the *Zolotukhin* judgment wanted to resolve the internal conflict in its case law and define the concept of *idem factum*.

[177] See R. CALÒ, *op. cit.*, who highlights that the approach followed by the ECtHR in *Zolotukhin* was indispensable in creating a bridge between the national *ne bis in idem* and the supranational *ne bis in idem*, as envisaged under by Article 54 CISA, thus overcoming the void of legal safeguard which has been generated as a result of the rulings of ECJ. Hence, for the author, the foreign *res judicata* has been attributed a wider foreclosure effect than the one recognized to a random national judgment. This aspect has also enhanced the supranational force and value of *ne bis in idem* preclusion.

[178] ECJ, Judgment of 9th March 2006, Case C-436/04, *Van Esbroeck*, ECLI:EU:C:2005:630, as commented by P. PIANTAVIGNA, *Il divieto di "cumulo" dei procedimenti tributario e penale*, in *Rivista di Diritto finanziario e Scienza delle finanze*, 2015, p. 46 ff. The author reckons that the ECJ has implemented the same ECtHR judicial standing in *Zolotukhin* by affirming that a breach of the *ne bis in idem* right exists wherever the facts under dual proceedings are substantially identical, regarded obviously in their "historic and naturalistic" acceptation.

characterized by a single intent. [179] Moreover, such temporal, spatial and psychological elements must be inextricably linked together in order to permit the ascertainment of identical facts.

This guideline was first elaborated *in Van Esbroek* and, then reiterated in *Van Straaten*. In the latter case, the Advocate General Colomer in its Opinion on the controversy claimed that the objective element of *idem* thus refers both to the relevant spatial and temporal frame where the facts *sub judice* effectively took place as well as to the intentions of the author of the offence. [180] Therefore, it may appear that the facts have to be necessarily identical, due to the fact that the objective action would remain the same, despite the identities and the quantities of the accomplices changed.[181] The Court of Justice, by following the AG's Opinion on the case, regarding to the application of the *ne bis in Idem* principle, established as an international standard under Article 54 CISA, that the provision at hand refers only to the intrinsic historical nature of the facts and in no manner to their formal legal classification.

The CJEU's statement is confirmed by the nature of Article 54 CISA itself, conceived as a fundamental right and considering its aims and purposes under the Schengen *acquis*. Consequently, it is possible to affirm that the CJEU as well as the ECtHR reckons that the main question in relation to the *idem factum* contentious debate is whether it is possible to asses that the concrete circumstances of a case represent a set of acts that are inextricably linked together.[182]

Going backward to the Italian judicial thinking on the *idem factum* issue, we should recall that the Italian *Corte di Cassazione* in the well-known *Donati* judgment has assimilated and implemented the ECtHR interpretative guidelines - greeted, in their turn, by the CJEU case law - on the determination of a procedural situation connoted by identical facts.[183] Indeed, also the Italian Supreme Court

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[179] ECJ, Judgment of 28 September 2006, Case C-150/05 *Jean Leon Van Straaten v Staatder Nederlanden and Republiek Italië*, EU:C:2006:614.
[180] Opinion of Advocate General Ruiz-Jarabo Colomer in *Van Straaten* delivered on 8 June 2006, I-9331.
[181] B. VAN BOCKEL, *op.cit.*, p. 50.
[182]ECJ, Judgment of 28 September 2006, Case C-150/05 *Jean Leon Van Straaten v Staatder Nederlanden and Republiek Italië*, EU:C:2006:614. Para. 41 of the decision at hand.
[183] Italian *Corte di Cassazione*, *Sezioni Unite*, Judgement no. 34655, 28 June 2005, *Donati* case, commented by F. MINISCALCO *Ne bis in idem: i recenti approdi giurisprudenziali* http://www.salvisjuribus.it 23.02.2018.

stated that, in order to avoid a *bis in idem* situation, the facts subjected to dual proceedings must be understood in their material and naturalistic conception: in this light, every constitutive element of the abstract criminal offence – i.e. conduct, event, causal link – assumes importance for ascertaining the existence of an identity of facts, provided obviously the due consideration also of the circumstances of place, time and persons.

Thereby, the Italian Supreme Court in *Donati* formally transposed the clarification provided by the two European Courts on *idem factum,* by declaring that what really matters is the same historical fact as realized and occurred in concrete terms, and not its comparison to the abstract criminal offence envisaged in the provision. On this point, it has already been made reference to the intervention by the Italian Constitutional Court, which with the Judgement no. 200 of 21 July 2016 declared the constitutional illegitimacy of art. 649 Italian Code of Criminal Procedure in the part in which it excludes that « the fact is the same for the sole circumstance that there is a formal connection or concurrency between the crime already judged by final irrevocable judgment and the crime for which the new criminal proceedings began ». Precisely, the questioned provision is declared as unconstitutional due to the presence in its wording of the expression "for the sole circumstance": this periphrasis means that the irrevocable ruling pronounced for only one of the offences in the formal criminal concurrence does not in itself allow or avoid the starting of new proceedings for the concurrent offence *sub judice*. In effect, it is necessary to verify in concrete terms whether the fact is the "same", by evaluating it not in its legal acceptation but rather in its historical-naturalistic dimension.[184] In other terms, the ruling of the Italian Constitutional Court has considerable importance because it confirms the need to conceive the "same fact" in its material and naturalistic meaning.

[184] P. FERRUA, *La sentenza costituzionale sul caso Eternit: il ne bis in idem tra diritto vigente e diritto vivente,* in *Cass. pen.*, 2017, p. 78 ff. The author deploys how the reason of the calling up on ruling of the Italian Constitutional Court by illustrating that if Court did choose "[...]the path of declaration of illegitimacy, it is evidently because of the fear that, since the interpretative rejections are not binding, the jurisprudence of *Corte di Cassazione* could persevere in an address conflicting both with the tenor of the ordinary law and with the superordinate source Article 4, as interpreted by the European Court".

Thus, by opting for a Conventionally compliant interpretation of the notion of *idem factum*, based on its natural and empirical connotation, the Italian Constitutional Court also further clarified that the evaluation of the fact under survey, intended as a historical event featured with criminal significance, cannot be exclusively centred on the conduct performed by the offender, but it has to include also the material object on which the behaviour falls and the naturalistic event resulting from the misconduct. What is interesting here is that such meaning of *idem factum* provided by the Italian Constitutional Court embraces also further elements in respect of the analysis carried out by the European Courts, often based on the sole identity of the misconduct.

Specifically, the Court considers that a fact should be deemed as "the same" when it coincides in its three constitutive elements (i.e. the conduct, the causal link and naturalistic event) with another fact belonging to a terminated sanctioning procedure. In this regard, a definition of *idem factum* that also includes such additional elements would not encounter any obstacles in the ECtHR case-law, since the Strasbourg court itself has also often recognized the importance to further elements other than the sole identity of the conduct under double proceedings. [185]

The Italian Constitutional Court in the declaratory of partial illegitimacy of Article 649 of the Italian Code of Criminal Procedure, within the modalities already examined, also specified that the prohibition of double jeopardy shall not be assumed under any circumstance to be automatically applicable wherever the offence is re-proceeded and it is in a formal concurrency with the one already been sanctioned.

In any event, some doubts have arisen concerning the hermeneutical path followed by the Italian Constitutional Court and its own methodological criteria used to identify the *idem factum*. Indeed, some may argue that they cannot be considered as the most effective possible criteria for ensuring the correct application of the prohibition of double jeopardy, with the view of the total accordance with Article 4 of Protocol no. 7 to the Convention.

[185] See B. LAVARINI, *op. cit.*, p. 63: here it is highlighted that « […] the judge in Strasbourg has sometimes attached importance, in assessing the idem factum, to the traceability of the conduct to the same victim, thus providing at least some "clues" as to the possible relief, to mark the change of fact, of the different "physical object" drawn from the action […] ».

In this stage, some considerations should be made with regard to the surely objectional assumption by the Italian Constitutional Court that the diversity of the naturalistic events, deriving from the conducts, is valid to exclude the existence of an *idem factum*. On this point, part of the Italian juridical doctrine highlighted that the identity of the conduct, together with the physical object on which the former falls and that represents an intrinsic part of it (and not a different element), is what fully define the *idem factum*.[186] If the events are different, according to such belief, there are certainly valuable reasons to retain the ban on double proceedings as inoperative. Yet such inoperability would necessarily cause the repetition of the judgment upon the same conduct, forcing the defendant to experiment again the onerous experience of being subjected to a criminal trial. Undoubtedly, this situation would clearly conflict with the purposes of the *ne bis in idem* right itself, on the grounds of the costs that the individual would have to bear for defending himself before a court.[187]

There are, moreover, others who questioned the choice of the Italian Constitutional Court to select the reference, as an identifying profile of the judicial *idem*, to the idealized "triad" composed of the conduct, causal link and event, that represented the theoretic scheme of each offence outlined under criminal law.

As matter of fact, provided that a fact would be inevitably affected by the formal criminal category under which it is collocated, making a reference to such a triad would still imply making a comparison based on the abstract criminal case, as depicted in the normative provision, and would subtend a parallelism between the constituent elements of the fact subject to repeated trials.[188]

On the one hand, while are surely understandable the underlying assumptions that justify the choice by the Italian Constitutional Court – with the assent by the prevalent Italian jurisprudence - to not limit the assessment of the

[186] See D. PULITANÒ, *La Corte Costituzionale sul ne bis in idem*, in *Cass. pen.*, 2017, p. 70 ff.
[187] In this sense, D. PULITANÒ, *op. cit.*, p. 72. The author claims that in case of contiguous or coexisting events, it would certainly be more in line with the inner logic of the *ne bis in idem* guarantee the establishment of a unitary process in relation to such different naturalistic events, since the plurality of naturalistic events is not enough to justify a multitude of trials against the same defendant.
[188] G. LOZZI, *Profili di una indagine sui rapporti tra "ne bis in idem" e concorso formale di reati*, Giuffrè, 1974, p. 38 ff.

identity of facts only to the element of the conduct, which would be more favourable to the accused offender and which would create "grey areas" granting its impunity, on the other hand , the approach of considering as necessary the comparison of the facts *sub judice* to the triad that constitutes every abstract criminal offence would certainly limit the *ne bis in idem* guarantee to a very marginal application.[189]

Hence, the most viable route appears to be the one deeming that the comparison should be made between the historic conducts, to which the eventual material object on which the illicit behaviour falls must be added, provided that the application of such criterion would permit to counterbalance the aim of avoiding additional procedural costs put on the charged person with need to ensure judicial certainty in legal situations.[190]

All in all, even considered the unavoidable litigations on the statements drawn by the Italian Constitutional Court, we cannot neglect that the intervention of the Court in 2016 on Article 649 Italian Code of Criminal Procedure has the merits of clarifying, at least, the widely debated issue of the real meaning of *idem factum* by providing an hermeneutical reading openly in compliance with the Convention and paving the way for the activation of the guarantee in instances of concurrent offences, in order to extend as much as possible the range of the *ne bis in idem* right.

[189] R.A. RUGGIERO, *Il ne bis in idem: un principio alla ricerca di un centro di gravità permanente*, in *Cass. pen.*, 2017, p. 3817. Here it is underlined how if a judge adheres to the parameter for which ii deemed as compulsory, for the purposes of the *idem factum's* identification, to carry out the comparison not only of the conducts under trials, but also of the causal links and the naturalistic events, the applicability of Article 649 of the Italian Code of Criminal Procedure would be by far hindered. In addition to this, it could not even be conceivable the attempt of committing a crime, provided that there would be no correspondence between the events. Such a casual scenario would be contrary to the wording of article 649 itself, since it contemplates the fact that the prohibition of a second judgement shall activate whenever the fact is the "same", even if it is connoted by different by degree of offensiveness.

[190] Again, D. PULITANÒ, *op. cit.*, p. 69. On the issue, it is highlighted by the author the crucial need to not overburdening the defendant with unreasonable procedural costs, that would certainly undermine the legal protection afforded by the *ne bis in idem* guarantee.

CHAPTER II

NE BIS IN IDEM IN THE JUDICIAL DIALOGUE BETWEEN THE ECJ, THE ECtHR AND NATIONAL CONSTITUTIONAL COURTS AND ITS IMPLICATIONS IN THE FIELD OF FUNDAMENTAL RIGHTS PROTECTION.

SUMMARY: 1. The *ne bis in idem* as a "general and common" principle of the laws of Europe. 2. Unlocking the mysteries of the homogeneity clause of Article 52(3) of the Charter of Nice: the *Boere* and *Spasic* judgements. 2.1 Does the homogeneity clause lead to an obligation of uniformity between CJEU case-law and ECtHR's decisions? 3. When miscommunications between the European Courts happen: the *Toshiba* and *Åkerberg Fransson* controversial incidents. 3.1 The ECJ goes beyond the homogeneity clause: the restrictive interpretation of Article 52(3) and the rise of Article 53 of the Charter of Nice. 4. The effects of the two different shapes of European *ne bis in idem* on national interpretation of the principle supplied by national Constitutional Courts: reverberations on the concrete application of European Human Rights law.

1. The *ne bis in idem* as a "general and common" principle of the laws of Europe.

In the previous Chapter, it has been extensively examined how the *ne bis in idem guarantee* determines, in general terms and net of its historical and cultural heritage, that an individual cannot be prosecuted, tried and convicted twice for the same illicit conduct[1]. In present day, the principle at hand is established in various

[1] B. VAN BOCKEL, *op. cit.*, p. 55: "In its original sense the principle can be traced back to Greek and Roman laws and evidence shows that it travelled from there into Canon law and onto civil and common law. However, the rationales of this principle have changed completely over time and even its status as 'principle' was doubted until quite recently. […] There are many rationales of the ne bis in idem such as legal certainty, due process, proportionality, protection of the *res judicata* and protection of human rights […]". The author reckons that in its most modern meaning the principle is intended to guarantee the proper administration of justice and to protect the individual's private

international instruments, the significative ones for the purposes of the survey conducted in this Chapter, whose core point is the relationship between EU and ECHR laws, being Article 50 of the Charter of Fundamental Rights of the European Union, Article 4 of Protocol 7 to the European Convention of Human Rights (ECHR) and Article 54 of the Convention Implementing the Schengen Agreement (CISA).[2]

As debated in the First Chapter, in the draft of the European Convention of Human Rights there is not a specific provision establishing the ban of double punishment as an individual right or prerogative. Instead, the principle has been instead incorporated into the ECHR framework thanks to Article 4 Protocol No 7.

Today, 43 out of 47 States of the Council of Europe have ratified the additional Protocol in question: the Netherlands and Germany have not yet ratified it and other Member States of the European Union (such as Portugal, France, Italy and Austria[3]) have made serious reservations on the application of Article 4 of Protocol No. 7. Therefore, the inescapable conclusion is that the recognition of the *ne bis in idem* within the Convention system does not reflect a solid consensus throughout the Western democratic area of the European Union.[4]

The prohibition in Article 54 CISA, unlike the one enshrined by Article 4 of Protocol No. 7, is limited only to double prosecution[5] and is featured by a cross-border dimension. In particular, this last peculiarity perfectly reflects the main goal of the Schengen Agreement, that is the abolition of physical boundaries among Member countries and, more specifically, the enhancement of the right to freedom of movement. It is interesting to note that the ECJ in its own case-law on Article 54

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sphere. It is considered to contribute to the efficient enforcement of law as far as it prevents over-punishment, vexatious multiple prosecutions and it creates incentives for proficient coordination between prosecutors.

[2] W. WILS, *The principle of Ne Bis in Idem in EC Antitrust Enforcement: A legal and Economic Analysis* (2003) 26 *World Competition*, 2, p. 136.

[3] The United Kingdom has not even signed it.

[4] J. VARVEALE, *The Transnational Ne Bis in Idem Principle in the EU: Mutual Recognition and Equivalent Protection of Human Rights* (2005) *Utrecht Law Review*, 2, 2012, p. 117: "Neither ECtHR practice, nor the application of the *ne bis in idem* principle in the Framework of the multilateral treaties in criminal matters of the Council of Europe have led to a common *ne bis in idem* standard in Europe".

[5] Pursuant to Article 54 CISA,« 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 ».

CISA puts its emphasis more heavily on the provision's aim of protecting freedom of movement, rather than other more general reasons for the application of the principle, like the right to a due process of law, legal certainty or the respect of the *res judicata*. Thus, the Court has formed a strong bond between the application of Article 54 CISA and the headline objective of the European Union, which is the creation of a custom union that facilitates the fluxes of money, people and goods within a common internal market. As also concerns the Court of Justice of the European Union, it ought to be mentioned two significant cases in order to understand its position towards the *ne bis in idem* principle. In *Gutman v. Commission*[6] the CJEU, for the first time, expressly recognized the existence and validity of *ne bis in idem.* In the case at stake, the plaintiff complained that the decisions of January 1965, which ordered a new and fresh disciplinary inquiry towards him, violated the *ne bis in idem*. Actually, the Court detected the violation by claiming that neither in the items in the in the file submitted to the Court itself nor in the terms of the contested decision, it has been possible to find any assurance that the principle has been respected.

The second judgement that is going to be examined is the *Walt Wilhelm* decision, that regards the parallel application of National authorities' competition rules and those of the European Community.[7] The CJEU was in favour of the acceptability of a dual procedure resulting from concurrent sanctions determined by the sharing of jurisdiction between the Community and its Member States with regard to cartels' regulation.[8] Anyhow, whether there is the case of consecutive sanctions, it must be deemed as necessary taking into account ay previous punitive decision in the determination of any sanction which is to be imposed. In this case,

[6] *Gutman v. Commission*, joined cases 18/65 and 35/65.
[7] *Walt Wilhelm and Others v. Bundeskartellamt*, Case 14/68.
[8] See W. WILS, *The principle of Ne Bis in Idem in EC Antitrust Enforcement: A legal and Economic Analysis* (2003) 26 *World Competition.* When we consider *Walt Wilhelm,* it is fundamental to keep in mind that at that time the Commission had a monopoly on enforcing the Community's competition law in cases that involved trades between Member States. Back then, the States only rarely prosecuted infringements under EU law, but rather applied solely their national competition law. Therefore, the reasoning of the ECJ in the case at hand is based on the fact that European Community's competition law and domestic competition laws pursued different ends and, thus, they protected different legal interest or values.

the Court nevertheless did not refer in an explicit way to the *ne bis in idem* safeguard, but instead relied on a more wide and general idea of "natural justice".[9]

After having assessed these two cases, it emerges that ECJ made an explicit reference to *ne bis in idem* in the first case and, whereas, referred in an 'indirect' fashion to it in the second one. But, in none of these instances there is an explicit reliance on a "general principle" of Community law which may have mirrored a consensus between Member States' laws. Hence, what did happen was that the European Convention on Human Rights (ECHR) had become a significant source of inspiration for the Luxembourg judges for elaborating such "general principles". Today, the Treaty of the European Union (TEU) in Article 6(3) explicitly recognizes the ECHR as a formal source of confirmation of the general principles.

Yet the *ne bis in idem* principle in nowadays enshrined in Article 50 of the Charter of Fundamental Rights of the European Union, which represents a legal instrument reflecting the highest level of consensus between EU's Member States, finally reached after a long and troubled course of juridical evolution, and consequently it should be seen as a general principle of EU law.[10] The main similarity of this provision with Article 4 of Protocol No. 7 to the ECHR is that they protect the individual against both double prosecution and double punishment. Nonetheless, in contrast to Protocol no.7, Article 50 EUCFR's scope is wider since it covers not only internal situations, but also cross-border circumstances, such as provided for by Article 54 CISA[11].

Going further, it is, by now, generally acknowledged that Article 50 of the Charter when it applies to the so-called "internal" situations (namely the application of the principle within the same Member State) should respect the ECtHR's case-law in the light of Article 52(3) EUCFR, that is the provision regulating the

[9] This ECJ reference totally corresponds to AG Cruz Villalòn's argument in the *Åkerberg Fransson* decision, in which he claims that the principle of proportionality and the principle of prohibition of arbitrariness, preclude a criminal court from exercising jurisdiction in a way that fully disregards the assumption that the fact before the judgement in question have already been the subject of administrative penalties.

[10] According to Article 50 EUCFR, « 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 ».

[11] Explanations relating to the complete text of the Charter (December 2000), (OJ C 303, 14.12.2007, pp 17-35) OJ 2007 No. C303/17-35. « The *ne bis in idem* principle applies not only within the jurisdiction of one State but also between the jurisdiction of several Member States. That correspond to the acquis in Union law. […] see Articles 54 to 58 of the Schengen Convention. […]».

relationship between the EU and the Convention legal orders or what it is usually called "the Law between the legal orders"[12]. However, the reality has proven that this commonality and specularity between is purely ideal scenario and a theoretical ambition. As a matter of fact, after the entry into force of the EUCFR, the CJEU delivered two controversial decisions*: Toshiba* and *Åkerberg Fransson*, concerning the application of *ne bis in idem,* respectively, in Union's competition law and tax law. These two cases are going be object of study afterwards (Paragraph 3), but in this script it should be analysed how some incongruences between the reasoning of the Court of Justice and of the ECtHR has flagged up.

In *Toshiba*, the ECJ, in sharp contrast with its own previous case-law, in which it consistently referred to Article 4 of Protocol No.7, and by going against the Opinion of Advocate General Kokott, who insisted on the necessity of uniform interpretation of the EU and ECHR law, has dropped such reference to the Convention. We might agree that the deletion of the reference to the ECHR is not properly a desire to update and borrow fundamental rights protection from the ECHR to the Nice Charter since actually any reference also of Article 50 EUCFR is equally lacking in the *Toshiba* decision[13].

In the *Åkerberg Fransson case*, the Court of Justice did not refer neither to its case-law nor to the ECHR, similarly to what it did beforehand in *Toshiba*. In this stage, the Opinion of Advocate General Cruz Villalòn necessitates to be scrutinized because it presents itself as very instructive for the study that we are conducting.[14]The Advocate General's opinion was as follows: the CJEU did not have the jurisdiction to deliver a ruling on the case at stake since it is considered to fall outside the scope of EU law. Anyhow, the AG reckoned to propose a reply to the questions referred to the Court of Justice, in the case it would have been able to rule on the substance of the issue. He considered, by looking at the relevant case-law of the ECtHR, that there had been a noticeable lack of agreement between the Member States of the European union in relation to the problems deriving from the imposition of both administrative and criminal sanction in respect with the same

[12] *The Law of the Laws -Overcoming Pluralism* (2008) Editorial, 4 *European Constitutional Law Review*, 3, p. 397.
[13] *Toshiba v. Commission*, 2012, case C-17/10.
[14] Opinion of Advocate General Cruz Villalòn in *Åkerberg Fransson*, delivered on 12 June 2012.

offence. Such absence of a complete agreement he found to be clearly revealed in the circumstance that not all member States of the European Union have been willing to ratify Protocol No.7 to the Convention and some of them have made reservations towards the interpretation and application of Article 4 of that Protocol. The Advocated General traced the lack of consensus back to the interest in a large number of Member States in maintaining a dual power to punish - administrative and criminal - even though the case-law of the ECtHR has developed in a direction which exclude such duality. When inspecting the jurisprudence of the ECtHR, regarding Article 4 of Protocol No. 7, the AG affirmed that, at that moment, the aforementioned provision precludes the contextual application of both administrative and criminal sanctions in relation to the same acts, therefore preventing the commencement of a second proceeding, whether criminal or administrative, in the case that the first sanction has become final.

Having established the sense of the principle of *ne bis idem* within the context of Protocol No. 7, the AG proceeded to evaluating the principle in Union law, namely Article 50 EUCFR and its interpretation in the light of Article 4 of the Protocol at hand. The AG here noticed that the *ne bis in idem* principle is not guaranteed in the same way as the core principle of the ECHR, as explicitly referred to in primary Union law, are ensured. This leak is the result of the lack of agreement among the Member States of the EU with regards to the *ne bis in idem* guarantee, that, as discussed above, arises from the widespread existence and well-established nature in Member States themselves of system where both an administrative and a criminal sanction could be imposed towards the same offence. He pointed out in *Åkerberg Fransson* that the admissibility and tolerance of the dual punitive system could be even described as "common constitutional tradition" of a considerable number of Member State of the European Union.[15]

The standpoint of the AG is that Article 50 of the Charter calls for an autonomous interpretation. However, the hermeneutical approach towards this

[15] Opinion of Advocate General Cruz Villalòn in *Åkerberg Fransson*, delivered on 12 June 2012, paras 86-87. Then Advocate General goes on to discuss Article 50 of the Charter and the infliction of both administrative and criminal penalty for the same misconduct. With support of the established jurisprudence of the CJEU on *ne bis in idem*, the AG affirms that the tax surcharge of the case at hand, in reality, represents a substantive criminal sanction and that the acts being penalized in the case were indeed "same acts" within the meaning *ne bis in idem*.

provision is characterized only by a partial autonomy, because regard must be had to the case-law of the ECtHR: this implies that ECJ, on one hand, must independently interpret Article 50 of the Charter, basing its interpretation exclusively on the scope and wording of the provision itself, but, on the other hand, the Court nevertheless shall keep a close eye on the developments of the current case-law of the European Courts of Human Rights. If this statement is true, it means that there is no obligation to interpret Article 50 EUCFR in conformity with Article 4 Protocol 7 to the Convention and the settled case-law of the ECtHR.

In brief, in *Åkerberg Fransson*, similarly to *Toshiba*, the ECJ refrained from referring to the ECtHR's jurisprudence and relied mostly upon the interpretation of Article 50 EUCFR considered uniquely in its semantic and juridical context, detached from any influence from the Convention framework.[16] Hence, *Åkerberg Fransson* has proven that the jurisprudential orientation raised in the precedent *Toshiba* case is not a one-time-only decision, but instead a consolidated outlook.

My reading of the underwritten of this quarrel is that, from now on, it is predictable that the ECHR and EU *ne bis in idem principles* will diverge and take different paths within the European legal sphere. In the end, it seems that, after the entry into force of the Nice Charter and its establishment in its Article 50, the *ne bis in idem* principle can be perceived, once and for all, as a "general principle" of the European legal order. Anyway, this establishment does not lead to a uniform interpretation in the different laws of Europe, but whereas it reinforces the autonomous nature of the EU law towards the ECHR legal order. Here a challenging issue arise: this autonomous interpretation of *ne bis in idem* clashes with the so-called "homogeneity clause" envisaged in Article 52(3) of the Charter: it sets out the obligation to respect the ECtHR's jurisprudence when the rights protected in both the ECHR and the Charter are corresponding.

[16]W. DEVROE, *How General should General Principle Be? Ne bis in Idem in Eu Competition Law*, in U. BERNITZ, X.GROUSSOT and F. SCHULYOK , *General Principles of EU Law and European Private Law*, European Monographs (Aphen aan Rijn: Kluwer, 2013) vol. 84, paras, 105-107: "some may have believed that the deletion of a reference to the ECHR was a one-time *"accident de parcours".* However, the recent *Fransson* judgement of the ECJ proves otherwise. It confirms that - unfortunately again only implicitly – that the deletion of a reference to the ECHR very much translates as a deliberate choice of the ECJ. The ECJ is no long willing to interpret the EU *ne bis in idem* requirement in Article 50 of the Charter in conformity with the ECHR's *ne bis in idem* requirement as interpreted in *Zolotukhin.* From now on, it seems that the EU and ECHR *ne bis in idem* principles will diverge in diverge in large areas of the law".

2. Unlocking the mysteries of the homogeneity clause of article 52(3) of the Charter of Nice: the *Boere* and *Spasic* judgements.

The relationship between the Nice Charter and the Convention rights is governed by Article 52(3) of the Charter, which enshrines the so-called "homogeneity clause" and it appears to be the key provision so as to assess the interaction between the two European Courts and evaluate whether there is an obligation on uniform interpretation of the *ne bis in idem* principle in the laws of Europe. The premise we must start out from is that, at least in light of Article 50 of the Nice Charter, *ne bis in idem*, to all intent and purposes, is now a principle common to the laws of the Member States of the European Union. However, this does not necessarily mean either that *ne bis in idem* must be interpreted uniformly in both the Convention and the Union legal orders or that ECtHR case-law should be taken into consideration, under all circumstances, while interpreting Article 50 of the Charter. Apparently, this uniform interpretation would be activated whether the European Convention on Human Rights were a formal normative source of EU law. But, as claimed by Jean-Paul Costa, the former President of the ECtHR, «formally speaking the Convention is not binding under Union Law»[17]. Nevertheless, the relation between the ECtHR and the CJEU has become so much internalized inside the Union legal system that it can no longer be considered a policy issue of external dimension.

As a matter of fact, with the entry into force of the Lisbon Treaty, the Charter of Fundamental Rights of the European Union has become the reference text and starting point for ECJ's assessment upon fundamental rights. Accordingly, it is vital to ensure the greatest coherence possible between the Charter and the

[17]J.P. COSTA, *The relationship between the European Convention on Human Rights and the European Court of Justice- A Jurisprudential dialogue between the European Court of human Rights and the European Court of Justice,* Lecture on 7 October 2008 at King's College London, p. 4-5. Moreover, the author, by addressing the relationship between the Strasbourg Court and Community Law, observes that "it is clear that as long as the European Union is not a contracting Party to the Convention, the Strasbourg Court has no jurisdiction to examine applications directed specifically against it or its institutions".

Convention in so far as the former contains rights which correspond to those guaranteed by the latter.

This is the primary aim of the homogeneity clause under Article 52(3) of the Charter, which states that: « 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 ».[18]

During the drafting the Nice Charter its foreseeable interactions with the Convention represented a matter of constant consideration, since there were high probabilities that a binding Charter within the European legal order could raise is that of diverging interpretations with the ECtHR. In this sense, it might be argued that the Charter could possibly increase the risk of interpretative divergences and, consequently, reinforce a lack of uniformity between the two system, due to the fact that the text of the Charter does not exactly correspond to the text of the Convention. However, the risk of such diverging interpretation is effectively weak because of the "subsidiary" character of the ECtHR jurisdiction. By "subsidiary" character we mean that the recourse for an individual to the ECtHR is always the last resort at national level that can be exercised by the subject. The preliminary ruling procedure before the CJEU is expressly integrated within the "exhaustion of remedies" under Article 35 ECHR. Hence, the ECtHR may generally have the last word on the interpretation upon fundamental human rights within the European legal framework.

The risk of divergence will always remain even after the definitive accession of the EU to the ECHR, since the Convention represent a minimum standard for human rights protection among Europe[19]. But, often put forward in the juridical literature, that there is a conflict or a tension between the Courts of

[18] Article 52(3) EUCFR, in *Official Journal of the European Communities*, C 364/20, 18.12.2000.
[19] J.P. COSTA, *op.cit.*, p. 4: "The Charter takes the Convention as setting out the minimum level of protection, while making it clear that the Charter itself may, and does indeed in certain areas, provide for a more extensive level of protection. That solution, which in reality gives effect to the practice of the Court of Justice, is wholly compatible with the Convention and reflects the principle of subsidiarity governing the relationship between the Convention and the national legal systems".

Strasbourg and Luxembourg is somehow exaggerated. In reality, the accession to ECHR will surely bring coherence and harmony rather than conflicts between the European Courts' case-law.[20] This assumption is demonstrated by the modality through which the ECtHR case-law regarding ne bis in idem has been implemented and welcomed, in specific cases, within the ECJ's jurisprudence.

As previously scrutinized in the First Chapter, two crucial areas related to Article 4 of Protocol 7 are of critical importance: the definition of "criminal charge" (or "criminal offence") and the definition of the term *"idem"*. In those two areas, we have found a converging case-law that reflects the common hope to reach a uniformity between the jurisprudence of the European Courts towards the *ne bis idem* context.[21]In effect, as regard the definition of criminal charge, it appears that the ECJ relies on the ECHR case law, namely on the so-called *Engel* criteria, in order to assess whether or not sanctions required by EU secondary legislation may be qualified as criminal.[22]

We mentioned beforehand in the First Chapter that the formal acceptance of the *Engel* doctrine by the ECJ officially occurred in the *Bonda* ruling. Here it is worth descending even further into the details of the case: it concerns the interpretation of article 138 of the Regulation No. 2988/95, which specifies the sanction to be taken by Member States against fraudulent farmers who operate in the field of the common policy upon agriculture.

The ECJ, by recalling the *Engel* criteria[23], found that the administrative character of the sanctions envisaged by Article 138 of that regulation is not

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[20] A. ROSAS, *Fundamental Rights in the Luxembourg and Strasbourg Courts* in C. BAUDENBACHER et al. (eds) *The EFTA Court: Ten Years on* (Oxford: Hart Publishing, 2005).

[21] B. VAN BOCKEL, *op.cit.*, p. 65. "In *Engel and Others v. the Netherlands*, the ECtHR stated that for determining the real nature of a conduct one should look not only the legal qualification of the offence under the internal law of a given State, but also the very nature of the offence, together with the repressive and deterring character of the penalty, and the type and the degree of affliction (severity) of the penalty for which a given individual is liable. In the application of those criteria the ECtHR has attributed a greater importance to the second and third criterion, which eventually has outweighed the first criterion, that is the formal classification of the offence under national law".

[22] In *Spector Photo Group*, Case C-45/08, ECR I-12073: in a reference regarding the interpretation of Article 2 and 14 of Directive 2003/6/EC2003 on insider trading and market manipulation, the Court interpreted Article 14 in the light of the *Engel* criteria and came to the conclusion that the administrative sanctions imposed against the individuals responsible may be qualified as criminal, according to the nature of the infringements at stake and the degree of the severity of the sanctions which may be imposed , for the purposes of the application of the ECHR.

[23] In that respect in the *Bonda* decision, EU:C:2012:319, para. 37, the Court of Justice held that: « according to that case-law, three criteria are relevant, the first criterion is the legal classification

questioned by applying the ECtHR case-law on the concept of "criminal offence" within the meaning of Article 4 of Protocol 7. Furthermore, it is ought to recall the convergence of interpretation that occurred between the Court of Justice of the European Union and the ECtHR in relation to the definition of the so-called "*legal idem*" in the wake of the *Zolothukin* ruling[24]. In this decision, the ECtHR provided a whole clarification on question of the identification of the term "*idem*".

This was a greedy opportunity provide a harmonized interpretation of "*idem*" element within the *ne bis in idem* guarantee, by settling the dust caused by the various approach among its own case-law upon the concept at stake, which has led to legal uncertainty towards the matter.

In *Zolothukin* the ECtHR compares several international legal instruments establishing the *ne bis in idem* principle: the CISA clearly refers to "same acts" and "same conduct"; whereas, the Article 4 of Protocol No.7 refers to "same offence". The Court held that the use of term "offence" in the Protocol cannot justify the adherence to a more restrictive approach towards the range of safeguard guaranteed by ne bis idem, than if the wording was "same acts" or "same conduct".

The statement made by the Court is based on the idea that the provision of a provision of the Convention must be construed in the light of its purposes and objectives and even in accordance with then principle of effectiveness. Therefore, limiting the legal protection guaranteed by the *ne bis in idem* principle solely to the "same offence" would undermine the guarantee of the principle itself and thus render the provision incorporating it ineffective and impractical.

Correspondingly, the ECtHR concludes that Article 4 of Protocol No. 7 shall be understood as prohibiting the prosecution of a second "offence" in so far as it derives from identical fact (or facts that are substantially identical). In addition to this, the Court claimed that is irrelevant which parts of the new criminal charge are eventually dismissed or upheld in the second procedure since Article 4 of Protocol No. 7 provides for a protection against being tried repeatedly in new proceedings rather than a ban on a second conviction or acquittal.

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of the offence under national law, the second is the very nature of the offence, and the third is the nature and degree of severity of the penalty that the person concerned is liable to incur. […] ». There is not a shadow of a doubt that the three criteria cited above by the CJEU do correspond to the three *Engel criteria,* formulated by the ECtHR.

[24] *Zolothukin v. Russia*, ECtHR 7 June 2007, already examined in Chapter I.

Finally, it dictates that the "legal idem" is identified by the set of concrete factual circumstances concerning the same defendant and inextricably linked together in space and time.[25] The ECtHR's reasoning was favourably accepted by the CJEU, in its case-law, and also reaffirmed in even more recent case of *Tomasović v. Croatia*, issued by the ECtHR.[26]

Returning to the article 52(3) of the Charter, it should be pointed out that the CJEU has adhered to a "minimalist" approach towards this provision by not expressly addressing the theme of the relationship between the Charter itself and the Convention rights and by omitting, in certain judgements, references to the jurisprudence of the ECtHR.[27] But, in the *Spasic* judgement, the ECJ directly addressed the relationship between the Article 50 of the Charter and the ECtHR's case-law upon Article 54 CISA[28]. As a matter of fact, the latter provision envisages the so-called "enforcement requirement", which substantially limits the application of the *non bis in idem* principle by dictating that the guarantee shall apply only in those cases in which the penalty has been enforced or is actually in the process of being enforced.

It is essential to keep in mind that since the entry into force of the Lisbon Treaty, the *ne bis in idem* principle has become a yardstick of the systemic impact of the Nice Charter on secondary EU law. One reason for this is that the *ne bis in idem* guarantee from Article 50 EUCFR differs in some aspect from the principle as laid down in the Convention implementing the Schengen Agreement (CISA), which introduced transnational *ne bis in idem* in the EU legal order[29]. In particular,

[25] *Zolothukin v. Russia*, ECtHR 7 June 2007, paras 83-84.
[26] *Tomasović v. Croatia,* ECtHR 18 October 2011, paras. 59-60.
[27] B. VAN BOCKEL, *op.cit.*, p. 24.
[28] Article 54 CISA declares: «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».
[29] A. MARLETTA, *The CJEU and the Spasic case: recasting mutual trust in the Area of Freedom, Security and Justice?* in *European Law Blog: News and comments on EU law* in https://europeanlawblog.eu. The author reckons that *ne bis in idem* is a fundamental principle of EU criminal law, protecting citizens against double prosecution, even in transnational situations. However, even though its "general and commonly shared" character make *non bis in idem* a principle unanimously recognized throughout the whole European legal framework, the ways through which such recognition had been enacted, by means of international legal instruments, may generate some discrepancies and inconsistencies in the concrete application of the legal guarantee. This phenomenon has given rise to numerous questions about the effective compatibility, between

the Charter neither provides for the "enforcement clause" under Art. 54 CISA, nor for the exceptions foreseen by Article 55 CISA, such as the national security exception. According to the enforcement clause, the transnational *ne bis in idem* is designed to bar further prosecutions in a Contracting State against the same subject for the same facts for which «[…] a penalty has been imposed, it has been enforced, it is actually in the process of being enforced or it can no longer be enforced» under the laws of another Contracting State. Since none of these enforcement conditions are mentioned by Article 50 Charter, numerous questions has been continuously raised, when the EUCFR became a normative source of primary EU law, on the point of the compatibility of those limiting conditions outlined in Art. 54 CISA with Art. 50 Charter, taking into consideration that the Charter is a *lex superior et posterior*. And, precisely, in *Spasic* the Grand Chamber of the Court of Justice gave a striking answer to this question, as this script will show.

For getting a clear understanding about the direction that the jurisprudence of the CJEU is taking, it is profitable to examine this case in further details. The question referred to the Court of Justice in the main proceedings against Mr. Spasic specifically concerned the evaluation upon the requirement of the enforcement of a previous penalty requested by Article 54 CISA.

The case at stake concerned Mr. Spasic, a Serbian national, who was prosecuted in Germany for organised fraud committed against a German national and, for this reason, the German judiciary authorities issued a European Arrest Warrant for his surrender. Furthermore, he had been previously been tried in Italy for the same facts and, in that case, was sentenced *in absentia* to a fine as well as to imprisonment. In the meanwhile, he was withheld in custody in Austria on ground not directly linked with those related to the case before the German court. Thereafter, he was surrendered to the German authorities and was retained in custody there and paid the Italian fine. In the proceedings before the German court, his lawyer argued that even if he never served his prison term in Italy, his sentence had consequently been enforced, according to the meaning of Article 54 CISA, by means of the payment of the fine and that should have sufficed for his release from

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themselves, of the very same international instruments establishing the *ne bis in idem* principle (such as the potential clashes between the Articles 54-58 CISA and Article 50 Charter.)

custody. However, this plea was rejected by the German court, which denied the application of the *ne bis in idem* safeguard arguing that effectively Mr. Spasic did not totally serve the custodial part of his sentence.

Hence, the defendant appealed to the higher regional court in Nurnberg on the grounds that the element of the enforcement of the previous penalty required by Article 54 CISA would violate Article 50 of the Charter. This latter court thus stayed proceedings and referred the questions to the ECJ asking its ruling upon the following question: is the enforcement requirement compatible with Article 50 of the Charter? The Court provided an affirmative response, by founding its reasoning mainly upon the Explanations relating to the Nice Charter itself, as regards Article 50. In particular, the Court held such explanations expressly mention Article 54 CISA among the provisions covered by the so-called "horizontal clause" enshrined in Article 52(1) of the Charter: « any limitation on the exercise of the rights and freedoms recognised 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 recognised by the Union or the need to protect the rights and freedoms of others ».[30]

The position adopted by the Court is remarkable, because the Explanations to Art. 50 do not actually mention Art. 54 CISA as being among the provisions covered by the horizontal clause. As a matter of fact, the Explanations do not cite any specific provision but uniquely refer to "very limited exceptions"[31]. For instance, some of these exceptions can be found in the CISA itself in Article 55, which allows a Member State to declare that it is not bound by Art. 54 in relation to specific categories of offences, that consist in acts characterized by a strong link to the sovereignty and territorial integrity of the State (e.g. offences against national security or other important interests of the State, acts which took place in the

[30] Article 52(1) EUCFR, in *Official Journal of the European Communities*, C 364/20, 18.12.2000.
[31] B. VAN BOCKEL, *op.cit.*, p. 27. Here it is pointed out that "in accordance with Article 50, the *"non bis in idem"* rule applies not only within the jurisdiction of one State but also between the jurisdictions of several Member States. That correspond to the acquis in Union law. […]". Moreover, the very limited exceptions in the Charter permitting the Member States to derogate from the *non bis in idem* rule are covered by the horizontal clause in Article 52(1) of the Charter concerning limitations.

territory of the State, acts committed by the State's officials).[32] Consequently, even though we see no trace of any mention of the CISA in the Explanations to Art. 50 of the Charter, there is no doubt that the enforcement requirement from Art. 54 CISA features, thanks to the clarification delivered by the CJEU in *Spasic*, among the legitimate restrictions towards the *ne bis in idem* under the effect of the horizontal clause from Art. 52(1) Charter.

We must now look back at the wording of Art. 52(1) of the Charter in order to achieve a better comprehension about the mechanism that have resulted in the incorporation of the CISA into the EU's legal order. The first sentence of the provision mentions the "essence" of the Charter rights, which represent a suitable measure of compatibility with the provisions of the Charter itself of an expression of fundamental rights provided for in an international instrument (in this case, the enforcement requirement from Art. 54 CISA). In *Spasic*, however, the Court did not examine in depth the "essence" of the *ne bis in idem*, merely holding that the condition of execution laid down in Art. 54 CISA «does not call into question»[33] the *ne bis in idem* principle intended as such, because this requirement has the only aim to avoid a scenario in which a person definitively convicted in one Contracting State can potentially no longer be prosecuted for the same acts in another Contracting State and consequently remains unpunished whether the first State did not give execution to the previously imposed sentence.[34]

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[32] Article 55 CISA: « 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, this exception shall not however apply if the acts took place in part in the territory of the Contracting Party where the judgment was given; b) where the acts to which the foreign judgment relates constitute an offence against State security or other equally essential interests of that Contracting Party; c) where the acts to which the foreign judgment relates were committed by an official of that Contracting Party in violation of the obligations of his office. A Contracting Party which has made a declaration regarding the exception referred to in paragraph 1(b) shall specify the categories of offences to which this exception may apply.
A Contracting Party may at any moment withdraw a declaration relating to one or more of the exceptions referred to in paragraph 1. The exceptions which were the subject of a declaration under paragraph 1 shall not apply where the Contracting Party concerned has, in respect of the same acts, requested the other Contracting Party to prosecute or has granted the extradition of the person concerned ».

[33] *Spasic*, EU:C: 2014: 586, Case C-129/14, para. 58.

[34] In other terms, the Court of Justice in *Spasic*, by merely holding that the enforcement element « does not call into question *the ne bis in idem* principle as such » was very way of openly claiming that this requirement does not respect the "essence" of the *ne bis in idem* principle.

The second sentence of article 52(1) Charter refers to the principle of proportionality, which is respected in so far as the limitations to the Charter rights are necessary and set up to achieve the objective of general interest recognized by the Union (or the need to protect the rights and freedoms of others). In *Spasic*, the Court examined, by performing a "proportionality test", if the enforcement condition can be considered capable of fulfilling an objective of general interest and, correspondingly, respecting the principle of proportionality.

The ECJ observed that the enforcement requirement is necessary for achieving the objective of general interest of preventing, in the Area of Freedom, Security and Justice (the so-called "AFSJ"), the impunity of individuals who has been definitively convicted in one Member State, but are no longer physically present in that State. Based on this, it went on concluding that the principle of proportionality is respected, because the Court apparently considered the possibility of starting a second prosecution for the same facts as more effective in achieving the goal of AFSJ than resorting to the European Arrest Warrant or to the cross-border enforcement of penalties by means of mutual recognition.

Moreover, the ECJ stated that relying on a mutual recognition instrument may entail a risk of impunity in the discretionary choice by the Member State that delivered the final decision to effectively enforce or not the instrument itself.[35] This argument is actually quite surprising, because the CJEU seems to reconsider the role and importance of mutual trust, which has been a theoretical dogma of the ECJ's case-law on the *non bis in idem* principle ever since the beginning, and which also constitutes one of the cornerstones of the AFSJ.[36]

[35] Basically speaking, the Court formally recognized that none of the other measure or instrument provided for by mutual recognition could be as effective as the enforcement requirement in pursuing the objective of general interest, richly meaningful for the AFSJ, of preventing the impunity of convicted and sentenced persons.

[36] *Spasic*, EU:C: 2014: 586, Case C-129/14, para. 65 of the judgement. However, it should be mentioned the contrary view from the Advocate General Jaaskinen in relation to the *Spasic* case, where he argued, instead, that the enforcement requirement is disproportionate in the light of the aim of preventing impunity. Indeed, the view of the Advocate General appears much more in line with the traditional philosophy of mutual trust in the EU context: even if Member States have discretion about the means to execute the sentences delivered by their courts and even if EU law does not oblige a Member State to issue an EAW in order to prevent impunity, the AG recalls that « the principle that every penalty must be executed forms part of the rule of law », whose respect is a common feature to all the Member States of the Union. Under this more "trustful" approach, the "necessity" of the enforcement condition would have probably received a different weight in the balance.

Unsurprisingly, the Court of justice considered that the fact that Mr *Spasic* paid the fine inflicted was not sufficient to meet the enforcement condition.[37] In effect, it is fundamental to remember that a second preliminary question was submitted by the German judge to the ECJ regarding the *Spasic* case: is the enforcement condition satisfied by the execution of only one part of the sentence, when it is composed of two independent penalties? As to the second preliminary question, the Court of justice concluded that the execution of only one part of the sentence (in this case, Mr Spasic's fine) does not adequately satisfy the enforcement requirement from Art. 54 CISA under any of its forms. This assertion by the Court of Justice is quite astonishing too because, while, on one hand, it is undisputable that the partial execution cannot be regarded as a full enforcement, it is also true, on the other hand, that Art. 54 CISA envisages the hypothesis of the penalty being "actually in the process of being enforced."

Consequently, the ECJ, by affirming that the partial execution of an autonomous part of a composed penalty can neither fulfil the "enforcement process", noticeably stretched the scope of the enforcement requirement and, at the same time, limited the protection offered by the *ne bis in idem* principle within the EU legal order. To round it all off, the *Spasic* ruling places a strong focus on the duty to prevent the impunity of criminals within the Area of Freedom Security and Justice and, apparently, shifts the balance of *ne bis in idem* towards a more "security-oriented" approach.

In doing so, the CJEU seems to endorse a new (and more "mistrustful" or, from a different perspective, perhaps more "realistic") comprehension of mutual trust and even to overlook the protective function of *ne bis in idem* and the logic of its previous settled case-law. After having discussed the judgement delivered by the CJEU in the *Spasic* case, it is worth noting that the same questions referred by the German court in this case may not have been a surprise. Indeed, in 2011 the German

[37] A. MARLETTA, *The CJEU and the Spasic case: recasting mutual trust in the Area of Freedom, Security and Justice?* in *European Law Blog: News and comments on EU law* in https://europeanlawblog.eu.: "Finally, the condition is necessary, since none of the less restrictive alternatives provided by the instruments of mutual recognition (such as the Framework Decision 2002/584/JHA on the European Arrest Warrant (FD EAW) or Framework Decision 2008/909/JHA on the mutual recognition of custodial sentences for their cross-border enforcement) could be "equally effective" in ensuring the aim of preventing impunity".

Federal Supreme Court (*Bundesverfassungsgericht*) in the *Boere* case had already dictated that the enforcement condition envisaged by Art. 54 CISA represents a limitation towards Art. 50 of the Charter, but compatible the horizontal clause from Art. 52(1) Charter. In particular, the German Federal Supreme Court believed that there was no need in referring the question to the CJEU, requesting for a preliminary ruling.

So, all in all, the higher regional court in Nurnberg was totally right in referring question about the compatibility between the enforcement requirement from Art. 54 CISA and Art. 50 Charter to the CJEU in the *Spasic* case, so as to verify the validity, as a matter of EU law, of the approach adopted by the *Bundesverfassungsgericht* in the *Boere* ruling[38].

Here it is helpful to briefly sketch the factual background of this case for better appreciating how the *Boere* decision could have foreshadowed the ECJ's ruling in *Spasic*. The case concerns a former Dutch national who was member of an SS elite squad that carried out numerous executions of citizens in the Netherlands in order to punish subversive actions by the resistance during WWII. Once the global conflict ended, Mr Boere was sentenced *in absentia* in his home-country, namely the Netherlands, but then escaped to Germany where he remained free from prosecution during the following decades. However, when he was finally prosecuted before a German court in 2009 for his actions in the Netherlands during the Second World War, his lawyers appealed to the transnational *ne bis in idem* in implemented by the EU law, by virtue of the fact that Mr Boere had been already be previously convicted in the Netherlands.

Unfortunately for him, Mr Boere was prevented from relying directly on Art. 54 CISA since his earlier sentence in the Netherlands had never been enforced against him[39]. Nonetheless, the main reason for which the case in question appear to be of special importance is that, even though in his defence before the German Courts Mr Boere's lawyers argued that the enforcement condition from Art. 54

[38]Judgement (ECLI): DE: BV erfG: 2011: rk20111215.2bvr014811.

[39] B. VAN BOCKEL, *op.cit.*, p. 26 on this point considers that "although both the facts of the cases as well as the first judgement predate the project of European integration itself, this does not stand in the way of application *ratione temporis* of Arts. 54-58 CISA if the second prosecution was brought at a time that the CISA had entered into force ». […] This approach has been also confirmed by the CJEU in the *Bourquain* case, Case C-297/07, *Bourquain*, EU: C: 2008:708.

CISA would form an unlawful limitation of Art. 50 Nice Charter (and, consequently that the Boere's prosecution violated *ne bis in idem* under EU law), this plea was not only thrown out by subsequent German courts, but also, once the case reached the *Bundesverfassungsgericht*, this last one confirmed instead that the enforcement requirement forms a limitation towards Art.50 Charter that is in reality compatible with the horizontal clause under Art.52(1) of the Charter itself.

In its *Spasic* judgement the CJEU basically followed the same approach of the German Federal Supreme Court in *Boere*, although without reference to the latter. Thereby, it is clear how *Spasic* and *Boere* shall be deemed as identical in their basic content and their respective ruling symbolize an almost perfectly matched endeavour of "connecting the dots" between the protection afforded under Arts. 54-58 CISA[40] and that established under Art. 50 EUCFR, both secure the prohibition of double jeopardy.

However, it is perfectly evident that the full effect of Article 50 Charter on the pre-Lisbon *acquis* upon the *ne bis in idem* guarantee remains to be further explored and discussed. Example of this is the fact that in *Spasic*, actually, the Court of justice only tackles the impact of the Nice Charter on the enforcement clause without examining, for instance, the exceptions provided by Art. 55 CISA, whose heterogeneous rationales are not directly finalized to prevent impunity and could

[40] These provisions are outlined in the Title 3 ("*Police and Security*") Chapter 3 *("Application of the Non bis in idem principle"*) of the Convention implementing the Schengen Agreement. Here following are the text of Articles 56 to 58, that have not yet been mentioned in the paper.
Article 56: «If further proceedings are brought by a Contracting Party against a person who has been finally judged for the same offences by another Contracting Party, any period of deprivation of liberty served on the territory of the latter Contracting Party on account of the offences in question must be deducted from any sentence handed down. Account will also be taken, to the extent that national legislation permits, of sentences other than periods of imprisonment already undergone». Article 57: «Where a Contracting Party accuses an individual of an offence and the competent authorities of that Contracting Party have reason to believe that the accusation relates to the same offences as those for which the individual has already been finally judged by another Contracting Party, these 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 in progress. At the time of ratification, acceptance or approval of this Convention, each Contracting Party will nominate the authorities which will be authorized to request and receive the information provided for in this Article». And, last but not least, Article 58: «The above provisions shall not preclude the application of wider national provisions on the "non bis in idem" effect attached to legal decisions taken abroad».

end up in a different balance with the goals inherent to the Area of Freedom, Security and Justice[41].

2.1 Does the homogeneity clause lead to an obligation of uniformity between CJEU case-law and ECtHR's decisions?

From the previous section it follows that Article 52(3) of the Charter has the clear purpose to ensure the consistency between the ECHR and the Charter itself by establishing the legal rule that, insofar as the rights in the present Charter also correspond to rights guaranteed by the European Convention on Human Rights, the scope and the meaning of those rights (including authorized limitations) are exactly the same as those laid down by the Convention. However, this recognition will not prevent EU law from providing a more extensive protection.[42] In this regard, as previously analysed, the horizontal provision contained in the Charter offers a platform for preventing conflicts between the ECJ and the ECtHR, in the quest of guaranteeing a harmonious relationship between the Charter and the Strasbourg regime.

[41] As a conclusion, it should not be disputed that, as the AG Jaaskinen has duly specified in its Opinion on the *Spasic* case, the *ne bis in idem* as laid down in Art. 54 CISA serves as a fundamental safeguard for citizens in legal systems based on «The acknowledgement that the individual has a series of rights and freedom in respect of the acts of public bodies. That provision therefore constitutes a restriction on the exercise of the right to prosecute and punish a criminal act. […] that article is intended to ensure legal certainty through respect for decisions of public bodies that have become final, in the absence of harmonization or approximation of the criminal laws of the Member States». Furthermore, the AG goes on to state that the limitation that Article 54 of the CISA envisages does not go further that what is necessary to prevent the impunity of person who have been convicted for criminal offence in a Contracting State.
J. NERGELIUS- E. KRISTOFFERSSON, *Human Rights in Contemporary European Law* in *Swedish Studies in European Law*, Volume 6, p. 184. The authors reckon that the finding of the Court of Justice corresponds with AG's Opinion, but only up until the point the Court carries out the "proportionality test" pursuant Art. 52 (1) Charter and depicts the picture of a Union ensuring to its citizens an area of freedom, security and justice. Accordingly, the Court tried to measure whether this goal would be achieved through the application of Art. 54 CISA or by relying on a mutual recognition instrument. Finally, by applying such "proportionality test" to the *ne bis in idem*, the authors claim that may occur instances in which the limitation represented by the enforcement requirement from Art. 54 CISA may exceed its scope and, thus, may not be applied, leading to the impunity of the convicted and sentenced individual.

This provision has the ambition to avoid any kind of interpretative conflicts between the various jurisdictions, that may arise as a result of the plurality of the legal sources, by ensuring equivalent protection of fundamental rights between the Strasbourg and Luxembourg frameworks. Nevertheless, even though there can be no doubt and no disputing upon the fact that the homogeneity clause gives rise to an obligation upon the EU institutions (including obviously the ECJ) to be committed at ensuring that the protection provided by the EU Charter is no less than the protection granted by the corresponding ECHR rights, on the other hand there is no certainty that such commitment forces the ECJ case-law to follow scrupulously the ECtHR jurisprudence. Indeed, notwithstanding the fact that EU has committed itself to secure to every individual within its cross-border jurisdiction the freedoms and the rights defined in the ECHR, by incorporating the standards of the Convention as a "minimum" within the meaning and the scope of the Charter's rights, there has been much discussion today about the existence of a legal duty upon the CJEU to be bound to the jurisprudence of the Strasbourg Court.[43] In fact, a part of the doctrine considered that the meaning and the scope of the protected fundamental rights are determined not only by the text of those legal instruments (namely, the Charter and the Convention), but also by the jurisprudence of the CJEU and of the ECtHR.[44]

According to this thesis, the aforementioned commitment derives from Union primary law and, consequently, all EU institutions, especially the ECJ, as well as the member states while acting within the scope of Union law, must respect the relevant rights guaranteed under the Convention. Such legal duty to respect the ECHR derives directly from the EU Charter of Fundamental Rights and is not contingent on any formal accession by the European Union to the ECHR legal framework (or any type of power recognized to the Council of Europe or to the ECtHR to sanction the EU for violating the legal standards set down by the Convention). By the way, the main criticism levelled by the international legal doctrine towards this approach is based on the reality that Article 52(3) of the

[43] Advocate General Trstnjak in Case C-411/10 *NS v. State Home Dept*, [ECtHR 2011].
[44] Advocate General Kokott in Case C-110710 P, *Solvay v. Commission* [2011] ECR I-10439, para. 95.

Charter does not provide for any explicit reference to the ECHR, but only to "the meaning and the scope" of the Convention.

Thus, one could argue that the rights established in the ECHR and forming object of interpretation by the Strasbourg Court in its own settled case-law constitutes an effective and integral part of the meaning and scope of the rights protected under the EU Charter of Fundamental Rights.[45] By contrast, others go as far as to say due regard must be given to the official explanations of the Charter: here is dictated that the reference to the ECHR in Art. 52(3) signifies that the legal protection granted to the relevant rights under the Charter is determined not only by the normative text of those legal instruments (hence, the EUCFR and ECHR), but also by the case-law of both the CJEU and the ECtHR.[46] But, even in these explanations there is nothing that imposes an explicit obligation upon the CJEU to respect the ECtHR jurisprudence and this may led to problems of interpretation. However, as evidenced by the recent case-law of the ECJ, it is possible to argue that the legal content of the Convention has been substantially implemented and incorporated into Union law.

Furthermore, it may even be highlighted that there has never been a case where the ECJ openly challenged the ECtHR's interpretation of the Convention. For instance, in *Elgafaji v. Staatsecretaris van Justitie* the Court of Justice stressed that this interpretation provided for in that judgement, upon the relevant provision of Directive 2004/83, was fully compatible with the settled jurisprudence of the ECtHR, relating to Art. 3 of the Convention.[47] This shall not surprise since the CJEU in its own judicial decisions, interpreting the provisions of the Charter, often takes into consideration the case-law of the ECtHR about relevant rights guaranteed under the Convention.

Therefore, if this is the scenario, there is no reason to worry about the absence of an unequivocal reference in Art. 52(3) of the Charter to the ECtHR case law.[48] It can even be affirmed that, since the entry into force of the Treaty of Lisbon,

[45] K. LENAERTS and E. DE SMIJTER, *The Charter and the role of the European Courts* (2001) *8 Maastricht Journal of European and Comparative Law*, 1, p. 90-91 and p. 95 ff.
[46] Official Explanations to the EU Charter of Fundamental Rights.
[47] Case C-465/07 *Elgafaji v. Staatsecretaris van Justitie* [2009] ECR I-0921.
[48] Nonetheless, other authors still argued against the binding effect of the ECHR jurisprudence. T. LOCK, *The ECJ and the ECtHR: The future relationship between the two European Courts*, p.

the EU has made itself unilaterally bound to the jurisdiction of the ECtHR[49], specifically thanks to the "homogeneity clause" established in Article 52(3) of the Charter and to the fact that the Convention is formally part of Union Treaty Law.[50]Anyhow, the thesis followed in this section gives a massive role to Article 52(3) EUCFR when it comes to interpreting EU fundamental rights in the light of the ECHR. From my point of view, the horizontal provision represents the fulcrum of the so-called "constitutional" interpretation of Art. 52(3) of the Charter[51].

3. When miscommunications between the European Courts happen: the *Toshiba* and *Åkerberg Fransson* controversial incidents.

As already stated in the introductory section, two controversial decisions by the CJEU, regarding the application of the *ne bis in idem* principle, "have jumped to the headlines" due to their questionable content, that consolidates the orthodox position of the Court of Justice towards the application of the homogeneity clause from Article 52(3) of the Charter.

In neither *Åkerberg Fransson* nor in *Toshiba*, the CJEU did refer to the ECHR for the interpretation of the *ne bis in idem* guarantee established under

387-388 and p.389 ff. According to the author, during the draft there were many attempts to include an explicit reference to the ECtHR jurisprudence in the EU Charter's text. However, it was impossible to reach an agreement on such express reference; neither the wording of the provision nor the history of the drafting support the theory that the ECJ is bound by the settled decisions of the Strasbourg Court. Besides, the author goes on to claim that by recognizing the ECHR as the minimum standards of protection for the corresponding rights in the Charter and in the ECHR, it shall be immediately raised the question if it is actually mandatory to rely on the ECtHR case-law when the corresponding rights in the Charter are being interpreted. In other terms, Lock puts into question the existence of such obligation upon the CJEU to align with ECtHR decisions on fundamental rights (or at least to take them into consideration) while interpreting Charter's provisions. In support of his argumentation, the author appears to be mainly concerned with the problems deriving from the potential effect on the independence of the EU legal order (the so-called autonomy of the EU legal order). Indeed, he hypothesizes a scenario in which the CJEU would be always obliged to follow the interpretation of the corresponding articles in the ECHR and therefore be subject to the decisions of the ECtHR. This scenario is deemed by the author as harmful for the maintenance of the independence of the Union legal order. Anyway, the author recognizes the significant role of the ECtHR jurisprudence on articles in the Convention corresponding to the Charter, along with other sources of legal interpretation.

[49] C. TIMMERMANS, *Relationships between the Strasbourg Court and the ECJ*, Intervention Round Table CCBE, Luxembourg, 20 May 2011, p. 3. Quoting Volker and DEB.

[50] Effectively, the Convention is part of EU primary law and, consequently, has a higher status compared to what it would have acquired if it was an ordinary treaty concluded by the EU, i.e. in between secondary and primary law.

[51] B. VAN BOCKEL, *op.cit.*, p. 76.

Article 50 of the Charter, even though Article 4 of Protocol no. 7 to the ECHR calls for an equivalent and corresponding *ne bis in idem* right. In doing so, a question arises spontaneously: did the CJEU violate its obligations under Article 52(3) of the Charter? First of all, it should be preliminarily recalled that Article 50 of the Charter effectively corresponds to Article 4 of protocol no.7 to the Convention, but its scope is extended to the Union level between the domestic courts of the Member States. In other terms, the *non bis in idem* guarantee under the Nice Charter can be evaluated, when the cross-border element comes into play, as a non-corresponding right.[52]As a matter of fact, in contrast to the provision in Art. 4 of Protocol no.7 to the ECHR, the principle of *ne bis in idem* in Article 50 in the Charter applies not only within the jurisdiction of one single State, but also between the jurisdiction of several Member States.

This means that the provisions in the Charter and in the Convention on the *ne bis in idem* correspond to each other only when the principle is invoked in one single Member State. To be noticed that, in this case only, the interpretation of Article 50 of the Charter will accordingly be guided by the jurisprudence of the ECtHR. This because Art. 4 of protocol no.7 has no transnational application, unlike Art. 50 EUCFR, since it concerns a purely "internal" application of the *ne bis in idem* principle. The major conflicting cases for Member States occur in the cases of the "internal" application of the principle, since both Article 50 EUCFR and Article 4 of Protocol no.7 to the ECHR can both apply in domestic situations. However, in those cases which are not a one-country situation the main practical consequence is that there is no obligation for the CJEU under Article 52(3) Charter to respect the ECtHR jurisprudence.

Hence, here is how the crucial question, object of discussion in the preceding section, about the effective existence of an obligation upon the CJEU to rely on the ECtHR case law, at least in respect of the application of the *ne bis in idem* guarantee, is answered. Both *Åkerberg Fransson* and *Toshiba* concerns the application of the *ne bis in idem* principle in Eu competition law and, as it can be read from the CJEU case-law, the principle actually does apply.[53]

[52] B. VAN BOCKEL, *op.cit.*, p.77.

[53] Case C-617/10, *Åklagaren v. Åkerberg Fransson*. The case at stake is certainly not the first instance in which the question has been raised as to whether the Swedish system of tax sanctions is

However, the determination of the "*idem*" in proceedings regarding EU competition law controversies is subject to a three-fold test elaborated by the jurisprudence of the Court of Justice, namely the so-called *Aalborg* criteria[54]: the judge shall consider the identity of factual circumstances, the identity of the legal interest which is being protected and the identity of the offender.

In *Toshiba*, Advocate General Kokott questioned the element of the identity of the legal interest recipient of protection, in the attempt of bringing the application of the ne bis in idem guarantee in the EU competition law's field in a fashion that is more in line with its application in other matters of law.[55]

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compatible with the *ne bis in idem* principle. This system, allowing for both a tax surcharge and a criminal sanction as cumulative and parallel penalties for the submission of wrongful information with regards to VAT to the tax authorities, has been questioned on multiple occasion in Swedish legal doctrine, as well as before national courts and even the ECtHR. The judgement delivered by the CJEU in *Åkerberg* established that the Swedish regulation involving parallel sanctions did in fact, as it far it concerned sanctioning infringements connected to the levying of VAT, imply an implementation of the EU law within Article 51(1) of the Charter. As to the substantive interpretation of the Charter rule on *ne bis in idem* and its consequences to the Swedish regulation, the CJEU held that Article 50 of the Charter precluded a criminal proceeding in relation to acts of non-compliance with declaration obligations if it followed a sanction of penal nature with regard to the same acts and if that sanction had become final. As already been discussed, the EU Court of Justice did not make any express reference to the case law of the ECtHR in this regard, nor did it discuss the possibility under EU law to maintain combined criminal sanctions for the same offence.

[54] C-204/00 P - *Aalborg Portland and Others v. Commission*, Judgment of the Court of Justice (Fifth Chamber) of 7 January 2004.

[55] *Toshiba v. Commission*, 2012, case C-17/10. This reference for a preliminary ruling concerns the interpretation of Article 81 EC, of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1), particularly Articles 3(1) and 11(6) thereof, and of point 51 of the Commission Notice on cooperation within the Network of Competition Authorities. The reference has been made in the context of a dispute between various undertakings and the Czech competition authority, concerning the decision of that authority to fine them for infringement of Czech competition law. The factual circumstances of the case at stake concerns an international cartel on the market for gas insulated switchgear ('GIS') in which a number of European and Japanese undertakings in the electrical engineering sector participated for different periods between 1988 and 2004. Both the Commission and the Czech administrative authority for the protection of competition law dealt with certain aspects of this case in 2006 and 2007 and each authority imposed fines on the undertakings concerned. The applicants in the main proceedings brought an action against the decision of Czech competition authority before the Regional Court of Brno. They argued inter alia that that authority had determined the duration of the cartel at issue in the main proceedings in an erroneous manner, and that it had knowingly placed the cessation of the latter at a date prior to the accession of the Czech Republic to the Union, in order to justify the application of the Law on the Protection of Competition. According to those applicants, it follows from Article 11(6) of Regulation No 1/2003 that the said authority no longer had the power to implement a proceeding at national level, since the Commission had already initiated a proceeding at European level in the same case. They concluded that the proceeding brought at national level infringed the *ne bis in idem* principle, prohibiting the cumulation of penalties. During the procedure before the Czech courts, the proceedings were suspended in order to refer the following questions to the Court for a preliminary ruling: 1) Must Article 81 EC (now Article 101 TFEU) and [Regulation No 1/2003] be interpreted to mean that that legislation must be applied (in proceedings brought after 1 May 2004) to the whole period of operation of a cartel, which commenced in the Czech Republic before that state's entry to

However, the AG's demands have in no way been listened by the Court of justice, that stuck to its previous definition of "*idem*" also in competition law controversies[56].

Thus, after the ruling of the CJEU in the *Toshiba* case what is still required for the application of the *ne bis in idem* principle is the "*legal idem*", not the factual one. Such strict position of the Grand Chamber is based on the finding that Art. 52(3) Nice Charter does only apply in relation to corresponding rights. Thereby, since the case of *Toshiba* is not a one-country controversy, the CJEU was not obliged to refer and follow the ECtHR case-law.

Instead, in *Åkerberg Fransson* the situation was totally different, because it regarded the issue of interpreting the *ne bis in idem* principle solely on an "internal level" since the Swedish courts alone imposed the penalties, whose cumulative application was object of the dispute in the case at hand.[57]

Still, alike *Toshiba*, the Court of Justice did not mention in any manner the Article 4 of Protocol 7 to the Convention, implying the will of the CJEU to avoid tackling the relationship between the Article 4 of Protocol 7 itself and Article 50. This decision leads once more to the legitimate question if there is a formal obligation for the ECJ under Article 52(3) EUCFR to strictly follow the Strasbourg jurisprudence when it interprets such a type of corresponding right.[58]

The Advocate General Cruz-Villalòn in the *Åkerberg Fransson* case gave a negative response to this question by founding its reasoning on the divergences resorting from the ratification of Protocol no.7 and the lack of consensus among the European Courts in relation to the interpretation of a specific Convention right. Particularly, the AG pointed out the reality that, as discussed before, many States

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the European Union (that is, before 1 May 2004) and continued and ended after the Czech Republic's entry to the European Union?; 2) Must Article 11(6) of Regulation No 1/2003 in conjunction with Article 3(1) thereof and recital 17 in the preamble thereto, point 51 of the Commission Notice ..., the principle ne bis in idem under [the Charter], and the general principles of European law be interpreted as meaning that if the Commission brings proceedings after 1 May 2004 for infringement of Article 81 EC and makes a decision in that case: «(a) the competition authorities of the Member States are automatically relieved of their competence to deal with that conduct from that time onwards? (b) the competition authorities of the Member States are relieved of their competence to apply to that conduct the provisions of domestic law containing parallel legislation to Article 81 EC?».

[56] Opinion of Advocate General Kokott in *Toshiba v. Commission*, paras. 119-120.

[57] As noted above, the application *ne bis in idem* principle under Article 4 of Protocol 7 to the Convention is limited only to the jurisdiction of one single country.

[58] BAS VAN BOCKEL, Ne Bis in Idem in Eu Law (2016), p.78.

of the Council of Europe have not ratified the Protocol yet or have even made specific reservations to Article 4 of Protocol no. 7 for the purpose of precluding the imposition of administrative penalties.[59] In addition to this, the AG draws a distinction between "core principles" of the ECHR and the other principles ("non-core principles" or "peripheral principles"), such the principle of *ne bis in idem.* More specifically, the former are mandatory since all the States that are parties to the Convention are bound to it; whereas, those principles established in additional protocols to the ECHR are binding in so far as the protocols are officially ratified by the States. In other terms, the Convention framework is characterized by a combination of provisions which are mandatory and other provisions which are, to a certain extent, conditional.[60]Therefore, following this logic, it appears difficult to state that always exists an obligation on the CJEU to respect the ECtHR case-law when a Charter's right is corresponding with a Convention's right.

Moreover, a distinction ought to be drawn between core corresponding rights, for which their interpretation in the light of the ECtHR jurisprudence is deemed as mandatory, and peripheral corresponding rights, that can be interpreted without relying on any reference to the ECtHR settled case-law. In *Åkerberg*, the CJEU did follow this approach and, in elaborating on the scope of Article 50 Nice Charter and determining whether the present situation was in violation with the provision, did not refer to the case law of the ECtHR concerning the principle of *ne bis in idem* and, instead, the Court kept its reasoning in line with is previous jurisprudence, principally with the ruling delivered in *Toshiba*. [61]

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[59] J. A. E. VERVAELE, *The application of the EU charter of Fundamental Rights (CFR) and its ne bis in idem principle in the Member States of the EU*, p. 133-134. The author poses the question of what happens if Member States have not ratified ECHR-PR 7 or have even formulated reservations to its application and are not willing to accept the application of the *ne bis in idem* principle to the cumulative application of both administrative and cumulative penalties. The given answer is as follows: Article 50 CFR "*de facto*" sets aside the non-ratification of declarations or reservations, in so far as the Nice Charter applies in a domestic situation of the *ne bis in idem* right.

[60] Opinion of Advocate General Cruz Villalòn in *Åkerberg Fransson*, delivered on 12 June 2012.

[61] As previously stated, in *Åkerberg Fransson*, similarly to *Toshiba*, the ECJ refrained from referring to the ECtHR's jurisprudence and relied mostly upon the interpretation of Article 50 EUCFR considered uniquely in its semantic and juridical context, detached from any influence from the Convention framework. In contrast, it should be mentioned that when the CJEU was asked in the *Melloni* case (Case C-399/11, *Stefano Melloni v Ministerio Fiscal*, Judgment of the Court on 26 February 2013) to interpret the corresponding rights to an effective remedy in and to a fair trial in Article 47 and the corresponding rights of the defence in Article 48(2) in the Charter, parallels to Article 6(1) and (3) in the ECHR, specific refences to the ECtHR were made.

All in all, it seems incredibly arduous to establish the status of the ECtHR jurisprudence with regard to corresponding rights under both the Nice Charter and the Convention. Indeed, the fact that a controversy before the ECJ involves the interpretation of right envisaged by the Charter corresponding to a provision in the Convention does not appear to imply that the ECJ must necessarily rely on the ECtHR jurisprudence.

3.1 The ECJ goes beyond the homogeneity clause: the restrictive interpretation of Article 52(3) and the rise of Article 53 of the Charter of Nice.

In this section it is argued that the EU Court of Justice went beyond the so-called "homogeneity clause" established under Article 52(3) of the EUCFR by interpreting this provision in a restrictive way and by conferring, instead, a "pluralist" acceptation to Article 53 of the Charter, which toady has a broader meaning that certainly does not reflect its wording. As a previously stated, the *Åkerberg Fransson* case represents an excellent illustration of the minimalist approach adopted by the CJEU in respect of the interpretation of Article 52(3) Charter. Despite the fact that the CJEU recalled the three *Engel* criteria for the purpose of assessing whether tax penalties are characterized by a criminal nature (namely, the legal classification of the offence under national law, the very nature of the offence, the nature and degree of severity of the penalty which the offender is liable to incur), interestingly here the Grand Chamber made a single reference only to its own case-law on the definition of "criminal charge" provided for in the *Bonda* judgement, without making any reference neither to the ECtHR jurisprudence (specifically, the so-called *Engel* doctrine elaborated by the ECtHR case-law in which these criteria are set) nor to Article 52(3) Charter on corresponding rights.

This scenario is all the more surprising especially if we take into account the fact that the same *Bonda* judgement makes an express reference to the ECtHR

jurisprudence.[62] By ignoring the Convention framework and the relevant corresponding ECtHR case law, the CJEU in *Åkerberg* give us the impression to be willing to build an autonomous standard of legal protection and the overall sensation is that the Court wishes to attribute a limited scope and meaning to the "homogeneity clause" by relying, in turn, on its own autonomous interpretation of the *ne bis in idem* right under Article 50 EUCFR.[63]

Such reasoning is in contrast with the position of the Advocate General Cruz-Villalòn, who held, as discussed in great detail in the previous section, that in order to accurately interpret Article 50 EUCFR, it is fundamental to take into consideration the reality that the ECHR system of protection for corresponding rights can be possibly biased by the lack of consensus concerning a right under the Convention framework. This represents the point of divergence between the Opinion of the Advocate General and the final decision delivered by the CJEU in *Åkerberg*[64]: here, the Court totally avoids making any explicit reference to Article 4 of Protocol no. 7 to the ECHR and to the issue of corresponding rights and, instead, made clear that the starting point of the interpretation of the *ne bis in idem* right in Union law is Article 50 of the Charter alone and the criteria defined by the CJEU itself in its own case law.[65]

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[62] Case C-489/10, *Bonda* decision, EU:C:2012:319, para. 37.

[63] In the *Melloni* decision, which was actually delivered on the same day as the *Åkerberg* judgement, the ECJ made a very cryptic reference to the ECtHR case law on Article 6 of the Convention, but without any explicit mention of the Article 52(3) EUCFR and to the "homogeneity clause". But, in *Åkerberg* the Eu Court of justice took a step further by making no reference at all to the ECtHR case law.

[64] K. LENAERTS and J. A. GUTEIRRÈZ-FONS, *The place of the Charter in the EU Constitutional Edifice*, in S. PEERS et al. (eds), *The EU Charter of Fundamental Rights: a commentary* (Oxford: Hart Publishing, 2014), p. 33-34 and p. 38. The author claims that, unlike the Opinion of the Advocate General Cruz-Villalòn, the CJEU relied, albeit only implicitly, on the interpretation of the *ne bis in idem* principle embraced by the ECtHR. Hence, the *Åkerberg* decision confirms the converging (and not the diverging, as generally stated) trend between the jurisprudence of the two European Courts.

[65] Indeed, after a quick look at the CJEU case-law, it appears difficult to maintain also that the Court follows in a scrupulous way the Strasbourg jurisprudence on corresponding rights. Many examples can be found in preliminary rulings issued by the ECJ where the Court does not (but, should have) analyse the ECtHR case-law. B. DE WITTE in *The use of the ECHR and Convention case law by the European Court of Justice*, in P. POPELIER, C. VAN DE HEYNING and P. VAN NUFFEL, *Human rights protection in the European legal order: the interaction between the European and National courts* (Antwerp: Intersentia, 2011), p. 25.: the conclusion by de Witte is that the CJEU jurisprudence reflects an "eclectic and unsystematic" use of Strasbourg case-law and the analysis on *non bis in idem* in *Åkerberg* and *Toshiba* confirms this peculiar reasoning.

This minimalist interpretation of the "homogeneity clause" is strictly connected with the rise of Article 53 EUCFR recorded under the title «Level of protection», which has progressively acquired an utmost importance. The wording of the provision is as follows: « Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions ».[66]

It is worth underlining that the consistent international legal doctrine have historically viewed Article 53 EU Charter as a mere "non-regression clause", therefore establishing the EUCFR as a minimum standard of protection in the field of human rights protection. However, others have considered this article in a broader sense as "best protection clause" or even as a "co-existence clause" for balancing the different legal levels of safeguarding of fundamental freedoms.[67] In any case, one thing is sure: the ECJ with the *Melloni* and *Åkerberg* decisions has decided to give an acceptation to Art. 53 that is different and pregnant from a simple "non-regression clause".

As a matter of fact, Article 53 is now used to give the possibility to the national referring courts to rely on their own national standards of protection of fundamental rights wherever an EU legal act calls for national implementing measures: namely, in all those situations where the action of the Member States is not entirely determined by European Union law. Only in such cases, « national authorities and courts remain free to apply their own national standards of protections, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised ».[68]

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[66] Article 53 EUCFR, in *Official Journal of the European Communities*, C 364/20, 18.12.2000.
[67] B. VAN BOCKEL, *op.cit.*, p.83. The author here uses also the colourful expression "fountain of law", in order to indicate the several layers of protection through which the legal protection of fundamental rights and freedoms flows.
[68] Case C-399/11, *Stefano Melloni v Ministerio Fiscal*, Judgment of the Court on 26 February 2013, para. 29, where it is stated that « the presumption of relevance attaching to questions referred for a

Conversely, domestic courts cannot rely on their own national standards when the action of the States is entirely determined by Union law, thus they have no room for implementing the latter. For instance, this happens in the context of the European Arrest Warrant (the so-called *Melloni* situation; the case where national authorities can implement their national standards of legal protection is known as *Åkerberg* situation).[69] Above all, the national courts to be allowed to use their own national standards of protection, it is necessary that two conditions shall be cumulatively met: first, the requirement that the level of protection grated by the Charter must not be compromised. This condition signifies that a domestic court shall rely only on national standards that guarantee a higher degree of protection to the individual than the level of protection ensured by the EU Charter. Certainly, a domestic court cannot rely on a lower national standard of protection that can undermine the level of protection provided by the Charter. This first condition, in practice, creates a complex system of fundamental rights' protection based on a cumulative application of several layers of legal protection, on both a national and European level. Moreover, the second condition is that the primacy, unity and effectiveness of EU law must not be compromised.

Overall, the interpretation of Article 53 EUCFR provided by the ECJ in *Melloni* and *Åkerberg* calls for a brand-new test regarding the application of fundamental rights and freedoms to the action by Member States, falling within the scope of Union law.[70] Most importantly, it establishes a solid bridge of connection

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preliminary ruling by a national court may be set aside only exceptionally, where it is quite obvious that the interpretation of the provisions of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it […] »; on the point, see B. VAN BOCKEL, *op. cit.,* p.83.

[69] In *Melloni*, the Article 53 EU Charter could not be used by the national court referring to a higher national standard of protection of fundamental rights: for example, the Spanish Constitutional Court in the case at hand relied on the right to not be tried *in absentia*, a higher national standard. Thus, in a *Melloni* situation, the minimum standard of protection is at the same time the maximum standard, that is the ECJ's Union standard; see B. VAN BOCKEL, *op. cit.,* p.83-84.

[70] D. SARMIENTO, *Who's afraid of the Charter? The Court of Justice, National Courts and the new framework of fundamental rights protection in Europe* (2013) 50 CMLRev, 5, p. 1267-1268 and p .1271. The author claims that in *Melloni* and *Åkerberg* the CJEU has effectively created a legal platform of situations with the clear purpose of allocating the respective scopes of application and protection of the EU Charter and of national fundamental rights. Such new approach entails the strategic role of domestic constitutional courts, but it also ensures the autonomy and independence of Member States as well as the Charter's predominant role in the protection of fundamental rights and freedoms.

between national legal standards of protection of human rights and the EU Charter's legal standards.

Essentially, the CJEU assigns a special meaning to Art. 53 EUCFR, which goes much further than a mere "non-regression clause" and materialize the willingness of the Court itself to launch a dialogue with national constitutional courts.[71] Therefore, there is no doubt that this article can now be perceived as a "pluralist clause" (or more precisely, a "best protection clause" or "co-existence clause") in cases that are not entirely governed by Union secondary law. And this means that a domestic maximum standard of protection can apply depending on the circumstance, provided that the EU Charter and the Union law represent always the main interpretative backdrop. In other words, the interpretation of Article 53 EUCFR by the CJEU, on the one hand, recalls the pluralist character of Union law, by recognizing the combined and cumulative application of several levels of fundamental rights' standards of protection; but, on the other hand, it creates a strong shield for the level of protection of the EU Charter and for the primacy, unity and effectiveness of European Union law.[72]

Thereby, the "pluralist clause" does not constitute a general clause as it is limited by the necessity of respecting the autonomy and the uniformity of EU law and the legal protection granted by the Charter itself, which is utilized as the starting point for the interpretation of fundamental rights' provisions and sits at the top of the normative pyramid within the Union legal order. Hence, the Nice Charter is deemed as a purposive legal document, whose main aim is to guarantee, within the limitations of reason, the enjoyment and fulfilment of the fundamental rights and freedoms it establishes.[73] Possibly, this purposive constitutional interpretation is capable of justifying a controversial ruling like the *Åkerberg Fransson* decision, that applied and autonomous standard of protection, i.e. in the case at stake Article 50 EUCFR, without taking into account the potential lack of consensus among the

[71] K. LENAERTS and J. A. GUTEIRRÈZ-FONS, *The place of the Charter in the EU Constitutional Edifice*, in S. PEERS et al. (eds), *The EU Charter of Fundamental Rights: a commentary* (Oxford: Hart Publishing, 2014), p. 22.
[72] B. VAN BOCKEL, *op.cit*, p. 84-85.
[73] B. VAN BOCKEL, *op.cit.*, p. 85. The authors held that the ECJ uses in fact a dual purposive interpretation. The first purpose is to ensure the protection of the individual fundamental rights and freedoms of the EU Charter. In addition to this, the second purpose is to grant the effectiveness of EU law.

States of the Council of Europe in respect of Article 4 of Protocol no. 7 to the Convention.

In the end, Article 50 of the Charter, in its interpretation provided by the CJEU in *Åkerberg*, sets its own autonomous standard of legal protection for the *ne bis in idem* right between the 28 Member States of the European Union and the express reference (or reliance) on the legal standards ensured by the ECHR is regarded as not compulsory.

4. The effects of the two different shapes of European *ne bis in idem* on national interpretation of the principle supplied by national Constitutional Courts: reverberations on the concrete application of European Human Rights law.

The main stage for the concrete application of European human rights law is, without a shadow of a doubt, the national one. Thus, it comes natural to take a closer look at how the two different shapes or expressions of the *non bis in idem* principle – namely, the ECHR and the EU one – influence the national interpretation, especially the one provided by domestic constitutional courts, of this guarantee. In this regard, the consequence of the intrinsic plurality of European human rights law needs to be assessed and both the interplay and the profound differences between the Convention and the Nice Charter are required to be disclosed.

First, it must be recalled that is generally said that the "material" scope of the rights ensured by the EUCFR is broader than the one of the Convention and that, on the contrary, the "personal" scope of the ECHR is wider than that characterizing the Nice Charter, since it is not limited only to Union law situations but also includes merely internal situations (thus, those cases where the Union law is not applicable because of the lack of the extraneity element). Besides, it is noteworthy that, contrary to the position of the EU law within the legal order of each Member State of the Union, the status of the ECHR within the legal orders of its Contacting States various considerably. This has important consequences on the fundamental rights' legal protection, as the union of fundamental rights with the

drive for European legal integration can significantly reinforce the impact of those rights at a national law level.

As a matter of fact, the existence of specific constitutional principles, like the principle of supremacy of EU law, that makes the enforcement of EU fundamental rights mandatory, and the duty of loyal cooperation with the European Union, which entails that Member States have to disapply any national measure, including even a constitutional provision, that is in conflict with an EU law right, render the traction and the weight of these rights – the ones provided for by the EU Charter – much more greater on a national level than the influence recognized to ECHR rights.

This consideration determines the reality that in some countries, such as the Netherlands, the decisions of the ECtHR have primacy over all conflicting national provisions, or in Austria, the Convention has the same rank of constitutional law and is directly applicable. On the other hand, other countries have adopted a more cautious position towards the ECHR: for instance, in the German legal order the Convention is ranked below than German ordinary pieces of legislation; in the United Kingdom, domestic courts are constitutionally limited in totally disapplying acts of the British Parliament, wherever they conflict with a Convention provision, since it is only required to take the decisions of the ECtHR into consideration.

Then, it has also occurred that national courts have been reluctant to adopt the methods of interpretation elaborated by the ECtHR and, in some cases, even refused to apply ECHR provisions.[74] Such a scenario would be impossible in the EU legal system, otherwise a national legislation was to infringe a Charter's right. This insomuch as the domestic courts of EU Member States have the legal duty under Article 4(3) TEU to disapply the national provision conflicting with the EUCFR right.[75] This crucial passage may have prominent reverberations on the concrete application of European Human Rights law on a national level.

[74] For instance, the highest court of Sweden in the so-called *Pastor Green* case has decided to depart from the traditional methodology based on preparatory works by the ECtHR and thus begin to show signs of constitutional pluralism by interpreting the provisions, in the Swedish constitution, regarding the freedom of expression and religion in the light of the European human rights regime as interpreted by the Luxembourg court.

[75] Article 4 TEU: « In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States. The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures,

Indeed, in the absence of a similar duty in respect of the ECHR, the application of the Convention's rights is unavoidably dependent on which status is conferred to the ECHR itself, intended as an international legal instrument, within the national legal system. In light of the *Åkerberg Fransson* decision, it seems useful to recall the Swedish constitutional context in order to exemplify the modalities in which the national courts, all over the Europe, have approached the European fundamental rights in general and, especially, how their interpretation of the *ne bis in idem* right can be influenced.

In fact, as elaborated upon previously in this Chapter, in the *Bonda* case, the CJEU fully applied for the first time the three *Engel* criteria for determining the criminal nature of a (formally) administrative sanction within the legal framework of a EUCFR right.[76]

Then, in *Åkerberg Fransson* the Court of Justice took a step further by not making any reference at all to the ECtHR jurisprudence. The general feeling is that the Court's wish is to give a restricted significance to the "homogeneity clause", by relying instead solely on its own autonomous interpretation of Article 50 EUCFR since it is essential to always bear in mind the possible lack of agreement regarding a right, such as the *non bis in idem*, in the Convention system. This because, as discussed above, not all the Member States of the European Union have ratified Article 4 of Protocol no. 7 to the Convention and many States have made reservations about the implementation of such provision. Considering this, it appears that the ECJ wanted to elude this problem of generally lacking consensus by simply not making any reference to Protocol no. 7 to the ECHR and also to the "homogeneity clause" from Article 52(3) EUCFR on corresponding rights, but rather preferred to refer the case back to the referring Swedish court.

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political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State. 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 jeopardise the attainment of the Union's objectives ».

[76] J. A. E. VERVAELE, *The application of the EU charter of Fundamental Rights (CFR) and its ne bis in idem principle in the Member States of the EU*, p. 133-134.

Indeed, the Court in the *Åkerberg Fransson* case did not decide itself on the criminal nature of the penalty, but left instead that task to the domestic court and, consequently, with that to the ECtHR case-law.[77] This controversial choice by the ECJ might appear that the Court did not take into consideration the existing general lack of consensus among the EU Member States about the ECHR.

In reality, this assessment by the Court of Justice had no real direct consequence since Sweden has already signed Protocol no.7. But it is not sure what will be the reactions in other legal systems, such as France or the United Kingdom, which have not ratified yet Article 4 of Protocol no.7.[78]

In effect, the ECJ may have not calculated the possibility of serious drawbacks in the European human rights law. In any event, it is clear from the ECJ's decision in *Åkerberg* the intention of the Court to leave, by referring the case back to the Swedish court that requested the preliminary ruling, the interpretation on the *ne bis in idem* matter in the case at stake to the domestic court, that eventually applied its own national standards of protection. Unquestionably, leaving such a freedom to national authorities and courts will lead to a certain outcome: inevitable constitutional implications regarding the application of the *ne bis in idem* principle and appetizing consequences of the plurality that characterizes European human rights law.[79]

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[77] For further debates about the implications connected to this topic, *see* K. LENAERTS and J. A. GUTEIRRÈZ-FONS, *The place of the Charter in the EU Constitutional Edifice*, in S. PEERS et al. (eds), *The EU Charter of Fundamental Rights: a commentary* (Oxford: Hart Publishing, 2014), p.1567-1568. It is noteworthy to remember that the judgement in *Åkerberg Fransson* ascertained that the Swedish regulation involving parallel sanctions did in fact, as far as it concerned sanctioning violations linked to the levying of VAT, entails an implementation of EU law, as according to Article 51(1) EUCFR. Regarding the substantial interpretation of the *non bis in idem* right under the Charter and its consequences toward the Swedish regulation, the CJEU stated that Article 50 EUCFR precluded a criminal proceeding in respect of acts on non-compliance with declaration obligations if it followed a sanction of criminal character in relation to the same acts and that penalty has already become final. In the end, as repeatedly discussed, the Court did not make any reference to the jurisprudence of the ECtHR in this regard, nor did it consider the possibility to maintain under EU law cumulative and combined criminal penalties for the same offence.

[78] B. VAN BOCKEL, *op.cit.*, p. 87.

[79] B. VAN BOCKEL, *op.cit.*, p. 88. The author here use a colourful expression in order to highlight the question whether the application of many standards of legal protection of fundamental rights, on different level (thus, the national ones and on the EU and ECHR level) would paradoxically undermine the effectiveness of human rights safeguard within the European legal framework: "Do too many cooks really spoil the broth?" . Such ominous statement may be the halo of future problems in the field of fundamental freedoms and rights protection.

Through this case-analysis in how the approach of domestic courts towards European human rights law may potentially evolve, in fact, we acknowledge that the multitude and plurality of legal standards of human rights protection may altogether contribute to the development of higher legal standards on the national level, which should represent the minimum form of protection of fundamental rights. Thus, even a small upgrade in the domestic minimum standards may then spark to a general development in the set of standards on the European level, as the latter ones must catch-up with the formers. [80]

This cross-fertilization phenomenon is especially felt on the domestic or local level, where the national courts must deal with the interactions between the national, Convention and EU standards of protection. It follows from the brand-new rule introduced by *Melloni* and *Åkerberg* that, wherever the Union law is applicable, domestic standards, other than the common uniform EU standards, can be utilized in a complementary way, only if they both meet the two requirements of the "level of protection" and the "primacy, unity and effectiveness of EU law" mentioned earlier in section 3.1. This seems to concede only a narrow possibility to national courts for effectively applying national standards of protection different from the general and uniform one granted by the EU.

Furthermore, even though the domestic standard is actually compatible with the Nice Charter, at least in so far as it promotes the same level of fundamental rights protection, it nonetheless could still not be applied in a fashion that the effectiveness of not human rights related EU legal provisions.[81] In these cases, the hands of the domestic judge are totally tied.

Therefore, it could be argued that the only innovative aspect introduced by *Melloni* and *Åkerberg* is that such restriction for national courts, in those case where the EU standard of fundamental rights protection shall not be substituted by a lower national standard, is reformulated in terms relating more to the EUCFR than to general principles of Union law.[82] But, on the other hand, one might argue that in

[80] J. A. E. VERVAELE, *The application of the EU charter of Fundamental Rights (CFR),* cit., p. 135.
[81] K. LENAERTS and J. A. GUTEIRRÈZ-FONS, *The place of the Charter in the EU Constitutional Edifice,* cit., p. 1569.
[82] J. A. E. VERVAELE, *The application of the EU charter of Fundamental Rights (CFR),* cit., p. 136-137.

this respect the CJEU decided to merely maintain the previous *status quo*. In any case, in all those instances where it is not clear if a national standard is compatible or not with EU law, the domestic court that faces this uncertainty will always have at least the option (or, under specific circumstances, the obligation or the duty) to ask the CJEU for a preliminary ruling, by triggering the procedure under Article 267 TFUE.[83]

Since we cannot find an analogous mechanism within the Convention system, a national court runs the risk of being trapped in a guessing loop in relation to the compliance of a national standard with an ECHR standard, in the view of the harmful consequences of the ECtHR court invalidating national legislation.[84] Nevertheless, it ought to be noted that, apart from the aforementioned grand differences between the EU and ECHR legal systems, another main divergence between the two legal orders consists in how they are absorbed into the domestic legal order: EU law imposes itself on its own merits and, whereas, ECHR law, by covering a more subsidiary role, depends on the specific status conferred to by each single Contracting State in its own hierarchy of sources of law. Only where the Convention, intended as an international legal instrument, is given a position ranked above ordinary national legislation, i.e. it is ranked at the same level of one State's constitution, thus the judiciary is entitled to disqualify an act of national parliament conflicting with the ECHR. The aftermath of the *Åkerberg Fransson* judgement offers a clear example of how the interplay between the Convention and Union legal orders provides a raised degree of fundamental rights protection, not achievable or envisaged without the input supplied by each stand of standards.[85] In fact, from *Åkerberg* it is possible to draw the conclusion that an ECJ's ruling not only may have the capability of influencing how the content of ECHR law is substantially perceived, but also how readily the Court of justice case law can penetrate national legal systems and be used as a vehicle of constitutional review.[86]

[83] B. VAN BOCKEL, *op.cit.*, p. 100.
[84] B. VAN BOCKEL, *op.cit.*, p. 100.
[85] B. VAN BOCKEL, *op.cit.*, p. 101.
[86] See U. BERNITZ, *The Åkerberg Fransson case: ne bis in idem: double procedures for tax surcharge and tax offences is not possible* in J. NERGELIUS and E. KRISTOFFERSSON, *Human rights in contemporary European law* (Oxford: Hart Publishing, 2015), p. 191.

In the case at hand, indeed, not only did the Swedish court equate the significance of *non bis in idem* in the EU Charter with that of the ECHR, but also the innovative test elaborated for the non-VAT penalties' compatibility with the Convention is influenced by the consequences of the Union law and the Charter.[87]

Of course, it should be specified that the Swedish court, when referred back by the ECJ, held that its autonomous interpretation of Article 50 EUCFR does not modify neither the meaning nor the scope of Protocol no.7 to the Convention. However, since the Swedish court did not want to risk failing below any of the minimum standards of protection prepared by both the ECHR and EU legal orders, and consequently chose to utilize instead an homogeneous standard, the protection granted by the Convention's principle of *non bis in idem* in Sweden will, in practical terms, have significantly increased.[88]

Finally, from what has been analysed in this Chapter, it is possible to conclude that there are surely remarkable differences in how the principle of *ne bis in idem* is conceived in the various countries within the European legal framework. Albeit the CJEU can not be realistically accused of being in open contrast with the ECtHR concerning the definition and application of the *ne bis in idem* right, envisaged in both the Convention and the Nice Charter, the Court of Justice has certainly been very methodic and careful in its reasoning, as aiming at preserving its autonomous interpretation of the principle.[89] Such an independent interpretative attitude can be undoubtedly questioned in the light of the "homogeneity clause", established under Article 52(3) EUCFR.

But, as clearly exemplified by the repercussions and consequences of the CJEU's ruling delivered in the *Åkerberg Fransson* case on the Swedish interpretation of *non bis in idem*, the conservation of the plurality of human rights protection's legal standards may effectively encourage the fruitful development on the national level of this particular right towards a higher degree of human rights protection.

This kind of scenario, characterized by the autonomy of Charter's rights interpretation *vis-à-vis* ECHR rights, actually stimulate constitutional competition

[87] B. VAN BOCKEL, *op.cit.*, p. 101.
[88] B. VAN BOCKEL, *op.cit.*, p. 101.
[89] B. VAN BOCKEL, *op.cit.*, p. 102.

in drawing up fundamental rights protection's system. Someone may argue that whether there would be complete uniformity in all European human rights law, there would not be various standard of minimum protection guaranteeing a dynamic implementation of human rights law.[90]

Put in different terms, if each applicable legal standard is exactly the same, there will be no necessity to adapt and improve the degree of protection to be eventually executed. Thus, there would simply not be any constitutional competition and this represents a serious prejudice towards the effective realization of the fundamental rights protection among the European legal framework.

[90] B. VAN BOCKEL, *op.cit.*, p. 102; on the point, also K. LENAERTS and J. A. GUTEIRRÈZ-FONS, *The place of the Charter in the EU Constitutional Edifice*, cit., p. 1570-1571.

CHAPTER III

NE BIS IN IDEM AND PUNITIVE SYSTEM: THE LONGSTANDING DEBATE OVER THE DUAL-TRACK SANCTIONING SYSTEM AND ITS COMPATIBILITY WITH THE BAN OF DOUBLE PUNISHMENT.

SUMMARY: 1. The rise and fall of the punitive system with regards to market abuses and tax offences: the double track's logic and its crisis. 2. The rethinking of the *ne bis in idem* principle provided by ECtHR in the *Grande Stevens* judgement. 2.1. Follows: Further jurisprudential standpoints in the Strasbourg regime and the audacious reply by CJEU: the *Åkerberg Fransson* decision. 3. *A & B v. Norway*: reduction of the deflagrating flow rate of the *Grande Stevens* judgement and the "sufficiently close connection in substance and time" criterion.

1. The rise and fall of the punitive system with regards to market abuses and tax offences: the double track's logic and its crisis.

The quest of an univocal definition of *ne bis in idem* in relation to the infliction of cumulative sanctions towards the same material conduct has fondly engaged over the years both national and supranational jurisdictional authorities, especially in the light of the progressive expansion of the areas of law covered by the principle at issue that did not make any easier the judicial dialogue between domestic and international courts.

Despite the lack of an unanimous view on the viable procedural remedies that can be implemented in order to prevent reiterated violations of the principle, it is possible to detect a sufficient certainty within the jurisprudence of the European Courts with regards to the instances where the *ne bis in idem* rule is assumed as disrespected.

The objective of the present work is therefore to educate on recent rulings by both the European Court of Human Rights and Fundamental Freedoms and the Court of Justice of the European Union, that have outlined possible measures to be

undertaken in order to *plug* and secure perilous "vacuums" within human rights legal protection generated by the consistent infringement of the prohibition of double jeopardy permitted by internal legislation in drawing the functioning of sanctioning mechanisms.

The starting point of the survey is going to be undisputedly the guidelines elaborated by the Strasbourg judicial board in the notorious "*Grande Stevens* affaire", where the Court censored the biased punitive regime of the "dual track" applied to market abuse offences. Indeed, this sanctionary system was recognized as incompatible with the conventional *ne bis in idem* from Protocol no. 7 due to the illegitimate combination of two penalties, one criminal and the other formally administrative, but, at any rate, related to the field of "criminal matters" whose boundaries were delimited by the ECtHR itself by virtue of the previously analysed "*Engel* criteria". Accordingly, the Court declared that that the imposition of formally administrative sanctions, but connoted by a substantially criminal character for the purpose of quelling market abuses violations shall be deemed as preclusive towards the initiation of criminal proceedings against the same illicit act.

This fundamental "*dictum*" from the Strasbourg case law – further corroborated by subsequent rulings by the same ECtHR and also by the CJEU – provides a purely "garantist" reading of the ban on double prosecution , which, in any case, does not hinder "*a priori*" the opening of two parallel proceedings in relation to the same misconduct, but exclusively precludes the interruption of one of the two trials whenever the other has reached a final resolution enshrined in an irrevocable judgement. Otherwise said, that the prohibition of double jeopardy is structured so as to operate not only when a judgement is issued as the result of a criminal proceeding and it has gained the value of *"res judicata"*, but when a penalty, albeit formally qualified under national law as "administrative" and already definitively imposed, can be traced back to the notion of "*matière pénale*" theorized under the ECtHR jurisprudence. Such hermeneutical approach, originally developed by the Strasbourg court and currently endorsed also by

the ECJ and the vast majority of domestic courts, is based on the framing of formally administrative offences endowed with a substantially criminal nature. However, the undeniable drastic force of this statement would have likely caused some resistances among internal legal systems, forced to adjust their legislation concerning sanctioning procedures openly in contrast with the Strasbourg dictum. Therefore, the ECtHR was compelled to reconsider the radicality of its autonomous interpretation of the issue and opted for mitigating the disrupting jurisprudential trend inaugurated by the *Grande Steven* decision.

By virtue of the *A & B v. Norway* ruling, which represents the arrival point of the study carried out in the present Chapter, the Strasbourg Court decided to make a jurisprudential "*revirement*" towards the implementation of the "double track" sanctioning system, making a "U-turn" in respect of its initial closure regarding the legitimacy of such punitive regime. The Court specifically held that the breach of the *ne bis in idem* guarantee can be compensated through some shrewdness enacted on the side of the concrete performance of dual proceedings against the same person and on the same facts. Precisely, in order to obliterate a violation of Article 4 of Protocol no. 7 it is essential to certify that the two set of proceedings are "sufficiently connected in substance and in time".

Hence, the Court with the introduction of the twofold connection requirement – namely the substantial and the chronological one – has put a break on the deflagrating flow rate of the *Grande Stevens* ruling that opened the season of the censorships towards national legal systems where they provides for parallel administrative and criminal penalties punishing the same conduct. The legal effects produced by dual proceedings are in fact unaffected as long as the substantial and temporal bond that unites them is sufficiently close.

Thereby, the conclusion drawn by the ECtHR is the following: the respect of the *ne bis in idem* guarantee established under the Convention legal order demands that the overall domestic sanctioning response, albeit structured in the form of a two-way punitive system, shall express a coherent, unified and coordinated action against facts liable of manifesting a social disvalue. Furthermore, a further focal point determined by the Strasbourg court in the *A & B* decision is represented by the highly debated choice of leaving to national judges

the task of ultimately judging whether the two proceedings give rise to a case of *"bis in idem"*, which is ruled out in any those hypothesis where the procedures are linked by a sufficiently close material and chronological connection, whose identifying criteria are going to be duly examined in Paragraph 4. Whereas, on this stage, we should limit to advocate only that a considerable downsizing of the scope of the conventional guarantee can be denoted, provided that since *A & B* not only the two proceedings can be initiated, but also they can even be brought to an end – being their outcome the infliction of two different sanctions –, if the conditions laid out by the ECtHR recent case-law are fulfilled. Among these prerequisites should be mentioned for now the proportionality of the cumulation of penalties with respect of the seriousness of the punished offence, the different purposes served respectively by the criminal proceeding – namely, a deterrent, repressive and "retributive" aim – and by the administrative one – thus, a compensatory function – and, finally, the foreseeability, from the defendant's perspective, of the risk of incurring in a double penalty.

From this necessary premise, it is now timely to examine the underlying arguments adopted by the Strasbourg court in order justify the European-wide radical censorship of the "double- track" sanctioning system on the account of its incompatibility with the prohibition of double jeopardy enshrined in Article 4 of Protocol no. 7 to the ECHR.

Beforehand, the undersigned reckons that, for acquiring a comprehensive knowledge of the criticism offered by the conventional jurisprudence, it is seminal to evaluate the inner logics and rationales of the dual track punitive system enforced in tax law and in financial market regulation. Specifically, in relation to tax offences, it is possible to retrieve striking illustrations of how national legislators have intended to improve the effectiveness of legal policies against fiscal frauds by promoting not only the worsening of the sanctioning treatments but also by allowing the cumulation of criminal and administrative penalties.[1]

[1] A. TRIPODI, op. cit., p. 671. The author observes how the implementation of the dual track sanctioning system in relation to fiscal offences and its incompliance towards the *ne bis in idem* principle represents one of the most contentious topics in the Italian juridical thought.

Taking into consideration the Italian regulations, the legal intervention on the criminal prevention and prosecution of tax evasion has historically been structured around the prominent role attributed to the tax judge and to infliction of administrative sanctions. As a matter of fact, a peculiar procedural mechanism was provided in relation to tax fraud consisting in the postposition of the activation of criminal prosecution after the occurrence of a judgement from the tax authorities which has become irrevocable.[2]

The Italian tax sanctions, featured by harsh edictal limitations, were connoted in practical terms by a substantially criminal nature, detached from the compensatory purpose typically pursued by administrative penalties, since they were designed to ensure an exemplary punishment to tax evaders.This scen ario brought into question the compatibility of such punitive mechanisms with the *ne bis in idem* rule and its autonomous interpretation constantly re-emphasized by the ECtHR since the *Engel* decision.[3]

Anyhow, by virtue of the Italian Legislative Decree No. 74/2000, the aforementioned procedural rule, imposing the suspension of the criminal procedure in the event that the same case was pending before a tax court –and not vice versa –, was definitively abandoned by the Italian legislator and the substantial autonomy between the criminal and fiscal trial was proclaimed, since any preliminary or super-ordination relationship among them was deleted.[4] In any case, both the Italian jurisprudence and legal doctrine has identified in the so-called "principle of speciality" – enshrined in Article 15 of the Italian Criminal Code – a valid expedient for resolving the issue of the superimposition of criminal and tax sanctions.[5] Moreover, this is the provision that is assumed to govern, in general, the interplay

[2] M. BELLACOSA, *La riforma dei reati tributari nella prospettiva europea*, in AA.VV., *Tutela degli investimenti tra integrazione dei mercati e concorrenza degli ordinamenti*, a cura di A. DEL VECCHIO- P. SEVERINO, Bari, 2016. This procedural mechanism is defined in Italian as *"pregiudiziale tributaria",* p. 288 ff.

[3] A. TRIPODI, *op. cit.*, p. 672. Here the author recalls the settled case law of the Strasbourg court and stresses how the qualification of sanctions based on the grounds of their "substantial nature", rather than on the formal guise attributed to them by domestic law has determined the enlargement of the scope of application of the conventional *ne bis in idem.* This hermeneutical standpoint overcomes any "formal" restraints, since an administrative penalty can be qualified as "criminal" the *Engel* criteria are met. Undisputedly, this approach has widened the operability of the guarantee at issue. Thus, the number of the cases of confliction with the principle has been certainly increased.

[4] F. RUSSO, *L'equilibrio storico sistematico tra processo penale e tributario alla luce dei principi Cedu e pronunce della Corte Edu,* in *Diritto e pratica tributaria internazionale,* 2017, p. 132.

[5] See on the point, M. BELLACOSA, *op.cit.*, p. 300 ff.

between administrative and criminal penalties, also with regards to the area of tax law.[6]

On this point, however, some objection can be thrown up since, on the one side, it is certain that this principle is essentially aimed at avoiding the enforcement of repeated sanctions against the same behaviour, also including penalties of different nature. But, on the other hand, the preclusion of the potential concurrency between administrative and criminal sanctions is only implicitly allocated by Article 15 of the Italian Criminal Code, without any reference made to its operability within the tax law field. This can be conceived as one the compelling reasons below the introduction of the Italian Legislative Decree No. 74/2000, whose Article 19(1) nips in the bud the possibility of a cumulation of administrative and criminal penalties since it states that when the same act is simultaneously punished by a criminal sanction laid out for a tax offence – under Title II of the normative text at hand – and by an administrative sanction, therefore the « special provision shall apply».[7] This is the methodology selected by the Italian legislator for the settlement of "apparent conflicts" between criminal and administrative penalties, that results generally in the application of the criminal provision given its characterization by "specializing elements", such as the particular connotation of the wilful intent or the provision of specific thresholds for criminal liability.[8] *Sic stantibus rebus,* the normative manipulation enacted by the Italian legislator in 2000 regarding the Italian regulation in matter of tax fraud, has marked the "death" of the cumulative double-track system – at least, as applied towards fiscal crimes – which

[6] Article 15 Italian Criminal Code: « Where more than one criminal law provisions or several provisions of the same criminal law, govern the same matter, the special law or provision of law shall derogate from the law or provision of general law, unless otherwise stated ».

[7] Article 19(1) of the Italian Legislative Decree No. 74/2000: « When the same act is punished by one of the provisions of Title II and by a provision providing for an administrative sanction, the special provision applies ».

[8] P.P. RIVELLO, *I rapporti tra giudizio penale e tributario ed il rispetto del principio del ne bis in idem,* in *Diritto penale contemporaneo,* 2018, n. 1, p. 107-108, in which the author reckons that "[...] the specialty relationship must be considered to exist if one of the two cases, in addition to containing all the constituent elements of the other, presents one or more additional and specializing elements […]". Furthermore, the author also reviews the doctrinal debate on the topic by noting that "[...]the thesis according to which the "special" provision would be the administrative one appears to be substantially minority; on the contrary, on the basis of the prevailing orientation, in the majority of cases it is the criminal offence that takes shape in terms of specialty. In fact, for the existence of such an offence, with the exception of certain hypotheses, there is a threshold of liability, which is not required for the configuration of the tax violation; moreover, it presupposes, at least generally, and unlike the tax offence, the existence of the element of the specific fraudulent intent of evasion".

has been supplanted by the alternative double- track punitive procedure, whose outcome is represented by the infliction of a single sanction – namely the one endowed with profiles of specialty.[9]

Furthermore, from a procedural standpoint, the aforementioned decree has consolidated the sheer independence between the two different sanctioning proceedings but, at the same time, even though the possibility to suspend an already instituted criminal trail due to a pending tax proceeding was abrogated, also added that the administrative sanctions envisaged for those tax offence shall be applied regardless of their already established prosecution before a criminal court.[10] However, it is also specified that the latter penalties cannot be enforced unless the criminal proceedings is terminated by an irrevocable acquittal by the criminal judge or by means of a decree containing the dismissal of the action by the public prosecutor. In other terms, in the solution elaborated by the Italian legislator, administrative penalties serve only a supplementary function, since their execution is barred by the delivery of a conviction before the criminal court for the same tax law violation and, instead, its activated by the judicial deliverance of the defendant. In this manner, the full compliance with the *ne bis in idem* principle is ensured and the opening of a parallel administrative procedure on the ground of the same offence, that may lead to the duplication of the penalty, is unquestionably averted.[11] Consequently, the separate application of sanctions towards the same fiscal fraud should be, at least in theory, capable of preventing any breach of the ban on parallel proceedings.

Anyhow, the Italian Supreme Court in 2013, on two different occasions, was summoned to rule upon the concurrency of the crime consisting in the failure of payment of VAT by an Italian supplier and its correspondent administrative offence: the Court denied the existence of a bond of specialty between the two

[9] G. FLICK, V. NAPOLEONI *Cumulo tra sanzioni penali e amministrative: doppio binario o binario morto?*, in *Rivista AIC*, 2014, n. 3, p. 2.

[10] Article 21 of the Italian Legislative Decree No. 74/2000: « 1. The competent office shall, in any case, impose administrative sanctions on the tax violations reported in the report of the following. 2. These sanctions are not enforceable against persons other than those indicated in article 19, paragraph 2, unless the criminal proceeding is defined by means of a dismissal order or an irrevocable acquittal or acquittal with formulas that exclude the criminal relevance of the fact».

[11] On this point, A. TRIPODI, *op. cit.*, p. 678, in which it is highlighted how the separate implementation of penalties is capable of avoiding any breach of the *ne bis in idem* principle.

offences and allowed substantially the punitive duplication against the same defendant.[12] Indeed, the Court also radically excluded the eventual possibility of an apparent conflicts between the two sanctions at hand, thus leaving no room for the application of the *ne bis in idem* guarantee, in obedience to basic demands of fairness and punitive rationality.[13]

The reasoning of the Court can be deployed in the light of a choice of criminal policy prone to ensure the fulfilment of general deterrent, punitive and preventive needs, despite the clear contrast of this jurisprudential approach not only with the immanent rationales of the *ne bis in idem* guarantee, but also with the consolidated case-law of both European Courts on the point. [14] In any case, since the "principle of speciality" appears as exclusively based on the specialty of the relevant regulation from a mere formal viewpoint, and, conversely, the *ne bis in idem* rule relates solely to the closure of a proceeding whose outcome results in the imposition of a sanctions having afflictive purposes, thus preventing the either the initiation or the perpetration of a second proceedings, it may be argued that the likelihood of conflicts between the principle of speciality – focusing only on the formal peculiarity of the applicable provision - and the *ne bis in idem* principle – as intended in the "substantial" acceptation given by the ECtHR – is fairly high.

[12] Italian Supreme Court, United Sections, 28 March 2013, Judgment no. 37424 and Italian Supreme Court, United Sections, 28 March 2013, Judgement no. 37425: the Court applied both the criminal and the administrative sanctions respectively established under Article 10-*bis* of the Italian Legislative Decree No. 74/2000 and by Article 13 of the Italian Legislative Decree No. 471/97. See M. DOVA, *Ne bis in idem e reati tributari: a che punto siamo*?, in*www.penalecontemporaneo.it*, 09.02.2016, p. 6, where the author underlines how the Italian Supreme Court "does not appear to be inclined to recognise that principle, leaving it to the principle of speciality alone to regulate the apparent competition of rules. In so doing, however, the case-law has endorsed punitive duplication.". At any rate, it is also stressed out the focal point that the wrongful approach undertaken by the Italian legislator towards the issue cannot be denied: "[…] the crimes of non-payment[…] facts which, in the original reform plan of 2000, were not even included in the catalogue of conduct worthy of punishment. In fact, it was only a few years later, precisely in 2004 and 2006 , that the legislator, going back on its own steps, attributed criminal relevance, respectively, to the omitted payment of certified withholding tax and the omitted payment of VAT (Articles 10-*bis* and -*ter*, Legislative Decree 74/2000). This produced an overlap between crimes and administrative offences of non-payment, which should have been resolved through the principle of specialty".

[13] M. DOVA, *op.cit*., p. 6.

[14] In this sense, M. DOVA, *op.cit.* p. 7. The author reckons that "In fact, even in a system governed by the principle of speciality alone, case law had all the appropriate means to prevent the violation of the principle of *ne bis in idem*. This orientation could only be in open contrast with supranational sources, whose ever-increasing influence on national systems can no longer be overlooked. In fact, according to the consolidated jurisprudence of the European Court of Human Rights, the double track penal-administrative sanctions provided for in tax matters violates the principle of *ne bis in idem"*.

Consequently, a more straightforward approach should be the one designed to avoid the combination of criminal and tax penalties, so that the formers shall be applied only against those offences connoted by a major degree of disregard towards the legal order, whereas the administrative ones shall be directed only against those infringements endowed with a minor level of social disvalue.

In other words, on the one side, the exclusivity of the application of criminal law punishment shall be enhanced and, on the other, the enforcement of administrative penalties in case of tax offences shall be instead reduced and not exploited so heavily, in the view of repealing and grubbing-up fraudolent behaviours that teem the area of tax regulations and which are characterized by a high negative legal value (e.g. presentation of false, incorrect or incomplete statements or documents regarding the fiscal situation of the tax-payer or other artifices or deceptions enacted for evading taxation).

The most effective legal weapon in the possession of national legislators is the criminal law sanction, which should be used as an *"extrema ratio"* against torts or delicts that necessitates of an exemplary punishment, also with the outset of producing a deterrent effect upon potential transgressors. This may represent one avenue that could be explored by the Italian legislator in order to override the censorships levelled against the sanctioning framework laid down in the Legislative Decree No. 74/2004. As we have been able to confirm, the Italian legal system represents a suitable benchmark for the analysis of the troublesome issue of the compatibility between the double-track sanctioning system and the prohibition of double jeopardy. The violation of the principle of *ne bis in idem*, however, cannot be exclusively detected in relation to tax law matters. As a matter of fact, a further profile of criticality can be found in relation to the operability of the punitive duplication's mechanism with respect of hypothesis of market abuse, and even in this case the current backdrop that has been configured in Italy – in the aftermath of the *Grande Stevens* judgement delivered by the ECtHR – affords an invaluable contribute for the study in the present Chapter.

A preliminary review of the regulations on market abuse offences in force within the Italian legal order at the time of the Strasbourg's ruling appears as

essential in order to achieve a better grasp on the hermeneutical standpoints developed by both the Italian and the European Courts on the matter.

The starting point of this report is unavoidably the Italian legislative act transposing the EU Directive 2003/6/EC –also known as MAD I ("Market Abuse directive")–, which introduced the brand new offences of "market manipulation" and "insider trading", whose main purpose is to ensure the safeguard of those mechanisms monitoring "the correct functioning and the transparency of financial markets", which, thereby, are reassumed in the trust of savers and investors, who are willing to grant the economic operators their savings, towards the bond and securities market.[15]More specifically, the offence of insider trading is integrated by the purchasing, the sale or by the completion of any other transactions involving financial assets – either directly or indirectly, either for his or her own account or for the account of a third party – on hand of privileged information acquired during the course of the execution of a function or role performed within a private corporation or a public authority operating in this sector.[16]

A "privileged information" is defined as cognitive knowledges that have not been yet in the public domain, that generate information asymmetry between the offender and the rest of the users and that are characterized by "price sensitivity": namely, the capability of a precise information of sensibly influencing the fluctuation of the prices of the foretold financial assets.[17]

Furthermore, the offence of market manipulation involves an ensemble of various and alternative conducts including the disclosure of false information or the performance of fictitious transactions or other devices directed at causing the fraudolent and illicit alteration of the price tag of negotiable securities (money market paper, bonds and equity securities) as well as credit balances (sight deposit account or loan).[18]

[15] F. SGUBBI, D. FONDAROLI, A. TRIPODI, *Diritto penale del mercato finanziario*, II ed., Padova, 2017, p. 34-35.
[16] F. SGUBBI, D. FONDAROLI, A. TRIPODI, *Diritto penale delmercato finanziario*, II ed., Padova, 2017, p. 41.
[17] F. SGUBBI, D. FONDAROLI, A. TRIPODI, *Diritto penale del mercato finanziario*, II ed., Padova, 2017, p. 7-8.
[18] F. SGUBBI, D. FONDAROLI, A. TRIPODI, *op. cit.*, p. 75 ff.

The national transposition of the EC Directive within Italian jurisdiction has been achieved through the insertion the "Titolo I-*bis*" into the Italian *"Testo unico delle disposizioni in materia di intermediazione finanziaria"* (commonly known as *"T.u.f."* and established by the Italian Legislative decree No. 58/1998), by virtue of the national reception Law No. 62/2005.[19] The normative system delineated by the Italian in "Titolo 1-*bis"* is based on a delicate balance between criminal and administrative offences, which have structured a "hypermuscular" punitive system that results in the cumulative imposition of both criminal sanctions, enforced by a criminal court, and administrative sanctions ordered by the Consob – which is the Italian administrative authority that monitors the proper performance of internal securities market –, converging on the same unlawful conduct.[20]

It is essential to note that the Italian legal doctrine has disputed about the existence of a "double -track" not only on the side of the enforcement of sanctions but also on the front of the typological and normative cataloguing of illicit conducts.[21] Indeed, the Italian legislator, by micromanaging the normative construction of the market abuse's criminalizing system, had created a legal framework where the criminal offences of insider trading and market manipulation – envisaged respectively in Articles 184 and 185 t.u.f. – are flanked by corresponding administrative offences – established under Articles 187-*bis* and 187-*ter* t.u.f. – in an interplay of almost total legal coincidence. The overlay between criminal and administrative provisions is permitted by the absence of any significant differentiation among the conducts abstractly depicted in the market abuse regulations. However, it should be recorded that within the Italian legal doctrine some arguments have been uphold against the superimposition of the normative provisions in question, that allegedly is assumed to bring practical incongruencies. These criticisms mainly focused on the most relevant divergence

[19] M. BELLACOSA, *"Insider trading": manipolazione del mercato, abusi di mercato e responsabilità*, in *Diritto e pratica della società*, 2005, p. 24.
[20] N. MAZZACUVA - E. AMATI, *Diritto Penale dell'economia*, IV ed., 2018 p. 351. The term "hypermuscolar" is recalled by the author from G. FLICK, *Cumulo tra sanzioni penali e amministrative: doppio binario o binario morto? («materia penale», giusto processo e ne bis in idem nella sentenza della Corte EDU, 4 marzo 2014, sul market abuse),* in *Rivista soc.*, p. 953 ff. On the point See also F. D'ALESSANDRO, *Tutela dei mercati finanziari e rispetto dei diritti umani fondamentali, in Dir. pen. proc*., 2014, p. 614 ff.
[21] N. MAZZACUVA - E. AMATI, *op.cit.*, p. 351.

between the criminal and the administrative offence of insider trading, i.e. the absence of a specific punishment provide against the so-called "secondary insiders". Particularly, no criminal penalty is contemplated against the conducts of "trading", "tipping", and "*tuyautage"* carried out by individuals that came into possession of the privileged information in indirect and mediated ways, or whether they knew or could have possibly known, with normal due diligence, about the privileged nature of this information.[22]

At any rate, there is no doubt that the sanctioning arsenal, composed of both administrative and criminal sanctions, with which Italian judges have been equipped, embraces not only the imposition of main penalties but also the enforcement of ancillary penalties and the application of both the preventive seizing and the confiscation of illicit assets connected with both criminal and administrative infractions.[23] Such regulatory hypertrophy in this area of law has certainly lead to the configuration of a punitive regime that can even be described as draconian, despite the surely valid purposes of criminal policy seeking the implementation of a strong and comprehensive statutory response towards the unlawful practices which have become embedded with time in the financial landscape of the Italian recent history.[24] This statement shall not be considered as a mere speculation because it is effectively confirmed by the same Italian market abuse legal discipline, since it is possible to retrieve some regulatory indicators reflecting how the Italian legislator has been inspired by the double-track punitive pattern previously adopted by other European Countries.[25]

Firstly, it should be recalled the opening clause of the provisions concerning the administrative counterparts of insider trading and market manipulation, according to which the assessment of the administrative offence shall not affect the

[22] On the point, it should be recalled E. AMATI, *La disciplina della manipolazione del mercato tra reato ed illecito amministrativo. Primi problemi applicativi*, in *Cass. pen.*, 2006, p. 992 ff.
[23] The application of ancillary penalties is envisaged respectively by Article 186 t.u.f. for criminal sanctions and by Article 187-*quarter* for the administrative ones. Moreover, the confiscation is provided for in Articles 187 and 187-*sexies* t.u.f..
[24] F. D'ALESSANDRO, *Tutela dei mercati finanziari e rispetto dei diritti umani fondamentali*, in *Diritto penale e processo, 2014*, p. 615.
[25] M. PELISSERO, *Pericolosità sociale e doppio binario. Vecchi e nuovi modelli di incapacitazione*, in *Itinerari di diritto penale*, Torino ,44, p. 9 ff. The author recalls the adoption of the double track sanctioning mechansim by the German legal order.

imposition of criminal penalties insofar as the "fact constitutes a crime".[26] Under this peculiar circumstance, the two different sets of proceedings (criminal and administrative) are instituted on the ground of the same evidentiary material acquired by the Consob, acting as national prosecuting authority. Hence, on the basis of the *incipit* of both Article 187-*bis* and 187-*ter* t.u.f. it can be observed that the imposition of an administrative sanction would not necessarily prejudice the outcome of a criminal trial, in the event of the ascription of the same conduct under the criminal figure provided by law.

On this point, the preferable interpretation is the one that underlines the aspect that if the real intention of the Italian legislator was undermining the infliction of criminal penalties, thereby the provisions on question should have contained the formula "unless the fact constitutes a crime": if this was the case, we might have definitely argued that the provisions would have contemplated the scheme of the alternative double-track system and not the cumulation of criminal and administrative sanctions. However, since the configuration of the crimes of market manipulation and insider trading does not hinder the possibility of enforcing administrative sanctions and vice versa, it appears that that Articles 187-*bis* and 187-*ter* t.u.f. authorize the punitive combination.

The underlying reason of this choice by the Italian legislator may be identified in the rapidity and flexibility characterizing the administrative sanctioning procedure, in comparison to the doubtless more laborious judicial assessment procedure within the criminal trial. In any event, the evident intention of the Italian legislator was to shape a framework capable of securing an initial ascertainment on the material facts at stake as soon as possible, without taking into consideration however the huge amount of the pecuniary sanctions laid down for the administrative offences.

Moreover, it ought to be mentioned Article 187-*terdecies*– entitled "Enforcement of financial penalties and fines in criminal proceedings" – that states that whenever an administrative pecuniary sanction is imposed "for the same fact" against the offender "the collection of the criminal fine is limited solely to the

[26] N. MAZZACUVA - E. AMATI, *op.cit.*, p. 352.

exceeding part" that has already been withheld by the administrative authority.[27] From the reading of this latter provision establishing such a peculiar mechanism of sanctionary compensation, it shall be now unquestionable that the allowance for Italian judges to inflict parallel sanctions towards the same infringement of market abuse statutory rules has been anchored by the Italian legislator.

The described dual-track punitive system has long been perceived by the Italian doctrine as hardly coherent with previously mentioned principle of *"extrema ratio"* , which governs the recourse to criminal prosecution, and, additionally, as not very consonant towards the basic tenets of the reasonableness and proportionality that guides the intervention of criminal law.[28] Perhaps, from the outlook of the legislator, the choice of the cumulation of sanctions did not seem to be particularly problematic, as proven by the evidence that also other European countries have also embarked on the same controversial path, driven by the expectation that the unlawful phenomenon of market abuse shall receive also a criminal garrison. Anyhow, the Italian regulatory discipline raised perplexities about the legitimacy of the sanctioning scheme implemented on the behalf of the MAD I statute and these criticisms have been echoed in a much more incisive fashion at the conventional level, since the ECtHR, as mentioned earlier, with the *Grande Stevens and others v. Italy* judgement of 4 march 2014 declared the incompatibility of the Italian double-track model, specifically with regard to market manipulation – but the censorship can be extended also to the offence of insider trading – with the Convention, in the measures in which it compromises the right to a fair trial from Article 6 ECHR and the principle of *ne bis in idem* established under Article 4 of Protocol No. 7 to the ECHR.[29]

These findings derive from the complex hermeneutical journey undertaken by the Court since the *Engel* ruling, in which it possible to discern an "anti-

[27] Analysis of Article 187-terdecies performed by N. MAZZACUVA - E. AMATI, *op.cit*., p. 352.
[28] N. MAZZACUVA - E. AMATI, *op.cit.*, p. 352.; also V. NAPOLEONI, *Insider trading, in Dig. disc. pen*., Agg. I, Torino, 2008, p. 37 ff.
[29] N. MAZZACUVA - E. AMATI, *op.cit*., p. 352 ff.

formalist" interpretative approach based primarily on the qualification of a penalty as criminal on the ground of its concrete and substantial features.[30]

From this point on, the Court has decided to draw its autonomous standpoints on the question, insomuch it concerns the violations of fundamental rights contained in the Convention, considering inconsequential for its reasoning the probable inconsistencies with the different standings provided by national judicial authorities. The objective of the Court is retained to be the development of adaptable concepts at an European-wide level, capable of reconciling the divergent individual qualifications of offences and relating sanctions set out by the 47 countries of the Council of Europe, with the prospect of achieving a uniform application of the ECHR rights – and notwithstanding the actual lack of a harmonious consensus on the operability of Protocol no. 7.[31]

As further illustrated in the following Paragraph, the ECtHR in *Grande Stevens* evaluated the punitive framework adopted by Italy in respect of the unlawful practice of market manipulation, in accordance to the guidelines crystallized in the *Engel* doctrine – defining the concept of "punishment" and "criminal matters" – and consistently with the "historic-naturalistic" view of the conduct *sub judice* in relation to the definition of *idem factum.*

Besides, the Strasbourg judge questioned the repressive powers attributed by the Italian legal order to the Consob, which is essentially an administrative body, that is entitled to penalize the authors of the aforementioned misbehaviour, despite the fact that the legal safeguarded assets at issue are the integrity of the securities markets and the protection of savings and investment, which are typically manned by means of criminal law provisions.

[30] V. ZAGREBELSKI, *La Convenzione europea dei diritti dell'uomo e il principio di legalità nella materia penale*, in V. MANES- V. ZAGREBELSKI, *La Convenzione europea dei diritti dell'uomo nell'ordinamento penale italiano*, Roma, 2009, p. 73 ff.
[31] N. MAZZACUVA - E. AMATI, *op.cit.*, p. 353.

2. The rethinking of the *ne bis in idem* principle provided by ECtHR in the *Grande Stevens* judgement.

On 4 March 2014, the Strasbourg Court officially censored the biased Italian sanctioning system, as enacted in the field of market abuse regulation, on the grounds of the systematic violations of the legal safeguards enshrined in Article 6 of the Convention and in Article 4 of Protocol no. 7.

In order to attain a more profound insight of the deflagrating flow rate of the *Grande Stevens* ruling, that evidenced a structural flaw affecting the Italian sanctioning system in matter of market abuse – thus, not only underscoring an isolated case of regulatory defect in relation to punitive mechanisms –, the here writing reckons fruitful for the study of the Court's argument the review of the complicated legal vicissitude involving the FIAT- IFIL case.

The case at hand concerns the liability for market manipulation based on the conduct of public disclosures made by IFIL Investments s.p.a. and Giovanni Agnelli & C. s.a.p.a in August 2005, with the latter being the controlling shareholder of FIAT s.p.a. by virtue of the simultaneous shareholding control of EXOR, IFI and in particular IFIL, which has an equity of 30.6% of the overall stake in FIAT.[32] The highlight of this intricated financial affair is represented by the communication to the public securities market executed on 24 August 2005 – on explicit request by the Consob pursuant to Article 114(5) of the Italian Legislative Decree No. 58/1998 – through which FIAT s.p.a. declared its intention to not take any action towards the expiry of an considerable loan granted in 2002.

Indeed, the whole matter derives from a 3 billion euros mortgage stipulated by FIAT with a group of banks, characterized by the specific clause providing that, in the event of the non-repayment of the loan, the debt would have automatically converted into shares. This scenario would have affected the position of IFIL as reference stakeholder within FIAT. However, in the communication to the Market,

[32] A. TRIPODI, *Uno più uno (a Strasburgo) fa due. L'Italia condannata per violazione del ne bis in idem in tema di manipolazione del mercato,* in www.penalecontemporaneo.it, 9 March 2014, p.1. The author mentions for a depeer consultation for the concrete circumstances of the case T. TRINCHERA, G. SASSAROLI, F. MODUGNO, *Manipolazione del mercato e giudizio di accertamento del pericolo concreto*: il caso Fiat, in www.penalecontemporaneo.it, 24 September 2013.

FIAT announced that any determination whatsoever had been carried out or otherwise planned in respect of the approach of the deadline of the loan. In any case, IFIL still reasserted its intent of maintaining the stock package of FIAT.[33]

The public announcement was considered by Consob as mendacious since it did not include any indication on the renegotiation of the contractual terms of the loan. This agreement of "equity swap" stipulated between EXOR and the American Merrill Lynch International banking group seemed to be actually re-finalised at the time of the communication, but its disclosure was deliberately hidden because of the probable altering effects that it would have on FIAT's share price.[34]

Such Illicit expedient insured IFIL with the retention of its 30,6 % stake in FIAT, which enabled it to preserve the control over the corporation. The allegation in the case at hand consisted in the circulation of false statements to the public investors, a conduct which was contested against the respondents – both legal entities and natural persons, among whom there were the Italian lawyer Franzo Grande Stevens and the leading managers of the FIAT group –, that facilitated the dissemination of the disputed misleading press release. The charge was therefore grounded on the duplication of legal proceedings (criminal and administrative) pursuant to Articles 180 and ff. t.u.f., being the *"thema decidendi"* the accusation of market abuse.

Before reviewing the main interpretative points of the censorships submitted by the ECtHR, it should be scoured the progress of the administrative and criminal proceedings respectively unfolded before the Consob and the Italian ordinary courts. First, the administrative offence of market manipulation from Article 187-*ter* was discovered during the administrative sanctioning procedure culminated in the infliction of pecuniary measures by means of a sentence that has become final. Thereafter, the Consob resolution was appealed before the Italian "*Corte di Appello di Torino*" – which diminished the amount of the fines enforced beforehand – and

[33] A. TRIPODI, op. ult. cit., p. 1.
[34] On the point, see D. LABIANCA, *La nuova dimensione del ne bis in idem: dal caso Grande Stevens a C. Cost. n. 102/2016*, in A. CADOPPI, S. CANESTRARI, A. MANNA, M. PAPA, *Diritto penale dell'economia*, Tomo I, Torino, 2016, p. 121-122.

also before the Italian Supreme Court, respectively on 23 January 2008 and on 23 June 2009.[35] The latter court, however, rejected the appeal filed by the defendant.

On the contrary, the criminal trial developed in a more turbulent sequence: on 21 December 2001 the Tribunal of Turin acquitted the defendants due to the groundlessness of material evidence proving the alleged fact, while the *"Corte di Cassazione"* later, on 20 June 2012, upheld the appeal – defined as *"ricorso per saltum"* – lodged by the Public Prosecutor's Office, by declaring the annulment of the contested judgment of second grade and referring the case back to the Court of Appeal of Turin. Then, again, the latter Court detected the violation of article 185 t.u.f. and the subsequent sentence of conviction was brought before the Supreme Court, that, finally, dismissed the charges since the limitation period in respect of the criminal prosecution of the market manipulation offence definitively expired.[36]

Having dealt with the judicial background established when the complaint was brought by the claimants before the ECtHR, it is now timely to take stock of the hermeneutical cluster bombs "dropped" by the Court *vis-à-vis* the Italian double track sanctioning mechanism. Primarily, the Court unanimously acknowledged the breach of Article 6(1) of the Convention establishing the right to a fair trial to be carried out within a reasonable time-frame and of Article 6(3), which enshrined the right to be promptly informed of the judicial accusation, thus awarding the requests submitted by the applicants.[37]

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[35] A. TRIPODI, *op. ult. cit*., p. 2, in which it is added that the main penalties were joined by the ancillary sanctions established under Article 187- *quarter*.

[36] A. TRIPODI, *op. ult. cit*., p. 1-2.; see also D. LABIANCA, *op.cit.*, p. 122 ff.

[37] Article 6(1) ECHR: « In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice ».; and Article 6(3) ECHR:« Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;(b) to have adequate time and facilities for the preparation of his defence;(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court ».

As a matter of fact, the Strasbourg judge held that the requirement of "fairness and objective impartiality" were disregard during the unfolding of the set of proceedings before the Consob since, albeit the offence was formally qualified as administrative under Italian law, the charge deriving from it was coloured by features of "criminality".[38]Hence, the procedure before Consob should have taken place in compliance with the criminal garrisons laid out in Article 6 ECHR.

This reconstruction offered by the Court is essentially grounded on the ascription of a certain infringement to the notion of "*matière pénale"* developed in the now abundant body of case law constituting the Strasbourg jurisprudential regime. In fact, the explanatory memorandum of the Court mainly refers to the degree of severity of the Italian penalty system which entails the imposition of a maximum administrative fine of five millions euros, that can be applied in conjunction with interdictory measures of the temporary loss of the requirements of integrity and professionalism for companies' representatives and, in particular as regards to listed companies or traded on Regulated Markets, the temporary inability to perform their duties of management, administration and control.[39]

From the Court's findings, this conclusion on the degree of severity of the envisaged sanction, is also reinforced by the very nature of the offence, in this way convening on the combined application of the two "substantial" *Engel* criteria. As a matter of fact, the Court observed that the financial penalties provided for by Article 187-*ter* t.u.f. do not exhaust themselves in a mere restorative function of the disrupted legal order because, in reality, pursue "an eminently repressive and

[38] A. TRIPODI, *op. ult. cit.*, p. 3.; It also should be recalled on the point *Grande Stevens and others v. Italy*, ECtHR 4 March 2014, paras 95-96: « In the present case, the Court finds, first, that the market manipulation attributed to the applicants does not constitute a criminal offence under Italian law. Such conduct is in fact punishable by a sanction qualified as 'administrative' by Article 187b(1) of Legislative Decree No 58 of 1998[...]. However, this is not decisive for the applicability of the criminal profile of Article 6 of the Convention, since the indications provided by domestic law have a relative value[...] As regards the nature of the infringement, it appears that the provisions whose infringement was attributed to the applicants were intended to ensure the integrity of the financial markets and to maintain public confidence in the security of transactions. The Court recalls that one of the objectives of CONSOB, an independent administrative authority, is to ensure the protection of investors and the effectiveness, transparency and development of the stock markets [...]».

[39] A. TRIPODI, *op. ult. cit.*, p. 3.; on the point, see also V. *ZAGREBELSKY, Le sanzioni Consob, l'equo processo e il "ne bis in idem" nella Cedu, in Giur. it.*, 2014, p. 1198.

afflictive purpose".[40] This last statement is surely proven by massive amounts that the pecuniary sanction can hit, backed by the dowry of interdictory measures that can be inflicted as ancillary sanctions accompanying the main penalties.

In the view of the above observations, the Strasbourg court ruled that the offence from Article 187-*ter*, despite its qualification under the Italian statutory arrangement as "formally administrative", it is actually connoted by a "substantially criminal" nature: the main implication of this regulatory pattern is represented by the overlay of the two infractions, namely the formally criminal offence and the substantially criminal one, resulting in the application on the same conduct of both Articles 185 and 187-*ter* t.u.f. Therefore, the Court reckoned that the penalties handed down by Consob shall be regarded as featured with an administrative character purely on a viewpoint of formal legality, but from the side of the concrete legal repercussions perceived by the condemned parties and the legal aims pursued by the normative provision, they must be considered as criminal.

For the sake of a broader appreciation on the penal *de facto* dimension of the fines that can be issued by independent administrative bodies – likewise the Italian Consob –, it should be examined the topic of the afflictive and retributive functions of criminal punishment. More specifically, the pursuing of an afflictive goal does not fall only within the exclusive competence of the judicial execution offered by criminal courts. In effect, not only criminal sanctions but also civil law ones can be considered as having an afflictive effect: it should be sufficient to recall the civil sanctions guaranteeing the compensation for damages or, even, controversial figure of "punitive damages", which are characterized by a contentious multi-objective approach, given that they seem to perform both a restorative function, on one side, and a punitive and deterrent action, on the other side.[41]

As already stated in Chapter I, the ECtHR originally provided some crucial guidelines in the *Engel* ruling with regards to the deterrent and punitive aims of the sanctioning measures implemented by independent administrative authorities, and

[40] N. MAZZACUVA - E. AMATI, *op.cit.*, p. 353, who also observes how the sanctions enforced by Consob are only measured in relation to "seriousness of the ascribed conduct" and not with regards to the damages suffered by the savers and the investors.
[41] For a wider insight on the issue, A. BRUNO, *Danni punitivi: perchè sono ammissibili anche nel nostro ordinamento*, in https://responsabilecivile.it, 13 July 2017.

these principles have been reiterated in the *Grande Stevens* decision in a more radical fashion[42]. The theoretical approach towards the issue, primarily based on a "substantialist" rather than on a "nominalistic" conception was resumed by the Court in relation to the sanctions inflicted by Consob towards the claimants in the case at hand, accused of the criminal and administrative offences concerning financial operations under Article 185 and 187-*ter*.[43] Similar to the *Engel* case, the Court utilized a substantial classification of the punishing measures by virtue of an investigation upon their repressive and dissuasive content.[44]

On the basis of this standing, it shall be undisputed that the sanctions enforced by the Consob – notwithstanding their formal legal labelling – are equally endowed with substantial criminal character and, thereby, shall not disrespect the standards of protection afforded by the Convention. Here is how the assessment as to the compliance between the double track system in market abuse's field structured around the two homologue offences of market manipulation and the prohibition of double jeopardy laid down in Article 4 of Protocol no. 7 was conducted by the ECtHR. It is worth mentioning that the Strasbourg court was, in any case, anticipated on its own "battleground" by the CJEU, which in 2009 ,by ruling upon the *Spector Photo Group NV* case concerning – alike *Grande Stevens* – a breach of the protection's standards afforded by the *ne bis in idem* right from Article 50 EUCFR, did not hesitate to declare that the penalties envisaged in Member State's national regulations transposing the content of the MAD I EU Directive, despite their qualification as "administrative", shall be intended as

[42] This aspect is highlighted in G. FLICK, V. NAPOLEONI, *op. cit*., p. 2-3, where the author claims that, "on the one hand, in fact, the pecuniary sanction imposed by Article 187-ter t.u.i.f. has an unequivocally repressive and deterrent function - and certainly not a compensatory one - with respect to facts that undermine the integrity of the financial markets and confidence of the public in the security of transactions: facts usually falling within the perimeter of criminal relevance, as the "different twin" of art. 185 t.u.i.f. attests most eloquently".

[43] See G. COFFEY, *op. cit.*, p. 61.; also G.M. BOZZI, *Manipolazione del mercato: la Corte EDU condanna l'Italia per violazione dei principi dell'equo processo e del "ne bis in idem"*, in Cass. pen., 2014, p. 3101 ff.

[44] G. FLICK, V. NAPOLEONI, *op. cit.*, p. 2: "Ideally, this approach is in line with the "substantive" reading of the principle of legality enshrined in Article 7 ECHR, and responds to the need for harmonization and "anti-elusion": on the one hand, it is the flywheel to overcome the profound differences in regulations between the member countries of the Council of Europe; on the other hand, it is the tool to avoid that the operation of conventional guarantees remains linked to the vane of the classification options of national legislators. In this perspective, the qualification of the measure by national law is a decisive "one way only" criterion".

"criminal" for the sake of the ECHR legal safeguards.[45] In the present case, the Court detected the violation of the conventional *ne bis in idem* principle in the circumstance that the trial upon the allegation of the conduct from Article 185 t.u.f. was effectively ongoing, while the previous "penal-administrative" proceeding on the charge in accordance with Article 187-*ter* was already become *"res judicata"*.[46]

The test of compatibility adopted by the Court was further detailed by the clarification that the operability of the *ne bis in idem* right is irrespective of any verification on the identity of the constitutive elements of the offence, as abstractly defined in the normative regulation, but, instead, it requires the condition that the concrete factual elements subsumed therein and finally adjudicated on the two proceedings are the same.[47] After all, this was the position already consolidated by the Court in its own jurisprudence, since the ruling delivered upon the *Zolotukhin v. Russia*, which is recalled in the *Grande Stevens* judgement in paragraph 224.[48]

Indeed, an additional corollary to the reasoning of the Court in qualifying the offence at issue as substantially criminal is represented by the hermeneutical survey on the notion of *idem factum*. According to the ECtHR most recent orientation, the identity of facts shall be evaluated not from a mere legal abstract outlook (thus, the so-called *"legal idem"*), rather in an "historic-naturalistic" sense (here is the so-called *"factual idem"*).[49]

Furthermore, the Court effectively "demolished" the unconvincing argument of the Italian Government – which acted in the guise of the respondent –

[45] G. FLICK, V. NAPOLEONI, *op. cit.*, p. 3.
[46] A. TRIPODI, *op. ult. cit.*, p. 4.
[47] A. TRIPODI, *op. ult. cit.*, p. 4.; on the point, also G. FLICK, V. NAPOLEONI, *op. cit.*, p. 5, where it is further specified that the ECtHR opted for reiterating its already settled case-law by stating that "for the purposes of the test of compatibility with the conventional rule, it is not relevant whether the elements constituting the abstract facts typified by the two rules are identical, but only whether the concrete facts which gave rise to the two proceedings are the same: and in the present case they certainly are".
[48] *Grande Stevens and others v. Italy*, ECtHR 4 March 2014, para. 224.: « It remains to be determined whether the new proceedings in question were based on facts which were essentially the same as those which were the subject of the final conviction. In that regard, the Court notes that, contrary to what the Government seems to assert […], it follows from the principles set out in the Sergueï Zolotoukhine case cited above that the question to be determined is not whether the constituent elements of the offences provided for in Articles 187b and 185(1) of Legislative Decree No 58 of 1998 are identical, but whether the facts ascribed to the applicants before the CONSOB and before the criminal courts were attributable to the same conduct ».
[49] N. MAZZACUVA - E. AMATI, *op.cit.*, p. 354.; for further explanatory statements D. LABIANCA, *op. cit.*, p. 135 ff.

founded on the assumption that the crime of market manipulation from Article 185 and the homonymous administrative tort envisaged in Article 187-*ter* were not identical.[50] Precisely, the respondent asserted that, regardless from insignificant differences in the way in which the conduct is delineated in the two provisions, the criminal offence demands the effective aptitude to alter the price of financial instruments, as well as the wilful default; whereas, for the administrative one the abstract price sensitivity and negligence are sufficient for its configuration.[51]

As regards the concrete case, the ECtHR discerns –in the terms crystallized in paragraph 225 *et seq*. of the decision – the violation of the ban on dual prosecution or punishment since the facts brought before both the Consob and the criminal judges of merit "are the same", since they both allegedly consist in declaring a mendacious and incomplete determination to the public financial market, provided that EXOR had neither researched nor taken any further action concerning the maturities of the loan subjected to eventual conversion into corporation securities, even though the renegotiation of the equity swap clause had already been concluded between the parties.[52]

Returning to the cross-examination of the infringement of the right to a fair and equitable trial established under Article 6 of the Convention, the Court dwells upon the biased sanctioning procedure enacted by the Consob: the principal flaw was unearthed in the manifest and disproportionate infringement of the defendant's

[50] G. FLICK, V. NAPOLEONI, *op. cit.*, p. 5.
[51] G. FLICK, V. NAPOLEONI, *op. cit.*, p. 5.
[52] *Grande Stevens and others v. Italy*, ECtHR 4 March 2014, para. 225 *et seq.* as cited by A. TRIPODI, *op. ult. cit.*, p. 4. : « Before CONSOB, the plaintiffs were accused, in substance, of not having mentioned in the press releases of 24 August 2005 the plan to renegotiate the equity swap contract with Merrill Lynch International Ltd while this project already existed and was at an advanced stage of implementation […]. Subsequently, they were condemned for this fact by CONSOB and the Turin Court of Appeal […] ». Furthermore, the ruling goes on by claiming that « before the criminal courts, the persons concerned were accused of declaring, in the same notices, that Exor had neither initiated nor developed initiatives with regard to the expiry of the loan agreement, while the agreement amending the equity swap had already been examined and concluded, information which would have been kept hidden in order to avoid a probable fall in the price of the FIAT shares». Finally, the Strasbourg judicial board declares that « […] this was clearly one and the same conduct by the same persons on the same date. Moreover, the Turin Court of Appeal itself, in its judgments of 23 January 2008, admitted that Articles 187b and 185(1) of Legislative Decree No 58 of 1998 were concerned with the same conduct, namely the dissemination of false information […]. Consequently, the new criminal prosecution concerned a second "offence", based on facts identical to those which had motivated the first final conviction. This finding is sufficient to conclude that there has been a breach of Article 4 of Protocol No 7».

right to be heard, resulting from the running of a contentious proceeding in a mere certificated form and from the absence of a public hearing. Specifically, this latter defect was considered as decisive, considering especially the controversial reconstruction of the factual context correlated by the masked negotiations between FIAT and Merrill Lynch. Moreover, the sanctions were imposed on the claimants without any official previous report or communication by the prosecuting authorities and were issued by the same body that was in charge of the investigative action, thus determining an unreasonable concentration of both judging and investigating powers upon the same subject (i.e. the Consob's Chief).[53]

The Court underlines how the plaintiffs did not receive a public audience before the Appeal Court of Turin and that the certainly public trial before the Italian *"Corte di Cassazione"* was, in any case, not sufficient in order to be used as remedy towards the defect of legal protection suffered by the applicants, provided the limited cognitive scope attributed to the latter judicial body.

All in all, it seems evident that the ECtHR recognizes that the sanctioning procedure before the Consob presents some structural faults with respect of the full compliance with the right to a fair trial: so as to summarize, the not sufficient impartiality of Consob as a ruling authority, the absence of an "equality of weapons" between prosecutor and plaintiff and, lastly, the lack of the express guarantee establishing a mandatory public hearing.[54]

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[53] A. TRIPODI, *op. ult. cit.*, p. 3. The author quotes paragraph 116 ff. of the judgement at hand, which states as follows: « The Court is prepared to admit that, as the Government pointed out, the proceedings before the CONSOB allowed the accused to present elements useful for their defence. Indeed, the accusation made by the IT office was communicated to the applicants, who were invited to defend themselves […] The applicants also had knowledge of the report ». But the Court also points out that the claimants were not fully enabled to exercise their defence's right since « the report containing the conclusions of the sanctions office, which was then intended to serve as the basis for the commission's decision, was not communicated to the applicants, who were therefore unable to defend themselves against the document finally submitted by CONSOB's investigative bodies to the body responsible for deciding on the merits of the allegations. Furthermore, the persons concerned were not given the opportunity to question, or to have questioned, any persons heard by the IT department ». In conclusion, the ECtHR review the primary importance of the attendance to a public hearing for ensuring the complete respect of Article 6 ECHR, as beforehand remembered by the same Court in the *Jussila* decision: « The Court also notes that the proceedings before CONSOB were essentially in writing and that the applicants were not able to attend the only meeting held by the committee to which they were not admitted. This is not contested by the Government. In that regard, the Court recalls that the holding of a public hearing constitutes a fundamental principle enshrined in Article 6 § 1 [...] ».

[54] G. FLICK, V. NAPOLEONI, *op. cit.*, p. 3.

The Strasbourg judge basically reaffirmed the standpoint taken in the *Menarini* judgement, in which it dealt with the enforcement of punitive measures by the Italian AGCM *("Autorità garante della concorrenza e del mercato"*) against anti-competitive offences, within the area of antitrust regulations. In this latter instance, the Court accepted that a penalty – as understood in the light of the Convention jurisprudence – can be applied also by an administrative body, even though initially it is not congruent with the protection's requirements set out in Article 6 ECHR. However, it is necessary that, during the last stages of the proceedings, a "full jurisdiction" control over the case must occur in order to prevent the violation of Article 6.[55] Indeed, the operability of the rule in question is dependent on the defendant's right to obtain a complete jurisdictional overlook on the alleged violation. Form this condition, it certainly derives the certification of whether the control performed by the administrative judge respects the requirements put down by the Convention.

Regarding the *Menarini* case, the ECtHR held that the administrative judge did examined as regards to the merits – and not only to the legitimacy of the action by AGCM – the concrete circumstances of the case and did confirmed that the AGCM itself did not violated the Convention's right while exercising its punitive functions. In short, the Court's ruling in *Menarini*, on one hand, ascertained that no disrespect towards the party's right of defence enshrined in the Convention happened but, on the other hand, it also stated that, for excluding the possibility of the infringement of Article 6, it is mandatory that the judicial assessment must involve both ordinary legitimacy controls upon the administrative measure and the review on the factual and legal context surrounding the measure itself. With regards to the *Grande Stevens* case, such possibility to appeal before an impartial and independent judiciary entitled of exercising a full jurisdiction power of review is retained as existing by the Court. The Consob's punitive act could be effectively challenged before a Court of Appeal, which is undoubtedly an unbiased judicial body equipped with "full jurisdiction".[56]

[55] G. FLICK, V. NAPOLEONI, *op. cit*., p. 3, which recalls the *A. Menarini Diagnostics S.R.L. v. Italy*, ECtHR 27 September 2011, Application No. 43509/08, paras. 123 and 137.
[56] G. FLICK, V. NAPOLEONI, *op. cit.*, p. 3.

Nonetheless, a *"deficit"* inherent to the proceeding of appeal against the Consob's sanction was encountered by the Court and consisted in shortage of a public oral hearing before a territorial court, assumed that the audience before the *"Corte di Cassazione"* – during the subsequent stage of proceedings – cannot be deemed as satisfying the legal expectations of the Convention, since its forum is limited only to a review on the legitimacy of the act.[57]

Ultimately, both the *Menarini* and *Grande Stevens* judgements can be described as two strong pleas reinforcing and underpinning the argument in favour of the peculiar mechanism of the full jurisdiction review – prodromal to the monitoring over the substantiation of the application of a "substantially" criminal sanction – that allows to mend, in a second moment and within a jurisdictional session, a penalty inflicted beforehand during an administrative procedure, which does not offer an adequate protection to the defendant in the sense of the conventional right of defence. Put differently, it is emphasized the need of the subjection for "penal-administrative" measures to a more intensive judicial scrutiny, rather than the one exerted on ordinary administrative acts. Besides, the second ground of the appeal lodged by the applicants alleges the breach of Article 1 of Protocol No. 1 to the Convention protecting the right to property, considered injured by the administrative sanctions applied after the ending of proceedings before the *"Corte di Cassazione*" and that have become irrevocable.[58] In any case,

[57] G. FLICK, V. NAPOLEONI, *op. cit*., p. 3-4. The author also offers an alternative to the judicial proceeding of opposition towards the sanction inflicted by the "partial and biased" administrative body. Indeed, in the recalled work it is stated that "At first glance, therefore, it would not seem that the *Grande Stevens* judgment lends itself to wedging general "crisis" factors into the existing mechanisms for the application of administrative sanctions managed by the independent administrative authorities. Even less could be seen in the European Court's statements a "deflection" of the "deflatory" logic that lies at the root of the decriminalization interventions, [...] having regard to a hypothetical "conventional necessity" to replicate, in the hands of the administrative authority invested with the power of sanctions, the "guarantor traits" of the judge and the criminal trial". In conclusion, the author also points out that "the *Grande Stevens* judgment reaffirms that there is no such need", due to the fact that "the judicial procedure for opposition, as set out in Law no. 689 of 1981, is sufficient to satisfy the "demands" of the Convention".

[58] Article 1 of Protocol No. 1 to the ECHR states as follows: « Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties ». For further details on the reasons why the Court rejected the second complaints filed by the plaintiffs, See D. LABIANCA, *op.cit.*, p.124 ff. and A. TRIPODI, *op. ult. cit.*, p. 3.

we should not linger too long on this second complaint since it was declared as inadmissible by the ECtHR. On these findings, the Court condemned Italy to pay each applicant ten thousand euros for moral damages and forty thousand euros jointly for the reimbursement of procedural expenses.[59] Moreover, it ordered the respondent State to remove the violation of Article 4 of Protocol no. 7, by insuring that the criminal trial conducted against the claimants and generating the infringement of their *ne bis in idem* right « shall be closed as soon as possible e without any detrimental consequences for them ».[60] The Italian government, in the concrete case, adequately complied with the ordinations established by the Strasbourg court by declaring invalid the criminal proceeding because of a time bar and this result was duly achieved even before the official publication of the ruling.

It is beyond any doubt that the *Grande Stevens* ruling posed a " hotchpotch" of interpretative challenges in respect of the possible ways of adaptations of the Italian statutory regime on market abuse from "Titolo I-*bis*" t.u.f., and provided a significant contribution also for other European States adhering to the Convention to plan normative amendments within their own legal system in order to reduce the risk of incompatibility between their market abuse's domestic regulation with the indications received from Strasbourg on the principle of *ne bis in idem*.[61]

The Italian legal thinking joined by national jurisprudence were deeply involved in finding suitable solution to overcome the regulatory structural flaws unearthed in the aftermath of the *Grande Stevens* decision, given the total unwillingness of the Italian legislator to modify the normative setup of the t.u.f.. The effort of bringing the Italian market abuse system into the scope of the compliance towards the Convention guarantees was unavoidably enormous –

[59] A. TRIPODI, *op. ult. cit*., p. 5.

[60] N. MAZZACUVA - E. AMATI, *op.cit.*, p. 354, which basically recalls the findings of the Strasbourg court in paragraph 235 *et seq.* of the *Grande Stevens* judgement: « In the particular circumstances of this case, the Court does not consider it necessary to indicate general measures which the State should take to enforce this judgment. As regards individual measures, on the other hand, the Court considers that, in the present case, the very nature of the infringement found does not really offer a choice between various types of measures which can remedy it. Consequently, in view of the particular circumstances of the case and the urgent need to put an end to the infringement of Article 4 of Protocol No 7 [...], the Court considers that it is for the defendant State to ensure that the new criminal proceedings initiated against the applicants in breach of that provision and still pending, at the date of the last information received, against Mr Gabetti and Mr Grande Stevens are closed as soon as possible and without detrimental consequences for the applicants [...] ».

[61] N. MAZZACUVA - E. AMATI, *op.cit*., p. 354-345.

especially, taking into account the invariability of the normative framework – but, anyhow, it is possible to enumerate some valid layouts coloured by potential applicability. This scrutiny will be played in Chapter IV, but it is now our duty to mention the possible paths of interpretative adjustment towards the Strasbourg's *"dictum"*, notably the direct applicability of the *ne bis in idem* principle enshrined in Article 50 EUCFR.[62]

What certainly emerges from the *Grande Stevens* affair is the unequivocal and general opposition shown by the ECtHR towards the double track punitive pattern, from a strong "garantist" angle based on the valorisation of the *ne bis in idem* principle and on the aim of widening as much as possible the scope of application of the bar towards double punishment. Furthermore, it might not be outrageous to affirm that, in more general terms, the decisive stance taken by the ECtHR compels the reconsideration of the dualism and the interactions between the two principal categories of punitive measures applicable while a State exercises its *"jus puniendi"*, namely the criminal and administrative ones, whose differentiation is represented by a blurred dividing line which tends to fade more and more. Perhaps, it is possible to argue that should be more appropriate to talk no longer about different typologies of sanctions, rather about a "general theory of the offence," which embraces all kinds of punishment and forces the indiscriminate application of all garrisons ensuring the performance of a fair and unbiased trial.[63]

In this sense, it can be perceived how this problematic can be reconnected to the broader topic on the frictions between, on one side, the notion of "formal legality" – characteristic of various European legal system and, above all, the Italian one –, which finds its concrete transposition in the provision of "formally criminal" penalties, in accordance with the "nominalistic" approach already object of due studies in this thesis, and, on the other side, the conception of "substantial legality", being purely of Communitarian matrix and primarily fostered by the European Courts, which is instead concretized in other fluid concepts, such as the proportionality of the sanctioning response intended as a coherent whole and the

[62] On the topic, N. MAZZACUVA - E. AMATI, *op.cit.*, p. 354 ff., A. TRIPODI, *op. ult. cit.*, p. 6 and F. VIGANÒ, *Doppio binario sanzionatorio e ne bis idem: verso una diretta applicazione dell'art. 50 della Carta?*, in *Diritto penale contemporaneo (Riv. Trim)*, 2014, n. 3-4, p. 222-223.
[63] G. FLICK, V. NAPOLEONI, *op. cit.*, p. 12.

foreseeability of the criminal measure.[64] More specifically, these latter legal standards have been handed down by the ECtHR in the well-known *A & B v. Norway* ruling, which is going to be promptly dissected in Paragraph 3.

The path that should be embarked should be a “virtuous” mix between the two different views: thus, national courts should apply the "substantial" standards of protection developed by the European jurisprudence but, at any rate, their interpretative itinerary should also be backed up by addressing the principle of legality, which still represents a valid constitutional guideline to be implemented while enforcing criminal law instruments.[65]

For the purposes of the study at hand, the undersigned reckons that the survey on the remarkable effects stemming from the *Grande Stevens* ruling should be conclude with a “cliffhanger” towards the following point under discussion in Paragraph 3: the *A & B v. Norway* case. Indeed, contrarily to its own multiples precedents within its own case law, the ECtHR did not acknowledged at all the criterion of the "sufficiently close connection in substance and time", that has apparently become the *"caveat"* to the declaration of inconsistency with *the ne bis in idem* rule, recognized the fact that the existent of such link between two separate sets of proceedings saves the operability of national dual track system from any prejudice or invalidation.

In truth, as asserted above, the *Grande Stevens* decision is characterized by a predominantly guarantee character aimed at shielding the principle of *ne bis in idem* from any distortions caused by the application of internal regulations. However, by virtue of the forthcoming pronouncements in the pool of the Strasbourg regime, it can be assumed that the absoluteness of the principle has been notably reduced and has made way – whether certain requirements are met – for a conception of relativity of the prohibition of double jeopardy.

[64] G. FLICK, V. NAPOLEONI, *op. cit.*, p. 11-12.
[65] G. FLICK, V. NAPOLEONI, *op. cit.*, p. 12.

2.1. Follows: Further jurisprudential standpoints in the Strasbourg regime and the audacious reply by CJEU: the *Åkerberg Fransson* decision.

On the wake of the *Grande Stevens* judgment, which stroke with an impact force that had never seen before the national sanctioning systems characterized by the forecasts of regulations involving parallel sanctions against market abuses, the ECtHR took the opportunity with the subsequent ruling on the *Lucky Dev v. Sweden* case to further reconsider the actual compatibility of the infliction of cumulative criminal and administrative sanctions against tax offences with the *ne bis in idem* right. Here follows a brief summary of the factual circumstances of the case at stake.[66] The applicant, as a result of the submission of a mendacious tax declaration, was subject to two different proceedings, whose common object was the same unlawful conduct, which ended with the imposition of both a criminal and an administrative sanction. Sweden, just like Italy in the aftermath of *Grande Stevens*, was condemned by the Court for the infringement of the prohibition of double jeopardy, on the ground of the liability of the national legal order allowing the procedural doubling with regards of the "same facts" contested against the same respondent. [67]

Specifically, the case at hand "hit the headlines" since the Strasbourg court reasserted the criterion of the identification of an *idem factum* hypothesis previously laid down in the *Zolotukhin v. Russia* judgment. As a matter of fact, the Court, after rejecting the Swedish Government's objections towards the admissibility of the appeal lodged by the plaintiff, moves on to examine the merits of the alleged infringement of Article 4 of Protocol no. 7. [68] In particular, the claimant asked the Strasbourg board to verify whether there was the possibility to apply in the present case the jurisprudential "*revirement*" taken in *Zolotukhin*, where the Grand Chamber – after having reviewed all the hermeneutical standpoints previously adopted – provided a univocal definition of "identity of facts". As already established, the Court held that placing too much the emphasis upon the abstract

[66] *Lucky Dev v. Sweden*, ECtHR 24 November 2014, Application no. 7356/10.
[67] For a depeer insight, *see* M. DOVA, *Ne bis in idem e reati tributari: una questione ormai ineludibile*, in www.penalecontemporaneo.it, 11.12.2014. p. 2, where the author comments upon the *Lucky Dev v. Sweden* judgement.
[68] M. DOVA, *op. ult. cit.*, p. 4.

legal characterisation of the offence would threaten the foreclosure effect of the guarantee enshrined in Article 4 of Protocol no. 7 of the Convention. [69] Therefore, the benchmark must be the fact in its concrete manifestations, not the way in which the it is described in the abstract legislative provision.

The Court awarded the plea filed by the plaintiff and applied the criteria set out in the *Zolotukhin* ruling, by reckoning the combination of administrative and criminal procedures against the same tax fraud as illegitimate since they both related to a fiscal evasion eluding the same monetary amount and occurred during the same taxable period: it should be thereby considered as representing *idem factum* within the meaning of Protocol no. 7.[70] Furthermore, it should be retrieved a third ruling on the topic at hand, namely the decision delivered by the ECtHR in *Kiiveri v. Finland*.[71] Such case regarded Mr Kiiveri, a Finnish taxpayer and shareholder of a company, who was convicted to the payment of administrative fines for having fraudolently misrepresented his incomes and for having unlawfully remunerated his employees. Moreover, on the same account, the claimant was also condemned before a criminal tribunal with the accusation of tax fraud.[72]

In this instance, the ECtHR condemned Finland on the ground of the violation of the conventional *ne bis in idem* principle, infringed by the implementation of the penal-administrative double-track system towards tax matters, consequently consolidating the current orientation within the Strasbourg jurisprudence on the thread.[73]Besides, once again, the Court further dictates more on the indicators defining the existence of an *idem factum*, rather than on the concept of "*matière pénale*" – upon whom another specification would have been, quite frankly, unnecessary provided that its definition has been remained rock solid since the *Engel* judgement.

Likewise the ruling issued in *Lucky Dev v. Sweden*, the Court referred to the jurisprudential "*revirement*" clause crystallized in *Zolotukhin* for assessing whether the two sanctions featured with criminal nature (one "formally" speaking, whilst

[69] M. DOVA, *op. ult. cit.*, p. 4.
[70] M. DOVA, *op. ult. cit.*, p. 4-5.
[71] *Kiiveri v Finland*, ECtHR 10 February 2015, Application no. 53753/12.
[72] M. DOVA, *Ne bis in idem e reati tributari: nuova condanna della Finlandia e prima apertura della Cassazione* in www.penalecontemporaneo.it, 27.03.2015, p. 3.
[73] M. DOVA, *Ne bis in idem e reati tributari: nuova condanna della Finlandia*, cit. p. 2.

the other "substantially") were enforced against the same offence. As a matter of fact, no reference was made to the abstract incriminating provision and the certification upon the *idem factum* was realized by dwelling exclusively on the historical and naturalistic identity of the facts *sub judice*.[74]

Lastly, a further significant observation was advanced by the Strasbourg judge: there cannot be any contravention of Article 4 of Protocol no. 7 in the event that the appellant did not endeavour to obtain judicial protection from double jeopardy before domestic courts, by challenging the conviction within the time-limits prescribed under national law. [75]As regards to the case at hand, as precisely stated by the Court in paragraph 47 of the sentence, the plaintiff did not exhaust the internal legal remedies available to him.[76] At any rate, Finland had been already condemned once, before the *Kiiveri* incident, for the inadequacy of its domestic regulatory framework regarding tax law torts in fulfilling the standards of legal safeguard to be ensured to the defendant set out by the Convention. Indeed, in 2014 the ECtHR in the *Nykänen v. Finland* case found that the Finnish legal order infringed the *ne bis in idem* guarantee related to Article 4 of Protocol no. 7 for allowing punitive duplication with regards to fiscal offences.[77]

The background to the Court's intervention is represented by the affair involving Mr Nykänen, a Finnish citizen accused of receiving dividends in a covered manner. The defendant was charged, first, with a fine in the form a surcharge imposed by the Finnish tax authorities and then was brought under prosecution before the ordinary criminal courts, which in the first and second

[74] M. DOVA, *Ne bis in idem e reati tributari: nuova condanna della Finlandia*, cit. p. 2
[75] M. DOVA, *Ne bis in idem e reati tributari: nuova condanna della Finlandia*, cit. p. 4.
[76] *Kiiveri v Finland*, ECtHR 10 February 2015, Application no. 53753/12, para. 47: « The Court notes that when the second set of proceedings became final on 27 February 2012, in the first set of proceedings the time-limit for rectification and subsequent appeal against the tax surcharge decisions was still open to the applicant in respect of the tax year 2006. At that time the applicant's taxation case was no longer pending before any domestic authority or court, but simply awaited the time-limit for rectification and appeal to elapse in order to gain legal force. After 27 February 2012 the only way of preventing double jeopardy would therefore have been for the applicant to lodge first an application for rectification and then an appeal against the taxation decision concerning the tax year 2006 […] As no such application or appeal was apparently lodged, the taxation decision concerning the tax year 2006 became final on 31 December 2012. The Court therefore considers that the applicant had a real possibility to prevent double jeopardy by first seeking rectification and then appealing within the time-limit which was still open to him and that, by failing to do so, he has failed to exhaust effective domestic remedies».
[77] *Case of Nykänen v. Finland*, ECtHR 20 May 2014, Application no. 11828/11.

instance and even before the Finnish supreme court upheld a huge monetary sanction and the custodial sentence both inflicted on the ground of the tax fraud committed.[78] Hence, Mr Nykänen filed an appeal before the Strasbourg court alleging the injury of his *ne bis in idem* right guaranteed under the Convention framework.

For the sake of a determination as regards to the merits of the case, the European judge relied on the well-established body of case-law on the topic of whether a penalty is characterized by criminal carved lines. Precisely, the Court not only recalled the three "classic" *Engel* criteria but also another own legal precedent regarding always Finland, namely the *Jussila v. Finland* case.[79] In this latter case, it was recognized the penal status of the administrative additional charge levied under Finnish statutory rules, albeit in relation to the violation of the right to a fair trial from Article 6.[80] Anyway, the most innovative profile outset by the Court in ascertaining the nature of the fine is given by the peculiar importance attached to the very nature of the tax infraction: it was expressed that a surcharge does not constitutes a mere compensation clause, whereas it configures a criminal penalty pursuing purposes of prevention and repression of widespread illicit behaviours within the taxation legal sector.[81]

[78] M. DOVA, *Ne bis in idem in materia tributaria: prove tecniche di dialogo tra legislatori e giudici nazionali e sovranazionali,* in www.penalecontemporaneo.it, 5 June 2014, p. 2.

[79] More specifically, the Court makes a reference to paragraph 37 and 38 of the ruling delivered in *Jussila v. Finland*, ECtHR 23 November 2006, Application no. 73053/01. Here, the Court held that « […] it is apparent that the tax surcharges in this case were not classified as criminal but as but as part of the fiscal regime. This is however not decisive. The second criterion, the nature of the offence, is the more important. The Court observes that, as in the *Janosevic* and *Bendenoun* cases, it may be said that the tax surcharges were imposed by general legal provisions applying to taxpayers generally. It is not persuaded by the Government's argument that VAT applies to only a limited group with a special status: as in the previously- mentioned cases, the applicant was liable in his capacity as a taxpayer. The fact that he opted for VAT registration for business purposes does not detract from this position. Further, as acknowledged by the Government, the tax surcharges were not intended as pecuniary compensation for damage but as a punishment to deter re-offending. It may therefore be concluded that the surcharges were imposed by a rule whose purpose was deterrent and punitive. The Court considers that this establishes the criminal nature of the offence ».

[80] M. DOVA, *Ne bis in idem in materia tributaria*, cit. p. 3.
[81] M. DOVA, *Ne bis in idem in materia tributaria*, cit. p. 3.

In addition, the Court also specified that the particular tenuousness of the punishment shall not release the infringement from the legal coverage afforded by Article 6 ECHR.[82]

Turning back to the *Nykänen* affair, the ECtHR stressed the point that the considerations regarding proceedings leading to the imposition of a surcharge that should be reckoned as criminal, that has been outlined in *Jussila*, shall not be relegated only to the application of the legal garrisons contained in Article 6, rather they shall be extended also to the safeguard ensured by Article 4 of Protocol no. 7.

One further facet that is worth emphasising is how the Court clarified that the institution or the ongoing performance of two parallel trials can be actually coherent with the *ne bis in idem* principle, provided that the second proceedings is stopped as soon as the first one has been completed.[83] The two penalties received "in parallel" by the plaintiff – that complained before the ECtHR the disrespect of its right to be not punished twice – were registered as issued by two distinct judicial body and within a context of proceedings totally independent of each other, due to the shortcoming of any judicial coordination mechanism provided for under Finnish law.[84]

Finally, notwithstanding the adjustments taken by the Finnish legislator in order to rectify the defect of consistency of the internal statute towards the Convention, the Strasbourg judge dictates that Finland had already irreparably breached the principle of *ne bis in idem* and, accordingly, ordered the respondent State to compensate the non-pecuniary damages and the procedural costs and expenses incurred by the claimant.[85] In addition to this, we ought to point out that alongside this settled case law of the ECtHR, with respect of the area of tax offences and its related punitive framework, certainly stands out the CJEU's judgement

[82] *Jussila v. Finland*, ECtHR 23 November 2006, Application no. 73053/01, para. 38.
[83] M. DOVA, *Ne bis in idem in materia tributaria*, cit. p. 3-4.
[84] M. DOVA, *Ne bis in idem in materia tributaria*, cit. p. 3. The author analyses how Finnish regulation on the matter does not secure any expedient governing the interaction between authorities which are conferred of sanctioning powers. Precisely, it is stated that national authorities "proceeds autonomously both in establishing the facts and in assessing the penalty". Furthermore, the author deploys how the Strasbourg court detected that "mr Nykänen was finally sentenced in 2009 to payment of the surcharge, whereas the criminal proceedings, which began in 2008, were not interrupted in any way, but became final in 2010".
[85] *Case of Nykänen v. Finland*, ECtHR 20 May 2014, Application no. 11828/11, para. 62 *et seq.*

issued in the *Åkerberg Fransson* case, that has been mentioned several times throughout this thesis.

This pronunciation further complicates the interpretative landscape regarding the sanctioning mechanism operating towards failures of VAT declarations. As a matter of fact, following the reasoning of the ECJ portraited in the ruling, the combination of criminal and administrative penalties for the same tax law breaches – at least, in abstract terms – is eventually compatible with the *ne bis in idem* principle depicted in Article 50 of the Nice Charter, save for the instance where the administrative sanction is – from a concrete angle – reckoned to be endowed with criminal character on the findings of the judicial assessment carried out by the domestic judge.[86]

For the purpose of the scrutiny of the affair, it is useful to retrieve what elaborated upon previously in Chapter II: the ruling in *Åkerberg* was delivered by the Court of Justice in response to a reference for a preliminary ruling from the Swedish judiciary with regard to the interpretation of the *ne bis in idem* principle envisaged by Article 50 EUCFR in connection with criminal proceedings for VAT fraud, instituted against an individual who had been already convicted to the payment of an administrative\ surcharge in relation to the same misbehaviour.[87] It must be first noted that the CJEU confirmed its jurisdiction to rule over the case in question and – without little controversy – opted for partially departing from the countercurrent Opinion of the Advocate General Cruz-Villàlon.[88] In turn, the EU Court, by catalysing all its attention towards the interplay between the dual track sanctioning system implemented in tax law matters and the prohibition of double jeopardy from Article 50 EUCFR, underlined how Article 50 of the Charter does not prevent Member States from enforcing the combination of tax penalties and criminal penalties against the same breaches of VAT declaratory obligations, in so

[86] M. DOVA, *Ne bis in idem in materia tributaria*, cit. p. 2, which recalls paragraphs 34 and 36 of the ECJ, Judgment 26 February 2013, Case C-617/10, *Åklagaren v. Åkerberg Fransson*, ECLI:EU:C:2013:105.

[87] A. TRIPODI, *Ne bis in idem e reati tributari*, p. 679 in A. CADOPPI, S. CANESTRARI, A. MANNA, M. PAPA, *Diritto penale dell'economia*, Tomo I, Torino, 2016, p. 669 and its comment on the *Åkerberg Fransson* judgement, Case C-617/10.

[88] D. VOZZA, *I confini applicativi del principio del ne bis in idem interno in materia penale: un recente contributo della Corte di Giustizia dell'Unione Europea*, in *www.penalecontemporaneo.it*, 15 April 2013, p. 5, recalling Opinion of Advocate General Cruz Villalòn in *Åkerberg Fransson*, delivered on 12 June 2012; on the point, also see B.VAN BOCKEL, *op.cit*., p. 60 ff.

far as the objective of this enactment is ensuring "the collection of VAT revenue" and, at the same time, "protecting the financial interests of the Union", intended as a whole.[89]

In other terms, the Court of Justice concedes Member States the freedom of choosing and composing, with wide room for manoeuvre, their preferable armamentarium of applicable sanctions, as long as they are suitable for serving the general objectives of the European Union. However, the ECJ also asserted that even an administrative surcharge, whose "substantially" criminal nature shall be assessed on the basis of the three relevant criteria outlined in the *Bonda* ruling – which, as highlighted on multiple occasions in the present study, refers in turn to the so-called *Engel* criteria theorized by the ECtHR – , in so far as it has become irrevocable, it hinders the institution of criminal proceedings on the ground of the same alleged tax infringement and in respect of the same defendant.[90]

From this viewpoint, it may seem that there is an unhoped agreement between the two European Courts on the applicable methodology for the ascertainment of the "substantially" criminal connotation of tax punishment, that must be realized by glancing at the formal normative classification of the tort under national law, the very nature of the offence and, ultimately, the nature and degree of severity of the penalty that the person concerned risks incurring.[91]

Nevertheless, one may argue that such unity of views is disrupted by a controversial statement made by the Court set out in the judgment at hand: the Court indeed held in the notorious above-mentioned paragraph 36 of the sentence that the referring national court must fulfil the task of determining, «in the light of these criteria, whether it is necessary to perform an examination of the cumulation of tax and criminal penalties envisaged by national legislation » against a given tax

[89] This represent one of the core points of the ruling delivered by the CJEU and it can be found in para. 34 of the judgement at hand, as recalled by D. VOZZA, *op. cit*., p. 5, Here is the reading of paragraph 34: « […] it is to be noted first of all that Article 50 of the Charter does not preclude a Member State from imposing, for the same acts of non-compliance with declaration obligations in the field of VAT, a combination of tax penalties and criminal penalties. In order to ensure that all VAT revenue is collected and, in so doing, that the financial interests of the European Union are protected, the Member States have freedom to choose the applicable penalties ».
[90] Again, D. VOZZA, *op. cit*., p. 5,
[91] B. VAN BOCKEL, *op. cit*., p. 40.

offence, by relying on its own "domestic standard of protection". [92] Thus, according to the CJEU's standpoint, it is a duty and a responsibility of the national court to decide whether maintaining or disabling the sanctioning cumulation, provided that the other remaining sanctions shall be effective, proportionate and dissuasive.[93]

This much-discussed choice by the ECJ to entrust the delicate task of certifying the effective nature of tax penalties to the national judge, eventually, runs counter to the consolidated guidelines offered by the ECtHR case law. Precisely, what has really changed is the "object of the evaluation", because now the settlement upon the question of whether or not the ban on double punishment is applicable must include also other variables and requirements related to the relationship between domestic law and EU law, thereby further complicating the set of elements on which the domestic judge shall found this assessment .[94]

Hence, so as to conclude our survey, it would not be excessive to state that the CJEU in matter of consistency between sanctioning duplication and *ne bis in idem* rule has arranged a set of hermeneutical criteria that allegedly seems to slightly deviate from the well-established theoretical guidelines that can be detected within the ECtHR case law in relation to the same contentious topic.

These discrepancies between the interpretative stance of the Strasbourg and Luxembourg regime are ulteriorly exposed by the ECJ'S choice, formulated in *Åkerberg Fransso*n and totally detached and foreign from the ECtHR's jurisprudence, to delegate the removal of the combined sanctions – in so far as the

[92] D. VOZZA, *op. cit.*, p. 5, which recalls the reading of the well-known Paragraph 36 of the *Åkerberg Fransson* decision.

[93] ECJ, Judgment 26 February 2013, Case C-617/10, Åklagaren v. Åkerberg Fransson, ECLI:EU:C:2013:105. The paragraph 36 of the judgement dictates more specifically that the domestic judge shall consider whether cumulation of sanctions is appropriate. The judgement, indeed, clearly states that « It is for the referring court to determine, in the light of those criteria, whether the combining of tax penalties and criminal penalties that provided for by national law should be examined in relation to the national standards as referred to in paragraph 29 of the present judgment, which could lead it, as the case may be, to regard their combination as contrary to those standards, as long as the remaining penalties are effective, proportionate and dissuasive».

[94] D. VOZZA, *op. cit.*, p. 7-8. The author here stress how such aspiration of the ECJ can be hardly achieved, considering the circumstance that " […] the subject matter of the evaluation seems to change from what was stated in principle by the Court of Justice and by the ECtHR [...] no longer only concerning criminal penalties (offences, procedures) for tax offences (from which it would be triggered, if successful, the preclusion from bringing proceedings under Article 50 of the CDFEU, as is normally the case under Article 4 of Prot. No 7. ECHR), but the combination of criminal and tax (criminal) penalties for the same act". Furthermore, the author highlights how, at any rate, do persist "various interpretative doubts about the type and wight of the standard of protection (internal or Euro-unitary) to be taken into account by the national judge in its assessment".

remaining ones are carrier of an "effective, proportionate and dissuasive" flow rate– to the free appraisal of the national judge, which will form its reasoning on the basis of the concrete circumstances of the case and on the applicable standards of legal protection granted by internal law. If this is the case, the main risk is the arising of a double-edge situation in which the domestic interpreter, being referred back of the case by the Court of justice, is conferred of the power of untangling the counterbalance between the tutelage of the *ne bis in idem* right – thus, an European-wide fundamental legal garrison – and the achievement of a general aim of the Union – such as the insurance of adequate means for combating crimes, in the form of suitable residual penalties.

Lastly, the theoretical divergences between the CJEU and ECtHR's standings concerning the application of the *ne bis in idem* right as it comes to the maintenance of parallel punishments within national legal systems – at least, as far it concerns taxation infringements – can be summarized in the following fashion: the more restrictive vision provided by the EU Court on the operability's scope of the guarantee is contrasted by the more extensive conception offered by the European Court of Human Rights, which fairly strongly neglected the implementation of the double-track punitive scheme in connection to fiscal torts. However, the rigid approach taken by the Strasbourg judge has assumed "smoother" contours from the moment the *A & B v. Norway* ruling was promulgated.

3. *A & B v. Norway*: reduction of the deflagrating flow rate of the *Grande Stevens* judgement and the "sufficiently close connection in substance and time" criterion.

In the renowned *A & B v. Norway* ruling the Strasbourg court was assumed to have partially revisited the hermeneutical standpoint adopted in *Grande Stevens* with regards to the duality between conventional *ne bis in idem* and double-track system.[95] As teased earlier, the judgement at hand has witnessed the Grand

[95] N. MAZZACUVA - E. AMATI, *op.cit.*, p. 373, which refers also to a more "intense" approach of P. FIMIANI, *Market abuse e doppio binario sanzionatorio dopo la sentenza della Corte E.d.u., Grane Camera, 15 Novembre 2016, A e B c. Norvegia*, in *Dir. Pen. Cont.*, 8 February 2017, which,

Chamber of the European Court of Human Rights delivering a clear statement representing an overriding of the precedent judicial settlements enumerable within the Strasbourg case law, that shared an unique common denominator: the structural and constant inconsistency of national punitive frameworks in respect of the *ne bis in idem* principle from Article 4 of protocol no. 7 ECHR in the part where they provide for the combination of criminal and administrative sanctions – as understood in the meaning established by the Court itself – against offence coloured by a relevant social disvalue, likewise tax frauds or illicit operation concerning financial instruments. Notwithstanding the concatenation of the decisions enucleated in the previous paragraph, contrary to the allowance of maintaining a two-faced punitive pattern, in *A & B v. Norway* it can be unearthed an openness in favour of the preservation of such sanctioning methodology.[96]

As a matter of fact, the Court appears to restrict the area of operability of the guarantee, on whose regards numerous pronouncements have already delineated its borders. Particularly, the Court in the *Grande Stevens* case seems to have anchored long-run the conception of "prohibition of double punishment" under the Convention arrangement to the occurrence of two seminal prerequisites, namely the "*matière pénale*" condition and the *"idem factum"* requirement (obviously, construed in relation to its historical dimension of "same material conduct").[97]

However, the *A & B judgement* introduced a supplementary parameter that must be taken into consideration by the national interpreter on the stage of the assessment of the compatibility of the internal regulatory system – within which is contemplated the convergence of criminal penalties and penalties "formally" administrative but "substantially criminal – towards the ban on a *bis in idem* instance: it is about the yardstick of the "sufficiently close material and temporal connection" between two proceedings, mentioned multiple times in this study,

instead, calls for a "clear overriding" of the preceding stance of the ECtHR itself on the same topic and a "step back" taken by the Court.

[96] In this sense, F. VIGANÒ, *A Never-Ending Story? Alla Corte di giustizia dell'Unione europea la questione della compatibilità tra ne bis in idem e doppio binario sanzionatorio in materia, questa volta, di abusi di mercato*, in www.penalecontemporaneo.it, 17 October 2016.

[97] See F. MINISCALCO *Ne bis in idem: i recenti approdi giurisprudenziali* http://www.salvisjuribus.it 23.02.2018.; in this sense also N. MAZZACUVA - E. AMATI, *op.cit*., p. 373-374.; On the point, also See V. CITRARO *Il giudicato sulla sanzione amministrativa sostanzialmente penale dichiarata incostituzionale* in https://deiurecriminalibus.altervista.org.

which, where it occurs, does not oblige the mandatory interruption of the trial which is still pending, in the event of the ultimate definition of the other set of proceedings alleging the *idem factum*.[98]

Before diving into the analysis of the relevant elements that presumably unveils the existence of such a link between two proceedings, it should be fruitful to examine the factual and legal grounds of the *A & B* case for acquiring a wide-ranging insight on how the procedural connection can be deployed.

The case at stake involves two different complaints both concerning the violation of the right to be not punished enshrined in Protocol no. 7 generated by the celebration of a criminal trial, that lead to the infliction of a related punishment, towards a defendant who has been already conclusively sanctioned by tax authorities with a surcharge (in this case equal to 30% of the tax evaded).[99] The first applicant, Mr. A, was arrested with the accusation of tax fraud based on the failure of disclosing incomes stemming from transnational financial operations. During the ongoing criminal proceeding, the Norwegian fiscal administration handed down against the plaintiff an administrative sanction equal to the 30% of the undeclared earnings, based, among other things, on the statement released at the time of his arrest.[100] The applicant complied to his charges and payed the whole amount of the administrative sanction before the expiry of the deadline prescribed for challenging the measure, ultimately closing, in this way, the administrative sanctioning procedure.[101] However, in a subsequent moment, Mr. A was convicted before a territorial criminal court to serve a one year's imprisonment term for the defective declaration of financial profits deriving from the monetary transaction mentioned above. The criminal custodial sentence was upheld by the local Appeal court and by the Norwegian Supreme Court (“*Høyesterett”)*, thereby rendering irrevocable the issued judgement.

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[98] Also N. MAZZACUVA - E. AMATI, *op.cit*., p. 374 and F. MINISCALCO *Ne bis in idem: i recenti approdi giurisprudenziali* http://www.salvisjuribus.it 23.02.2018.
[99] F. VIGANÒ, *La Grande Camera della Corte di Strasburgo su ne bis in idem e doppio binario sanzionatorio*, in www.penalecontemporaneo.it, 18 November 2016, p. 1.
[100] F. VIGANÒ, *La Grande Camera della Corte di Strasburgo*, cit., p. 2.
[101] F. VIGANÒ, *La Grande Camera della Corte di Strasburgo*, cit., p. 2. ; See also G. CALAFIORE, *La sentenza A e B c. Norvegia della Corte di Strasburgo ridimensionala portata del principio ne bis in idem, European Papers Vol. 2, 2017, No 1,* pp. 243-250 *(European Forum, 18 April 2017),* p. 243.

The application lodged by the second claimant Mr. B. was founded on vicissitudes similar to those involving the first plaintiff. Indeed, Mr. B was implicated in the same investigation concerning the alleged tax fraud contested to Mr. A and he was the recipient of the same administrative sanction consisting in the surcharge fixed at the rate of 30% of the pecuniary amount evaded and deriving, even in this case, cross-boarders transaction.[102] Likewise the incident regarding Mr. A, the second applicant decided to duly correspond the levied fine, action that determined the final closure of the proceeding before Norwegian tax administration. Anyhow, in the meantime, criminal proceedings were lifted against the same individual on the account of the same charge of fiscal fraud and, similarly to Mr A, he was sentenced to one year's detention. Even in this second litigation, both the Court of Appeal and the Norwegian Supreme Court refused to review the case, thus allowing the conviction's judgement to become *"res judicata"*.[103]

Therefore, in the light of these facts, both Mr A and Mr B had recourse to the ECtHR denouncing the violation of their *ne bis in idem* right under Article 4 Protocol no. 7. The case was assigned to the judging panel of the Grand Chamber and, against the claim brought by the plaintiffs, six governments legally bounded by Protocol no. 7 – i.e. Bulgaria, Greece, Moldovia, Switzerland, Czech Republic and France – have appeared in the trial to support Norway, acting as a resisting State, by uplifting the absence of any infringement to the prohibition of double jeopardy within the Convention legal order. [104]

The Grand Chamber in the decision at stake rules upon two joined cases: with regards to the first complaint, the appellant submitted the alleged breach of its ne bis in idem guarantee by arguing that the custodial sentence issued by a criminal court against the tort of tax fraud was illegitimate, since a parallel administrative proceedings on the "same facts" has been already concluded by virtue of the imposition of measure become final; and the second complaint overall reported the same plea due to the close resemblance between the two cases.[105]

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[102] F. VIGANÒ, *La Grande Camera della Corte di Strasburgo*, cit., p. 2; see G. CALAFIORE, *op. cit.*, p. 244.
[103]F. VIGANÒ, *La Grande Camera della Corte di Strasburgo*, cit., p. 2.
[104] F. VIGANÒ, *La Grande Camera della Corte di Strasburgo*, cit., p. 1.
[105] G. CALAFIORE, *op. cit.*, p. 246.

In its reasoning, the ECtHR immediately highlighted on paragraph 20 of the resolution that the Norwegian Supreme Court had already aligned with the relevant Strasbourg case-law on the issue by adjusting the prevailing orientation of national jurisprudence to the conventional guidelines applying in respect of double-binary punishment.[106] The first question addressed by the Court concerns the definition of "criminal charge", within the meaning of the Convention, with particular reference to Article 6. More specifically, the European judge posed a parallelism between the concept of "criminal charge" under Article 6 and the term "criminal proceedings" utilized in Article 4 of Protocol no. 7 : it is noted that the two notions have different implication from a perspective of both substantial and procedural law.[107]

In fact, in paragraph 106 it established – in a very objectional manner – that Article 4 of Protocol 7 was originally intended by its drafters as operating only in relation to criminal proceedings "in strict sense" and, unlike Article 6, it is not derogable under any circumstances.[108] Moreover, whilst the fair-hearing guarantees from Article 6 are allegedly restricted only to criminal trial, the prohibition of double jeopardy under Protocol no. 7 may have potentially wider implications, since it presupposes an intense assessment on substantive criminal law profile, in the sense of the concrete verification of whether the « respective offences concerned the conduct ».[109] However, the Court "compensates" this statement on the different amplitude of the operability's scope of the two conventional guarantees by claiming that even though « the *ne bis in idem* principle is mainly concerned with due process, which is the object of Article 6, and is less concerned with the substance of the criminal law than Article 7», in any case, « for the consistency of

[106] *Case of A and B v. Norway*, ECtHR 15 November 2016, Applications nos. 24130/11 and 29758/11, para. 20: « the Supreme Court first considered whether the two sets of proceedings in question had concerned the same factual circumstances (same forhold). In this connection it noted the developments in the Convention case-law expounded in the Grand Chamber judgment of *Sergey Zolotukhin v. Russia* […] and the attempt in that judgment to harmonise through the following conclusion:
"... Article 4 of Protocol No. 7 must be understood as prohibiting the prosecution or trial of a second 'offence' in so far as it arises from identical 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[...] ».
[107] G. CALAFIORE, *op. cit.*, p. 246.
[108] *Case of A and B v. Norway*, ECtHR 15 November 2016, Applications nos. 24130/11 and 29758/11, para. 106.
[109] *Ibid.* para. 106.

interpretation of the Convention taken as a whole », the applicability of both principles shall be governed by the *Engel* criteria, which bring below the theoretical coverage given by the notion of "*matière pénale*" the punitive combination of administrative and criminal sanctions.[110] In effect, the Court recalls in the present judgement that, while ruling upon the *Zolotukhin* case in 2009, it actually applied the *Engel* criteria, planning this strategy on the assumption that the principle of *ne bis in idem* can be seen as "contained" within the broader principle of due process of law from Article 6, and as embodying a further specification of content set out by this latter legal guarantee.[111] Such effort of approximation between the interpretations upon these two fundamental judicial standards is motivated by the desire manifested by the Strasbourg judge to forecast the "internal consistency and harmony"[112] among different rules laid down in the Convention, which shall be addressed as a unitary and homogeneous complex and not as an inorganic accumulation of non-complementary provisions.[113]

After having settled the dispute of whether or not the affair in question falls within the field of "criminal law matters", the Court shift its focus on the incandescent nucleus of the matter, thus the conventional legitimacy of the dual-track system in the spectrum of the safeguard clause represented by the "sufficiently close connection in substance and in time" between two proceedings. This topic constitutes an interpretative riddle difficult to overcome, especially given the notably ambiguous standings within the same ECHR case law, outlined in preceding rulings. Moreover, on a preliminary basis, the Court calls out its own well-established jurisprudential orientations granting Contracting States a wide margin of discretion in selecting autonomously how to better organize their domestic legal system, also "including their criminal- justice procedures".[114]

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[110] *Ibid.* para. 107.
[111] G. CALAFIORE, *op. cit.*, p. 246, which recalls paragraph 107 of the *A & B v. Norway* decision.
[112] Specifically, *Case of A and B v. Norway*, ECtHR 15 November 2016, Applications nos. 24130/11 and 29758/11, para. 133 « […] the Convention must be read as a whole, and interpreted in such a way as to promote internal consistency and harmony between its various provisions ».
[113] *Ibid.* para. 107: « The Court finds it more appropriate, for the consistency of interpretation of the Convention taken as a whole […] ».
[114] *Ibid.* para. 120: « Against this backdrop, the preliminary point to be made is that, as recognised in the Court's well-established case-law, it is in the first place for the Contracting States to choose how to organise their legal system, including their criminal-justice procedures ».

Accordingly, such procedural autonomy is concretized in the free choice of the most suitable and efficient legal measures that can be executed in order to insure the protection of the defendant's right to be spared from double punishment from Protocol no. 7, without affecting the liberty of the State to opt for the sanctioning instruments most adequate in respect of certain misconducts, that can be levied even through the institution of distinct proceedings – under the condition that they form a coherent punitive whole.[115]

The possibility of enjoying such a large discretion conceded to the States adhering to the Convention assumes the appearances of an obligation with regards solely on the results to be achieved, with any strain on the selection of the means to be employed. In any case, the Court reserves itself the faculty to evaluate whether the applicable national measures may substantially engender the hazard for the defendant to be forced to withstand a disproportionate sacrifice.[116]Thus, it is possible to argue in the sense that the remarkable freedom of manoeuvre yielded by the ECtHR to national legislators does not filter down to the global allowance of the punitive cumulation. As a matter of fact, albeit Article of Protocol no. 7 – pursuant to this ultimate reading by the Court – does not prevent domestic legislators from implementing the punitive duplication against tax fraud, it is nevertheless also true that the dual track system must be consistent with the conventional parameters by affording a fairly strict "connection in time and substance" between two sets of proceedings.[117]

The innovative criterion of the procedural bond has been essentially designated to counterbalance two different demands: on one hand, the individual interest of the defendant to be safeguarded from double jeopardy and, on the other

[115] On this point, G. CALAFIORE, *op. cit*., p. 247.
[116] *Case of A and B v. Norway*, ECtHR 15 November 2016, cit., para. 121 : « In the view of the Court, States should be able legitimately to choose complementary legal responses to socially offensive conduct […] through different procedures forming a coherent whole so as to address different aspects of the social problem involved, provided that the accumulated legal responses do not represent an excessive burden for the individual concerned ».
[117] *Ibid*. para. 123: « The object of Article 4 of Protocol No. 7 is to prevent the injustice of a person's being prosecuted or punished twice for the same criminalised conduct. It does not, however, outlaw legal systems which take an "integrated" approach to the social wrongdoing in question, and in particular an approach involving parallel stages of legal response to the wrongdoing by different authorities and for different purposes ».

hand, the State's interest to chastise illicit conducts that might constitute either a tax law violation or a criminal felony.[118]

It should be pointed out straightaway that the criteria of the "sufficiently close connection in substance and time" is not fulfilled whenever « one or other of the two elements – substantive or temporal – is lacking», and the burden of proving that the imposition of double penalties, ordered at the hands of different authorities and within the context of distinct proceedings, does not infringe Article 4 of Protocol no. 7 ECHR, will be borne by the respondent State.[119]

Besides, the Grand Chamber specifies on paragraph 130 that « the surest manner of ensuring compliance with Article 4 of Protocol no. 7 is the provision, at some appropriate stage, of a single-track procedure 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 ».[120]

Here the Strasbourg judge give national interpreters a clue about the instances where would subsist the "material connection" between two proceedings. First of all, the two procedure must « pursue complementary purposes and thus address, not only *in abstracto* but also in *concreto*, different aspects of the same social misconduct involved ».[121] To put it into a different wording, the two sanctions representing the outcome of the parallel punitive procedures shall be considered as

[118] *Ibid*. para. 124, recalled by G. CALAFIORE, *op. cit*., p. 248, affirms that the main aim of the request for the existence of the "sufficiently close connection in space and time" is to ensure « the fair balance to be struck between duly safeguarding the interests of the individual protected by the ne bis in idem principle, on the one hand, and accommodating the particular interest of the community in being able to take a calibrated regulatory approach in the area concerned, on the other».

[119] With respect of the necessity of the cumulative co-existence of both the "material and temporal connection" between two proceedings, the Court it is straight and clear: indeed, on paragraph 125 of the judgement it is stated that: « […] this test will not be satisfied if one or other of the two elements – substantive or temporal – is lacking». Moreover, as regards to the probatory burden on the respondent State G. CALAFIORE, *op. cit*., p. 248 recalls para. 134, whose reading is the following: « It should be open to States to opt for conducting the proceedings progressively in instances where doing so is motivated by interests of efficiency and the proper administration of justice, pursued for different social purposes, and has not caused the applicant to suffer disproportionate prejudice. However, as indicated above, the connection in time must always be present ». Besides, the Court even specifies – in a pretty ominous fashion – that « the weaker the connection in time the greater the burden on the State to explain and justify any such delay as may be attributable to its conduct of the proceedings ».

[120] *Case of A and B v. Norway*, ECtHR 15 November 2016, cit., para. 130.

[121] *Ibid*. para. 132.

complementary parts of a unique sanctioning reaction by the internal legal order against the same illicit behaviour. Secondly, such connection is deemed as existing whenever « the duality of proceedings concerned is a foreseeable consequence, both in law and in practice, of the same impugned conduct ("*idem"*) ».[122] Moreover, a third material indicator is represented by the pattern in which the two proceedings are conducted, hence « in such a manner as to avoid as far as possible any duplication in the collection as well as the assessment of the evidence, notably through adequate interaction between the various competent authorities to bring about that the establishment of facts in one set is also used in the other set ».[123] Finally, above all, the substantial bond is proven whether « the sanction imposed in the proceeding which become final first is taken into account in those which become final last », with the purpose of avoiding a detrimental situation where the respondent involved in a two-faced trial is forced to experience an excessive burden, being this latter risk of probable occurrence wherever the domestic legal order does not lay down a procedural « offsetting mechanism » aimed at maintaining the proportionality of the overall amount of the sanctions concretizing the punitive response against that tort.[124] In effect, the principle is more likely to be disrespected if the administrative procedure, regarding particularly serious offence, is conducted in practice by following stigmatizing cadences that resemble the ones typical of a criminal trial.

With specific regards to this latter criterion of the intrinsic and global proportionality of the sanctioning reaction afforded by the national legal framework, it is plain that it symbolizes the most innovative contribute introduced within the Strasbourg body of jurisprudential stances on the debate about the compatibility between dual-track system and *ne bis in idem* right, to such an extent that this concept will be resumed also by the CJEU in ruling upon the joint cases of March 2018 – namely, *Di Puma*, *Menci* and *Garlsson Real Estate*.

Its cutting-edge capacity is given by the fact that the idea of a "punitive proportionality" is absolutely extraneous to the inner logics of the "procedural" *ne bis in idem*, since it attains exclusively the profile of the punitive preclusion

[122] *Ibid.* para. 132.
[123] *Ibid.* para. 132.
[124] *Ibid.* para. 132.

regarding the substantial and concrete repercussions affecting the defendant, obliged to tolerate an afflictive load, and does not operate as a guarantee prodromal to merely ensure legal certainty in judicial situations and the rationalization of times and procedural resources.[125] Consequently, the Court delegates national judges to imprint a canon of proportionality to the whole procedural vicissitude, without the risk of incurring into any censorships from the Strasbourg board. In other terms, the national interpreter is encumbered by the duty of "rescuing" the abstractly unbiased internal regulations enabling the application of the double-track methodology, which – in most cases – entails the enforcement of proportionate measures that however, in concrete terms, are applied in unreasonable and disproportional ways by ordinary judges with the intention of handing down exemplary punishments.

Willing to sum up, the proportionality requirement, as long as it is not disregarded, permits the avoidance of breaches throughout the *ne bis in idem* guarantee and the aggregation of ontologically differentiated sanctions, albeit relating to a unique procedure and functional to penalize various sociological consequences stemming from the same misconduct.

However, harsh criticisms have been brought forward this latter and most significative criterion of sanctioning proportionality, which has been even mockingly defined as blunt weapon due to its extremely general and vague character. It seems not so "plucked out of the air" the dissenting opinion by the member of the judging board Pinto de Albuquerque, according to which the absence of a proper evaluation grid on proportionality would render the criteria arbitrary and nebulous, on the account that the assessment of the indicators mentioned above is left to the decoupled discretion of national judges. [126] Moreover, it is not clear whether all the aforementioned material indicators of the compatibility test are demanded to cumulatively co-exist for the sake of the ascertainment of the procedural connection in time amongst two trials or if it is sufficient the alternative presence of only some of them.

[125] A. TRIPODI *Ne bis in idem e reati tributari*, cit., p. 670 ff.
[126] See F. VIGANÒ, *La Grande Camera della Corte di Strasburgo*, cit., p. 1; also G. CALAFIORE, *op. cit*., p. 250.

From the sheer reading of the judgement, it does not univocally emerge either their disjunctive or the cumulative character and this is a point that has not clarified yet by the Court.[127]

In any event, it is still dubious whether this conventional interpretative approach will be matched by a follow-up jurisprudential development by the EU Court of Justice on the homologue principle provided for in Article 50 EUCFR. Thanks to the three preliminary ruling delivered in March 2018, it is possible to register a hermeneutical evolution in this sense – as it is going to be dissected in Chapter IV. For now it should be retrieved the impulse given by the Advocate General Campos Sanchez-Bordona, who in its Opinion on the *Orsi* and *Baldetti* affair solicited the CJEU to improve its interpretative standards on the *non bis in idem* rule, with the view of the alignment with the sophisticated jurisprudence of the ECtHR on the corresponding right enshrined in Article 4 of Protocol no. 7 ECHR.[128]

Carrying forward our theoretical survey, with regards to the "temporal connection" between proceedings, the Strasbourg Court clarified that this requirement does not mandate the necessary simultaneous conduction of the two trials from beginning to end, since they might unquestionably proceed on a mere "consequential" manner.[129] In truth, what really matters is the subsistence of a chronological bond sufficiently tied so that any procedural delay or uncertainty or the excessive length of the definition's time- frame can be avoided.[130] The weaker this chronological nexus is, « the greater the burden on the State to explain and justify any such delay as may be attributable to its conduct of the proceedings ».[131] Once the Court has reconstructed the fundamental conditions under which the prohibition of double jeopardy can apply, it then concretely adopted these

[127] G. CALAFIORE, *op. cit.*, p. 250.
[128] Opinion of AG Campos Sanchez-Bordona, on joint cases C-217/15 e C-350/15, *Orsi e Baldetti*, il 12 Januray 2017, paras. 4-5.
[129] *Case of A and B v. Norway*, ECtHR 15 November 2016, cit., para. 134: « This does not mean, however, that the two sets of proceedings have to be conducted simultaneously from beginning to end. It should be open to States to opt for conducting the proceedings progressively in instances where doing so is motivated by interests of efficiency and the proper administration of justice, pursued for different social purposes, and has not caused the applicant to suffer disproportionate prejudice. However, as indicated above, the connection in time must always be present ».
[130] N. MAZZACUVA - E. AMATI, *op.cit*., p. 374, on the reading of *Case of A and B v. Norway*, ECtHR 15 November 2016, cit. para. 134.
[131] *Case of A and B v. Norway*, ECtHR 15 November 2016, cit., para. 134.

parameters in order to settle the dispute in its sight. In particular, the Court observed that the Norwegian legal system by means of administrative sanctions, that pursue a compensatory purpose, accompanied by criminal ones, endowed instead with a punitive effect, express the willingness to achieve different goals of legal protection.[132]

By firmly taking up a breakthrough position, the Strasbourg judge dictated that the Norwegian dual track punitive system as shaped in this guise does not disrespect the principle of *ne bis in idem* on two essential counts: firstly, because of the possibility for the defendant to foresee his or her submission to parallel proceedings that may end up with the combined imposition of two sanctions. [133] Besides, secondly, the element of the sufficiently close nexus between the two sanctioning procedures was proven on the basis of the utilization of the evidence in one of the two trials, that had been already collected and evaluated in the other one, and by virtue of the proportional commensuration of the criminal penalty in respect of the fiscal one issued beforehand, hence determining the proportionality of the aggregate punitive response towards the alleged tort.[134]

For these motives, the Court denied the violation of Article 4 of Protocol no. 7 to the Convention and explicitly held in paragraph 147 of the ruling at stake that,

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[132] G. CALAFIORE, *op. cit.*, p. 249.

[133] *Case of A and B v. Norway*, ECtHR 15 November 2016, cit., para. 146: « In these circumstances, as a first conclusion, the Court has no cause to call into doubt either the reasons why the Norwegian legislature opted to regulate the socially undesirable conduct of non-payment of taxes in an integrated dual (administrative/criminal) process or the reasons why the competent Norwegian authorities chose, in the first applicant's case, to deal separately with the more serious and socially reprehensible aspect of fraud in a criminal procedure rather than in the ordinary administrative procedure. Secondly, the conduct of dual proceedings, with the possibility of different cumulated penalties, was foreseeable for the applicant who must have known from the outset that criminal prosecution as well as the imposition of tax penalties was possible, or even likely, on the facts of the case[…]. Thirdly, it seems clear that, as held by the Supreme Court, the criminal proceedings and the administrative proceedings were conducted in parallel and were interconnected […]. The establishment of facts made in one set was used in the other set and, as regards the proportionality of the overall punishment inflicted, the sentence imposed in the criminal trial had regard to the tax penalty […] ».

[134] *Ibid*. para. 147: « […] the Court finds no indication that the first applicant suffered any disproportionate prejudice or injustice as a result of the impugned integrated legal response to his failure to declare income and pay taxes. Consequently, having regard to the considerations set out above […], the Court is satisfied that, whilst different sanctions were imposed by two different authorities in different proceedings, there was nevertheless a sufficiently close connection between them, both in substance and in time, to consider them as forming part of an integral scheme of sanctions under Norwegian law for failure to provide information about certain income on a tax return, with the resulting deficiency in the tax assessment […] ». See also G. CALAFIORE, *op. cit*., p. 249.

despite a two-fold sanction was handed down by two distinct judicial authorities within the context of separate proceedings, « there was nevertheless a sufficiently close connection between them, both in substance and in time, to consider them as forming part of an integral scheme of sanctions under Norwegian law for failure to provide information about certain income on a tax return, with the resulting deficiency in the tax assessment ».[135]

The principles established in the *A & B* ruling, notwithstanding the fact that they were theorized within a legal affair specifically related to tax offences, manifest a surely wider interpretative scope, to such a point that they completely shifted and recalibrated the previous breadth of the conventional *ne bis in idem* towards all national regulatory areas set on the dual track pattern, among which it certainly is included the discipline of market abuses.[136]

Consequently, it is possible to argue that the Court through the *A & B* decision, even accepting the criticisms advanced by those who reckon that the criteria of the "sufficiently close connection in substance and time", joined with the symptomatic indexes from which the existence of this requirement can be deduced, has compelled national courts to measure themselves up with an unprecedented jurisprudential strand that have scaled the range of operability of the prohibition of double jeopardy, as depicted in the Convention, and has granted major windows of survival to domestic statutory frameworks that implements the mechanism of the double track punishment.[137]

In reality, it should be also underlined that this jurisprudential "*revirement*" by the Grand Chamber might be incentivised by the numerous accusations received beforehand, alleging that the Court whished prioritizing individualistic demands of citizens without duly considering the other general interests at play – above all the financial needs of the Union as a whole –, thereby generating excessive grudges and expenses for Contracting States which were forced to adjust their domestic regulations in the view of the Strasbourg's *"dictum"*.

[135] Again, *Ibid*. para. 147.
[136] N. MAZZACUVA - E. AMATI, *op.cit*., p. 375.
[137] N. MAZZACUVA - E. AMATI, *op.cit*., p. 377.

CHAPTER IV
CONCLUDING REMARKS: THE FORTHCOMING EVOLUTION OF FUNDAMENTAL RIGHTS PROTECTION'S LANDSCAPE IN THE EUROPEAN LEGAL FRAMEWORK.

SUMMARY: 1. In the wake of *A & B v. Norway*: the ultimate transition from the "procedural" *ne bis in idem* to the "substantial" one, throughout the subsequent interventions of the European courts. 2. The three CJEU's preliminary rulings of March 2018: *Menci*, *Garlsson Real Estate* and *Di Puma*. 2.1. Follows: The ECtHR pulled the trigger again: the *Nodet v. France* decision. 3. Final comments: the "iridescent" nature of Fundamental Rights protection in Europe.

1. In the wake of *A & B v. Norway*: the ultimate transition from the "procedural" *ne bis in idem* to the "substantial" one, throughout the subsequent interventions of the European courts.

As profoundly sliced down in the previous Chapter, the scope of the legal tutelage granted by the principle of *ne bis in idem* does not really seem to have been dramatically compromised by the ECtHR in the *A & B v. Norway* ruling, since the Court has apparently taken a crucial stance in shaping the legal value attached to the principle in question, especially when it comes to its definition from a "gnoseological" perspective.

In the view of the above, the Grand Chamber, however, delimited the coverage afforded by the guarantee by circumscribing its operability exclusively in those cases where the element of the "sufficiently close connection in substance and time" is demonstrated. This criterion has in any case been already implemented – not in a formal and explicit way though – in preceding rulings issued by the Court, but only by virtue of this peculiar setback the ECtHR has constructed this requirement in the form of a "test of compatibility", by further tracing the material factors marking its juridical subsistence. Among the previous judgements establishing the condition of procedural nexus should be recalled the already examined *Nykänen* and *LukyDev* cases, both presenting the Swedish government in

the vest of the respondent, in which the Strasbourg Court did not ruled out at the root the legitimacy of the parallel application of administrative and criminal sanctions, but nonetheless it did not intend to apply the method of the "sufficiently close connection", since its relevant substantive and chronological indicators were not deemed as present in the cases at issue.

Indeed, the Court merely limited its assessment in declaring that the two punishments were inflicted by two distinct domestic authorities in the aftermath of two different procedures that had been conducted without any form of coordination or connection between them. Each of the two proceedings had run its own independent course and they both had been terminated separately from the other, with the addition that neither two judicial authorities took into consideration – in the view of laying down a proportionate global afflictive burden on the defendant – the sanction imposed by the other judge while tailoring the punishment to be inflicted. For these reasons, despite the ascertainment of the requirement under scrutiny was limited only to the existence of a "temporal" connection between the two trials – due to the absence of the "substantial" link –, the European Court appointed the non-injury of the *ne bis in idem* right from Article 4 of Protocol no. 7.

To summarize, one may argue that the fondly "garantist" jurisprudential orientation towards the matter assumed in the previous Strasbourg's pronouncements – as from the *Grande Stevens* decision – has undergone a severe downsize with regard to its scope of application, but, on the other hand, it is not hazardous to have an alternative understanding of such recent upheavals within the ECtHR case law: namely, a reading that identify in the criterion of the procedural connection not the intention of narrowing the extent of the guarantee at hand, rather the endeavour of balancing the *ne bis in idem* right, in its "individualistic" acceptation of citizens' legal garrison, with the general interest of European Countries to fully ensure the effectiveness of the punitive response towards tax evasion and illicit operations involving financial instruments.

From this viewpoint, the general impression that can be traced from the *A & B* ruling is the configuration of a fundamental right no longer untouchable, given the reality that it finds itself in a frame of actual concurrency with other demands

and values of general concern – likewise the public interest in pursuing anti-social behaviours detrimental for both national and supranational fiscal and financial objectives – that may clash with the intrinsic purposes of an essential human right.

In this sense, it can be brought forward the idea that the Grand Chamber wanted to reclaim and redesign its role as the keeper of the balance between fundamental rights and interests of general relevance, and the parameter of the sufficiently close bond would be nothing than a well-structured device to enact in practical terms this judgement of balancing.

Such a statement is confirmed from the circumstance that the criteria is theoretically built as a test of legitimacy which, in order to be "passed with flying colours", certain prerequisites shall be met. Obviously, this certification requires an

an individual evaluation on a case-by-case basis, thereby the restriction of the ground of operability of the *ne bis in idem* guarantee in not totally annulled in an absolute way, but only in specific cases it will be verified a contraction of the foreclosure effect stemming from the ban on double punishment, which will give the way to a public need whose satisfaction is subordinated to the cumulative imposition of administrative and criminal sanctions.

After having established how the condition of the "sufficiently close connection in substance and time" operates as a "safe-conduct" clause for the sanctioning proportionality and for the preservation of national regulatory mechanisms enabling the triggering of the double track scheme, we ought to observe that the innovative hermeneutical breadth of the *A & B* decision does not end here. As a matter of fact, it marked the beginning of the process of ultimate transition from the "procedural" *ne bis in idem* – which has been traditionally the one addressed by both the ECHR and CJEU case law – to the more "fluid" and flexible "substantial" *ne bis in idem,* that leaves behind its extremely rigid and schematic legacies in the view of seeking a fair equilibrium between financial and fiscal interests pursued by national and supranational policies and the protection of a fundamental right such as the right to not be punished twice.

As extensively examined in Chapter I, the "procedural" *ne bis in idem* configures a legal rule that operates on a preliminary level and is aimed at preventing the author of a crime already sentenced by a judgement that has become

final from being anew subjected to a second trial for the same fact, even though differently considered in terms of its title, degree or circumstances.

On the contrary, the "substantial" *ne bis in idem* represents a mechanism governing and settling hypothesis of concurrency of offences with the purpose of avoiding that the legal disvalue deriving from the unique conduct would be repeatedly prosecuted on the account of various criminalizing provisions, that abstractly converge on the same fact. [1]

The latter principle, which is a clear expression of a "substantialist" outlook on criminal law incidents, finds its primordial significance in forbidding that the same conduct can be charged more than once upon the same respondent, in the event that the application of only one of the statutory provisions – whereby the alleged infringement can be abstractly subsumed – would entirely exhaust the inner disvalue connotating the illicit action.

Conversely, the "procedural" *ne bis in idem* retrieves its genesis in the principle of "formal legality", which is openly conflicting which some criteria engaged in the vision of substantial criminal law – such as the parameter of "absorption" or "consumption" –, since it is traditionally regarded as preferable the settlement of the issue of concurrent offences by resuming logical and formal standards that are devised in order to ensure legal certainty.

Hence, a conclusion can be drawn up: the ban of double punishment in its eminently procedural acceptation merely serves the purpose of shielding an individual from the commencement of a new criminal trial on a conduct previously judged in a conclusive fashion, by means of a sentence of conviction or dismissal of the case. Whereas, the aforementioned prohibition is inextricably related to the formal concurrence of crimes, a legal construct that unfolds its juridical effects not on the operative side of the practicability of conducting multiple proceedings in

[1] On the point, see M. BONTEMPELLI, I*l doppio binario sanzionatorio in materia tributaria e le garanzie europee (fra ne bis in idem processuale e ne bis in idem sostanziale)*", in *Arch. pen.*, 2015, p. 130 ff. and F. GAITO, *introduzione allo studio dei rapporti tra ne bis in idem sostanziale e processuale*, in *Arch. Pen*. 2017, n.1, p. 7-8; See C. BUFFON, *Interferenze tra ne bis in idem processuale e sostanziale nel contenimento del doppio binario sanzionatorio* in www.processopenaleegiustizia.it, Fascicolo 2, 2019.

respect of the same misbehaviour, but rather in terms of the abstract comparison between different offences as described in their relative criminal provision.

Furthermore, provided that the guarantee on its procedural dimension fulfils a necessity of non-contradictory, certainty and economy of final judicial assessments – whose legal relevance is deployed towards the right of the defendant to not be exposed *"sine die"* to the risk of criminal proceedings –, it is unquestioned that the prohibition is strictly dependant on canons of legal typicality and statutory reservations, which confer a concrete shape to the ban on tracing back a single conduct to a plurality of crimes .

Upon this stance, it appears plausible to state that the violation of the "procedural" *ne bis in idem* can occur without the disrespect of the "substantial" *alter ego* of the principle: for instance, when the same subject undergoes more trials on the same fact but, in the end, he or she is convicted only once and on the account of a single offence. Or vice versa, whether the disregard of the "substantial" *ne bis in idem* takes place but it is not joined by any breach of the "procedural" one, like when, within the pathway of a single proceeding, the same conduct is classified as configuring a plurality of crimes.

The demarcation between the two facets of the *ne bis in idem* principle symbolizes a seminal yardstick in the scrutiny over the cutting edge content of the *A & B v. Norway* decision, upon which the major critics appointed the defect of having departed from the paramount guarantee logic of the rule from Protocol no. 7. This jurisprudential incongruence emerges from the fact that the Court does not forbid the repetition of proceedings on the same tort in so far as the overall sanctioning outcome remains within the bounders of punitive proportionality, legal foreseeability and judicial reasonableness.[2] On this point, it has been acknowledged that the judgement at hand fosters the consolidation of the substantial version of the principle at the expense of its procedural counterpart, whose relevance and scale have been lowered. In this sense, the Court accepts the possible scenario that, in spite of the potential submission of an *"idem factum"* to a proceedings started beforehand, the establishment of a second trial – an eventuality totally "demonized"

[2] See A. TRIPODI, *Il nuovo volto del ne bis in idem convenzionale agli occhi del giudice delle leggi. Riflessi sul doppio binario sanzionatorio in materia fiscale, in Giur. cost.*, 2018, p. 500 ff.

by the advocates of the procedural *ne bis in idem* – does take place under the mandatory circumstances that the parallel proceedings are functionally tied together, in the meaning of the proportionality of the aggregate punitive response, the foreseeability of the sanctioning combination and assumed the diversity in the aims pursued by the respective measures, which must penalize different downward implications of the same anti-social action.

Precisely, a due differentiation should be made: even before the promulgation of the *A & B* ruling, the above requirement of the foreseeability has been already listed in the ECHR case law, in the guise of a manifestation of the more general principle of legality. Thus, until this point, no profile of novelty was inserted in relation to the devising of the conventional rule. However, the proportionality requirement – let us reiterate on the merits – represented the watershed within the Strasbourg jurisprudence on Article 4 of Protocol no. 7 and overturned all the previous case-law by bringing about the supremacy of the substantial *ne bis in idem*, correlated not only to the harmful consequences of experiencing a double trial, but also inherent to the whole afflictive entity levied by national courts.

Lastly, the final point to be addressed is given by the fact that such parameters of foreseeability, proportionality and reasonableness of the global punishment are considered to be automatically outlawed or excluded wherever the multiple penalties enforced in relation to the same "historic" fact – as understood in the acceptation offered by the Court in *Zolotukhin* – are all characterized by criminal nature. This *"ipso facto"* disqualification is justified on the assumption that the punitive duplication would be excessively strident with the three aforementioned parameters themselves, since a double criminal penalty borne by the same subject for the same conduct would submit him or her to a preposterous afflictive burden.

In any case, the interpretative developments, as in last instance mentioned, concerns exclusively the “conventional” dimension of the *ne bis in idem* principle, portraited in the specific normative sectors of tax fraud and market abuse. However, these two aeras of regulations are primarily territories of legislative interventions

enacted by Union's policies.[3] Therefore, the dispute on the compatibility of the dual track punitive system in respect of the principle, main protagonist of the scrutiny at hand, takes place also on the stage of EU law, and, more specifically, what shall be object of detailed examination is the coherency of the sanctioning cumulation mechanism towards Article 50 EUCFR and its autonomous reading provided by the CJEU. On this regard, multiple preliminary references have been raised before the Luxembourg judge, who was summoned not to solely rule upon the consistency of statutory procedures allowing the combination of punishments, present in national regulatory framework – above all, within the Italian legal system, – with the bar to double jeopardy from the Charter, but also to clarify whether, in the event that this procedures were conflicting with the prohibition of a *bis in idem*, it would be possible to resort the direct application of Article 50 EUCFR, joined by the contextual disapplication of the contrary internal provision.[4]

An essential reference about this topic should be made to the preliminary rulings formulated on the joint cases *Menci* and *Garlsson Real Estate* and in the *Di Puma & Zecca* affair, being the former an incident regarding tax law violations and the others concerning in turn offences configuring the figure of market abuse. An interpretative dole from the CJEU was felt as indispensable due to the strong expectations on the Luxembourg judge to homogenize its jurisprudential standpoint on *ne bis in idem* to the innovations introduced by the ECtHR in its own case law and in order to redefine accordingly the scope of operability of the principle.

2. The three CJEU's preliminary rulings of March 2018: *Menci, Garlsson Real Estate* and *Di Puma.*

The burst forth of the new jurisprudential "wave" inaugurated by the *A & B* judgement has represented an arduous challenge for the EU Court of Justice in terms of interpretative adjustment procedures towards its ruling's methodology.

The Advocate General Campos Sanchez- Bordona masterfully depicted this scenario in its Opinion on the *Orsi and Baldetti* by highlighting that the

[3] N. MAZZACUVA - E. AMATI, *op.cit*., p. 377.
[4] N. MAZZACUVA - E. AMATI, *op.cit*., p. 378.

Luxembourg judge had to face a crossroad.[5] The Court could have in fact either conformed its jurisprudential standards to the considerably restrictive parameter of conventional derived nature, by implementing the criterion of the sufficiently close connection while interpreting Article 50 of the Charter, or rather could have opted for maintaining the degree of legal protection set out in the *Akerberg Fransson* judgment, by promoting the application of the "homogeneity clause" established under Article 52(3) EUCFR and inferring that there should be equal protection against double jeopardy under both the Nice Charter and Article 4 of Protocol no.7, thus substantially reversing its preceding case law.[6] To lay it down differently, the Court implicitly aligned itself to the more "garantist" approach in ECtHR pre-*A & B* ruling without importing into its judicial regime the jurisprudential adaptations on the applicability's range of *ne bis in idem*.

Th latest contribution by the Luxembourg jurisprudence on the matter worth of attention is constituted by the ruling issued by the Grand Chamber on three referrals submitted on 20 March 2018 – in accordance to the procedure enshrined in Article 267 TFEU – , in which the Court expressed an hermeneutical position which, albeit following an interpretative *"iter"* partially dissociated from the one devised by the ECtHR, appears to carry forward the same considerations and outcomes.[7] The starting point of the analysis carried out by the Grand Chamber is basically equivalent to the assumption from which the ECtHR moves ahead its reasoning. Hence, the ECJ, from a viewpoint of jurisprudential continuity with the content of the *Akerberg* decision, held that the scrutiny over the grounds that legitimize the defendant to invoke its *ne bis in idem* right must be founded on the *Engel* criteria (already cleared by the Luxembourg jurisprudence in the *Bonda* judgement) and upon the indexes provided for in *Zolotukhin*, respectively in order to ascertain whether the sanction formally classified as administrative can be subsumed under the conception of "*matière pénale"*, and if the parallel proceedings have as their object an *"idem factum"*, conceived in its historic-naturalistic

[5] Opinion of AG Campos Sanchez-Bordona, on joint cases C-217/15 e C-350/15, *Orsi e Baldetti*, on 12 Januray 2017, para. 4.
[6] B.VAN BOCKEL, *op.cit*., p. 199 and N. MAZZACUVA - E. AMATI, *op.cit*., p. 378.
[7] B.VAN BOCKEL, *op.cit*., p. 195 ff. and N. MAZZACUVA - E. AMATI, *op.cit*., p. 378.

connotation without any regard recognized to the element of its formal labelling under national law.[8]

The Court of Justice formulates some fundamental indicators for guiding national judges while evaluating whether the foreseeability of the dual track's plug-in would determine a constraints to the full operability of the *ne bis in idem* safeguard that can be retained as in compliance with Union regulations.

By proceeding in an orderly fashion, it ought to be premised that, by means of the overreaching preliminary ruling delivered on 20 March 2018, the Grand Chamber of the Court of Justice – for the first time since the *A & B* decision – expressed its viewpoint on the compatibility of a national legal system allowing the punitive duplication with respect of EU law. Particularly, the regulatory arrangement under the supervision of legality from the Court was the Italian legal order, which entailed the applicability of the penal-administrative double track. The pronouncement from the Luxembourg judging board regarded – in this umpteenth chapter of what can now be defined as a real and intricate "storyline"– the application of the above sanctioning "diagram" towards both tax frauds as well as crimes of insider trading and market manipulation.[9]

It is conviction of the underwritten that briefly recapitulating the concrete issues brought before the CJEU shall be deemed as profitable in the view of acquiring a wide-ranging understanding on the contentious interactions between the EU *ne bis in idem* – and, in an indirect manner, also the Convention one – and the Italian double track sanctioning system, with the results of this research representing convenient solutions extensible also to other flawed domestic normative orders in order to overtake their structural problems of inconsistency towards European fundamental rights protection.[10]

Firstly, the *Menci* case was prompted by a reference for a preliminary ruling issued from the *"Tribunale di Bergamo"* in 2015, which brought before the attention of the Court the problematic of the compliance of the double track mechanism in the field of tax law infringements: the affair in particular regards the conduction in

[8] N. MAZZACUVA - E. AMATI, *op.cit*., p. 378.
[9] A. GALLUCCIO, *La Grande Sezione della Corte di Giustizia si pronuncia sulle attese questioni pregiudiziali in materia di bis in idem, in Dir. pen. Cont.*., Fascicolo 3/2018, p. 286.
[10] A. GALLUCCIO, *op. cit.*, p. 286.

parallel of two different proceedings related to the same VAT evasion, which lead to the combined imposition of a criminal sanction alongside an formally administrative but substantially penal penalty.[11]

Secondly, the *Garlsson Real Estate and others* incident was submitted to the CJEU through a request for preliminary intervention filed by the Italian "*Sezione tributaria della Cassazione civile"* in order to overcome interpretative doubts on the adherence to European norms of the Italian internal provision formally classifying the offence of market manipulation under article 187-*ter* from the Italian Legislative Decree No. 58/1998, which instead provides for a substantially criminal offence, and the corresponding article 185 of the same legislative regulation contemplating the (formally) penal corresponding figure.[12] The concrete dispute involved the plaintiffs challenging a punitive injunction ordered by the Consob at a time subsequently to that in which the criminal proceedings against them had been definitively concluded, as a result of final plea-bargained sentence.

Finally, the preliminary sentence uttered by the ECJ embraced the joined *Di Puma* and *Zecca* cases, arising from two identical cross-referrals coming from the Italian *"Cassazione Civile"* and then reunited by the EU Court itself. These last requests of an hermeneutical aid were raised within the framework of oppositions to injunctions delivered by Consob and imposing fines in accordance to the above-mentioned Article 187-*ter* of Legislative Decree No. 58/1998 *("T.u.f."*): once again the pecuniary penalties, despite their formal qualification as administrative, presented a criminal character and they had been levied on the applicants by the Italian administrative authority charged with the surveillance of the integrity and transparency of the internal securities market, without any due regard accorded to the fact that a final criminal sentence had previously dismissed the claimants, in

[11] A. GALLUCCIO, *op. cit.*, p. 286, which recalls on the point F. VIGANÒ, *Ne bis in idem e omesso versamento dell'IVA: la parola alla Corte di giustizia*, in www.penalecontemporaneo.it, 28 September 2015.

[12] A. GALLUCCIO, *op. cit.*, p. 286, which recalls F. VIGANÒ, *A Never Ending Story? Alla Corte di Giustizia dell'Unione Europea la questione della compatibilità tra ne bis in idem e doppio binario sanzionatorio in materia, questa volta, di abusi di mercato,* in www.penalecontemporaneo.it, 17 October 2016.

respect of the same historic facts, from any criminal liability for the crime of insider trading from Article 184 T.u.f.[13]

Having done this general preamble on the topic interested by the interpretative remark afforded by the Court, it is now timely to deeply dissect the resolutions suggested in each case by the Luxembourg judge to national interpreters and, most importantly, to domestic legislators in order to update internal statutes on prosecution of tax and market law violations to the unedited CJEU's reading on the principle of *ne bis in idem*.

Starting from the *Menci* case, as pointed out earlier, the applicant lodged its claim to the Court complaining a breach to its right to not be punished multiple times, since it had been the recipient of an administrative fine totalling 84 million euros for failing to remit VAT and because, in a second moment, a criminal trial was initiated from this account on the ground of the same accusation.

In its argumentative *iter*, the Court observed how the eventuality of a punitive combination in respect of tax offences was, primarily, envisaged under Italian legislation in a "sufficiently clear and precise manner" and that the essential purpose of this regulatory system can be detected in the willingness of ensuring an effective and complete collection of VAT revenues, which constitutes an interest of general relevance. Moreover, it appears seminal to recall the guidelines set by the Advocate General Campos Sànchez- Bordona in its Opinion on the case that, despite the event that the Court departed from the conclusions drafted therein, should be loaded so as to seize better the flow rate of the "new" *ne bis in idem* emerging from the Luxembourg's elaboration.

More specifically, the AG addressed the issue about whether it would be considered as "convenient" for the CJEU to align its vision on the *ne bis in idem* right to the more restrictive approach taken by the ECtHR upon the content and scope of the guarantee. Indeed, the Advocate General reckons that the introduction within the Union law of an hermeneutical criteria upon Article 50 of the Nice Charter equivalent to the one devised in the Strasbourg's pronouncement in *A & B*

[13] A. GALLUCCIO, *op. cit.*, p. 286-287, which recalls on the topic F. VIGANÒ, *Ne bis in idem e doppio binario sanzionatorio: nuovo rinvio pregiudiziale della Cassazione in materia di abuso di informazioni privilegiate*, in www.penalecontemporaneo.it, 28 November 2016.

and based on the greater or lesser substantial and material connection between a plurality of proceedings on the same fact, working as a safeguard clause for a regulatory scheme that generally is contradictory to the *ne bis in idem* itself, would significantly add uncertainty and complexity to the right of European citizens to be secured against repeated prosecutions or punishments.[14] Accordingly, it is pointed out that resorting double prosecution normally generates the consequence of the unavoidable disregard of the prohibition of double jeopardy, and the sacrifice of this fundamental right cannot be warranted either with the achievement of a – although rightful – general objective carried forward by Member States, in terms of ensuring effectiveness to prosecution and avoiding the impunity of serious tax frauds, or with laudable aim of protecting EU's financial interests.[15] Thus, it ought not be considered as totally incorrect the point driven by the AG underlining that the insurance of an effective tutelage for the fundamental rights laid down in the Charter shall necessitate certain canons of legal foreseeability and certainty – found in this instance in the absolute and *a priori* assessment of the illegitimacy of dual

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[14] Opinion of Advocate General Campos Sánchez-Bordona, delivered on 12 September 2017, on the *Menci* case, Case C-524/15**,** ECLI:EU:C:2017:667, para. 73: « Further, the introduction into EU law of a criterion for interpretation of Article 50 of the Charter which rests on the degree of the substantive and temporal connection between one type of proceedings (criminal proceedings) and another (administrative proceedings in which a penalty is imposed) would add significant uncertainty and complexity to the right of individuals not to be tried or punished twice for the same acts. The fundamental rights recognised in the Charter must be easily understood by all and the exercise of those rights calls for a foreseeability and certainty which, in my view, are not compatible with that criterion ».

[15] *Ibid.* paras. 65-66 and para. 68: « Those governments observe that national laws and practices vary widely with regard to the possibility of imposing both criminal and administrative penalties for the same acts. In the light of that heterogeneous reality, they advocate a restrictive interpretation of Article 50 of the Charter, which guarantees States an appropriate power to impose punishment, as the ECtHR did in its judgment in A and B v. Norway. I disagree with those arguments[…] That outcome is incompatible with Article 52(3) of the Charter, with the result that the common constitutional traditions, should they exist in this area, may only operate as a criterion for interpretation of Article 50 of the Charter if they lead to a higher level of protection of the right ». Also *Ibid.* para. 71: « […] The change in the case-law to exempt 'combined proceedings that are sufficiently closely connected in substance and in time' is based on a position of deference towards the arguments of the State Parties to the ECHR ». Also *Ibid.* para. 88: « The duality of parallel (administrative and criminal) proceedings, regardless of their degree of closeness in time, and of the associated penalties of a criminal nature at the end of those proceedings imposed by the punitive authorities of the State which rule on the same unlawful acts, is not a *necessary* requirement permitting the limitation of the right protected by the principle *ne bis in idem*, even if it has the laudable aim of protecting the Union's financial interests and ensuring that serious fraud does not go unpunished ».

track punitive mechanisms – which, as detailly stated in the Opinion are not respected by the "sufficiently close" procedural connection criterion.[16]

In short, the Advocate General does not believe that the CJEU « should follow the ECtHR down that route », since the provision of a twin-track sanctioning treatment would cause an irremediable injury to the defendant's *ne bis in idem* right.[17] Moreover, the AG even held that «ECtHR itself acknowledges that the best way of respecting the principle *ne bis in idem*, provided for in Article 4 of Protocol No 7, is the single procedure in which a penalty is imposed, meaning that the ECtHR regards the dual procedure in the case of combined proceedings as an exception to that general rule».[18] In addition to the suggestion hinted to national regulators to adopt single-track system in order to forestall any potential contravention to the *ne bis idem* principle – either the Union or the Convention one –, the Advocate General offers a further advice to the EU Court: provided that the actual reality is that the Convention does not constitute a legal instrument which has been formally incorporated into Union law, since at the moment the European Union has not acceded to it yet, and notwithstanding that Article 52(3) EUCFR imposes that the right enshrined in the Charter shall be given the "same meaning and scope" as those set out in the ECHR, the CJEU should in any case autonomously interpret the provisions of the Charter, «which are the sole provisions applicable in the context of EU law».[19] On this assertation, the ECtHR jurisprudence should be disregarded in those instances where the interpretation

[16] *Ibid.* para. 69: « For my part, I see no reasons why the Court of Justice should follow the ECtHR in its decision to limit the content of the right guaranteed to individuals by the principle *ne bis in idem* where penalties of the same nature (those which are criminal in substance) are imposed twice in respect of the same acts; indeed, I see only reasons not to do so. I find it difficult to abandon the level of protection previously reached in the *Åkerberg Fransson* judgment solely because the ECtHR has changed direction […] in its interpretation of Article 4 of Protocol No 7 in the area concerned». Moreover, the Ag himself highlights how the ECtHR itself considered the "mono-track" punitive system as an instrument capable a further satisfaction of the conditions under Article 4 of Protocol no. 7 ECTHR, and this is observed in *Ibid.* para. 70: «[…] the ECtHR itself acknowledges […] that the best way of respecting the principle *ne bis in idem*, provided for in Article 4 of Protocol No 7, is the single procedure in which a penalty is imposed, meaning that the ECtHR regards the dual procedure in the case of combined proceedings as an exception to that general rule. If there are dual proceedings, even if they are combined proceedings, this will normally result in infringement of the principle *ne bis in idem* ».

[17] *Ibid*. paras. 106-107; in this sense, B. PEETERS, *The Ne Bis in Idem Rule: Do the EUCJ and the ECtHR Follow the Same Track? in EC Tax Review,* Volume 27 (2018) Issue 4, p. 183-184.

[18] *Ibid.* para. 70.

[19] *Ibid.* para. 74-75.

provided by the CJEU on rights or freedoms from the Charter – that are "similar in content" to those crystallized in the Convention and the protocols thereto – grants a « higher level of protection, provided that this is not detrimental to another right guaranteed by the Charter ».[20]

Besides, while exploiting such judicial autonomy, the ECJ should rely on its own independent reading of Article 50 EUCFR, even if it differs more or less greatly from « the line of case-law represented by the judgment in *A & B v. Norway*», which is believed by the Advocate General in its Opinion of limiting the content and scope of the *ne bis in idem* right.[21] Finally, it is underlined how the Court in interpreting Article 50 EUCFR must not disregard the level of protection afforded by the Article 4 of Protocol no. 7, « as construed by the ECtHR» but, at the same time, by acknowledging that the ruling in *A & B* restricts the legal effects of the guarantee at stake by allowing the trial duplication, the AG reiterates that the Court, at any rate, will ensure a higher degree of protection by maintaining its case-law in line with the *Åkerberg* ruling, where no reference was made neither to the Convention nor to the ECtHR jurisprudence.[22]

However, as we will see shortly in the Court's cumulative assessment on the conjoined cases, the expectations of Advocate General Campos Sánchez-Bordona have been dashed in virtue of the fact that the CJEU has harmonized its case-law orientation in the sense of the downgrading of the significance accorded to the "European" *ne bis in idem*, as previously proposed by the ECtHR in the *A & B* judgement, by conceding the possibility to Union's Member States of implementing a two-faced sanctioning system, under the essential precondition that such punitive cumulation shall respect the restraints and requirements set out by the CJEU itself.

By furthering the analysis on the relevant issues of fact and law lifted in the thee three referrals brought before the Court, it is now turn of the *Garlsson Real Estate* case's screening. This second dispute has as its subject-matter the certification of the validity and conformity of the two-track sanctioning system, operating in the field of financial brokerage, in respect of Union law. The applicant, after having received the enforcement of a sentence of plea bargaining on the charge

[20] *Ibid.* para. 75-76.
[21] *Ibid.* para. 94; Also *Ibid.* para. 76.
[22] *Ibid.* para. 77.

of market manipulation, was involved in an administrative sanctioning procedure on the same ground. The Court of Justice ruled that the Italian normative system on the matter did comply with the provisions of Union law, since the internal regulations envisaging the imposition of dual sanction were featured with a satisfactory degree of precision and clarity and were directed to the protection of the integrity and transparency of securities market, which is an interest of general domain.

Last but not least, the *Di Puma* case concerned – similarly to *Garlsson Real Estate*– the measurement of the compliance of the Italian dual-track system as implemented in financial intermediation's normative discipline with the ban on double punishment, specifically with reference to the offence of insider trading in both its criminal and administrative declinations within the Italian statutory regime respectively in Article 184 T.u.f. and 187-*bis* T.u.f. .

In the case in question, the plaintiff had been already granted with a final criminal acquittal in virtue of the lack of sufficient evidence on the same fact under proceeding before an administrative procedure. The referring ordinary judge questioned whether Article 50 EUCFR should have been interpreted within the meaning that a sentence of acquittal under criminal law would be capable of tackling the continuation of an administrative proceeding on the same tort.

The ECJ dictated in the sense that whenever a criminal exculpatory judgement, which has become final, declares the absence of enough proofs as to the facts that integrate an infringement of law, the administrative prosecution of the same fact must be regarded as devoid of any concrete ground whatsoever. Hence, the infliction of a pecuniary administrative penalty, albeit endowed with substantially criminal nature on the same conduct whose criminal liability has been excluded beforehand, would determine a violation of Article 50, due to the fact that it «would manifestly exceed what is strictly necessary to achieve the general objective of protecting the financial market ».[23]

[23]ECJ, Judgement 20 March 2018, Case C-524/15, *Menci*, ECLI:EU:C:2018:197, para. 44: «However, in a situation such as that at issue in the main proceedings, the continuation of proceedings for the imposition of a criminal fine would clearly exceed what is necessary to achieve the objective set out in paragraph 42 of this judgment, once there is a final criminal conviction of acquittal declaring the absence of the constituent elements of the offence »; See B. PEETERS, *op. cit.*, p. 184-185.

Therefore, the CJEU on 20 March 2018 set out various important "bullet points" while drafting these three rulings. The guidelines provided therein also lead to new and different interpretative settings across the international legal elaboration, which, anyhow, concords on the essential principles inferable from the reading of the aggregate preliminary forum. On a first point it should be noted that the co-existence of both administrative and criminal prosecutions either resulting in the imposition of substantially penal measures can be considered legitim as long as the combination of the different sanctions does not transcend the threshold of what is reckoned as "strictly necessary" for the accomplishment of the legal purposes sought by the relevant regulation at issue, in accordance to the principle of proportionality established in Article 52(1) EUCFR.[24] Secondly, the conjoined ECJ's ruling explored the attribution to the free and discretional appraisal of the national judge of the power to ascertain, in concrete terms, the aforementioned proportionality of the punitive cumulation. In the third place, the Court addressed that such discretionary power entitles the national interpreter to apply directly Article 50 EUCFR and, thereby, disapply the internal regulation – even subsequent in time – at variance with the Charter provision. Precisely, the domestic judge is responsible for doing this « on its own initiative » and « without having to request or await the prior removal by law or by any other constitutional procedure ».[25]

From what has been stated above, it can be drawn that the most significant passage of the cumulative ruling delivered by the Court is represented by the bid upon the necessity of the global proportionality of the sanctioning load affixed on the respondent compared with the overall seriousness of the alleged conduct.[26]

This requirement upholds the belief that the Luxembourg judge, albeit without resorting to an explicit reference to the Strasbourg case-law or although

[24] ECJ, Judgement 20 March 2018, Case C-537/16, *Garlsson Real Estate and others*, ECLI:EU:C:2018:193, para. 56: « the combination of penalties of a criminal nature must be accompanied by rules to ensure that the severity of all the penalties imposed corresponds to the seriousness of the offence in question, an obligation which derives not only from Article 52(1) of the Charter but also from the principle of proportionality of penalties laid down in Article 49(3) thereof. These rules must include an obligation on the competent authorities, where a second penalty is imposed, to ensure that the severity of all the penalties imposed does not exceed the seriousness of the offence established ».

[25] ECJ, Judgement 20 March 2018, Case C-537/16, *Garlsson Real Estate and others*, ECLI:EU:C:2018:193, para. 67.

[26] N. MAZZACUVA - E. AMATI, *op.cit.*, p. 379-380.; also A. GALLUCCIO, *op. cit.*, p. 289. and B. PEETERS, *op. cit.*, p. 185.

without blindly imitating the argumentative path followed by the ECtHR in *A & B v. Norway* on rescaling the scope of the *ne bis in idem* principle, basically greeted the same interpretative outcome deduced by the Grand Chamber of the ECtHR: thus, the CJEU acknowledged that the provision of a twin-track punitive system is not *per se* contrary to the *ne bis in idem* rule, dwelling its reasoning on the compulsory condition that the intensity of the combined punitive response must not exceed the canon of proportionality of the imposed punishment in respect of the disvalue and seriousness conveyed by the chastised conduct.[27] In brief, the decisive factor that should be considered in order to verify the disrespect of the prohibition of double jeopardy is the quantum of the overall punitive reaction "outburst" towards the conduct. The logic of proportionality of the sanctioning treatment comprehensively ordered has been already dimly visible in the assertions made by the Strasbourg Court in the measure it estimated that an integrated and cumulative punitive system that was prodromal to the penalization of different prejudicial consequences stemming from the same anti-social behaviour, carried out in a proportional and foreseeable fashion and within the environment of cohesive strategy, would certainly not represent a peril for the integrity of one individual's *ne bis in idem* right.[28]

Overall, the CJEU's confirmation of the thesis furthering the direct applicability of Article 50 of the Nice Charter – already consolidated in the *Akerberg Fransson* decision – unveils a certain shortcoming of homogeneity throughout the jurisprudential orientations of the Court of Justice. Particularly, the reiteration of the device of the immediate operability of the EU *ne bis in idem* that can be exploited by domestic judges for dismissing problematic issues brought under their jurisdiction, on one side, settled the long-standing debate over the balancing between demands of legal certainty and requests of efficient enforcements of legal safeguard upon a European citizens' fundamental right, such as it is the *ne bis in idem*. But, from another perspective, the Court selected the potentially hazardous choice to entrust national courts with the task of the assessment on the lawfulness of penal-administrative sanctioning combination,

[27] N. MAZZACUVA - E. AMATI, *op.cit*., p. 380.; also A. GALLUCCIO, *op. cit.*, p. 290.
[28] N. MAZZACUVA - E. AMATI, *op.cit*., p. 380.

which is permitted in so far as it is truly proportional to the aggregate seriousness of the misconduct under parallel trials. Such decision of leaving the destiny of the defendant's *ne bis in idem* right to the free discretion of an ordinary judge, that is now engaged with a jurisdictional evaluation on a case-by-case ground and from a concrete – rather than abstract – stall, has been bitterly criticized in recent times on the basis of the conviction that leaving the insurance of a European fundamental right at the mercy of a contingent and variable judicial scrutiny would constitute a dangerous precedent that might ulteriorly undermine the scope and content of the *ne bis in idem* warranty.

In this manner, the general and sturdy standard of legal protection laid down in Article 50, which could have been applied in an indeterminate number of instances, incurs into a lowering of its scope due to the above parameter of proportionality, which actually cannot provide a firm surety in terms of harmonization of Union law and uniformity of judgements upon litigations, given the fact that its survey is based on a broadly discretionary basis and primarily upon indicators that may vary across different domestic jurisdictions.[29]

The judicial dialogue between Strasbourg and Luxembourg therefore seems to place before a mysterious destiny the safeguard of *ne bis in idem*, provided that the parameter of the whole proportionality of the punitive response, whose assessment is delegated to the vast degree of discretion of national courts, may fluctuate from case to case. In fact, it may be argued that the permanent shelter offered by both CJEU and ECtHR to domestic double track sanctioning frameworks would represent the harbinger of the ultimate overriding of the principle of *ne bis in idem*, accorded the fact that the jurisprudential approach advocating the automatic declaration of their unlawfulness is no more relevant, differently from what might be extrapolated from the wording of the *Grande Stevens* ruling.[30]

Put it in another way, the element of proportionality is alleged to result into the surpassing of the ban on double punishment and has now been rated among the relevant material indicators – as first enumerated by the Strasbourg Court in *A & B* – unfolding the existence of a coherent punitive whole preventing the abuse of one

[29] See N. MAZZACUVA - E. AMATI, *op.cit.*, p. 379 and A. GALLUCCIO, *op. cit.*, p. 293-394.
[30] N. MAZZACUVA - E. AMATI, *op.cit.*, p. 380 and A. GALLUCCIO, *op. cit.*, p. 291-292.

defendant's right to be not penalized twice. Apart from the requirement of proportionality, also other essential preconditions are devised in the cumulative preliminary ruling issue on 20 March 2018 which, in the event of their fulfilment, preclude the national legislation, whereby it is possible to instigate parallel prosecutions upon a same respondent – either for the non-payment of VAT or for unlawful financial operations integrating one of the two offences of market abuse –, from being declared as conflicting with Article 50 EUCFR.

As a matter of fact, so as for the constraints to Article 50 to be reckoned as coherent towards EU law, the Court claims that it will be mandatory that the following requirements shall be jointly met. First, the cumulation of proceedings and punishment must subsist as a consequence provided for "clear and precise rules of law".[31] Secondly, it is compulsory that the two proceedings must be aimed at the realization of a "common objective of general interest", by serving "complementary scopes" involving different facets of the same misconduct.[32] On a third point, the national legal system must provide for normative mechanisms of procedural coordination between the two trials on the *idem factum*, in the view of minimizing as much as possible the additional burdens placed on the defendant and arising from the recourse to procedural duplication.[33] More precisely, a careful eye manages to

[31] N. MAZZACUVA - E. AMATI, *op.cit*., p. 379 and A. GALLUCCIO, *op. cit.,* p. 389. The authors here recalls particularly paragraph 44 of the ECJ, Judgement 20 March 2018, Case C-537/16, *Garlsson Real Estate and others: «* In the present case, it is common ground that the possibility of cumulating criminal proceedings and penalties as well as administrative proceedings and penalties of a criminal nature is provided for in law ». Moreover, it is also recalled para. 42 of the ECJ, Judgement 20 March 2018, Case C-524/15, *Menci* : « In the present case, it is common ground that the possibility of cumulating criminal proceedings and sanctions as well as criminal administrative proceedings and sanctions is provided for by law ».

[32] N. MAZZACUVA - E. AMATI, *op.cit*., p. 379 and A. GALLUCCIO, *op. cit.,* p. 389. More precisely, the authors retrieve paragraph 44 of the *Menci* decision: «[…] a combination of proceedings and penalties of a criminal nature may be justified where those proceedings and penalties relate, with a view to achieving such an objective, to complementary aims which may, where appropriate, concern different aspects of the same conduct of the offence concerned, which it is for the referring court to verify » and also paragraph 46 of the *Garlsson Real Estate* ruling: « […] a combination of criminal proceedings and penalties may be justified where those proceedings and penalties pursue, with a view to achieving such an objective, complementary aims relating, where appropriate, to different aspects of the same unlawful conduct concerned, which it is for the referring court to determine ».

[33] N. MAZZACUVA - E. AMATI, *op.cit*., p. 379, as well as A. GALLUCCIO, *op. cit.,* p. 389. Here are recalled paragraph 53 of *Menci* ruling: « As regards, on the one hand, the cumulation of criminal proceedings which, as can be seen from the information in the file, are conducted independently, the requirement referred to in the preceding paragraph implies the existence of rules ensuring coordination with a view to reducing to what is strictly necessary the additional burden which such cumulation entails for the persons concerned ». Moreover, see even paragraph 55 of *Garlsson Real*

notice a clear similitude with the criterion of the "sufficiently close material connection" invoked by the ECtHR, notwithstanding the reality that the CJEU did make any reference or further specification neither to the indexes revealing the existence of a coordination between proceedings nor even to the ulterior element of the chronological connection.[34] As extensively observed earlier, it is up to national judges checking the satisfaction of these latter three preconditions, alongside with the most important one of the proportionality of the overall penalty towards the seriousness of the charged offence. The domestic interpreter, in truth, can also rely in any moment on the precious interpretative contribution of the ECJ by triggering the preliminary reference procedure under Article 267 TFEU.[35]

This is the pathway chosen by the EU Court of Justice in order to "blot" further voids of legal protection caused by the persistent incompatibility of national punitive frameworks in relation to the fundamental *ne bis in idem* right, with specific regard to VAT evasion and market abuses.

As concerns the targeted topic of market abuses, it ought to be indicated that the CJEU recognized the certain infringement of Article 50 EUCFR, at least, as it comes to two determined instances. [36] In this sense, a first reference should be made in relation to the situation where the criminal sentence has been delivered before the (formally) administrative one: here, the proportionality between the cumulative punishment and the related tort is considered by the Court as lacking *"in re ipsa"*, conveyed that the criminal sanction handed down first is deemed as sufficiently appropriate for repressing the unlawful action in an "effective, proportionate and dissuasive" manner.[37] The imposition of an "extra" administrative penalty would

Estate decision: « as regards, on the one hand, the cumulation of proceedings of a criminal nature which, as can be seen from the elements in the file, are conducted independently, the requirement mentioned in the previous point implies the existence of rules ensuring coordination in order to reduce to the strict minimum necessary the additional burden which such cumulation entails for the persons concerned ». From the reading of the two passages of the ruling it is evident how their wording and significance are substantially specular.

[34] N. MAZZACUVA - E. AMATI, *op.cit.*, p. 380.

[35] A. GALLUCCIO, *op. cit.*, p. 389.

[36] N. MAZZACUVA - E. AMATI, *op.cit.*, p. 380-381.

[37] ECJ, Judgement 20 March 2018, Case C-537/16, *Garlsson Real Estate and others*, ECLI:EU:C:2018:193, para. 59: « In those circumstances, it appears that the continuation of proceedings for a criminal fine under Article 187-*ter* would go beyond what is strictly necessary to achieve the objective set out in paragraph 46 of this judgment, in so far as the criminal conviction handed down definitively, having regard to the harm caused to society by the offence committed, is capable of punishing that offence effectively, proportionately and dissuasively, which it is for the

generate an exceedingly stigmatizing disproportionality between the severity of the aggregate punishment inflicted and the disvalue carried by the offence. The second circumstance were the Charter's *ne bis in idem* is assumed as disrespected is constituted by the hypothesis where the sanctioning administrative procedure has been started in the aftermath of a definitive criminal judgement of acquittal on the same factual context. This situation was addressed earlier in the draft of the Chapter at hand and it is profitable to retrieve what hinted above: the ECJ pointed out – while precisely ruling on the preliminary reference in *Di Puma* – that whenever a criminal proceeding instituted on the allegation of market abuse is terminated by virtue of a final acquittal, the commencement or continuation of a parallel administrative procedure, whose outcome may be reasonably expected to be the imposition of an administrative penalty endowed with "substantially" penal nature, would « manifestly exceed whet strictly necessary » for ensuring a comprehensive sanctioning response proportionate to the facts integrating the figure of market abuse.[38] It is unequivocally very hard to propose a satisfactory comment on the utterances from the CJEU on the subject, starting from the premise that the ruling in question involves a variegate number of objects. What is crystal clear is that the Court of Justice digested the interpretative scaffolding structured by the Strasbourg Court and, despite the different departure point of its analysis, has reached similar conclusions to those illustrated above in the *A & B* ruling and in the following pronouncements.

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referring court to ascertain »; on the point, N. MAZZACUVA - E. AMATI, *op.cit*., p. 381; on this facet, a due reference should be made to ECJ, Judgement 8 September 2015, Case C-105/14, *Taricco*, ECLI:EU:C:2015:555, in which the ECJ concretely resorted the enforcement of the obligation upon national judges to disapply national statutes conflicting with a EU norm or that, more generally, may determine detrimental prejudices towards the compliance of Member States' obligation in respect of EU law. More specifically, the Court obliged Italian ordinary criminal tribunals to disapply the internal regulation providing for a specific limitation term applicable to pending criminal proceedings concerning VAT fraud, in order to give full effect to Article 325 TFEU: this EU primary norm represents the legal ground for attributing predominant relevance to the protection of EU financial interests, even over the application by Member State's judicial authorities of domestic provisions.

[38] See N. MAZZACUVA - E. AMATI, *op.cit.*, p. 381; ECJ, Judgement 20 March 2018, Cases C-596/16 e C-597/16, *Di Puma & Zecca*, ECLI:EU:C:2018:192, para. 44: « [...] in a situation such as that at issue in the main proceedings, the continuation of proceedings for the imposition of a criminal fine would clearly exceed what is necessary to achieve the objective set out in paragraph 42 of this judgment, once there is a final criminal acquittal ruling declaring the absence of the constituent elements of the offence which Article 14(1) of Directive 2003/6 is intended to sanction».

The CJEU, indeed, by considering the Italian regulation on tax fraud and market abuse featured with a twin-track system as capable of fully guaranteeing the maintenance of the integrity of securities market and the public trust thereto – hence, serving an interest of general scope –, stated that it could have been permitted in this sense a legitimate restriction to the *ne bis in idem* right, without also disregarding what established under Article 52 EUCFR.

However, even though the Court of Justice theorized instances and conditions under which the absoluteness of the principle of *ne bis in idem* is moderated – likewise to what already elaborated by the ECtHR –, one aspect cannot be questioned: the CJEU did not pick perhaps the sole way for solving once and for all the infamous debate over the correct application of the *ne bis in idem* (at least on a Union-wide level). Indeed, the EU Court has chosen to not align its predominant jurisprudential orientation to the correlative one within the ECtHR case-law consolidated in *A & B* and about the non-automatic detection of a *non bis in idem*'s infringement, which is now subordinated to the verification of certain preconditions.[39] Just like the ECtHR, the ECJ formulated a set of symptomatic ratios for the certification of the coherency of a domestic regulatory framework towards Article 50 of the Charter, and even relied on the prudent discretion of the national ordinary judge when evaluating the subsistence of these factors in the concrete case submitted before its sight.

Anyhow, it is fascinating viewing the almost total convergence between the jurisprudential approaches taken by the two European Courts, which *"ictu oculi"* appears scratched by no palpable misalignment.[40] In reality, if we want to hound some slight differences between the two interpretative standpoints, it ought to be noted that within the CJEU's stance it seems prevalent the intention of averting unnecessary punitive duplication, stressed by the mandatory provision of "formal" normative rules facilitating the procedural coordination of trials instituted upon the same tort. Whereas, the ECtHR may be believed of giving major relevance to the "substantialist" control over the redress to double track mechanisms, exclusively on an *"ex post"* check-up, rather than on their "*ex ante*" establishment in the formal

[39] A. GALLUCCIO, *op. cit.*, p. 393.
[40] See A. GALLUCCIO, *op. cit.*, p. 393-394.

internal discipline: this latter statement is proven by the demand of the actual presence of a "sufficiently close material and temporal connection" between two sets of proceedings, with no relevance at all granted to the way in which the combination of punishment is formally and aprioristically described in the domestic regulation.[41]

Nevertheless, it is not erroneous to state that the Court of Justice substantially incorporated the core content of the standing taken by the ECtHR and even went beyond the earlier theoretical verdict rendered in *Akerberg*, where the Luxembourg judge accepted the eventuality of the adoption of the penal-administrative sanctioning attitude launched against the same conduct, ruling out however its operability in event of the infliction of a formally administrative penalty with substantially criminal traits, conceived within the meaning given by the universally acknowledged *Engel* doctrine.[42]

Having examined the general features modelling the physiognomy of the principle of *ne bis in idem* in either the Union and Convention legal sphere, whose appearance still seems somewhat hazy and blurred, we cannot fail to observe that the Strasbourg and Luxembourg case law – that have been sectioned so far – ended up burdening the national judge with the perennial mission to solve in practice the intricate interpretative maze represented by the cumbersome relationship between the widespread respect of fundamental rights guaranteed on a European basis and the legitimacy of internal sanctioning legislations.[43]

The most troublesome aspect the domestic interpreters have to deal with is constituted by the only partial correspondence between the juridical institutions exploited by the two European Courts made available to the national courts in order to verify the compatibility between sanctioning cumulation and right to not be punished twice.[44]

Add to this the reality that the legal categories of European derivation do not always perfectly match with those traditionally employed within single internal legal orders, and we will have a further entangled scenario where ordinary judges

[41] F. CONSULICH, *Il prisma del ne bis in idem nelle mani del giudice euro-unitario,* in *Dir. e Processo*, 2018 n.7, p. 940-941.
[42] F. CONSULICH, *op. cit.*, p. 951-952.
[43] A. GALLUCCIO, *op. cit.*, p. 394.
[44] F. CONSULICH, *op. cit.*, p. 952 ff.

will be left as not suitably equipped with undue judicial instruments to enforce in the view of settling this hermeneutical cluster.[45]

2.1. Follows: The ECtHR pulled the trigger again: the *Nodet v. France* decision.

The latest noticeable ruling from the ECtHR on the topic of the relationship between the safeguard of the *ne bis in idem* right and punitive cumulation methodology was pronounced against France on 6 June 2019 and has reignited the sore debate on legitimacy's limits of the double-track punitive system.[46]

Anyhow, before addressing the footpath selected by the Strasbourg Court in dealing with the punitive system adopted by the French legislator, it should be slice down the juridical positioning of the principle of *ne bis in idem* within the Transalpine legal order.

Under French law, the operability of the ban on double prosecution or punishment has long remained confined exclusively to either to the criminal or to the administrative procedure, without having any kind of incidence in respect of a hypothesis of cumulation of proceedings of different nature.[47] This restrictiveness in the terms of scope of application of the principle has represented the platform upon which France threw up its formal reservation to Article 4 of Protocol no. 7 to the ECHR.[48] This reservation was, however, significantly weakened by the *Grande Stevens v. Italy* ruling in 2014: indeed, the European Courts, having been confronted with the increasing implementation of the dual punishment mechanism by national legislators, related to the growth of the sanctioning powers conferred to domestic independent authorities, have provided an extensive interpretation of the prohibition of double jeopardy, broadening its material definition and geographical range. Therefore, once undercut the shield constituted by the reservation made by

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[46] *Affaire Nodet v. France*, ECtHR 6 June 2019, Application No. 47342/14 as commented by M. SCOLETTA, *Il ne bis in idem "preso sul serio": la Corte EDU sulla illegittimità del doppio binario francese in materia di abusi di mercato (e i possibili riflessi nell'ordinamento italiano)* in *Diritto penale contemporaneo (Riv. Trim.*), 17 June 2019, p. 1.

[47] C. TORRISI, *Francia,* in P. PASSAGLIA (et al.), *Il principio del ne bis in idem (servizio studi Corte Costituzionale)*, in *www.cortecostituzionale.it*, 2016, p. 13.

[48] C. TORRISI, *op.cit.*, p. 13.

France towards Protocol no. 7, the French conception of *non bis in idem* was antagonist compared with the interpretative stance of the ECtHR.[49]

Taking a step backwards, the principle of *non bis in idem* is governed by Article 368 of the French Code of Criminal Procedure, under which it is dictated that « no legally acquitted person may be sent to trial or charged for the same facts, even if they have a different classification of the facts ».

The recognition of the principle on a penal array has been also extended to the administrative sphere by virtue of the decision promulgated by the "*Conseil d'État"* in 1958, where the administrative jurisdiction has attributed to the *ne bis in idem* the value of *"principe général du droit"*, by furthering its applicability also towards the judicial action performed by internal administrative authorities and forbidding the infliction of repeated sanctions on the account of facts already prosecuted in an administrative procedure, "even in the absence of a specific text".[50]

Similar to the Italian legal order, in France the right to not be tried or punished twice neither had ever been "dressed" with an explicit constitutional vesting, nor the *"Conseil constitutionnel"* had ever seemed to be particularly prone to the conferral of such constitutional ranking. This inevitably created an ample room of discretion for French judges in giving application to the guarantee at stake in a considerably restrictive fashion.[51] For instance, according to the French domestic case law, the bar towards a second proceeding on a charge already lodged in a previous trial definitively terminated does not hinder the possibility of the multiple classification of that fact as constituting a criminal offence. In this sense, the abstract configuration of a concurrency of crimes is not at odds with the prohibition of double prosecution.[52] Furthermore, turning back to the issue of the authorization of sanctioning cumulation, the domestic jurisprudence observed that the foreclosure effect of the principle does not expound on the possibility of the

[49] *Ibid.* p. 14.
[50] *Ibid.* p. 14.
[51] *Ibid.* p. 14 and p. 15 ff.
[52] *Ibid*. p. 16, where the author recalls "*Conseil constitutionnel"*, Judgement No. 2010-604 DC issued on 25 February 2010, where the Court has established that the prohibition of double jeopardy does not prevent the national lawmaker from providing that "certain facts may give rise to multiple offences". In other terms , "the Conseil has expressly made it clear that the ideal concurrence of offences does not conflict with the rule prohibiting "the same person from being charged with an offence for which he has already been acquitted or sentenced by final judgment"".

combination of penalties having different nature. Otherwise stated, the formal qualification of proceedings and correlate sanctions had long been considered as predominant, at the expense of the parameters defining a "criminal trial", well-established in the conventional jurisprudence.

Hence, the mashing of proceedings and punishments endowed with a different legal qualification had been firmly rooted under French internal regulations and, additionally, domestic jurisprudence had also shown an embedded tendency in restraining the scope of operability of the prohibition of *bis in idem*, by giving its approval to the incorporation of mixed punitive frameworks.[53] Such hermeneutical obstinacy endured until the consolidation of the opposite orientation in the *Grande Stevens* ruling from the Strasbourg judiciary, which – as already abundantly stated – represented the first supranational condemnation of the double track system, whose "whiplash" effect involved also the French national statutory system.

Anyhow, the ultimate turnabout in the French jurisprudential approach with regards to the dualism between sanctioning duplication and *non bis in idem* was marked by the judgement delivered by the *"Conseil constitutionnel"* on 18 March 2015, questioning the constitutional legitimacy of the internal provisions rendering the offence of insider trading equally prosecutable before both the criminal and the administrative authority.[54] The decision in question is connoted by a remarkable

[53] *Ibid.* p. 18-19. The author states as follows: "the *"Conseil d'État"* itself and the French Court of Cassation rendered a series of judgments that limited the scope of the ne bis in idem rule. The jurisprudence has therefore recognised the possibilities of cumulation for: criminal and administrative penalties; disciplinary and professional proceedings and penalties when they pursue different objectives and are of a different nature; criminal and disciplinary penalties; criminal and fiscal penalties; criminal and customs penalties". On this regard, are retrieved the following sentences: *Cass., crim.*, 1 March 2000, Judgement No. 99-86299; *Conseil d'État*, 27 January 2006, Judgement no. 265600; *Cass., crim.*, 27 March 1997, Judgement No. 96-82669; *Cass., crim*., 4 June 1998, Judgement No. 97-8062; *Cass., crim*., 4 September 2002, Judgement No. 01-84011 and 01-85816.

[54] *Ibid.* p. 21-22. The author highlights how the French Constitutional Court "decided on the issues received on 18 March 2015, with the so-called EADS judgment". Moreover, it is discussed how "the questions concerned numerous provisions of the Code of Criminal Procedure and the Financial Code with regard to the offence of insider trading, as it is punishable by both the criminal court and the sanctions commission of the Financial Market Authority. This double possibility of sanction, specifically provided for in Articles L. 465-1 and L. 621-15 of the Financial Code, had been contested by the plaintiffs on the basis of the principle of necessity and proportionality of offences and penalties, which the Council derives from Article 8 of the Declaration of Human and Citizen's Rights of 1789". The content here reported is enshrined in the Judgement by the QPC, 18 March 2015, *M. John L. et autres* (so-called. "EADS decision").

importance since, from a first viewpoint, the Court has transfigured the nomenclature, through which the *ne bis in idem* had been addressed beforehand, from a mere "rule" of law to an essential "principle" of the French Constitutional legal order.[55] Moreover, the Court reasserted the admissibility of the procedural cumulation with regards to the same misconduct, even though redefining the preconditions legitimizing the lawfulness double track scheme. As a matter of fact, the procedural and sanctioning duplication is allowed and it is not assumed as blatant towards the *ne bis in idem* principle, as long as the joint subsistence of the four following criteria is not proven: the identity of the facts under dual proceedings, the identity of the nature featuring each imposed sanctions, the identity of the judicial body and, lastly, the identity of the legal asset safeguarded. If only one of these requirements is missing, it is possible to derogate to the application of the principle of *ne bis in idem*.[56]

In any case, such revolutionary standards elaborated by the French Constitutional Court – while also providing the declaration of the constitutional illegitimacy of the provisions enabling the procedural duplication, placed under review of constitutionality – are not equipped with a general range of coverage. In effect, the criteria of admissibility of the twin-track procedure cannot be applied blindly in respect of any kind of offences for which the internal legal system envisages the enforcement of the procedural and sanctioning combination, but rather they are limited only to the field of market abuse.[57]

The systemic approach of the French jurisprudence on the matter concerning the two-facet punitive system and the prohibition of double jeopardy is yet to be fully defined, provided that the domestic judiciary appears to be not so "open-minded" when it comes to enact normative adjustments spurred by the jurisprudential impulses stemming from the two European Courts.[58]

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[55] *Ibid.* p. 21-22.
[56] *Ibid.* p. 22.
[57] *Ibid.* p. 29 and p. 30-31; in note it is also recalled V. M. BABONNEAU, *Le non bis in idem fiscal aux portes du Conseil constitutionnel, in Dalloz actualité*, 31 March 2016.
[58] *Ibid.* p. 31, quoting V. C. MASCALA, *La contagion de la remise en cause de la constitutionnalité des doubles poursuites pénales et administratives: affaire Wildenstein (T. corr. Paris, 6 janvier 2016),* in *Revue de science criminelle et de droit pénal comparé,* 2016, p. 75.

In any event, the Strasbourg judge in the *Affaire Nodet* has taken over once again the topic of the controversial dyscrasia between the *non bis in idem* rule and double-track framework, while ruling over an application filed by a French national complaining about the disregard of its right to not be prosecuted twice undertaken by the French sanctioning regulation on market abuse.

For the sake of the scrutiny it is useful to briefly review the factual terms of the judicial case at, particularly by giving due regard to the time scale of the events, in order to better decipher the scope and possible forthcoming implications of the Strasbourg court decision within the Convention jurisdictional regime itself. In December 2007, Mr Nodet, a financial analyst, was ordered by the French financial market supervisory authority to pay a fine of 250.000 euro, on the account of a series of abusive financial operations configuring the offence of market manipulation. The illicit conduct of the respondent was directed at generating an artificial increase in the value of the securities of a listed company.[59] While the administrative proceedings were definitively closed in November 2009, with the confirmation of the sentence by the French Supreme Court, in the meantime, on the recommendation of the French financial market supervisory authority itself, criminal proceedings had also begun for the analogous charge of market manipulation, resulting into the imposition of a custodial sentence of a 8 months' imprisonment term.[60] The conviction was upheld by both the regional Appeal Court and finally confirmed by the French Supreme Court in January 2014.[61]

Consequently, Mr Nodet summoned the jurisdiction of the ECtHR and, in its appeal before the Strasbourg Court, the claimant pleaded infringement of its *ne bis in idem* guarantee under Article 4 of Protocol 7 to the Convention, damaged by its subjection to a double proceeding, culminated in the infliction of a twin-faced penalty. While ruling upon the case brought before its sight, the ECtHR took the opportunity to reassert the jurisprudential "pivots" established in *A & B v. Norway* in 2016. Specifically, the Court held that, in order to assess the limits of compatibility of the "*procédures mixtes"* with the conventional guarantee, it is seminal that the two proceedings (criminal and administrative), instituted against

[59] M. SCOLETTA, *Il ne bis in idem "preso sul serio*", cit. p. 1.
[60] M. SCOLETTA, *Il ne bis in idem "preso sul serio*", cit. p. 1.
[61] *Ibid.*, p. 1.

the same defendant and on the same factual and causal context, shall be "reciprocally combined and integrated so as to determine an overall coherent whole".[62] In this respect, the ECtHR reaffirmed the vital significance of the requirement of «*a lien matériel et temporel suffisamment étroit*» – as enucleated from the French version of the judgement – and reviewed the main material indexes unfolding the subsistence of the safeguard clause of the dual track punitive system, dwelling especially on the precondition of the provision under the internal regulation of the Contracting State concerned of mechanism of sanctioning compensation rendering proportionate and not excessive the overall afflictive burden handed down on the offender.[63]

By translating and implementing the guidelines set out in the *A & B* ruling, the Court verified that the shortcoming of the sufficiently close connection element and the subsequent illegitimacy of the French sanctioning statutory scheme from both the substantial and temporal perspective. In particular, a sufficient connection "in substance" was not detected on two grounds: first of all, although the double punitive track system was clearly foreseeable at the time of the event, the two proceedings did not pursue complementary objectives, since they were designed to repress the same damaging aspects of market manipulation and to protect the same socially valuable asset.[64] Secondly, the judged charged of jurisdictional powers within the criminal proceeding ordered a new collection and revaluation of the evidence, without the indispensable procedural coordination being ensured.[65]

Furthermore, the Court spotted the absence of a sufficiently close link also from a "chronological" standpoint, in so far as the plaintiff had in effect been in fact been subject to proceedings for a total period of almost eight years – from June 2006 to January 2014 – and although the two proceedings had been conducted simultaneously for about two years – between 2007 and 2009 –, the criminal trial had continued for more than four years after the administrative trial was definitively

[62] *Ibid.*, p. 2.
[63] *Affaire Nodet v. France*, cit., para. 47: « The Court finds, first of all, that in the present case the mixed nature of the proceedings was a consequence, if not certain, then at least possible and foreseeable, both in law and in practice, of the same conduct of which the applicant is accused ».
[64] Ibid. para. 47; See M. SCOLETTA, *Il ne bis in idem "preso sul serio*", cit. p. 3.
[65] *Affaire Nodet v. France*, cit., para. 49: «[...] However, the court of appeal relied on the work of both the AMF investigators and the financial investigators».

concluded with the judgment of the French Supreme Court in 2009.[66] In addition to this, the French government did not put forward any explanation for this procedural lengthy and slowness: such a justification - as the *A & B* judgements previously dictated - is all the more necessary the more the temporal connection between the proceedings is weak and, consequently, prejudicial for the individual under proceedings.[67]

From the standpoint of the undersigned, this latest decision by the ECtHR is connoted by a peculiar systematic importance in relation to a more substantive definition of the scope of the ban on double punishment from the Convention, and urges us to delineate, once again, the legitimacy of the double-track sanctioning systems currently in force in several countries within the European legal framework. The *A & B* judgement, as it is generally acknowledged, has been immediately (and also, unfortunately, hastily) interpreted as a significant reduction of the operative scope of the *ne bis in idem* principle, if not even as a complete "*revirement"* of the Strasbourg jurisprudence, regardless its own consolidated precedents.[68]

The close connection criterion – which has been portraited by the ECtHR as an essential precondition of legitimacy for domestic mixed punitive systems – has in effect been given an excessively broad meaning, especially, due to the formulation in quite generic terms of the material parameters unveiling the substance of such procedural bond between trials – which has led to a total emptying of the "procedural" content of the *ne bis in idem* guarantee, with the almost exclusive valorisation apanage of its "substantial'" profile regarded as prodromal

[66] Ibid. para. 52: « On this point, the Court notes that the proceedings in this case began with the AMF investigation launched on June 21, 2006 [...] and ended with the Court of Cassation's decision of January 22, 2014 relating to criminal proceedings [...]. They therefore lasted more than seven and a half years overall. During this period, they were partially conducted in parallel, between the referral to the financial squad by the public prosecutor on September 11, 2007 [...] and the Court of Cassation's ruling of November 10, 2009 relating to the AMF proceedings [...], i.e. for two years and two months ». This paragraph is cited in M. SCOLETTA, *Il ne bis in idem "preso sul serio*", cit. p. 4.

[67] M. SCOLETTA, *Il ne bis in idem "preso sul serio*", cit. p. 4.

[68] M. SCOLETTA, *Il ne bis in idem "preso sul serio*", cit. p. 6, with note of A. TRIPODI, *Uno più uno (a Strasburgo) fa due. L'Italia condannata per violazione del ne bis in idem in tema di manipolazione del mercato, in Diritto penale contemporaneo (Riv. trim.), 9 marzo 2014.*

to the proportional rate among the aggregate punitive charge and the seriousness of the alleged offence. [69]

In the aftermath of the *A & B* ruling, the CJEU has been consistently requested to manifest its outlook on the eventual downsizing of the applicability's scope of the corresponding principle enshrined in Article 50 EUCFR – precisely in relation to the Italian double-track sanctioning mechanisms both in tax matters and concerning market abuse, a dilemma unfolded in the conjoined preliminary ruling of 20 March 2018. As previously hinted, the EU Court of Justice endorsed a "weak" reading of both the requirement of the complementarity of purposes and the procedural coordination between punitive proceedings.[70] In relation to the first profile, with peculiar regards to the dual-track approach to market abuse figures, the Court indicated that the administrative procedure is designed to discourage and repress any abusive conduct, whether intentional or not, capable of causing a distortion within regulated securities market, by applying administrative sanctions that shall be usually set at a flat rate. In turn, the criminal procedure is functional to repress and prevent serious unlawful conducts affecting the stability and transparency of equity market, in such a manner that they are considered as particularly harmful towards the society and, therefore, justify the recourse to the more severe criminal punishment. Instead, with regards to the second profile, the Court clarified that the requirement of the necessary procedural coordination between the two distinct proceedings – aimed at minimizing the additional burdens on the defendant – is proven whenever the transmission of documentation collected during the investigative operations and the fluent exchange of information between the Public Prosecutor Office and the administrative authority supervising the internal financial market is secured by specific procedural mechanisms provided for national regulations.

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[69] M. SCOLETTA, *Il ne bis in idem "preso sul serio*", cit. p. 5-6.

[70] M. SCOLETTA, *Il ne bis in idem "preso sul serio*", cit. p. 6, recalling the content of the three CJEU's preliminary rulings of March 2018: Case C-524/15, *Menci*, C-537/16, *Garlsson Real Estate and others* C-596/16, *Di Puma*. For further details See decisions F. CONSULICH, *Il prisma del ne bis in idem nelle mani del Giudice eurounitario*, cit., 952 ff; specifically, in relation to the *Garlsson* ruling, See B. VARESANO, *Il diritto al "ne bis in idem" ed il doppio binario sanzionatorio: alcune riflessioni a margine della sentenza "Garlsson Real Estate"* in *Diritti umani e diritto internazionale*, Fascicolo 3, settembre-dicembre 2018, p. 711 ff and B. PEETERS, *op. cit.*, p. 185.

Furthermore, the CJEU, on the lines of what established by the ECtHR, attributed a predominant relevance to the precondition of the overall proportionality of the penalties cumulative handed down in relation to the same accusation, furthering the importance of the provision for regulatory mechanisms entrusting ordinary judges with the deduction of the penalties already ordered at the outcome of a first proceedings. In addition to this, the CJEU incentivised national legislators to implement sanctioning offsetting mechanisms applicable also in relation to penalties other than monetary one, and even suggested the extension of this mechanism also to the cumulation of heterogeneous penalties.[71] It is on this basis that the MAD II Directive and the coeval MAR have structured the Union discipline on market abuse prosecution and punishment. This normative pair was adopted in virtue of the new EU regulation no. 596/2014 and directive 2014/57/EU entered into force on 4 July 2016 and abrogating the previous regulatory framework on market abuse introduced by the directive 2003/6/EC.

As observed above, one of the most innovative elements set out by the new standardised discipline is represented by procedural mechanism of punitive compensation that grants domestic judges very generous and ample powers in respect of the commiseration of the punitive response resulting from the second proceeding in the view of ensuring a proportionate and calibrated reaction towards the unitary disvalue of the illicit act – although already sentenced and punished through two separate procedures.[72] In other terms, this rule allows the national interpreter to truly "take into account" the punitive measures already imposed as a

[71]M. SCOLETTA, *Il ne bis in idem "preso sul serio*", cit. p. 6. The author here alludes to what stated by the CJEU in C-537/16, *Garlsson Real Estate*, para. 60, where the Court has censored the Italian double-track system in relation to market abuse, in so fa as in the current version of Article 187-*terdecies* allows the sanctioning compensation only between pecuniary sanctions, without touching the cumulation between administrative pecuniary sanctions and imprisonment, that may eventually generate a disproportionate punitive treatment: « It should be added, as regards the duplication of penalties authorised by the legislation at issue in the main proceedings, that the latter seems merely to provide in Article 187l of the TUF that, where, with respect to the same acts, a criminal fine and an administrative fine of a criminal nature have been imposed, recovery of the former is limited to the part exceeding the amount of the second. In so far as Article 187l of the TUF appears solely to apply to the duplication of pecuniary penalties and not to the duplication of an administrative fine of a criminal nature and a term of imprisonment, it appears that that article does not guarantee that the severity of all of the penalties imposed are limited to what is strictly necessary in relation to the seriousness of the offence concerned»; on the point, B. VARESANO, *op. cit.*, p. 713.

[72] M. SCOLETTA, *Il ne bis in idem "preso sul serio*", cit. p. 7 and M. SCOLETTA, *Abusi di mercato e ne bis in idem: il doppio binario (e la legalità della pena) alla mercé degli interpreti*, in *Soc*., 2019, p. 534-535.

result from a first trial in relation to the same charge and to effectively ensure, once for all, a judicial assessment of the proportionality of the overall punitive treatment with respect to the concrete value of each fact under dual prosecution.[73]

In accordance to the ECtHR's standpoint in *Nodet*, the satisfaction of the condition of the sufficiently close connection between punitive procedure shall be "facilitated" whatsoever by domestic legislators, since the recognition of the complementarity of the autonomous purposes pursued by the two distinct proceedings should be upstream forwarded in domestic regulations: in simple terms, the different disvalue's profiles of one single act shall be easily deduced directly from the wording of the internal provision describing its constitutive elements. This is the reason why the perfect structural identity between the administrative offences and the criminal offences of market abuse, as established for instance under the Italian and French legislations, is not perfectly adherent to the safeguard clause devised by the ECtHR and then recovered by the CJEU. Only by following this path it will be possible to ascertain downstream the teleological uniqueness of two proceedings without disrespecting the *ne bis in idem* guarantee.[74] This conception has been expressed also by MAD II that offered fundamental guidelines for national legislators for transplanting the European warranty of the protection of the integrity of the Union's financial markets and the public faith in respect of financial instruments. Indeed, the directive in question states that these purposes shall be synergistically pursued by administrative and criminal sanctions, with the latter constituting a more incisive legal device for the protection of the same legal interest.[75]

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[73] M. SCOLETTA, *Il ne bis in idem "preso sul serio*", cit. p. 7 and M. SCOLETTA, *Abusi di mercato e ne bis in idem: il doppio binario (e la legalità della pena) alla mercé degli interpreti*, in *Soc*., 2019, p. 538 ff. The author here dissects the particular way by which the Italian jurispreudence has interpreted the recent findings of the European Courts regarding the scope of the *ne bis in idem* guarantee and on the national transposition of the European rule allowing the judge that "came for second" to exploit the punitive offsetting mechanism provided therein. Indeed, in the Judgement no. 45829, 10 October 2018, *"Franconi"* and also in analogous terms in the Judgement no. 49869, 21 September 2018, *Chiarion Casoni*, the Fifth Section of the Italian "*Corte di Cassazione"* has interpreted the European rule at hand as conferring the power not only to deduct all sanctions with homogeneous content – particularly, not exclusively pecuniary sanctions, but also those with interdictory content –, but also to proceed to a compensation between sanctions with heterogeneous content – i.e., basically, between pecuniary sanctions and custodial sentences–, up to the possibility of fully or only partially disapplying the incrimination applicable at the end of the second trial.

[74] M. SCOLETTA, *Il ne bis in idem "preso sul serio*", cit. p. 8.

[75] M. SCOLETTA, *Il ne bis in idem "preso sul serio*", cit. p. 8.

Accordingly, in the wake of the censorship by the ECtHR on the account of the violation of Article 4 of Protocol no. 7 to the Convention and on the ground of the normative modifications requested the new European directive on market abuse, the obsolete "*procédure mixte*" is no longer in force in the French legal system, provided that the punitive system of market abuse has been completely renovated in 2016. In effect, the French legislator followed the instructions stemming from the EU normative and by virtue of Law. no 2016-819 of 21 June 2016 adjusted the sanctioning treatment provided by the criminal law provision criminalizing the offence of market manipulation, which has registered an increase in the amount of the maximum applicable fine, now in line with the pecuniary penalty envisaged for the specular administrative offence.[76]

The practical consequences that the Strasbourg censorship from the *Nodet* ruling have been manifested towards the French legal system and the flexible ways in which the national legislator adapted accordingly the conformation of the internal market abuse discipline can surely provide interesting points for consideration exploitable also by other domestic legal orders in orders to update their arrangement to the newest findings of the conventional judge. In fact, other national legislators ought to now look at the new French punitive model, in order to prepare a technical solution consistent and compatible with the conventional constraints.

A certainly feasible solution may be the ultimate transition from a "double cumulative track" punitive model to a "double alternative track" punitive model – like nowadays it has already been implemented under the Italian legal system in relation to tax crimes. The peculiarity here is constituted by the fact that the applicable sanction is graduated or calibrated in respect of the fact object of proceedings. In this work, it has been already extensively explored how the single-track system would apply in this regard, resulting in the application of the "more special" legal provision, that generally happens to be the criminal law one, in so far as it is the most severe due to its punitive, afflictive and deterrent nature. And speaking of the double punitive track in tax matters, a final remark ought to be made, particularly in consideration of the doubts that could also arise about its potential general incompatibility with the constraints of close connection. As a

[76] M. SCOLETTA, *Il ne bis in idem "preso sul serio*", cit. p. 9.

matter of fact, it could be argued that States may incur in technical difficulties on supplying "cue points" of procedural coordination capable of avoiding the duplication in the collection and evaluation of evidence, as well as the debatable effective complementarity of purposes between tax and criminal sanctions converging on the same misconduct.[77]

On a closer inspection, however, ECtHR case law, on this point, paints a different picture: the Court in the *A & B* decision positively evaluated the Norwegian punitive framework in tax matters by acknowledging the alterity and complementarity of the objectives respectively pursued by the tax sanctioning procedure – which has a primary compensatory purpose for the expenses incurred by the State to carry out fiscal controls – and by the criminal one – whose repressive attitude is predominant and deploys its effect against acts characterized by a fraudulent or intentional facet.[78]

Furthermore, the ECtHR both in *A & B v. Norway* and in *Jussila v. Finland* highlighted that fiscal penalties – which often consist in the payment of a surcharge – are usually the "less stigmatizing" punitive sanctions and they are not integral part of the "hard core" of criminal law.[79] On this account, they are subject to a more lenient evaluation of the close connection's requirements.[80]

In any case, regardless the acceptability of this statements, it appears undebatable that the Strasbourg Court bluntly manifested a different grade of

[77] M. SCOLETTA, *Il ne bis in idem "preso sul serio*", cit. p. 10.
[78] *A & B v. Norway*, ECtHR 5 November 2016, para. 144: « […]the administrative penalty of a tax surcharge served as a general deterrent, as a reaction to a taxpayer's having provided, perhaps innocently, incorrect or incomplete returns or information, and to compensate for the considerable work and costs incurred by the tax authorities on behalf of the community in carrying out checks and audits in order to identify such defective declarations; it was concerned that those costs should to a certain extent be borne by those who had provided incomplete or incorrect information », as cited in M. SCOLETTA, *Il ne bis in idem "preso sul serio*", cit. p. 10.
[79] *A & B v. Norway*, ECtHR 5 November 2016, para. 133, which patently addresses the *Jussila v. Finland*, ECtHR 23 November 2006, Application no. 73053/01, para. 43: « […] 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[...], customs law [...], competition law [...], and penalties imposed by a court with jurisdiction in financial matters[....] Tax surcharges differ from the hard core of criminal law; consequently, the criminal-head guarantees will not necessarily apply with their full stringency[...]».
[80] M. SCOLETTA, *Il ne bis in idem "preso sul serio*", cit. p. 10.

sensitivity while judging the coherency to the rule from Article 4 of protocol no. 7 of twin-track systems in tax law matters rather than in market abuse's controversies. On this point, it should be observed that the ECtHR is the judge ruling on specific cases and the guidelines provided thereto are not subject of unlimited generalisations, but rather to reasonable extensions on similar cases demanding the application of the same theoretical parameters. Thereby, the conclusions drawn in the *Nodet* decision may be peacefully utilized for assessing the consistency of other national sanctioning frameworks, obviously with a "grain of salt" provided the natural statutory differences from domestic legal order to domestic legal order.

This is what occurred when the Strasbourg Court was questioned on the flaws of protection within the Islandic legal system, in so far as it permitted an abnormal punitive cumulation implemented in tax law matters. The *Jóhannesson and others v. Island* and the *Ármannsson v. Island* decisions have so far been the most recent rulings – alongside the *Nodet* judgement – delivered by the ECtHR on the contentious issue of the *ne bis in idem* guarantee and its interface with sanctioning practices, since the reorganization of the previous case-law enacted by the Grand Chamber with the ruling in *A & B v Norway*. [81]

Even though these two latter judgements do not enunciate any profile of content novelty in respect of the criteria laid down in *A & B*, their examination remains useful for weighing the validity of the interpretative criteria of the "sufficiently close connection" established by the Grand Chamber. In fact, no consistent help has been provided to national courts in order to understand whether (or not) the dual-track systems are realistically compatible with the *ne bis in idem* principle.[82]

This situation may potentially represent a huge drawback towards the effectiveness of the legal safeguard for a fundamental rights, like the *ne bis in idem* guarantee, in the European legal framework, especially if we take into account that

[81] *Jóhannesson and others v. Island*, ECtHR 18 May 2017, as commented *by* F. VIGANÒ, *Una nuova sentenza di Strasburgo su ne bis in idem e reati tributari*, in *Diritto penale contemporaneo*, Fascicolo 5/2017, 22 maggio 2017. Moreover, *Ármannsson v. Island*, ECtHR, 16 April 2019, as analyzed by A. GALLUCCIO, *Non solo proporzione della pena: la Corte EDU ancora sul bis in idem*, in *Diritto penale contemporaneo*, 7 maggio 2019.
[82] F. VIGANÒ, *Una nuova sentenza di Strasburgo*, cit. p. 7-8.

double track punitive mechanisms are solidly established in nearly all national legal orders all over the European continent.[83]

The general hope is that, in the future, the ECtHR will be able formulate less random and generic indications, in order to enable Contracting States to prepare – for avoiding the bogeyman of concrete convictions levied by the Strasbourg Court –, corrective measures at a regulatory level to ensure compliance in their own legal system with Article 4 of Protocol no. 7 of the Convention, whose physiognomy still seems elusive.[84]

3. Final comments: the "iridescent" nature of Fundamental Rights protection in Europe.

The principle of *non bis in idem* has over time transformed itself into a multifaceted legal rule of remarkable importance in Union law, due to the prominent role granted to it within the conformation of the EU Charter of Fundamental Rights and by virtue of various instruments of secondary law, first of them the Framework Decision concerning the European Arrest Warrant and the Schengen Agreement: these two legislative acts patently refers to the right to not be subjected to double prosecution or repeated punishment.[85] Nonetheless, it may be argued that, thanks to the practical lapels taken by EU law, it has been given the possibility to the *ne bis in idem* principle to proliferate throughout the most disparate areas under the jurisdiction of Union institutions and policy.[86]

However, despite the assumption that "*ne bis in idem* is everywhere" in the EU legal arrangement, the delineation of its exact contours still remain a debatable topic.[87] The purpose of this final paragraph is to codify what the countless jurisprudential standpoints analysed in the preceding chapter of the study at hand

[83]F. VIGANÒ, *Una nuova sentenza di Strasburgo*, cit. p. 7-8. In addition to this, this can be generally perceived as true unless national courts start to think that the answer to the question should be different from time to time in relation to the greater or lesser speed of the proceedings (administrative and criminal) brought against a single person for the same infringement. But it is undisputed that this would transform the guarantee of *ne bis in idem* into an improper remedy against the excessive duration of the proceedings that survives the definition of the first.
[84] A. GALLUCCIO, *Non solo proporzione della pena*, cit., p. 1.
[85] B. VAN BOCKEL, *op. cit*., p. 103.
[86] B. VAN BOCKEL, *op. cit*., p. 236.
[87] B. VAN BOCKEL, *op. cit*., p. 236.

can show us about the forthcoming route that the methodology of Fundamental Rights protection in the European legal sphere is presumably going to follow. Precisely, the most relevant profile of this saga revolves around the dilemma of who will have the ultimate say on a controversy involving human rights tutelage. On this stage, the principal breakthroughs obtained during the course of our scrutiny will be tabled and consequent conclusions will be duly exposed.

In every chapter of the present work, hermeneutical questions and discrepancies between the jurisprudence of the two European judges have been detected and profoundly examines, with some analytical superimposition though. More specifically, it was argued in Chapter I that the right of an individual to be subjected to double jeopardy on the account of the same illicit conduct takes its roots in an ancient sociological and juridical "soil" and that its innate *"ratio composita"* resides in the spirit of complying with demands of justice's effectiveness and in the willingness of ensuring an adequate degree of legal certainty in litigations' settlement. These purposes are strictly tied with the interest of single citizens as well as of the general community living in modern European societies to be warranted from any arbitrary exercise of the State's punitive power (i.e.*"ius puniendi"*), and they are also functional to the satisfaction of the preconditions defining the performance of a fair and equitable trial to which any member of a social aggregation may undergo.

Moreover, the double vest of the principle has been placed under a special attention, especially in relation to the possible occurrences where the “substantial” counterpart of the ban finds itself to confront with categories of substantial criminal law: above all, the issue of the necessity to reach a fair equilibrium between the requirement of legal protection of a fundamental right and the needs for the implementation of deterrent and repressive criminal policies, which concretizes itself in the judicial hassle to inflict a cumulative punitive load that shall be compulsorily overall proportionate to the seriousness of the offence *sub judice*.

It has been noted that the principle is constantly hovering around a volatile position as a result of the lasting modifications to its scope of applicability, which faces alternate cycles of contraction and expansion depending on the changing of relevant jurisprudential approaches and on the supply of concrete circumstances of

application. This statement may be demonstrated by recalling the fact that each constitutive element of the formula depicting the prohibition of double jeopardy has been revised in details and its breakdown has given rise to numerous interpretative clashes over the ages, in the light of attaching an univocal meaning to each term of the phrase "*non bis in idem*". Peculiar consideration shall be paid to the notion of "*idem*", upon whom the quarrel between the two supranational Courts was fuelled by the opposite standings respectively siding, on one hand, for the identification of the significance accorded to this word found in the identity of the abstract offence integrated in all its constitutive element and actuated into double proceedings *("legal idem")* and, on the other hand, for leading back this concept into the identity of facts viewed in their historical-naturalistic dimension *("idem factum").* As amply observed, this latter orientation prevailed and was obsequiously emphasised by the ECtHR in its case law since the *Zolothukin* ruling and accepted – in one way or another – by the CJEU. A similar remark can be referred to the theorization of the concept of *"matière pénale"*, collapsed within the threefold *Engel* requirement from the Strasbourg case law and resumed by the ECJ while ruling upon the *Bonda* case.

As what concerns the propositions drafted in Chapter II, it ought to be resumed the difficulties broached by the European Courts on reconciling constitutional pluralism with the outlook of maintaining a doctrinal coherence throughout various strands of supranational jurisprudence.[88] In effect, it is not surprising that the Court of Justice has struggled to create a coherent set of judicial rules governing the interplay between the ECtHR and constitutional traditions of Member States. It has been repeatedly remembered that, on certain occasions, the Court of Justice did not refer to the settled case-law of the ECtHR about litigations on corresponding rights: the well-known *Akerberg Fransson* is the upstanding example of this specific trend by the ECJ, which even decided to delegate the concrete determination of the presence or not of an actual infringement of a Charter's right to the national referring court. From the personal stance of the underwritten, the excessive exploitation by the CJEU of such deference to the domestic judiciary in disputes involving rights established under the Nice Charter

[88] B.VAN BOCKEL, *op. cit.*, p. 236.

might bring more detrimental effects on human rights protection rather than consistent benefits. As a matter of fact, even though this precise strategy selected by the Court of Justice on leaving sufficient room for domestic courts to deliver their own determinations can be justified on the assumption that national judicial bodies nowadays are increasingly faced with challenging questions about the interaction between national constitutional rights, Convention rights and obligations stemming from the EU Charter, it would nonetheless generate a "decentralized" system of EU fundamental rights protection that will unequivocally ensure a comprehensive and unbiased safeguard of the garrisons anchored in the Charter in a long-term perspective.[89]

In truth, notwithstanding the probable feasibility of such a system of human rights governance, the CJEU might not have taken in dutiful account in its calculation the reality that single national constitutional scaffolds may present differentiated standards of human rights legal protection, something that will cause over time a "dilution" of the core content of an European unalienable right of the individual, due to its persistent distorted interpretation in concrete instances that may be absorbed within the judicial tradition of that Member State. Such a drawback may be amplified by the common practise for which these disputes concerning the interpretation of rights from the Charter reach the Luxembourg judging board primarily in the guise of a preliminary reference and by the fact that the issue of the variegate level of fundamental rights safeguard in each Member State it is not always among the primary concerns of the Court, unless the interpretation upon the right at stake affects the "primacy, unity and effectiveness of EU law" and the minimum standards of its protection as appointed by the EUCFR is disregarded.[90]

Moreover, a further objectionable profile of the CJEU's standing it is without a shadow of a doubt its apparent stubbornness in sharing its position as the European highest fundamental rights court with the ECtHR, particularly if we consider how much internalized the nature of the corresponding Convention right has become within the Union legal order. The Luxembourg Court still maintain its

[89] B.VAN BOCKEL, *op. cit.*, p. 238.
[90] B.VAN BOCKEL, *op. cit.*, p. 238.

dogged approach towards the accession of the European Union into the Convention legal order, but, even if it succeeded so far in arresting the above accession, it has not been comparatively so zealous in limiting the effects of the "homogeneity clause" under Article 52(3) EUCFR. The Court of Justice will not always managed to ignore, while settling controversies involving Charter's rights, the innovative interpretative guidelines provided by the ECtHR case law and at some point in time it will be presumably forced to recognize and refers the duality between ECtHR and EUCFR rights. One may label this attitude from the Luxembourg Court as "hypocritical", given the fact that the Court already basically addressed the Strasbourg reasoning in the past – just thinking at the *Engel* criteria recalled in *Akerberg*, only implicitly though –, but there is no actual reason below such a biting critique since the CJEU appears well aware that stacking up of reclaims about having the final authority over the jurisdictional control on fundamental rights protection would result in the sure erosion of the extremely fragile foundations of the system of European human rights legal protection, based on an indisputable mutual interdependence among the ECJ itself, the ECtHR and national constitutional courts that communicate between each other in a dynamic fashion.[91]

Hence, the CJEU will have to face the concrete reality that Union and Convention law have now become inextricably interconnected and this is something that the Court will not totally overtake – for instance, by refusing any kind of mention to the jurisprudence of the Strasbourg Court. Furthermore, despite the ECJ's enormous efforts to foster the full-blown judicial autonomy of its hermeneutical standings *vis-à-vis* the ECtHR ones, the jurisprudential practice has actually shown that the CJEU needs the precious support from the interpretative innovatory parameters devised by the ECtHR. Therefore, willing or unwilling, the effective degree of decision-making autonomy enjoyed by the CJEU is unquestionably lower than the one it openly professes.

In the light of this, the best possible solution for the CJEU is to go through with the total alignment with the ECtHR case-law with regards to corresponding Charter and Convention rights, mainly acknowledged the fact that the most revolutionary inputs on the interpretative reading of fundamental rights provisions

[91] B.VAN BOCKEL, *op. cit.*, p. 239-240.

derive from the jurisprudential developments of the Strasbourg regime, as the *excursus* throughout the various rulings offered by the conventional judge may testify.

At any rate, it is also true that the jurisprudential uniformity does not represents the sole remedy to the leaks of legal protection within the Union system of fundamental rights safeguard. Indeed, as previously concluded in Chapter II, the dynamic interweaving between the ECJ, the ECtHR and national constitutional courts, in spite of not ensuring a complete coherence in the interpretation of essential rights and freedom, it may nevertheless result in the application of a higher standard of fundamental rights guarantee, not only on a supranational level but also incentivising the sprout of always more advanced national methods of legal protection.[92] From this point of view, complete uniformity would constitute a double-edged sword, since the improvement of domestic applicable levels of protection might be sacrificed on the altar of a static (albeit, standardised) structure of human right protection.

Perhaps a similar scenario may not be perfect for a comprehensive system of fundamental rights protection that would be, in this sense, inevitably affected by legal uncertainty. However, from such precariousness may surprisingly arise relevant beneficial consequences, like a higher degree of human rights protection operating in practical terms. This is a risk that the European Courts can afford to take, once established the fact that their reciprocal interconnection would never permit to establish which court would have the last word on the interpretation of a pivotal right such as the *ne bis in idem*.

It is not even necessary to remind the CJEU that the ideal way to overcome possible interpretative loopholes should be granting the accession of the European Union to the Convention framework, a demand that may be perceived as even more mandatory when the EU Court of Justice will be required to justify faults within the warranty system of the Charter, since Article 50 EUCFR can only operate in situations falling « within the scope of EU law » and Article 4 of Protocol no. 7, in

[92] This statement can be proven by looking at the *Spasic* case (Case C-129/14 PPU, *Spasic*, EU: C: 2014: 586), where the Court of Justice avoided any reference to the Strasbourg's hermeneutical method but, at the same time, employed a standpoint that was not totally grounded on the Charter's wording. In turn, the ECJ decided to apply the national legal standards of the *Bundesverfassungsgericht* in order to settle the dispute.

turn, applies only to litigations occurring with a single State and it has not been ratified by the totality of EU Member States.[93]

After having appointed that the system of European fundamental rights protection is way far from being impeccable, throughout Chapter III and IV the illustrations of the jurisprudential diatribes between the European Courts were then moved onto the level of the judicial ascertainment of the consistency between dual track punitive mechanisms contemplated within several Member States' legislations and the prohibition of double jeopardy. In the present work it have been enucleated the main areas of law which make recourse to the methodology of parallel prosecution and punishment, by making use of the Italian, French and Scandinavian legal systems as suitable benchmarks for evidencing the defects of legitimacy of this chastising practice in the light of the parameter ensuring the full safeguard of one individual's *ne bis in idem* right.

Precisely, the survey addressed the fields of tax law and of market abuse, which have always been legal grounds sensitively polluted by treachery and articulated unlawful operations that consequently demands the implementation of a prosecuting pattern capable of ensuring justice's effectiveness and certain repression. The offences performed in these contexts are generally considered as endowed with peculiar hazardousness towards legal interests and assets connoted by general relevance. Indeed, illicit conducts configuring fiscal evasions endanger the State's interest at the unabridged collection of tax contributions and, in particular, wherever failures of VAT payment are involved, also Union's financial interests may be put under jeopardy, since this revenue represents a major source of income for the EU's institutional engine. Whereas, the figures of insider trading and market manipulation – first envisaged in the Directive 2003/6/EC – are conceived with the purpose of shielding from disguised and fraudolent financial operations the common legal asset of the correct performance and integrity of regulated securities market. Behind the constant urge from the European legislators, domestic legal systems were requested of incorporating punitive policies providing for repressive and preventive measures to enforce against such particularly threating conducts. Accordingly, the sanctioning schemes implemented in these

[93] B.VAN BOCKEL, *op. cit.*, p. 241.

legal sectors have been structured with having in mind the imperative objective of ensuring the highest level of protection possible for the greater and sensible Union's financial concerns. This purpose lead to the introduction of rigorous prosecution practices based on the procedural combination of administrative and criminal trials, whose outcome would have been the parallel imposition of a two-fold penalty on the account of an *"idem factum"*. Unavoidably, plentiful of puzzlements have been raised about the legal proportionality of the punitive combination in respect of the persecuted unlawful tenor of the tort under proceedings, either it was a fiscal fraud or an abusive financial operation. The ECtHR in *Grande Stevens* at first tried to assail the interpretative darkness surrounding this topic by adopting a highly "garantist" trend aimed at enhancing the operative incidence of the principle under Protocol no. 7 to the Convention, extending its scope of application also beyond the realm of offences and relative sanctions as understood in their "formalistic" dimension. The Court was in effect committed to confer absolute priority to the guarantee of the indefeasible person's right to not be exposed at the mercy of double jeopardy, by censoring punitive frameworks authorizing double prosecution and punishment on the ground of the distinct formal label recognized to administrative and criminal procedures and consequent measures. Thereby, the Strasbourg judge by summoning the *Engel* criteria broadened the discharge range of the guarantee in such a way as it then covered also those sanctions endowed with "substantially" criminal nature, in spite of its formally administrative qualification under national law. This delicate issue has been also handled by the CJEU which recognized a prominent role to the guarantee under Article 50 EUCFR within the architecture of fundamental rights established in the Charter, even though allowing the mitigation of its effects whenever essential general interests of the Union are concerned.

The idea of the subjugation of the defendant's right to not be prosecuted or punished twice before Union's overreaching objectives has been teased by the Luxembourg Court for years, but it was finally metabolized and solidified within the Strasbourg regime only in *A & B v. Norway*, where – as reasserted multiple times – the ECtHR retraced its steps and called into question the undisputed absoluteness of the *ne bis in idem* from the ECHR. As a matter of fact, a pioneering chapter in the storybook on the prohibition of double jeopardy was written by the

ECtHR and it symbolizes a point of no return in the jurisprudential evolution of the ban: the Court certified the downgrade of the *ne bis in idem* right compared with the safeguard of national and supranational financial interests. On this date, the "European" *ne bis in idem* appears to go through a phase of downturn, having established that its disregard can be overlooked insofar as the requirement of the "sufficiently close connection in substance and time" between two proceedings – originally devised by the ECtHR in *A & B* and later officially announced by the CJEU in the preliminary ruling on the joint cases *Menci*, *Garlsson Real Estate* and *Di Puma* – is fulfilled. This parameter has been frequently reemphasised also by the Strasbourg court in its subsequent pronouncements – such as upon the *Nodet* case and the *Jóhannesson* and *Ármannsson* affairs –, but it still remains a criterion enveloped by a halo of vagueness to the point where it has been tagged as a hollow and vaporous formula.[94]

The utmost generic nature of the mandatory requirement of the material and temporal connection between trials has rendered more heated the debate on the compromise between the expectations of individual justice's supply and the general demands for crime's repression.

Although the judicial dialogue between the two European Courts on this entangled matter will hardly stop altogether, it is possible in any case to enucleate some feasible solutions for undoing this complicated hermeneutical node. In fact, among the international legal doctrine, it has been scrutinized the incidence brought about by the interpretative guidelines set out especially by the Strasbourg Court, which among the two European supranational judicial bodies it is the one affording the most innovative impulses in the shaping of jurisprudential parameters of general application. Indeed, the principles established since the *Grande Stevens* judgement have been often addressed with particular reference to the possibility of the opening of two parallel proceedings (one criminal, the other administrative), stemming from either a fiscal violation or a market abuse offence.[95] Precisely, the major question is connected to the cases whether one of the two trials (usually, the

[94] See F. CONSULICH- C. GENONI, *L'insostenibile leggerezza del ne bis in idem. Le sorti del divieto di doppio giudizio e doppia punizione, tra diritto eurounitario e convenzionale*, in *www.giurisprudenzapenale.com*, 22.04.2018, p. 12-13.
[95] N. MAZZACUVA - E. AMATI, *op.cit.*, p. 354.

procedure before the administrative authority due to its rapid settlement) has been already culminated in the imposition of an ultimate punitive act, whilst the other (generally, the criminal one because of its towbarless development) is still pending. Various interpretative suggestions can be enumerated in this regard with the purpose of putting a swift end to the illegitimate second proceeding that threatens the integrity of an accused's right to be warranted against a *bis in idem* situation.[96] First of all, a peculiar interpretative route that can be taken is the one that finds its argumentative logic in the multi-level system of fundamental rights protection, delineated by the interwining between the Charter and Convention frameworks. [97] This pattern is founded on the existing judicial coordination between the CJEU, the ECtHR and national constitutional courts and it is inspired by the so-called principle of the "major protection" – collaboratively established in Article 53 ECHR and Article 53 EUCFR –, whose meaning entails that it shall be privileged the application of the legal standard which, in the concrete case, offers the highest degree of protection.[98] On this ground, the proposition for tackling the illegitimacy of the second proceeding is based on the direct applicability of Article 50 of the Nice Charter. Provided that the Charter of Fundamental Rights of the European Union forms an integral part of the Union primary law and it is connoted by the same juridical binding force of the European founding treaties, the national judge can peacefully immediately apply the Charter provision and consequently disapply the internal regulation conflicting with it. This expedient had constituted the only possible way for implementing – albeit in an indirect and mediate manner – the interpretative criteria formulated by the Strasbourg judge since *Grande Stevens* and pointing out the structural inconsistencies of national double-track punitive

[96] N. MAZZACUVA - E. AMATI, *op.cit*., p. 357.
[97] F. VIGANÒ, *Doppio binario sanzionatorio e ne bis idem: verso una diretta applicazione dell'art. 50 della Carta?*, in *Diritto penale contemporaneo (Riv. Trim)*, 2014, n. 3-4, p. 219-220.
[98] N. MAZZACUVA - E. AMATI, *op.cit.*, p. 358., also F. VIGANÒ, *Doppio binario sanzionatorio e ne bis idem: verso una diretta applicazione dell'art. 50 della Carta?*, cit. p. 221; Article 53 ECHR: « Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party » and Article 53 EUCFR: « Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and inter-national law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions ».

methods towards the conventional *ne bis in idem*. The direct application of the corresponding right envisaged in Article 4 of Protocol no. 7 ECHR was not conceivable since the legal rules contained in the Convention are not equipped with neither direct effect nor direct applicability likewise those enshrined, instead, in the EU Charter. Consequently, national judges were not encumbered by any duty of disapplying an internal statute contrasting with the conventional norm.[99]

Thus, the sole manner through which it was conceivable permitting the direct operability of Article 4 of Protocol no. 7 was relying once again on the "homogeneity clause" from Article 52(3) EUCFR, by virtue of which a Charter right shall be granted with the same gradient of legal protection that the parallel conventional right – as interpreted by the ECtHR in its own case law – insures.[100] The hermeneutical leverage supplied by Article 52(3) of the Charter and used to unlock the direct applicability of Article 4 of Protocol no. 7 – in an incidental manner and through Article 50 EUCFR – may be believed of low significance if we consider the recent jurisprudential interventions by the CJEU in *Menci*, *Garlsson* and *Di Puma*, issued in the wake of the now famous Strasbourg's *A & B* ruling.

In effect, these judgements have sealed the tendential convergence between the two European jurisdictional regimes in the direction of the retrenchment of the scope of applicability of the *ne bis in idem*, leaving out the different argumentative platform upon which the two supranational Courts made their statement.[101] However, since such jurisprudential alignment between the two European Courts is anything but absolutely certain, the most valid assertion in this regard is that the conventional ban on a *bis in idem* appears to not be perfectly coincident with its parallel Charter's counterpart and, in this sense, it may be difficult arguing in favour of the impeccable interoperability between the Charter and the Convention as hoped in the terms above.[102] Hence, excluding entirely the always viable expedient of the

[99] At least, the domestic interpreter could have resorted the option of a conventionally consistent interpretation of the internal rule or, perhaps, raising a question of constitutional legitimacy of the conflicting national provision, as long as such a mechanism is provided for by the constitutional order of the concerned State.

[100] F. VIGANÒ, *Doppio binario sanzionatorio e ne bis idem: verso una diretta applicazione dell'art. 50 della Carta?*, cit. p. 234- 235; see also N. MAZZACUVA - E. AMATI, *op.cit.*, p. 358.

[101] F. VIGANÒ, *Doppio binario sanzionatorio e ne bis idem: verso una diretta applicazione dell'art. 50 della Carta?*, cit. p. 236. and N. MAZZACUVA - E. AMATI, *op.cit.*, p.360.

[102] N. MAZZACUVA - E. AMATI, *op.cit.*, p.360.

direct applicability of the Charter's *ne bis in idem* would show an unjustified confidence in the conviction that the two European Courts will be on the same page when it comes to the interpretation of the *ne bis in idem* principle.

Another practicable gimmick for upstream neutralizing the institution of the an illegitimate second proceeding on the same conduct may be constituted by the contingency that the communitarian law might compel national legislators to adopt only administrative sanctions, but also leaving to their faculty the introduction of criminal sanctions only in a subsidiary and ancillary manner.

This is a scenario embedded in the assumption that EU law is far from obliging Member States to implement the sanction cumulation method, provided that they remain free to either choose the way of the single-track system – with either the alternative application of administrative or criminal sanction depending on the peculiar disvalue of the fact object of proceedings – or opting for the sanctioning duplication, within the limits laid down in the jurisprudence of the Court of Justice. Regarding at least the field of market abuse regulation, the Union with the aforementioned MAD II Directive and the contextual MAR has overthrown then pre-existing system established by the Directive from 2003, without foregoing the provision of administrative penalties.[103] Indeed, the new European legislation on market abuse entered into force in 2016 has scarred the definitive overrunning of the double-track pattern by means of the provision of a punitive offsetting and graduation mechanism, but specially by radically changing the EU strategy of persecution of illicit conduct assailing the integrity of equity markets, no longer based on the compulsoriness of the administrative sanctions and on the mere optionality of parallel criminal punishment, instead exactly the other way around. This choice by the European legislator is founded on the conviction that the protection of fair concurrency in the financial sector inevitably goes through the adoption of a set of rules accurate and uniform on a European-wide level, in the light of reducing as much as possible the unavoidable normative divergences between Member States.

[103] N. MAZZACUVA - E. AMATI, *op.cit.*, p. 369.

Therefore, the fulcrum of this new regulatory regime is represented by the criminal sanction, deemed to be capable of offering a preventive and repressive force superior than that the one afforded by the administrative sanction.[104]

Member States have currently the sole duty to introduce criminal sanctions at least for those offences connoted by particular gravity, parameterized on specific indexes – such as the impact of the conduct on the genuineness of securities market or the amount of the illicit profit achieved.[105] Besides, it is mandatory that such offences shall be coloured by the component of wilful default and, in the view of ensuring a wide-ranging and coherent sanctioning framework, Member States are committed to implement a minimum level for the maximum custodial sentence.[106]

At this stage, it may be foster the objection that this new communitarian normative apparatus would authorize – albeit, without obligating – domestic legislators to resort the sanction cumulation whenever market abuse figures are integrated and threatening once again the safeguard on the EU *ne bis in idem*.[107]

However, it seems that it is not the case since the rebuilt normative system on market abuse is perceived not in terms of a "twin-track" system, but rather in the fashion of a unitary body triggering the following standardised and graduate punitive reaction: the card of the criminal punishment will be played exclusively against the offences featured with a major offensiveness, whilst administrative sanctions will be enforced against less serious infractions.[108] Put it differently, the

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[104] N. MAZZACUVA - E. AMATI, *op.cit.*, p. 368; see also N. RUSSO, *Market Abuse: MAD II è stata davvero recepita in Italia?*, in http://www.riskcompliance.it, 21 May 2019.

[105] F. MUCCIARELLI, *Gli abusi di mercato riformati e le persistenti criticità di una tormentata disciplina*, in www.penalecontemporaneo.it, 10 October 2018, p. 3 ff; Directive 2014/57/Eu of the European Parliament and of the Council, in *Official Journal of the European Union*, L 173/179, 12.6.2014, "recitals 8-10": « The introduction by all Member States of criminal sanctions for at least serious market abuse offences is therefore essential to ensure the effective implementation of Union policy on fighting market abuse. Member States should be required to provide at least for serious cases of insider dealing, market manipulation and unlawful disclosure of inside information to constitute criminal offences when committed with intent »; *Ibid.* "recital 16": «In order for the sanctions for the offences referred to in this Directive to be effective and dissuasive, a minimum level for the maximum term of imprisonment should be set in this Directive»; finally, See *Ibid*. Article 7(2) and 7(3): « Member States shall take the necessary measures to ensure that the offences referred to in Articles 3 and 5 are punishable by a maximum term of imprisonment of at least four years. Member States shall take the necessary measures to ensure that the offence referred to in Article 4 is punishable by a maximum term of imprisonment of at least two years ».

[106] F. MUCCIARELLI, *Gli abusi di mercato riformati*, cit., p. 4; N. MAZZACUVA - E. AMATI, *op.cit.*, p. 369.

[107] N. MAZZACUVA - E. AMATI, *op.cit.*, p. 370.

[108] F. MUCCIARELLI, *Gli abusi di mercato riformati*, cit., p. 6-7; See N. MAZZACUVA - E. AMATI, *op.cit.*, p. 372.

sanctioning graduation implies that idealistically the punitive path should be only one – namely, the criminal punishment –, but Member States are now entrusted with the possibility to calibrate the afflictive effects in respect of the alleged infractions.[109]

Against the background delineated by the revamped importance of the criminal sanction and the concerns about whether the Union institutions would prefer the revival of the cumulative double track system, it stands out the topic of the dualism between the "procedural" and "substantial" *ne bis in idem*, with the former constituting the mere ban on the establishment of dual proceedings on the same misbehaviour, whilst the latter precluding the repeated punishment of the same conduct whenever it may be subsumed – at least, apparently – under multiple criminal provisions. Altogether, they materialize the dichotomy within this fundamental guarantee for the individual, which experienced the gradual switchover from one "soul" to the other of the principle, being the substantial facet exposed to an incisive enlargement of its scope of operability entailing the "debunking" of the perched nature of the traditional procedural version of this ancestral criminal law rule, in favour of the pragmatic realization of the safeguard of the legal interest to not be rendered vulnerable before double jeopardy carried by the single individual. The rhythmic contraction and re-expansion of the legal flow rate of the principle under scrutiny has been punctuated by the everlasting disharmony between national sanctioning procedures and the inner legal content of the principle itself.

The inescapable feud between the dual track system and prohibition of double jeopardy perhaps will be always rekindled by the reality that the former constitutes an "infamous" but tremendously effective device for repressing illegal practices involving economic and financial values, whereas the latter has been since unspeakable time a juridical cornerstone of modern society. Form the showcase of

[109] F. MUCCIARELLI, *Gli abusi di mercato riformati,* cit., p. 7-8; See N. MAZZACUVA - E. AMATI, *op.cit*., p. 372-373. Moreover, the MAD II Directive itself, in the "recital 27" establishes that: « This Directive respects the fundamental rights and observes the principles recognised in the Charter of Fundamental Rights of the European Union (the Charter) as recognised in the TEU». And in the list of the "respected" Charter rights it is also included the *ne bis in idem*: « […] and the right not to be tried or punished twice in criminal proceedings for the same offence (Article 50) », Directive 2014/57/Eu of the European Parliament and of the Council, *in Official Journal of the European Union,* L 173/179, 12.6.2014.

the innumerable swinging back and forth between the various hermeneutical approaches between the two European Courts, national legal orders have witnessed to this jurisprudential "rollercoaster" that manifested its penetrating effects within those internal regulatory sectors representing a fertile ground for the application of the two-fold punishment mechanism. Under these circumstances, it appears that nowadays the task of re-inflaming the protection granted by the *ne bis in idem* right has been outsourced from the supranational EU institutions to national legislators of Member States, even provided the ample room of manoeuvre left by Union policies in terms of structuring the most suitable punitive framework in relation of domestic demands of justice's effectiveness.[110]

Naturally, this does not automatically imply that the balancing of the platform of the needs at stake will run smoothly for domestic legislators. However, some workable methods can be surely implemented, such as the employment of the single-track system – based exclusively on the adoption of criminal punishment and on the marginalization of the resort of administrative measures – or also the exclusion from the criminal law realm of relatively less serious offences, destined to end up under the aegis of national administrative authorities applying administrative penalties, on the outcome of sanctioning procedures performed in accordance with the legal garrisons under Article 6 ECHR, typically provided for criminal trials.[111] In this manner, the demands of individual legal protection may be duly answered, albeit a necessary sacrifice in terms of justice deterrence and repression has to be discounted. Perhaps, this path will ensure more steadiness to a fundamental right, such as the *ne bis in idem*, whose flimsy stability is anything but adamant.

[110] M. L. DI BITONTO, *op.cit.*, p. 1356.
[111] M. L. DI BITONTO, *op.cit.*, p. 1353-1354. The author deeply dissects how criminal law, in those instances where it configures itself in the guise of "administrative criminal law", will require under any circumstances the same patterns of allegations' ascertainment and the same ""minimum" guarantees established under Article 6 ECHR", generally in relation to proceedings beneath criminal law.

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