COMMON MARKET LAW REVIEW

CONTENTS Vol. 55 No. 6 December 2018

Aims
The Common Market Law Review is designed to function as a medium for the understanding and implementation of European Union Law within the Member States and elsewhere, and for the dissemination of legal thinking on European Union Law matters. It thus aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

Common Market Law Review is published bimonthly.
Subscription prices 2019 [Volume 56, 6 issues] including postage and handling:
2019 Print Subscription Price Starting at EUR 868/ USD 1228/ GBP 619.
This journal is also available online. Online and individual subscription prices are available upon request. Please contact our sales department for further information at +31(0)172 641562 or at lnternational-sales@wolterskluwer.com.
Periodicals postage paid at Rahway, N.J. USPS no. 663–170.
U.S. Mailing Agent: Mercury Airfreight International Ltd., 365 Blair Road, Avenel, NJ 07001.
Published by Kluwer Law International B.V., P.O. Box 316, 2400 AH Alphen aan den Rijn, The Netherlands

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Printed on acid-free paper.

COMMON MARKET LAW REVIEW

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Establishment and Aims
The Common Market Law Review was established in 1963 in cooperation with the British Institute of International and Comparative Law and the Europa Instituut of the University of Leyden.The Common Market Law Review is designed to function as a medium for the understanding and analysis of European Union Law, and for the dissemination of legal thinking on all matters of European Union Law. It aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

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Common Market Law Review **55**: 1717–1750, 2018.

THE ECJ'S RECENT CASE LAW ON *NE BIS IN IDEM:* IMPLICATIONS FOR LAW ENFORCEMENT IN A SHARED LEGAL ORDER

MICHIEL LUCHTMAN*

Abstract

The ne bis in idem principle is a forerunner for fundamental rights in the European legal order. It has facilitated integration, but it also meets strong resistance. This contribution deals with the principle of ne bis in idem at the interface of administrative and criminal law enforcement, which has been a particularly controversial issue over the last few years. It analyses the recent case law of the ECJ and explores its consequences, focusing on the extent to which the principle has been made dependent on the degree of harmonization of EU law and on the transnational implications. With the rise of many new forms of transnational cooperation and an increasing focus of the EU legislature on law enforcement, the significance of this case law is hard to overlook.

1. Introduction

The right not to be tried or punished twice in criminal proceedings for the same criminal offence is laid down in, *inter alia*, Article 4 of Protocol 7 ECHR, Article 50 of the EU Charter of Fundamental Rights (CFR) and Article 54 of the Convention implementing the Schengen Agreement (CISA). This contribution deals with the principle of *ne bis in idem* at the interface of administrative and criminal law enforcement. This has been a particularly controversial issue over the last few years. In 2016, the European Court of Human Rights (ECtHR) in Strasbourg, after immense pressure by many

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signatory States, changed its case law with respect to the extent to which the *ne bis in idem* principle sets the bar for the accumulation of punitive administrative and criminal proceedings. By redefining the element of what constitutes a second prosecution ("*bis*"), the court loosened its standards and allowed for such combinations, provided both types of proceedings are sufficiently connected in substance and time. The European Court of Justice (ECJ) in Luxembourg was forced to respond and did so in a number of judgments in March 2018.[1]

This contribution analyses to what extent the ECJ has followed the Strasbourg Court. Moreover, it aims to shed light on what could be the consequences of the ECJ's new case law for the enforcement of EU law in the national, as well as the transnational setting, and, more generally, for the development of the European legal order as such. The importance and urgency of these issues for the institutional – constitutional – design of law enforcement in the European legal order can hardly be ignored,[2] also taking into account that they directly relate to such a sensitive area as that of criminal justice, where disputes between the ECJ and national (constitutional) courts appear to be increasing.

The topic of this contribution may be illustrated by an actual case that is currently pending in the Benelux.[3] In 2007, Banco Santander, Fortis Bank and the Royal Bank of Scotland obtained control over ABN AMRO bank through a hostile takeover.[4] In the wake of the meltdown of the financial markets and the nationalization of Fortis bank by the Belgian, Dutch and Luxembourg governments in 2008, questions soon arose concerning the potentially misleading character of the communication strategies of Fortis bank to attract new capital to finance its share of the ABN AMRO takeover. Investigations were opened by the Dutch Financial Services Authority (AFM). Upon closure of its investigations in 2012, AFM imposed four (punitive) fines on the Belgian and Dutch legal persons that together constituted the Fortis holding, for the incorrect public announcements made by Fortis' former CEO on 5 June 2008 regarding Fortis' financial position around the time of the ABN AMRO

1. Case C-524/15, *Luca Menci*, EU:C:2018:197; Joined Cases C-596 & 597/16, *Di Puma and Zeccai,* EU:C:2018:192; Case C-537/16, *Garlsson Real Estate SA*, EU:C:2018:193.

2. See also Meyer, "Multiple Sanktionierung von Unternehmen und *ne bis in idem*" in Stein, Greco, Jäger and Wolter (Eds.), *Systematik in Strafrechtswissenschaft und Gesetzgebung – Festschrift für Klaus Rogall zum 70. Geburtstag am 10 August 2018* (Duncker & Humblot, 2018).

3. Other examples (Volkswagen, Libor, etc.) are not difficult to imagine.

4. This case description is an update of Vervaele and Luchtman, "Criminal law enforcement of EU harmonized financial policies – The need for a shared criminal policy" in De Jong (Ed.), *Overarching Views of Crime and Deviancy – Rethinking the Legacy of the Utrecht School* (Eleven International Publishing, 2015). Many thanks to Francis Desterbeck for his help in retrieving the Belgian case reports.

takeover (market manipulation), as well as for not disclosing price-sensitive information ("*koersgevoelige informatie*") after 14 June 2008.

Meanwhile, Belgian supervisory and judicial authorities had also opened investigations regarding the same legal persons, as well as a number of their board members. The facts under investigation overlapped with those underlying the Dutch fine decisions. The Belgian administrative enforcement agency, the Financial Services and Markets Authority (FSMA), also found that Fortis had distributed misleading information and it imposed administrative fines on the former Fortis Bank and a number of its board members. In addition to that, the Belgian judicial authorities initiated criminal prosecutions in 2013 against seven former board members for issuing misleading information, market abuse, the forgery of documents and deception. Former Fortis Bank (or its legal successor Ageas) were not prosecuted.[5]

In March 2014, the highest Dutch administrative court confirmed the fines against the Fortis holding.[6] Administrative proceedings in Belgium have in the meanwhile reached the Belgian *Court de Cassation* (*Hof van Cassatie*). Interestingly, however, the amounts of the administrative fines for the legal persons involved were mitigated in 2017 by the Brussels Court of Appeal,[7] because of the overlap between the Dutch fining decisions and parts of the administrative punitive proceedings in Belgium. The court thereby established a violation of the *ne bis in idem* principle.[8] As for the remainder of the case, it imposed a fine of €250,000 on Ageas.[9] Apparently, the Dutch and Belgian authorities involved failed to coordinate their actions and were unable to prevent a violation of the *ne bis in idem* principle.

The *Fortis* case illustrates how significantly law enforcement is still driven by national enforcement design and by national enforcement agendas,[10] even though the underlying provisions of substantive law have a strong European dimension. What we notice today is that, on the one hand, the ECJ seems determined to accord Article 50 CFR a wide material scope (see *infra* section 4.1.), also covering combinations of administrative and criminal law enforcement and implying that in the common European areas (the internal

5. According to some Belgian media, the criminal proceedings against the natural persons involved have meanwhile been considerably delayed.

6. College van Beroep voor het bedrijfsleven (CBb), 4 Mar. 2014, NL:CBB:2014:67.

7. Brussels Court of Appeal, 24 Sept. 2015, *Internationaal tijdschrift voor ondernemingsrecht/DAOR* 2015/4, No. 116, 48, para 150. See also <www.ageas.com/news room/regulated-information-brussels-appeal-court-reduces-fine-imposed-fsma>, (last visited 10 Sept. 2018).

8. Apparently, FSMA did halt part of the proceedings of its own motion.

9. The Belgian court decision does not explicitly mention which legal provision, guaranteeing the principle, was used.

10. Vervaele and Luchtman, op, cit. *supra* note 4, p. 338.

market, the Area of Freedom, Security and Justice), decisions made by authorities from one specific jurisdiction may have consequences for those in others. On the other hand, however, in many areas of EU law, effective mechanisms for cooperation between the many authorities involved and thus for preventing such situations from occurring are still lacking at the national level, let alone the transnational level.[11] This means that further accidents and arbitrary results – forum shopping by defendants or by authorities, for instance, or the inefficient use of investigative and prosecutorial resources – are scenarios waiting to happen. Potentially, we could even face situations where a minor administrative fine in one legal order may annul years of work in the preparation for a significant criminal prosecution in another.

How to overcome this dilemma will be a true challenge for the European legal order for the years ahead. In this article, an analysis of the background and scope of the *ne bis in idem* principle is presented, with a particular focus on its relevance in the transnational setting. For that, an attempt will be made to explain the much criticized, apparent differences in approach towards the principle in competition law and the Schengen *acquis* (section 2). After that, an analysis and critique of the case of *A and B* v. *Norway* in 2016 (section 3.1.)[12] and the recent responses of the ECJ are given.[13] Although the ECJ has revealed some aspects of its position and has apparently sought to coordinate its approach with that of the Strasbourg Court, many elements are still unclear. The main part of this article will be dedicated to two issues of particular importance for the issues introduced above. In section 3.2., the relationship between the degree of protection offered by the *ne bis in idem* guarantee of Article 50 CFR (and, potentially, other Charter rights) and the degree of the harmonization of EU law will be analysed. Moreover, it is vital to explore the relevance of the guarantee specifically for transnational combinations of administrative and criminal proceedings or sanctions (section 4). In doing all of this, one cannot ignore the apparent frictions and tensions between the ECJ's approach, which has given the Charter a broad scope (including the rights that are associated with criminal justice) in *Åkerberg Fransson,*[14] and some of the national (constitutional) courts, which seem to be increasingly concerned with that approach, as the domain of criminal justice is not considered to belong to the core of the EU's competences, but rather to that of the nation State. As demonstrated below, the ECJ's approach in the *ne bis in*

11. See Luchtman, *European Cooperation between Financial Supervisory Authorities, Tax Authorities and Judicial Authorities* (Intersentia, 2008).

12. ECtHR, *A and B* v. *Norway*, Appl. Nos. 24130/11 and 29758/11, judgment of 15 Nov. 2016.

13. Case C-524/15, *Luca Menci*; Joined Cases C-596 & 597/16, *Di Puma and Zecca*; Case C-537/16, *Garlsson Real Estate.*

14. Case C-617/10, *Åkerberg Fransson*, EU:C:2013:280.

idem cases (and other recent cases concerning Charter rights) may be regarded as a way to ease this tension.

2. Background and scope of the principle in Europe

The background of the *ne bis in idem* principle is quite diverse, diverging from country to country. As is well known, it essentially protects two different types of interests, both related to the principle of legal certainty.[15] First of all, it protects the "integrity" of the first (court) ruling on a given matter (*res iudicata*); later rulings on the same set of facts, in a case against the same person, and thus the possibility of contradictory verdicts on the matter, should be prevented. Secondly, the principle has developed into a fundamental right, protecting the interests of individuals. In the transnational setting of the Area of Freedom, Security and Justice, Article 54 CISA for instance ensures "that a person whose trial has been finally disposed of is not prosecuted in several Contracting States for the same acts on account of his having exercised his right to freedom of movement, the aim being to ensure legal certainty — in the absence of harmonization or approximation of the criminal laws of the Member States — through respect for decisions of public bodies which have become final."[16]

The importance one attaches to the specific rationales of the principle inevitably has consequences for its design and effects in a specific legal order. Where the principle primarily protects the integrity of a first final decision, it makes sense to assume that it will primarily protect a *court* decision on the matter (a criminal case), and that both sets of proceedings essentially relate to the same judicial activities (the assessment of the facts and, particularly, the determination of their legal qualifications – the *crimen* – and their consequences).[17] Yet where the emphasis is put on the protection of the

15. See Eser and Burchard, "Interlokales '*ne bis in idem*' in Europa? Von 'westfälischem' Souveränitätspathos zu europäischem Gemeinschaftsdenken" in Derra, *Freiheit, Sicherheit und Recht: Festschrift für Jürgen Meyer zum 70. Geburtstag* (Baden-Baden, 2006), pp. 499–524; Floinn, "The concept of idem in the European courts: Extricating the inextricable link in European double jeopardy law", 24 CJEL (2017), 75–109; Luchtman, "Transnational law enforcement in the European Union and the *ne bis in idem* principle", 4 REALaw (2011), 5–29; Mansdörfer, *Das Prinzip ne bis in idem im europäischen Strafrecht* (Duncker & Humblot, 2004); Van Bockel, *The "Ne Bis in Idem" Principle in EU Law* (Kluwer Law International, 2010); Vervaele, "The transnational *ne bis in idem* principle in the EU – Mutual recognition and equivalent protection of human rights", *1 Utrecht Law Review* (2005), 100–118.

16. Case C-486/14, *Kossowski*, EU:C:2016:483, para 44.

17. See the dissenting Judge Pinto de Albuquerque, paras. 35 and 39, in ECtHR, *A and B* v. *Norway*.

expectations legitimately raised on the side of defendants, the principle will as a rule have a much broader scope.

Despite the many and considerable differences that exist between different States, the ECtHR has given the principle, as laid down in Article 4 of Protocol 7 ECHR, a broad scope. It contains three distinct guarantees and holds that no one should be liable to be tried or punished for the same offence twice. It is immaterial whether the first set of proceedings resulted in a conviction.[18] The scope of the guarantee, as interpreted by the ECtHR, is therefore broader than only the avoidance of a double punishment. It also prohibits a second prosecution or trial for the same offence. The three guarantees exist cumulatively, not alternatively.[19] Article 4 of Protocol 7 ECHR is a non-derogable right, as meant in Article 15 ECHR.[20]

The relationship between the principle and the right to a fair trial has been the subject of debate. The ECtHR has never acknowledged specifically – rather, it has denied – that the guarantee is rooted in the right to a fair trial.[21] Presumably, this is because the guarantee in and of itself involves no qualification of the fairness of the first set of proceedings and aims to prevent the second set before they can even start.[22] Nonetheless, the mere possibility of multiple proceedings for the same set of events, against the same persons, will inevitably have a bearing on defence strategies – and the exercise of procedural rights, such as the right to silence – deployed in either proceedings. This is why it is correct that the ECtHR links the principle to the more abstract notion of "due process", a notion which in itself is not a Convention right.[23] From this perspective, it is also understandable that the ECtHR explicitly links the guarantee to the so-called *Engel* criteria for the determination of whether proceedings are "criminal". It further means, by implication, that the elements of foreseeability which the ECtHR introduced in *A and B* v. *Norway* (see section 3 below) relate to the possibility for defendants to determine their defence strategy, even more than to their ability to know in advance whether their actions (or inactions) constitute criminal offences and are liable to sanctions.

18. EctHR, *A and B* v. *Norway*, para 110.

19. On the relationship between the three guarantees, see Van Bockel, op. cit. *supra* note 15, pp. 30–36.

20. Art. 4(3) of Protocol 7 ECHR.

21. ECtHR, *Ponsetti and Chesnel* v. *France*, Appl. Nos. 36855/97 and 41731/98, judgment of 14 Sept. 1999; but see also ECtHR, *Nikitin.*v. *Russia*, Appl. No. 50178/99, judgment of 20 July 2004.

22. Floinn, op. cit. *supra* note 15, 103–108; Van Bockel, op, cit. *supra* note 15, p. 25; Trechsel, *Human Rights in Criminal Proceedings* (OUP, 2005), p. 385.

23. ECtHR, *A and B* v. *Norway*, para 107.

For the purposes of the application of the *ne bis in idem principle*, four conditions must be satisfied: (1) the person prosecuted or on whom the penalty is imposed is the same, (2) the acts being judged are the same (*idem*), (3) there are two sets of proceedings in which a punitive penalty is imposed (*bis*), and (4) one of the two decisions is final.[24] As said, the principle only applies to punitive procedures/penalties, as defined by the ECtHR and ECJ in the famous *Engel* and, subsequently for the EU, *Bonda* cases.[25] The concept of "idem" has meanwhile been defined by the ECJ as "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."[26] The Strasbourg Court later also adopted this approach in *Zolotukhin*[27] and has not changed it since.

There are differences in the scope of the principle as put forward by its different international or supranational sources, particularly Article 4 of Protocol 7 ECHR on the one hand, and Articles 54–58 CISA and 50 CFR on the other. Article 4 of Protocol 7 ECHR explicitly links the application of the principle to the legal orders of the individual signatory States.[28] The scope of the corresponding Charter provision and Article 54 CISA is much wider: "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" (my emphasis).

The ECJ's case law on Articles 54–58 CISA (which, according to the explanatory notes to the Charter, inspired the scope and content of Art. 50 CFR) has already pointed out that these articles have become a part of the Area of Freedom, Security and Justice and are to be interpreted accordingly; Article 3(2) TEU states that "the European Union is to offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with regard to, amongst other matters, the prevention and combating of crime." Therefore "the interpretation of the final nature, for the purposes of Article 54 of the CISA, of a decision in criminal proceedings in a Member State must be undertaken in the light not only of the need to ensure the free

24. Opinion of A.G. Campos Sánchez-Bordona in Case C-596/16, *Enzo di Puma*, EU:C:2017:669, para 53.

25. ECtHR, *Engel and Others* v. *The Netherlands*, Appl. Nos. 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72, judgment of 8 June 1976; Case C-489/10, *Łukasz Marcin Bonda*, EU:C:2012:319, discussed by De Moor-van Vugt, "Administrative sanctions in EU law", (2012) REALaw (2012), 5–41.

26. Case C-436/04, *Van Esbroeck*, EU:C:2006:165, paras. 36 and 38; Case C-367/05, *Kraaijenbrink*, EU:C:2007:444.

27. ECtHR, *Sergey Zolotukhin* v. *Russia*, Appl. No. 14939/03, judgment of 10 Feb. 2009, para 84.

28. ECtHR, *Krombach* v. *France*, Appl. No. 67521/14, judgment of 20 Feb. 2018.

movement of persons but also of the need to promote the prevention and combating of crime within the Area of Freedom, Security and Justice.[29]

Already in 2004, Vervaele noted that by choosing this course, the Court of Justice provided a strong impetus for integration in the area of criminal law.[30] Within the Schengen setting, there is no doctrine of dual jurisdictions, such as in the United States, in which decisions at the federal level do not in principle affect those at State level. Rather, in light of the apparent will of the EU Member States to introduce a transnational *ne bis in idem* standard (regardless of the degree of harmonization of their criminal laws) and in light of the rationale of the free movement of persons, decisions taken within the administration of justice in one legal order now have binding effects in other EU States and they prompt close consultation and cooperation.

It is all the more surprising that the ECJ does not seem to take the same approach in matters of competition law. Whereas the ECJ has removed legal qualifications (diverging from State to State) from the definition of the concept of "*idem*" in the Schengen case law, in competition law it uses a different criterion: "[a]s regards observance of the principle *ne bis in idem*, the application of that principle is subject to the threefold condition of identity of the facts, unity of offender and unity of the legal interest protected. Under that principle, therefore, the same person cannot be sanctioned more than once for a single unlawful course of conduct designed to protect the same legal asset."[31] Clearly, the criterion of the legal interest appears to be at odds with the Schengen case law. This apparent inconsistency has been widely criticized.[32]

Indeed, it is not clear what the ECJ wishes to express with this additional criterion. However, is it really (a) a way of limiting the scope of the *ne bis in idem* principle itself, or rather (b) an attempt to limit the scope of the EU legal order (including, nowadays, the Charter; Art. 51(1) CFR) and to delineate it from national competition law,[33] or (c) a criterion to allocate, within the scope of EU law, responsibility for, *inter alia*, fundamental rights protection among the various components of the European shared legal order, comprised of the EU and its Member States? Presumably, it is either one of the last two options and probably the third. Already in *Walt Wilhelm*, the Court held that:

29. Case C-486/14, *Kossowski*, paras. 46–47.

30. Vervaele, annotation of Joined Cases C-187 & 385/01, *Criminal proceedings against Hüseyin Gözütok and Klaus Brügge*, EU:C:2003:87, 41 CML Rev. (2004), 795–812; see also Vervaele, op. cit. *supra* note 15.

31. Joined Cases C-204, 205, 211, 213, 217 & 219/00 P, *Aalborg Portland and Others* v. *Commission*, EU:C:2004:6, para 328; confirmed in Case C-17/10, *Toshiba*, EU:C:2012:72, para 97.

32. Van Bockel (Ed.), *Ne Bis in Idem in EU Law* (Cambridge University Press, 2016), pp. 141–145, 157–161 and 240–242, with further references.

33. This position is forcefully rejected by Nazzini in Van Bockel, ibid., pp. 157–161.

> "the acceptability of a dual procedure of [national and EC competition law] follows in fact from the special system of the sharing of jurisdiction between the Community and the Member States with regard to cartels. If, however, the possibility of two procedures being conducted separately were to lead to the imposition of consecutive sanctions, a general requirement of natural justice . . . demands that any previous punitive decision must be taken into account in determining any sanction which is to be imposed."[34]

This is a different situation from criminal law *sensu stricto* where the EU and its Member States established a common Area of Freedom, Security and Justice and opted, *inter alia* by integrating the Schengen Agreements in the *acquis*, for a strong integrative approach (at least as perceived and consequently stimulated by the ECJ). By contrast, the lack of a sufficiently strong legislative framework indicating the scope of the guarantee in transnational competition cases – involving multiple legal orders – seems to be the essential difference with the Schengen setting.[35]

3. The ECtHR's new approach in *A. and B.* v. *Norway*

Recently, a great deal of debate has arisen around the concept of "*bis*", particularly in the relationships between criminal and administrative law proceedings. *A. and B.* v. *Norway* involved a combination of tax and criminal proceedings, including punitive tax sanctions. In this case, tax audits in 2005 were followed by reports to the judicial (criminal) authorities in October 2007, leading to indictments for tax fraud at the end of 2008 and convictions in early March 2009, respectively November 2009. Those convictions were upheld on appeal and, in the case of *A*., after proceedings before the Supreme Court. The criminal convictions became final in September, respectively, October 2010. Meanwhile, the tax authorities amended the tax assessment and imposed tax penalties of 30 percent at the end of 2008. It was not in dispute that the facts in both sets of proceedings were essentially the same. The decision of the tax authorities was based in part on statements by the applicants in the criminal proceedings. The tax decisions became final in December 2008, less than two years before the criminal proceedings. At first sight, this was a clear violation of the *ne bis in idem* principle.

However, after intense pressure by the signatory States, the ECtHR mitigated the scope of the principle by redefining the concept of "*bis*".

34. Case 14/68, *Walt Wilhelm*, EU:C:1969:4, para 11.
35. Van Bockel, op. cit. *supra* note 32, pp. 141–145, 157–161 and 240–242.

Essentially, the ECtHR held that – depending on whether combinations of criminal and administrative law penalties are sufficiently connected in substance and time – those combinations may not constitute two distinct, consecutive sets of proceedings ("*bis*"), but are better considered as one and the same procedure, thereby precluding the application of the principle.[36] The Grand Chamber of the ECtHR also defined the material factors for determining whether there is such a sufficiently close connection in substance, namely:

- whether the different proceedings pursue complementary purposes and thus address, not only *in abstracto* but also *in concreto*, different aspects of the social misconduct involved;
- whether the duality of the proceedings concerned is a foreseeable consequence, both in law and in practice, of the same impugned conduct (*idem*);
- whether the relevant sets of proceedings are conducted 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 so that the establishment of facts in one set is also used in the other set;
- and, above all, whether the sanction imposed in the proceedings which became final *first* is taken into account in those which become final *last*, so as to prevent the individual having to bear an excessive burden; this risk is least likely to be present where there is an offsetting mechanism in place that is designed to ensure that the overall amount of any penalties imposed is proportionate.[37]

As regards the first criterion, combined proceedings will more likely meet the criteria of complementarity and coherence if the sanctions to be imposed in the proceedings not formally classified as "criminal" are specific for the conduct in question and thus differ from "the hard core of criminal law",[38] which must refer to *Jussila* v. *Finland*.[39] Nonetheless, the ECtHR did not incorporate the notion of the "hard core of criminal law" in the *ne bis in idem* safeguard; instead, it ruled that "the order in which the proceedings are conducted cannot be decisive of whether dual or multiple processing is permissible under Article 4 of Protocol No. 7 …".[40]

36. ECtHR, *A and B* v. *Norway*.
37. Ibid., para 132.
38. Ibid., para 133.
39. ECtHR, *Jussila* v. *Finland*, Appl. No. 73053/01, judgment of 23 Nov. 2006, para 43.
40. ECtHR, *A and B* v. *Norway*, para 128.

Eventually, the ECtHR concluded on the basis of these criteria that in both cases[41] no violation of Article 4 of Protocol 7 could be established, because:

> – there was no cause to call into doubt either the reasons why the Norwegian legislature opted to regulate the socially undesirable conduct of the non-payment of taxes in an integrated dual (administrative/criminal) process or the reasons why the competent Norwegian authorities chose to deal separately with the more serious and socially reprehensible aspect of fraud in a criminal procedure rather than in the ordinary administrative procedure;
> – the conduct of dual proceedings, with the possibility of different cumulative 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; – 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 taken the tax penalty into consideration.[42]

The judgment was vehemently criticized by dissenting judge Pinto de Albuquerque, on all parts of the majority's reasoning.[43] The dissenting judge was critical, first of all, because the dividing line between the hard core of criminal law and other types of irregularities has always been a particularly problematic issue, certainly in light of the consequences that may follow from this division in terms of different levels of the protection of fundamental rights.

The dissenting judge also, and rightly, stressed that the issue of foreseeability is – as it is now applied – an empty shell. Criminal offences and sanctions, as defined by the Strasbourg organs, will always have to meet the requirements of foreseeability; that already follows from Article 7 ECHR. What needs to be foreseeable is the double proceedings, but hardly any consideration was given by the majority to that condition and the choices to be made by the cooperating authorities in that respect (with a view to preventing arbitrary outcomes). In fact, as the dissenting judge noted, the applicable

41. With respect to *B* the GC came to the same conclusion, after having explained why the delay in the criminal proceedings did not alter this outcome, ECtHR, *A and B* v. *Norway*, para 151.

42. Ibid., para 146.

43. See also Csúri and Luchtman in Ligeti and Marletta (Eds.), *Liability of Company Directors in a Comparative EU Criminal Justice Context* (Luxembourg University, forthcoming).

national guidelines were apparently not followed in this case. From that point of view, the Grand Chamber's approach also raises questions in light of the Strasbourg case law, particularly *Camilleri* v. *Malta*.[44]

As regards the issue of the avoidance of unnecessary duplications, the dissenting judge argued that the approach chosen by the majority poses challenges to the (overall) authority of the State (because of the risk of contradictory decisions) and removes barriers to forum shopping and manipulations by the authorities. One could add to that criticism that the arguments put forward by the majority could just as easily have been applied in the opposite direction and therefore do not have true argumentative force. The ECtHR emphasizes that the complementarity of the proceedings is essential to prevent a *bis in idem* situation. But now that coordination and cooperation are so strongly promoted, why should those authorities not be given the joint responsibility to prevent or stall dual proceedings in the first place? This point is returned to below.

Finally, as regards the offsetting mechanism designed to ensure that the overall amount of any penalties imposed is proportionate, this criterion can only be of assistance in those cases where the first set of proceedings led to the application of sanctions.

All in all, the question arises as to what has been gained with the new approach.[45] The new approach did not take away the concerns of many Member States regarding the impact of the *ne bis idem* principle on the organizational set-up of their legal orders; it still requires a large degree of coordination and cooperation between the authorities involved.[46] But this, as said, is capable of creating abuses. Moreover, we now have a criterion that is extremely difficult to apply in individual cases, because of the vagueness of the terms used. Thus, the new case law appears incredibly difficult to apply, but the "gains" for States are not very clear and the position of the individual has become increasingly complicated. Finally, the sudden change in approach potentially also brings about important changes for the European Union. Is the alignment of the case law of the two European Courts not important in and of itself? Did the Strasbourg Court take into account the institutional specificities of the European Union, including the differences in scope of Article 4 of Protocol 7 ECHR and Article 50 CFR? In fact, how can this case law be applied in such a complicated institutional setting?

44. ECtHR, *Camilleri* v. *Malta*, Appl. No. 42931/10, judgment of 22 Jan. 2013.

45. Meyer, op. cit. *supra* note 2.

46. This is also illustrated in ECtHR, *Jóhannesson and Others* v. *Iceland*, Appl. No. 22007/11, judgment of 18 May 2017.

4. Follow-up in the European Union

4.1. *Ne bis in idem and VAT cases*

Obviously, *A and B* v. *Norway* did not go unnoticed in the EU Member States. Given the possible overturning of *Grande Stevens* v. *Italy* (a market abuse case following the principles established in the above-mentioned case *Zolotukhin*),[47] four Italian cases were referred to the ECJ, all of them dealing with the issue of whether the new approach of the ECtHR would have consequences for European Union.[48] Essentially all four Italian cases revolve around the compatibility of combinations of criminal law and administrative law (punitive) sanctions with Article 50 CFR. One of these cases concerns the protection of the EU's financial interests, the other three are related to the area of market abuse.

As the Explanation to Article 50 CFR indicates, regarding the situations referred to by Article 4 of Protocol No. 7 (i.e. 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. However, Article 53(3) CFR also stipulates that that provision shall not prevent Union law from providing more extensive protection. So, what should be the EU's course after *A and B* v. *Norway*?

In *Luca Menci*, upon an alleged failure to pay VAT within the time limit, Mr Menci was ordered to pay the VAT that was due. The tax authorities also imposed an administrative penalty of almost €85,000 on him, representing 30 percent of the tax debt. In November 2014, criminal proceedings concerning the same facts were commenced, long after the tax proceedings had become final. Obviously, the question was whether this situation was in line with Article 50 CFR, as interpreted in light of Article 4 of Protocol 7 ECHR.

The Grand Chamber of the ECJ started – in line with its own case law[49] – by stating that the Charter is indeed applicable in this situation and immediately stressed that, although Article 52(1) CFR aims to ensure the necessary consistency between the Charter and the ECHR, due account must be taken of the autonomy of Union law and that of the Court of Justice of the European Union. That means that the issue must be examined in the light of the fundamental rights guaranteed by the Charter and, in particular, Article 50

47. ECtHR, *Grande Stevens and Others* v. *Italy*, Appl. Nos. 18640/10, 18647/10, 18663/10, 18668/10 and 18698/10, judgment of 4 Mar. 2014; *Sergey Zolotukhin* v. *Russia*, Appl. No. 14939/03.

48. Case C-524/15, *Luca Menci*; Joined Cases C-596 & 597/16, *Di Puma and Zecca*; Case C-537/16, *Garlsson Real Estate.*

49. Case C-617/10, *Åkerberg Fransson*; Case C-42/17, *M.A.S. and M.B*. ("*Taricco II*"), EU:C:2017:936.

CFR. The *ne bis in idem* principle, according to the ECJ, prohibits a duplication of proceedings, as well as of penalties of a criminal nature for the same acts and against the same person.[50]

After having established – unsurprisingly – that the automatic tax surcharges were indeed criminal by nature, and that the two types of (fiscal and criminal) proceedings concern the same offence (*idem*), a series of interesting observations were made. The ECJ confirmed, consistent with its own Schengen case law,[51] that the legal classification under national law of the facts and the legal interest protected are not relevant for the purposes of establishing the existence of the same offence. This is because the scope of the protection conferred by Article 50 of the Charter cannot vary from one Member State to another.[52] The fact that the imposition of a criminal penalty depends on an additional constituent element in relation to the pecuniary administrative penalty of a criminal nature is therefore not capable of calling into question the identity of the material facts at issue. This is the first time that the Schengen case law and its reasoning have been applied in a purely national setting.

The Court subsequently recognized that the combination of proceedings in *Menci* amounted to a limitation of Article 50 CFR, calling for a justification on the basis of Article 52 CFR.[53] Here, the ECJ clearly deviates from the approach of the Strasbourg Court, which does not recognize such combinations as a limitation of the principle, but rather excludes such combinations from the scope of the principle; according to the ECtHR, they are not considered to be a *bis*. Precisely because of that difference, it is important to stress that the ECJ does establish a higher *ne bis in idem* threshold than the ECtHR, although the ECJ itself makes no mention of that difference, nor does it refer to the aforementioned final sentence of Article 52(3) CFR. According to the ECJ, such combinations do amount to a *bis*.

Limitations of the right are however not automatically breaches of it. In accordance with Article 52(1) CFR, limitations on the exercise of the Charter rights and freedoms must be provided for by law and respect the essence of those rights and freedoms. Limitations to those rights and freedoms may only be made if they are necessary and genuinely meet objectives of general interest, as recognized by the Union, or the need to protect the rights and freedoms of others. Yet unlike Advocate General Campos Sánchez-Bordona who was of the opinion that the Italian law, as applied in *Menci*, was probably

50. Case C-524/15, *Luca Menci*, paras. 23–25.
51. See *supra* section 2.
52. Case C-524/15, *Luca Menci*, para 36.
53. I assume that the difference must also be seen in light of the fact that Art. 4 of Protocol 7 ECHR is a non-derogable right.

not capable of respecting the essence of the guarantee (thereby suggesting that the same might be true for the Strasbourg case law),[54] the ECJ quickly dismissed any concerns as to the legal basis or the essence of the guarantee.[55] It merely, and almost apodictically,[56] stated that the possibility of duplicating criminal proceedings and penalties and administrative proceedings and penalties of a criminal nature was provided for by the law,[57] though it remains unclear what type of legality the ECJ was referring to here and why a correct legal basis is important.[58]

The Court subsequently accepted that an accumulation of proceedings or sanctions in order to ensure the collection of VAT can be considered as an objective of general interest, provided that the proceedings and sanctions have complementary aims and relate to different aspects of the same unlawful conduct. Interestingly, however, in the following assessment of the proportionality of such accumulations, the requirement of subsidiarity was not strictly tested by the ECJ. Rather, account appears to be taken of the specificities of the shared European legal order. In a manner which is reminiscent of the approach in *M.A.S. and M.B.*,[59] the ECJ noted that Member States are currently free to choose the applicable penalties in order to ensure that all VAT revenue is collected. In the absence of harmonization of EU law in the matter, the proportionality of national legislation cannot be called into question by the mere fact that the Member State concerned has made the choice to provide for the possibility of such a duplication, as otherwise that Member State would be deprived of that freedom of choice.[60]

In leaving the Member States with a margin of discretion with respect to the appropriateness of their legislative choices, the ECJ has however imposed conditions as to the strict necessity of combinations of criminal proceedings and sanctions. All in all, Article 50 CFR does not preclude a duplication of proceedings or sanctions, but only on condition that that legislation:

– pursues an objective of general interest which justifies such a duplication of proceedings and penalties, namely combating VAT

54. Opinion of A.G. Campos Sánchez-Bordona in Case C-524/15, *Luca Menci*, EU:C:2017:667, paras. 82–93. Further on in his Opinion, the A.G. took the position that *Menci* is to be distinguished from ECtHR case, *A and B* v. *Norway*, due to the lack of a clear material and temporal connection between the proceedings, paras. 124 et seq.

55. It is not clear to me why the Court made no reference to (Art. 6 of) Regulation 2988/95 on the protection of the European Communities financial interests, O.J. 1995, L 312/1.

56. For a further analysis, see Meyer, op. cit. *supra* note 2, sub. IV.2.

57. Case C-524/15, *Luca Menci*, paras. 42–43.

58. Is it related to the *maxim nullum crimen nulla poena sine lege*, or *nullum judicium sine lege*? This is relevant, because it brings about different consequences as to what must have a clear legal basis; see remarks on this *supra* section 2.1.

59. Case C-42/17, *M.A.S. and M.B.* ("*Taricco II*"), paras. 43 and 59–61.

60. Case C-524/15, *Luca Menci*, paras. 47–48.

offences, it being necessary for those proceedings and penalties to pursue additional objectives. As the ECtHR had done, the ECJ also stressed the importance of clear and precise rules in this regard, so that individuals can predict which acts or omissions are liable to be subject to such a duplication of proceedings and penalties.[61]
– contains rules ensuring coordination which limits to what is strictly necessary the additional disadvantage which resultsfrom a duplication of proceedings for the persons concerned, and
– provides for rules making it possible to ensure that the severity of all of the penalties imposed is limited to what is strictly necessary in relation to the seriousness of the offence concerned.[62]

The picture that emerges from the foregoing is that the ECJ takes a different approach from the ECtHR, though in the end the results may not be that different. The principle of *ne bis in idem* is clearly presented as a common EU right or principle. It appears to protect, first and foremost, the legal certainty of individuals. It requires a common definition of its constituent elements throughout the EU, particularly the element of "*idem*". However, it also functions in a shared legal order, and is not absolute. National laws may limit the scope of the guarantee, but only under certain conditions and subject to ECJ supervision. The intensity of that supervision – and, hence, the leeway offered to the Member States and their authorities – is also dependent on the degree of harmonization.

Menci thus leads to some provisional reflections, assumptions and questions. It is noteworthy, first of all, that the ECJ limited its own analysis to an assessment of the Italian legislation, and refrained from an assessment of the actions of the Italian authorities on the basis of that legislation. Presumably, this approach was also warranted, as was the limited proportionality review under Article 52(1) CFR, by the fact that this case, though clearly within the scope of EU law, had little *specific* EU law for the ECJ to build on. Consequently, the ECJ found that it is up to the referring courts to decide[63] whether the *actual disadvantage* resulting for the person concerned from the application of the relevant national legislation and from the duplication of the proceedings and penalties that that legislation authorizes is *excessive* in relation to the seriousness of the offence committed.[64] No further criteria are given to the referring court to deal with that latter – very important – aspect of its work. What we can learn from the ECJ's analysis, however, is that it does not seem to find particularly important the fact that

61. Ibid., para 49.
62. Ibid., para 63.
63. Ibid., paras. 60–61.
64. Ibid., para 64.

there has been no coordination between the authorities involved.[65] The presence of a temporal connection between the proceedings was also not included in its assessment of the legislative framework. In fact, *Menci* is the only one of the four recent *ne bis in idem* cases in which the ECJ specifically mentions this element; only in *Menci* were the administrative proceedings concluded before the start of the criminal proceedings.

Moreover, it can be assumed that the relatively lenient approach towards the Italian tax system in this particular case was also chosen to accommodate the operation of more or less automatic systems of tax enforcement, at any rate *before* criminal prosecutions start.[66] This implies that there is room for combinations of proceedings that integrate automatic systems of sanctioning and proceedings that accommodate a more individualized, discretionary decision in light of the administration of criminal justice. But will the ECJ show the same amount of understanding in other areas of EU law (competition law or financial law, for instance), where specialized administrative bodies execute highly complex legal analyses and complicated investigations, resulting in significant pecuniary or other types of sanctions? Does the order in which the proceedings are executed make a difference? Will the ECJ case law become more stringent where EU law reduces the discretionary margins for the Member States with respect to combinations of punitive administrative and criminal proceedings in their legal systems? Is there a difference, moreover, between situations where dual proceedings run in parallel or consecutively? Three cases in the area of market abuse provide some answers to these questions, though certainly not to all of them.

4.2. *Ne bis in idem and market abuse: Directive 2003/6 (MAD-I)*[67]

The enforcement of tax law (VAT) and market abuse rules are not the same, certainly not if measured by the degree of harmonization of EU law. At least after 3 July 2016, the date on which the new Market Abuse Regulation (MAR) and the Market Abuse Directive (MAD-II) became effective, national laws and legal systems have been harmonized to a considerable extent. The new EU market abuse framework was however not yet in force at the time of the material events leading to *Garlsson Real Estate et al,*[68] and *Di Puma and Zecca*.[69] All three cases concern the imposition of considerable administrative

65. See, by implication, ibid., para 53.

66. The Court seemed to attach particular relevance to this in Joined Cases C-596 & 597/16, *Di Puma and Zecca,* para 43, comparing the facts of *Di Puma* to Case C-617/10, *Åkerberg Fransson* – a situation comparable on the facts to Case C-524/15, *Luca Menci*.

67. Directive 2003/6.

68. Case C-537/16, *Garlsson Real Estate*.

69. Joined Cases C-596 & 597/16, *Di Puma and Zecca*.

(punitive) fines by the Italian CONSOB, the competent Italian supervisor, after the initiation and final conclusion of criminal proceedings for the same offences – the situations thus differed from that in *Menci*. The criminal proceedings in *Di Puma* and *Zecca* eventually led to an acquittal by a criminal court before the conclusion of the administrative proceedings; the persons concerned in *Garlsson* were convicted by a criminal court before the administrative proceedings had come to an end.

In *Garlsson*, the CONSOB imposed, on 9 September 2007, an administrative fine of over €10 million for market manipulation. Appeals were lodged, but criminal proceedings were meanwhile instituted, leading to a conviction under (prison sentences, which were later mitigated and then pardoned). That conviction became final, with appeals on points of law in the administrative proceedings still pending. There was no discussion as to the fact that both proceedings concerned the same set of facts. Because of the confusion that arose after *A and B* v. *Norway* (in light of the prior judgment in *Grande Stevens*),[70] the Italian Court of Cassation referred the case to the ECJ.

The reasoning of the Grand Chamber of the ECJ followed that of *Menci*. After establishing the applicability of the Charter, it applied the *Engel*/*Bonda* criteria, finding that the CONSOB sanctions were indeed of a criminal law nature. It repeated its position with regard to the definition of "*idem*". Consequently, because the scope of the guarantees of Article 50 CFR had been clearly limited, it applied the same test, based on Article 52(1) CFR, as in *Menci*. It started by accepting the need for dual proceedings. In the same wording as in *Menci,* it accepted that a Member State may wish to, first, dissuade and punish any infringement, whether intentional or not, of the prohibition of market manipulation by imposing administrative penalties (set, as the case may be, on a flat-rate basis) and, second, to dissuade and punish serious infringements of such a prohibition, which have particularly negative effects on society and which justify the adoption of the most severe criminal penalties.[71] This position is surprising. Are these proceedings really of the same type? Market abuse investigations would seem to be of a different nature from punitive proceedings for the overdue payment of taxes. As said, the former type of investigations often entail considerable discretionary powers of the relevant authorities to open punitive investigations, as well as to perform complex analyses as to the legal qualification of certain facts.

Also in line with *Menci,* and despite the high degree of Europeanization in the area of market abuse, the ECJ recognized that the Member States still have the right under Directive 2003/6 to provide for either a system in which infringements of the prohibition of market manipulation may be subject to

70. ECtHR, *Grande Stevens and Others* v. *Italy*.
71. Case C-537/16, *Garlsson Real Estate*, para 47.

proceedings and penalties only once, or for a system allowing a duplication of proceedings and penalties. The ECJ therefore restated its position, as discussed above, that the proportionality of national legislation cannot be called into question by the mere fact that the Member State concerned has chosen to provide for the possibility of such duplication.[72] Indeed, in the absence of clear guidance by the EU legislature on what constitutes effective and dissuasive sanctions under Directive 2003/6, the ECJ may have been hesitant to take up this debate with the Member States.[73] This hesitation could also explain why the ECJ does not differentiate in its case law between administrative market abuse proceedings on the one hand and administrative proceedings for overdue VAT on the other.

However, an important addition to *Menci* follows from the remainder of the judgment, with regard to the necessity of the cumulation of proceedings and sanctions. Where administrative proceedings follow those of criminal justice, the bringing of those proceedings exceeds what is strictly necessary, at least when the criminal proceedings are capable of punishing the offence committed in an effective, proportionate and dissuasive manner. This will be so, specifically, where the market manipulation is of a certain seriousness and where the penalties include a custodial sentence and a criminal fine in a range which corresponds to that provided for in respect of the administrative fine.[74]

Moreover, as regards the duplication of sanctions, the Italian legal rule at issue (Art. 187l of the TUF[75]) merely seemed to provide that, where a criminal fine and an administrative fine of a criminal nature have been imposed for the same acts, the recovery of the former is limited to the part exceeding the amount of the second. Since the Italian rule, the ECJ continued, 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 appeared that it did not guarantee that the severity of all of the penalties imposed is limited to what is strictly necessary in relation to the seriousness of the offence concerned.

Garlsson confirms the concentric approach of the ECJ, to the extent that where criminal proceedings are capable of addressing the core of the harm done to society, the necessity of subsequent administrative proceedings will be questionable. That is the case, particularly, where the criminal proceedings

72. Ibid., para 49.

73. My guess is that the commotion surrounding the *Taricco I* and *II* cases (Case C-105/14, *Taricco*, EU:C:2015:555, Case C-42/17, *M.A.S. and M.B*. ("*Taricco II*")) will have strengthened the Court in this position. See also recently Case C-574/15, *Scaldione*, EU:C:2018:295.

74. Case C-537/16, *Garlsson Real Estate*, paras. 57–58.

75. Testo unico delle disposizioni in materia di intermediazione finanziaria, see Case C-537/16, *Garlsson Real Estate*, paras. 6–10.

tackle the most serious elements of the impugned actions and offer adequate sanctions to address the harm done. Therefore, the order in which the proceedings are conducted (and concluded) does apparently matter to the ECJ. Unfortunately, however, the ECJ does not really clarify this position. Is this a (procedural) manifestation of a ranking (similar to ECtHR *Jussila* v. *Finland*) between, on the one hand, the "hard core of criminal law", imputing a significant degree of stigma upon the offender for his acts, and lighter administrative offences, on the other hand? As mentioned above,[76] the ECtHR has rejected this approach. Is it related to the nature of criminal proceedings and the high level of safeguards they normally entail?[77] But if so, will this line of reasoning always apply, for instance also in out-of-court settlements or other types of simplified proceedings of criminal law *sensu stricto*? All of this remains unclear. Remarkably, moreover, the ECJ measures the seriousness of the criminal law pecuniary sanctions by comparing them to the available administrative (pecuniary) sanctions.

Whereas *Garlsson* covered the situation of a prior criminal law conviction (followed by an amnesty), in *Di Puma* administrative proceedings were continued after a criminal law acquittal on the same facts. The referral in *Di Puma* was a result of the fact that the ECJ itself had held in *Åkerberg Fransson* that combinations of tax penalties and criminal penalties may be examined in relation to national constitutional standards (and Art. 50 CFR),[78] which could lead to a finding that these combinations are contrary to such standards, *as long as the remaining penalties are effective, proportionate and dissuasive*.[79] The latter phrase suggested that the well-known *Greek Maize* criteria are capable of requiring national constitutional standards (and Art. 50 CFR) to be set aside. The case was further complicated due to an Italian provision extending to the proceedings for administrative fines the *res judicata* effects of factual conclusions made in the context of prior criminal proceedings.

In its considerations, the ECJ explicitly detached the discussion on the *res iudicata* effects from the *ne bis in idem* principle. Regarding the former, and in the absence of EU law regulating the effects of final decisions in criminal matters, the Court concluded that the *res judicata* effects of a national provision on the factual conclusions of a criminal judgment in relation to punitive administrative proceedings do not prevent the finding of violations of the legislation on insider dealing, nor do they hinder effective punishment, where, according to the terms of that judgment, the facts at issue are

76. See, by contrast, the ECHR position referred to in ECtHR, *A and B* v. *Norway,* cited *supra* note 40.

77. A hint of this is found in Joined Cases C-596 & 597/16, *Di Puma and Zecca*, para 28, where the Court noted that the final criminal decision followed adversarial proceedings.

78. This element was added in Joined Cases C-596 & 597/16, *Di Puma and Zecca*, para 20.

79. Ibid., para 36.

established.[80] That outcome, according to the Court, is also in line with Article 50 CFR. The principle of proportionality laid down in Article 52(1) CFR precludes punitive administrative proceedings where a final criminal judgment of acquittal has concluded that the alleged acts of insider dealing were not established. In such cases, the administrative proceedings clearly exceed what is necessary.[81] In light of the judgment in *Garlsson*, I am inclined to conclude that this finding would also have been reached without the specific characteristics of the Italian legislation assigning *res judicata* effect to criminal judgments in administrative proceedings.

4.3. *The new market abuse rules: MAR and MAD II*

Would these cases have led to different outcomes had they taken place under the new market abuse regime? And also: assuming a situation in which criminal proceedings followed punitive administrative ones (as in *Menci*), would that situation also be held to be in violation of Article 50 CFR? Two new legal instruments – a Regulation (MAR)[82] and a Directive (MAD II)[83] – now prescribe both administrative (punitive) sanctions for certain core violations of the regulation, as well as the duty for Member States to establish, as a minimum, criminal offences and sanctions for the most serious violations of the market abuse rules (provided they were committed with intent).[84] These duties overlap in their scope considerably. An exception to this dual track system of law enforcement is foreseen for those legal orders which already had criminal sanctions in place in July 2016 (Art. 30(1) MAR); those legal orders are excused from the duty to establish administrative sanctions.[85] Therefore, under the new system, Member States still use a dual system of enforcement for a significant part of the prohibited conduct in the new market abuse regime, but this system is now imposed by the EU legislature itself.

80. Ibid., para 35.

81. Ibid., paras. 43–44.

82. Regulation 596/2014 of 16 Apr. 2014 on market abuse (market abuse regulation), O.J. 2014, L 173/1.

83. Directive 2014/57/EU of 16 Apr. 2014 on criminal sanctions for market abuse (market abuse directive), O.J. 2014, L 173/79.

84. On the new system, see also Luchtman and Vervaele, "Enforcing the market abuse regime: Towards an integrated model of criminal and administrative law enforcement in the European Union?", 5 *New Journal of European Criminal Law* (2014), 192–221.

85. In such cases, however, they must ensure that appropriate measures are in place so that competent authorities have all the necessary powers to liaise with judicial authorities within their jurisdiction to receive specific information related to criminal investigations or proceedings commenced for possible infringements of this Regulation and provide the same to other competent authorities and ESMA to fulfil their obligation to cooperate with each other and ESMA for the purposes of this Regulation (Art. 25(1) MAR).

As regards the penalties, the Regulation prescribes the minimum amount of the maximum pecuniary penalties, also for natural persons (Art. 30 MAR). With regard to criminal offences, MAD II obliges Member States to introduce so-called minimum-maximum custodial sanctions with respect to natural persons, of at least four or two years, depending on the offence (Art. 7). The pecuniary sanctions are not harmonized. We can assume, however, that any of these sanctions are considered to be sufficiently effective and dissuasive by the EU legislature.

In light of the now mandatory system of dual enforcement, it is all the more striking that the Regulation itself provides no guidance on how this relates to Article 50 CFR. As for the Directive, it merely stipulates in the preamble that:

> "the scope of this Directive is determined in such a way as to *complement*, and ensure the effective implementation of, [the] Regulation. Whereas offences should be punishable under this Directive when committed intentionally and at least in serious cases, sanctions for breaches of [the] Regulation do not require that intent is proven or that they are qualified as serious. In the application of national law transposing this Directive, Member States should ensure that the imposition of criminal sanctions for offences in accordance with this Directive and of administrative sanctions in accordance with the Regulation . . . does not lead to a *breach* of the principle of *ne bis in idem*" (emphasis added).[86]

Moreover, the Directive's preamble also states

> "[w]ithout prejudice to the general rules of national criminal law on the application and execution of sentences in accordance with the concrete circumstances in each individual case, the imposition of sanctions should be proportionate, taking into account the profits made or losses avoided by the persons held liable as well as the damage resulting from the offence to other persons and, where applicable, to the functioning of markets or the wider economy."[87]

As regards the administrative sanctions, these, too, are to be applied in a proportionate fashion (Art. 31 MAR). However, neither the Regulation, nor the Directive provide criteria for achieving a proportionate response in cases of parallel proceedings.

86. Directive 2014/57/EU, preamble, recital 23.
87. Directive 2014/57/EU, recital 24.

Without doubt, the compatibility of this double track regime, now endorsed – even imposed – by the EU legislature, will be brought to the Court of Justice in due course. It is unclear if the changes in the legal regime will lead to a fundamentally different outcome. On the one hand, those who start from the position – as did the Court – that combinations of proceedings or sanctions do interfere with Article 50 CFR, may now want to apply a more stringent test of proportionality on the basis of Article 52 CFR. Now that the new EU system has aligned national systems of enforcement to a considerable extent, in order to create a truly EU level playing field,[88] the default position that there should be a uniform definition of the scope of the guarantee has also gained weight. By implication, there is also less room to facilitate deviations by national law.

On the other hand, however, the foregoing does not automatically mean that the new EU system cannot itself offer a sufficiently strong basis to deviate from the prohibition of a cumulation of (criminal) procedures and sanctions, as set out in Article 50 CFR. In the cases of March 2018, the ECJ seemed to be susceptible to arguments in favour of – what it presented as – a system of "automatic" administrative punitive sanctions, followed by more individualized criminal proceedings.[89] Indeed, the EU legislature's choice for a dual system cannot in itself lead to a finding of a violation of Article 50 CFR. Moreover, the wording of the preamble to the Directive hints at possible limitations of the principle; it recalls that *breaches* of Article 50 CFR must be prevented, suggesting that limitations of the principle may be acceptable, within the parameters of Article 52 CFR. Finally, despite the more far-reaching obligations for Member States on the basis of EU law, many of

88. Recital 71 of Regulation 596/2014 states: "a set of administrative sanctions and other administrative measures should be provided for to ensure a common approach in Member States and to enhance their deterrent effect." Relevant recitals in the new directive read:

> "(4) A well-functioning legislative framework in relation to market abuse requires effective enforcement . . . A new legislative act is therefore needed to ensure common minimum rules across the Union. (5) The adoption of administrative sanctions by Member States has, to date, proven to be insufficient to ensure compliance with the rules on preventing and fighting market abuse. (6) It is essential that compliance with the rules on market abuse be strengthened by the availability of criminal sanctions which demonstrate a stronger form of social disapproval compared to administrative penalties . . . (7) Not all Member States have provided for criminal sanctions for some forms of serious breaches of national law implementing Directive 2003/6/EC . . . Common minimum rules would also make it possible to use more effective methods of investigation and enable more effective cooperation within and between Member States . . . The absence of common criminal sanction regimes across the Union creates opportunities for perpetrators of market abuse to take advantage of lighter regimes in some Member States. The imposition of criminal sanctions for market abuse will have an increased deterrent effect on potential offenders. (8) 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."

89. Case C-537/16, *Garlsson Real Estate*, para 47.

the safeguards that the Court has assessed in its recent case law to prevent limitations from becoming breaches in the aforementioned cases are left to the national laws. It is still at that level where the problems ultimately need to be solved.

The first line of reasoning is to be preferred. The new regime has in fact changed the parameters to a decisive extent. The system of dual enforcement has, after all, become the main rule under EU law. There is little discretion left for Member States in that regard (save for the – limited – possibility of criminal law enforcement only). Both the Regulation and the Directive have also established minimum thresholds – unlike under Directive 2003/6 – of which the EU legislature itself opines that they make the administrative and criminal sanctions, each in and of themselves, sufficiently effective and dissuasive. Their application is to be proportionate to the seriousness of the violation. Clearly, this provides the Court with more specific criteria than before: an administrative response to alleged cases of market abuse can be considered to be sufficient in itself, according to the EU legislature.

Moreover, the national authorities – administrative and judicial – are encouraged to cooperate, nationally and transnationally under the new regime.[90] While it is true that there is, astonishingly, no specific *obligation* for the national supervisors and their national judicial counterparts to cooperate and share information (except where a Member State has opted for criminal law enforcement only), the relevant provisions of EU law, in combination with the duty of loyal cooperation, can be seen as adequate venues to prevent *bis in idem* situations from arising. It means, after all, that there are less intrusive alternatives available under the new EU system to realize the goals of the new market abuse system than by accepting limitations of the *ne bis in idem* guarantee. In light of the requirements of Article 52(1) CFR, it makes sense to assume that such alternatives are in principle to be used.

Therefore, the fact that cooperation between administrative and judicial bodies is promoted by EU law[91] may now work in the opposite direction from that under the Strasbourg case law.[92] Instead of providing for an argument that the proceedings are indeed still the same proceedings (hence, no "*bis*", and no

90. See Arts. 23(1), 27(2) and 32(2)(c) of Regulation 596/2014. Art. 23(1) uses rather unconditional wording: "Competent authorities shall exercise their functions and powers in any of the following ways: (a) directly; (b) in collaboration with other authorities or with the market undertakings; (c) under their responsibility by delegation to such authorities or to market undertakings; (d) by application to the competent judicial authorities."

91. Primary law (the duty of loyal cooperation), but also secondary law, see the references cited ibid.

92. It was already stated above that cooperation between the relevant authorities is not a very convincing argument for accepting a combination of proceedings in light of the *ne bis in idem* principle; *supra* section 3.1., *in fine*.

violation of Art. 4 of Protocol 7 ECHR), the possibility of cooperation can be seen as an important procedural guarantee to prevent unnecessary limitations of Article 50 CFR (at least in those legal orders where the opening of criminal or administrative proceedings is not mandatory and such cooperation does not unduly hamper ongoing investigations). It has to be conceded, however, that the procedural framework for that is not particularly precise and unconditional in its wording.

5. Transnational implications

A shared legal order and enforcement integration is not only defined by the interactions between the national and EU courts, and between the national and EU fundamental rights standards. At the executive operational level, such a shared order implies and seeks to stimulate the interaction between the many competent (EU or national) authorities involved, as decisions taken in one legal order (the EU or a Member State) affect the position of authorities and individuals in another, as in the *Fortis* case. It is this aspect that makes the *ne bis in idem* guarantee such a powerful instrument for enforcement integration. As Article 50 CFR has an EU-wide scope, both the principle itself, but also the justifications for its limitations need a narrative that fits the characteristics of this shared legal order.

However, the impact of the new *ne bis in idem* case law on transnational constellations has received little attention in the case law of European or national courts.[93] For the ECtHR, this comes as no surprise, because of the limited scope of Article 4 of Protocol 7 ECHR; that Article only binds individual signatory States. For the EU, this is of course different, now that Article 50 CFR holds that no one shall be liable to be tried or punished again in criminal proceedings if (s)he has already been finally acquitted or convicted within the Union. So, how precisely is the new case law of the ECJ to be applied in a transnational setting? No doubt the broad scope of the guarantee will inevitably lead to questions, for instance in situations where "light" administrative punitive proceedings in one legal order precede or follow "serious" criminal proceedings in another.

In the EU transnational setting – comprising both horizontal (State-State) relationships, as well as vertical interactions between the State level and the EU – the potential of the *ne bis in idem* principle is illustrated *par excellence* by the Schengen case law. After the incorporation of Articles 54–58 CISA in the former third pillar, the principle has after all been used by the Court in the

93. Meyer, op. cit. *supra* note 2, sub V.

horizontal relationships between EU States as a method to promote the principle of mutual recognition. Article 54 CISA aims to enhance European integration and, in particular, to enable the Union to become more rapidly an Area of Freedom, Security and Justice, and its objective is to maintain and develop this area.[94] It does so by ensuring that no one is prosecuted on the same facts in several Member States on account of his having exercised his right to freedom of movement. This is even the case where the first decision has been adopted without the involvement of a court and does not take the form of a judicial decision.[95] After all, if that had been different, then only defendants in the more serious cases would have enjoyed the protection of the guarantee enshrined in Article 54 CISA.[96]

What does seem to be required in the Schengen case law, however, is that final decisions are taken by "an authority required to play a part in the administration of criminal justice in the national legal system concerned."[97] This apparently excludes administrative punitive proceedings and sanctions imposed by administrative bodies from other Member States, from the scope of the Schengen arrangements. It could be, however, that some types of those proceedings are nonetheless covered by Article 54 CISA. The ECJ has extended the scope of numerous instruments of mutual recognition in criminal matters – pre- and post-Lisbon – to administrative proceedings, provided an appeal is open to a "court having jurisdiction in particular in criminal matters."[98] The latter criterion is an autonomous concept of EU law.

Also, in the vertical relationships between the EU and its Member States, the *ne bis in idem* principle is capable of becoming an essential building block for European integration. Unlike in the Schengen situation, where Articles 54–58 CISA trigger the application of the Charter, the Charter will in these types of situations be triggered by the inextricable link between the relevant area of EU law and national criminal law, regardless of whether it has been harmonized. Examples are found in, for instance, banking law or consumer law. Where provisions of national criminal law – the forgery of documents for instance or deception – are used to enforce norms of EU origin, Member States can after all be said to act within the scope of EU law (Art. 51(1)

94. Joined Cases C-187 & 385/01, *Gözütok and Brügge*, para 37; see also Case C-486/14, *Kossowski*.

95. Joined Cases C-187 & 385/01, *Gözütok and Brügge*, para 38.

96. Ibid., para 40.

97. Ibid., para 37; see also Case C-486/14, *Kossowski*, para 39.

98. Case C-60/12, *Marián Baláž*, EU:C:2013:733. This wording was also found in the Schengen Agreements in Art. 50, extending the scope of mutual legal assistance to the so-called *Ordnungswidrigkeiten*. It has been replaced by newer instruments and its wording has been included in those instruments.

CFR).[99] This means, for instance, that in the case of the Single Supervisory Mechanism (SSM) in banking law,[100] concurrent proceedings of the ECB and national criminal justice actors are certainly not excluded *per se* from the scope of Article 50 CFR.[101] The ECB has anticipated this and issued a decision on the disclosure of confidential information in the context of criminal investigations,[102] to ensure that the application of national procedural rules which apply to requests for information by judicial bodies are consistent with the general principles of EU law, particularly the principle of loyal cooperation. There is no need to explain that similar questions will emerge once the European Public Prosecutor's Office becomes operational in 2020.[103]

In all of these cases, we see new constellations of administrative proceedings interfering with criminal proceedings, both horizontally and vertically, outside the setting of the nation State. Equally, in all these cases there appears to be a clear link with EU law and, hence, the Charter, including Article 50 CFR. But will the Court also apply Article 50 CFR to these types of situations? How can one justify a limitation of the principle where the legal systems of the EU Member States (and the EU itself) are not always aligned, and authorities are simply not always aware of the transnational implications of their proceedings (possibly connected with other jurisdictions)? After all, where such justifications are not available, a breach of the principle is imminent and solutions for that will certainly not be readily available. Vice versa, the more such limitations are accepted, the lower the need for authorities with a different (administrative or criminal law) status and from different countries to cooperate and, hence, the lower the integrative thrust of the guarantee will be. Precisely these circumstances – the fact that the guarantee

99. Case C-617/10, *Åkerberg Fransson*, para 28. Van Bockel appears to be less certain: see Van Bockel, "The Single Supervisory Mechanism Regulation: Questions of *ne bis in idem* and implications for the further integration of the system of fundamental rights protection in the EU", 24 MJ (2017), 194–216. Indeed, it must be admitted that in VAT cases the Court has also established (though not explicitly in *Åkerberg Fransson*) – on the basis of Art. 325 TFEU – an obligation for Member States to use criminal law enforcement in certain serious cases.

100. Council Regulation 1024/2013 of 15 Oct. 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, O.J. 2013, L 287/63.

101. Of course, much depends on what facts are under investigation and who are the alleged perpetrators. For an overview of the interaction between the SSM system and criminal justice, see Allegrezza and Voordeckers, "Investigative and sanctioning powers of the ECB in the framework of the Single Supervisory Mechanism: Mapping the complexity of a new enforcement model", 4 EUCRIM (2015), 151–160.

102. Decision 2016/1162 of 30 June 2016 on disclosure of confidential information in the context of criminal investigation, O.J. 2016, L 192/73.

103. Council Regulation 2017/1939 of 12 Oct. 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ("EPPO"), O.J. 2017, L 283/1.

may be applicable in a transnational setting and that limitations of the principle (which are not that difficult to imagine) would then need sufficient justification – make the combination of administrative and criminal proceedings in a transnational setting a particularly pertinent issue, as is illustrated by the *Fortis* case in the introduction.

It is impossible to outline the many different scenarios that may arise here. The following can therefore only present a very rough outline of what could happen. From the outset, it is likely that the ECJ will indeed define the scope of the guarantee in the same way as it has done previously, in its Schengen case law and in the aforementioned cases of *Menci* and others. The Court, after all, clearly seeks to develop a common European standard. By implication, that also means that combinations of criminal and administrative punitive proceedings and sanctions come within the scope of Article 50 CFR, regardless of their transnational setting, and require justifications as limitations of the guarantee.

However, as the principles by which the ECJ has now designed the principle can be applied in a transnational setting, the same appears to hold true for the system of limiting the *ne bis in idem* principle. More precisely, the Court will presumably be reluctant to impose strict subsidiarity requirements upon the EU and its Member States, where EU law offers no guidance to the legal orders involved. The Court has shown that it is receptive of the argument that wider margins of appreciation are allowed where EU law is silent. That argument will even gain weight where the legal orders of different Member States are involved. In the absence of guidance by EU law, those legal orders will after all enforce the laws as they see fit and make different choices as to criminal, administrative or other means of law enforcement.

Also, as regards the strict requirements of proportionality laid down in Article 52(1) CFR, the Court has held that a cumulation of criminal proceedings or sanctions can be considered as an objective of general interest where those proceedings and penalties pursue complementary aims relating to different aspects of the same unlawful conduct at issue. The requirement of complementariness – the pursuit of additional objectives, in the words of the Court in *Menci* – cannot only be understood in a substantive fashion, but also in a more territorial fashion, linked to the many legal orders that together constitute the shared legal order of the EU and its Member States, including the common areas such as the internal market and the Area of Freedom, Security and Justice. In those areas, the achievement of those common goals is a joint responsibility for all the many different actors at the national and EU levels. In European Arrest Warrant cases, the ECJ's message has consistently been that judicial cooperation in the AFSJ is not a matter for sovereign States, but for judicial authorities in order to ensure the free circulation of court

decisions in criminal matters within an Area of Freedom, Security and Justice.[104]

By consequence, criminal proceedings and sanctions that involve multiple legal orders can be allocated over different legal orders (horizontally and vertically: EU and/or national), and can thus be said to protect different legitimate interests (assuming that the exercise of jurisdiction is indeed reasonable). Now, with respect to criminal law *sensu stricto*, the Schengen Agreements have made sure that this is no reason to limit the reach of the principle, but outside the scope of these agreements, this logic does not necessarily apply. If combinations of criminal and administrative proceedings from different jurisdictions occur, they can be said to pursue additional objectives, linked to different legal orders, capable in principle of justifying limitations of the *ne bis in idem* principle. This then confirms what in essence was already decided in *Walt Wilhelm*.[105]

It also remains to be seen whether, should the circumstances arise, the ECJ will also apply the logic of *Garlsson* and *Di Puma* – that, where criminal proceedings have already been concluded, administrative proceedings are in principle precluded – in a transnational setting.[106] It was already noted that the arguments behind that position are not really clear. At any rate, that line of reasoning would certainly facilitate the logic of Articles 54–58 CISA and its underlying goal, the realization of an Area of Freedom, Security and Justice. Final decisions from judicial bodies – including prosecutors and, possibly, some administrative bodies[107] – from other Member States thus preclude the possibility of later administrative proceedings or sanctions, and facilitate the free movement of persons. In fact, it would be an anomaly to accept that further criminal proceedings *sensu stricto* would be precluded in such cases on the basis of the Schengen Agreements, but not their administrative counterparts – arguably the least intrusive measures – from the same Member State (even though the latter type of proceedings are not necessarily within the scope of the Schengen Implementing Convention).

As for the possibility of an accumulation of sanctions, that situation was basically accepted by the ECJ in cases where administrative proceedings precede criminal proceedings. Should a conviction follow later, then the application of the principle of *Anrechung* is needed (as in *Walt Wilhelm*, which, perceived in this way, coincides with the logic of *Menci*). As is the case in purely national situations, a later acquittal under criminal law then seems to

104. Case C-477/16 PPU, *Kovalkovas*, EU:C:2016:861, para 41.

105. See *supra* section 2.

106. Disregarding the fact that both cases concerned decisions by criminal courts. The scope of Art. 54 CISA could be wider; see *supra* note 98.

107. *Supra* note 98.

be the most worrisome scenario, at least from the perspective of the defendant. Both European Courts – ECJ and ECtHR – seem to accept this situation.

The need to uphold a common European *ne bis in idem* approach, which also recognizes that limitations to the principle are necessary, is vital in Europe's shared legal order. The case law of the Court of Justice seems to make this possible, also where EU law is absent. At any rate, as held in *Menci*, it will be for the competent courts to ensure, taking into account all of the circumstances in the main proceedings, that the duplication of proceedings and sanctions is not excessive in relation to the seriousness of the offence committed. As explained above, the courts do not necessarily have to pay attention to the controversial criterion of a sufficient connection in time; this mainly plays a role in relation to the *ne bis in idem* principle in the national setting (Art. 4 of Protocol 7 ECHR).

However, in those situations where EU policy areas have been harmonized (particularly when indicating the jurisdictional reach of the legal orders involved, the types of enforcement, the (minimum-maximum) sanctions to be imposed, as well as the venues for cooperation), I see no reason to differentiate between purely national cases and transnational cases. As argued in the above, I submit that those situations call for a strict subsidiarity test. The legal possibilities to mutually share information and to coordinate investigations between authorities from different legal orders and of a different (administrative or criminal law) status, should be a decisive factor in this balancing test. Where possibilities for coordination are legally present, they should in principle be used to prevent *bis in idem* situations. In that way, the *ne bis in idem* principle also becomes a strong instrument for promoting European integration at the executive level.

One final remark remains. The ECJ stresses in its case law that, with regard to the requirement of strict necessity, the applicable legislation – national law – must provide for clear and precise rules allowing individuals to predict which acts or omissions are liable to be subject to such a duplication of proceedings and penalties. It was already indicated above that it is not clear whether and how the Court links this phrase to a principle of legality, if any at all.[108] In a transnational setting, it will be quite a challenge, to say the least, to know how and where one's actions are punishable under the large number of applicable (and often diverging) administrative and/or criminal laws. The development of a coherent defence strategy will consequently be very difficult. However, it was also noted that the requirement of clear and precise rules is not interpreted in a very strict manner. In a minimalist interpretation of the requirement (and the current case law certainly does not go far beyond that), the prediction of any duplication of proceedings and penalties can be

108. See s*upra* note 58.

said to be fulfilled already once an individual can simply know that his actions constitute an administrative offence, and a criminal offence. Likewise, in a transnational setting, one can argue that it suffices that – on the basis of a person's actions – that person is in the position to establish that he or she may be held liable in different European jurisdictions, i.e. that he or she may be held liable *somewhere* else in the EU. That does not necessarily mean that a person needs to know which *specific* legal orders are competent.[109] It is, however, a very thin line. On other occasions, I have argued that the European Union, which fosters its Area of Freedom, Security and Justice, as well as its internal market, should do more to facilitate the free movement of persons, by providing those persons with clear and precise rules as to which legal orders govern their affairs in criminal matters.[110]

6. Conclusions

The principle of *ne bis in idem* is a fundamental principle of criminal justice. However, the applicability of the principle, as enshrined in Article 4 of Protocol 7 ECHR and Article 50 CFR, to combinations of criminal and administrative punitive proceedings have also made it a very controversial one. Many European States deny its full applicability in those cases. Similar debates continue on the scope of the principle in a transnational situation. In many aspects, the principle has been a forerunner for fundamental rights in the European legal order, comprised of the EU and its Member States. It has facilitated integration, but it also meets strong resistance, arguably precisely because of its integrative effects.

After immense pressure by the States Parties, the ECtHR adjusted the scope of the principle, by changing its approach as to what constitutes a "second"

109. There is a clear analogy here with the debate on whether the principle of substantive criminal law requires that the exercise of criminal jurisdiction falls within the scope of that guarantee; see Oehler, *Internationales Strafrecht: Geltungsbereich des Strafrechts, internationales Rechtshilferecht, Recht der Gemeinschaften, Völkerstrafrecht* (Heymanns, 1983); Strijards, *Internationaal strafrecht, strafrechtsmacht – Algemeen deel* (Gouda Quint, 1984); Luchtman (Ed.), *Choice of Forum in Cooperation against EU Financial Crime – Freedom, Security and Justice & the Protection of Specific EU-interests* (Boom/Lemma, 2013), pp. 21–24, with further references.

110. See also Biehler, Kniebühler, Lelieur-Fischer and Stein (Eds.), *Freiburg Proposal on Concurrent Jurisdictions and the Prohibition of Multiple Prosecutions in the European Union*, Max Planck Institute for Foreign and International Criminal Law (Freiburg i.Br., 2003); Böse, Meyer and Schneider, *Conflicts of Jurisdiction in Criminal Matters in the European Union – Volume II: Rights, Principles and Model Rules* (Baden-Baden, 2014); Luchtman (Ed.), op. cit. *supra* note 109; Ligeti and Robinson, *Preventing and Resolving Conflicts of Jurisdiction in EU Criminal Law* (OUP, 2018).

prosecution. As long as administrative and criminal proceedings are sufficiently connected in substance and time, a violation of the non-derogable right of the 7th Protocol does not take place. The sudden change of approach must have surprised the European Court of Justice. After it reopened investigations in the *Menci* case, in early 2017, it decided in March 2018 – contrary to the outspoken Opinion of its Advocate General – to remain close to the ECtHR. The criteria that it has used in *Menci* and the other cases indeed resemble those of *A and B* v. *Norway*. The criticism of that latter case was extensively discussed above (section 3).

Although the approaches of the two Courts may for now produce similar results, it is submitted that the ECJ has in fact introduced a higher standard than Strasbourg, yet without mentioning the last sentence of Article 52(3) CFR. What is important to stress in that regard is that the ECJ – not the ECtHR – has upheld the almost binary status of the *ne bis in idem* guarantees. A second prosecution or sanction after a final first one *is* a limitation of the principle, requiring a solid justification. The ECJ has managed to avoid an open conflict with the ECtHR, but has also kept its options open to raise the standards over time. That is quite a remarkable – maybe even an impressive – balancing exercise.

From a broader perspective, it appears that the ECJ – for the second time in a short period[111] – is developing its own way of solving the conflicts that have been prominent ever since *Akerberg Fransson*[112] and *Melloni*[113] between, on the one hand, EU law and, on the other, national principles of criminal justice and constitutional law. In those types of situations where national legal orders fall within the scope of EU law (Art. 51(1) CFR), but where no specific EU legislation on the subject matter is present, the Court seems to be prepared, particularly in such a sensitive area as that of criminal justice, to step back, even if that means lowering the demands of the EU legal order – Charter standards, for instance.[114] Thus, it avoids open conflicts with national (constitutional) courts and with the ECtHR. Framed in the broader debate on judicial dialogue between these courts, I see a resemblance with the case law of the ECtHR that regulates the relationship between national law, EU law and the ECHR.[115]

111. The first time was Case C-42/17, *M.A.S. and M.B.* ("*Taricco II*").

112. Case C-617/10, *Åkerberg Fransson.*

113. Case C-399/11, *Melloni*, EU:C:2013:107.

114. Van Eijken, Emaus, Luchtman and Widdershoven, "The European citizen as a bearer of fundamental rights in a multi-layered legal order" in Van den Brink, Luchtman and Scholten (Eds.), *Sovereignty in the Shared Legal Order of the EU – Core Values of Regulation and Enforcement* (Intersentia, 2015), pp. 263–265.

115. ECtHR, *Bosphorus* v. *Ireland*, Appl. No. 45036/98, judgment of 30 June 2005; ECtHR, *Avotiņš* v. *Latvia*, Appl. No. 17502/07, judgment of 23 May 2016.

The coming period will be particularly interesting to follow. Important legislative actions have taken place both in the area of VAT as well as that of market abuse. They can give the ECJ more specific materials to work with and to shape the principle according to the needs of the European Union. The European legislature has now provided specific criteria as to what constitutes effective and dissuasive sanctions in the area of market abuse rules. It has obliged Member States to enforce EU law both through administrative law as well as criminal law. However, it remains to be seen whether the Court of Justice will be prepared to raise its own standards on that basis.

Two options are possible for the future. It could be that the ECJ – despite higher degrees of harmonization – maintains its present course, for instance because it wishes to continue to facilitate combined systems of – what the Court presents as[116] – more or less automatic, standardized administrative sanctions and more individualized, balanced approaches in criminal justice, which usually take longer to commence.

It could also be, however, that the higher degree of harmonization has an impact on the balancing exercise on the basis of Article 52(2) CFR. The more EU law prescribes the organization of law enforcement, as well as cooperation and coordination between the many EU and national authorities involved, the more opportunities there are to prevent *bis in idem* situations, at least where administrative and criminal law sanctions are both sufficiently effective and dissuasive, as well as suitable to be applied proportionately. Unlike under the the ECtHR case law, where such cooperation is used to determine whether or not proceedings were sufficiently connected in substance (through the exchange of evidence, for instance), such possibilities for cooperation then demonstrate that, without proper reasons indicating otherwise, *bis in idem* situations could have been avoided, rendering the limitations of the principle more easily disproportionate.

Certainly under the latter scenario, there is work to be done for the other actors who also shape and form Europe's shared legal order. In my opinion, current debates focus too much on the role of the ECJ and how it interacts with national courts. But let us not forget the role and position of, for instance, the EU legislative bodies in this regard. In my opinion, the ECJ has sent the latter very clear messages on what it needs so as to further integration in the sphere of law enforcement. The European Commission is currently considering what new legislative initiatives it will launch in the years ahead. On the basis of the Court's recent judgments, initiatives with respect to, *inter alia*, statutes of limitations,[117] the prescription of what constitutes effective and dissuasive

116. I disagree; see *supra* section 4.2.
117. Case C-42/17, *M.A.S. and M.B*. ("*Taricco II*").

sanctions,[118] the alignment of systems of administrative and criminal law enforcement and the introduction of clear rules on the choice of forum in transnational cases will be very welcome indeed.

Last but not least: let us also not forget the role of national courts. Should the ECJ indeed raise the standards, then the criticism that different *ne bis* standards would come to apply, depending on the subject matter (harmonized EU law or not), will become a concern for the national courts. It remains to be seen whether they are, in turn, willing to raise (or lower) their own national standards to align national law with EU law and to remove these differences for the sake of coherence and legal certainty. What is certain, however, is that we can expect a whole series of interesting events in the years to come, in which all actors need to demonstrate a willingness and an openness to developments that take place in other parts of the European legal order and even, should the circumstances arise, to align their own legislation, enforcement practices and case law with those developments.[119] That, in itself, is already quite a challenge.

118. See the ECJ judgments discussed in this article.

119. See also Luchtman, *Transnationale rechtshandhaving* (Boom, 2017), inaugural lecture Utrecht, pp. 45–46.

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