Focus: Sanctions in European Criminal Law
Dossier particulier: Sanctions dans le droit pénal européen
Schwerpunkttehema: Sanktionen im Europäischen Strafrecht

Guest Editorial
Peter Csonka

The Harmonisation of Criminal Sanctions in the European Union
Prof. Dr. Helmut Satzger

Compliance with the Rule of Law in the EU and the Protection of the Union’s Budget
Prof. Dr. Lorena Bachmaier

The European ne bis in idem at the Crossroads of Administrative and Criminal Law
Sofia Mirandola and Giulia Lasagni

Ne bis in idem and Tax Offences
Francis Desterbeck

Mutual Recognition of Financial Penalties
Dr. Christian Johnson and Bettina Häussermann

Obtaining Records from a Foreign Bank
Stefan D. Cassella
The Associations for European Criminal Law and the Protection of Financial Interests of the EU is a network of academics and practitioners. The aim of this cooperation is to develop a European criminal law which both respects civil liberties and at the same time protects European citizens and the European institutions effectively. Joint seminars, joint research projects and annual meetings of the associations’ presidents are organised to achieve this aim.

Contents

News*

European Union

Foundations
79 Fundamental Rights
82 Security Union
85 Area of Freedom, Security and Justice
86 Schengen
86 Legislation

Institutions
86 Council
87 European Court of Justice (ECJ)
87 OLAF
88 European Public Prosecutor’s Office
89 Europol
90 Eurojust
91 European Judicial Network (EJN)
91 Frontex

Specific Areas of Crime / Substantive Criminal Law
92 Protection of Financial Interests
93 Tax Evasion
94 Money Laundering
97 Counterfeiting & Piracy
98 Cybercrime
99 Terrorism
101 Illegal Employment

Procedural Criminal Law
102 Procedural Safeguards
103 Data Protection
106 Ne bis in idem
107 Victim Protection

Cooperation
107 Police Cooperation
109 Judicial Cooperation
110 European Arrest Warrant
111 European Investigation Order
111 Criminal Records
113 Law Enforcement Cooperation

Articles

Sanctions in European Criminal Law

115 The Harmonisation of Criminal Sanctions in the European Union
Prof. Dr. Helmut Satzger

120 Compliance with the Rule of Law in the EU and the Protection of the Union’s Budget
Prof. Dr. Lorena Bachmaier

126 The European ne bis in idem at the Crossroads of Administrative and Criminal Law
Sofia Mirandola and Giulia Lasagni

135 Ne bis in idem and Tax Offences
Francis Desterbeck

141 Mutual Recognition of Financial Penalties
Dr. Christian Johnson and Bettina Hüssemann

145 Obtaining Records from a Foreign Bank
Stefan D. Cassella

Imprint

* The news contain Internet links referring to more detailed information. These links are being embedded into the news text. They can be easily accessed by clicking on the underlined text in the online version of the journal. If an external website features multiple languages, the Internet links generally refer to the English version. For other language versions, please navigate using the external website.
Guest Editorial

Dear Readers,

Developing criminal law and judicial cooperation in criminal matters has been a key component of Union policies for the last 20 years. The Union’s common area of freedom, security and justice (AFSJ) provides citizens and companies with both security and rights, in particular by ensuring an ever-increasing coordination between judicial authorities, the progressive mutual recognition of judgments and judicial decisions in criminal matters, and the necessary approximation of criminal laws.

Soon, Union institutions must take stock of what has been achieved and what remains to be done. Our future priorities must follow the wake of our achievements but also deliver innovations capable of addressing new challenges. Indeed, much progress has been achieved since the 1999 Tampere Programme: there is a robust Union acquis on cooperation between judicial authorities, covering the recognition and execution of a range of judgements and decisions, e.g., arrest warrants, investigation and supervision orders, prison sentences and financial penalties. This progress is facilitated by the progressive harmonisation of certain aspects of national substantive criminal and procedural laws, including minimum standards to protect the rights of suspects and victims, and it is enforced through the forward-looking case law of the CJEU. The Union’s efforts to establish a common area of justice (AFSJ) are thus visible, both in the progress of judicial cooperation and in the protection of the rights of persons involved in justice-related issues. Going forward, however, some challenges remain in making this existing acquis work efficiently throughout the Union, at the heart of which is ensuring effective implementation of the adopted legal instruments in all Member States.

As the world becomes more fractured and unsettled, the Union’s core task remains to protect and further Europe’s achievements, including its open democratic societies and liberal economies, while keeping terrorism and cross-border organised crime effectively under control. Judging by the relevant indicators, it seems that the terrorist threat in the Union will remain high and new attempts to carry out attacks likely. While the number of fatalities has decreased since 2015 (from 151 to 62 in 2017), the number of jihadist-inspired attacks (33) in 2017 more than doubled, with the number of arrests in relation to jihadist terrorist activities reaching high levels (705 in 2017). Similarly, organised crime remains a challenge for the authorities: Europol’s current Serious and Organised Crime Threat Assessment (SOCTA 2017) records more than 5000 organised crime groups (OCGs) operating on an international level and currently under investigation in the EU. Overall, this number highlights the substantial scope and potential impact of serious and organised crime on the EU. More than one third of these groups active in the EU are involved in the production, trafficking, or distribution of illicit drugs. Other major criminal activities for organised crime groups in the EU include organised property crime, migrant smuggling, trafficking in human beings, and excise fraud. 45% of the groups mentioned in the SOCTA 2017 are involved in more than one criminal activity. It is estimated that the economic loss due to organised crime and corruption remains high in the Union, between €218 and €282 billion annually. In addition, organised crime and corruption have significant social and political costs, such as infiltration of the legal economy through the investment of laundered criminal proceeds.

Faced with the evolution of crime, globalisation, and technological innovations, there is a clear need to adapt the Union’s acquis to the actual needs of practitioners and citizens and thus enable appropriate responses to new developments, including those linked to digitalisation and the use of Artificial Intelligence (AI). A primary challenge is the establishment of a solid EU criminal law framework capable of coherently tackling serious and/or cross-border crime (“euro-crimes”) and other areas of crime in which the approximation of offences or sanctions is essential for the enforcement of EU law (“accessory crimes”) in full respect of Member States’ legal traditions. It is important to strike the right balance between EU action and respect for Member States’ legal traditions, in particular in the area of sanctions. This particular issue of eucrim is dedicated to helping the reader understand how or in what specific areas of sanctions, whether criminal or administrative, financial, or otherwise, the Union can achieve better results.
Another high priority in the area of justice is to strengthen mutual trust based on democracy, the rule of law, and fundamental rights, to increase fairness and sustainability in society, and to ensure the smooth functioning of the single market. It is now clear that further efforts are required to consolidate the system of mutual recognition of judgments and judicial decisions in criminal matters, including by ensuring minimum harmonisation of criminal procedural rules. One major issue here is to address the growing lack of mutual trust due to problems in the functioning of criminal justice systems or poor prison conditions in some Member States and the ensuing refusals of European Arrest Warrants. As the Union’s institutional landscape for judicial cooperation gains maturity through the reform of Eurojust and the necessary integration of various judicial networks, it will also grow in complexity owing to their future interaction with the European Public Prosecutor’s Office (EPPO) and its direct criminal enforcement. The Union will need to ensure coherence of action and adequate funding for all actors in this chain, including vis-à-vis the Union’s law enforcement and administrative agencies.

Besides finalising pending legislative files, such as those on e-evidence, and ensuring the implementation of the acquis, reflection should also begin on possible initiatives that could help the Union complete its criminal justice arsenal. Issues worth exploring in the medium or long term could include:

- The transfer of criminal proceedings, perhaps in the broader context of rules on conflicts of jurisdiction and the principle of ne bis in idem;
- Cross-border use and admissibility of certain types of evidence;
- Protecting vulnerable suspects and accused persons;
- Updating Union law on corruption and environmental crime;
- Extending the material competence of the EPPO;
- Developing minimum standards on pre-trial detention and on compensation for unlawful detention;
- Continuing work on victims’ rights, including access to justice and compensation;
- Enhancing convergence and cooperation between Eurojust, the European Judicial Network (EJN), and the EPPO;
- Issuing or revising handbooks on mutual recognition instruments to help practitioners implement CJEU case law;
- Use of Artificial Intelligence (AI) in criminal proceedings;
- Enhancing the digitalisation and interoperability of criminal justice authorities and EU bodies.

Of course, before becoming Union law any initiative in these areas of evolution will be subject to political validation and practitioners’ scrutiny: for both the Commission will need to demonstrate their added value and compliance with principles such as subsidiarity and proportionality. We may be looking for feedback from you as well, dear Readers, on many of them.

Peter Csonka
Head of Unit, General Criminal Law and Judicial Training, Directorate General for Justice and Consumers, European Commission
The European ne bis in idem at the Crossroads of Administrative and Criminal Law

Sofia Mirandola and Giulia Lasagni

This article discusses the recent developments in the case laws of the European Courts on the principle of ne bis in idem at the interface between criminal and administrative law, in particular with regard to the legitimacy of double-track enforcement systems. It is argued that both, the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU), have aligned not only in lowering their previously more protective standards, but also in laying down new rules that, according to the Justice Scoreboard, and the Anti-Corruption Reports, might weaken the protection of human rights.

I. Common Trends in the Protection of ne bis in idem at the Supranational Level

The right not to be prosecuted or punished twice for the same offence is a fundamental principle of criminal law and has a twofold rationale. On the one hand, it is a key guarantee for the individual against abuses of the ius puniendi, and, on the other hand, a means to ensure legal certainty and the stability of the res indicata. At the European level, the ne bis in idem principle is enshrined in Art. 4 of Protocol No. 7 to the European Convention on Hu-
man Rights (ECHR), in Art. 50 of the EU Charter of Fundamental Rights (CFR), and in Art. 54 of the Convention implementing the Schengen Agreement (CISA).\textsuperscript{3} Despite their different wording and the wider scope of the principle at the EU level - where it is applicable also to transnational settings - the scope of protection offered by the ECHR and CFR provisions is the same with respect to the national dimension of the ne bis in idem,\textsuperscript{4} namely when it is applied within the same jurisdiction.

Under both legal texts, the following four elements are necessary to trigger its application: 1) two sets of proceedings of criminal nature (bis), 2) concerning the same facts (idem), 3) against the same offender, and 4) a final decision. The ne bis in idem principle therefore represents an ideal lens through which one can observe how the relationship between the Convention and the Charter and the judicial dialogue between the respective courts is evolving in the construction of a European system of fundamental rights.\textsuperscript{5} Cross-fertilization between the case laws of the two courts on the different elements of ne bis in idem could consequently result in a virtuous circle or, quite the opposite, in “a vicious circle of troublesome jurisprudence multiplied through mutual encouragement.”\textsuperscript{6}

Until 2016, the jurisprudence of the Courts of Strasbourg and Luxembourg on the prohibition of double jeopardy aligned towards a higher level of protection.\textsuperscript{7} This defendant-friendly approach can be observed in relation to the notion of idem: The Court of Justice of the European Union (CJEU) first, soon followed by the European Court of Human Rights (ECHR), defined it as the same set of factual circumstances, regardless of the legal classification of the offence or the legal interest protected.\textsuperscript{8} The persisting relevance of the legal interest in the CJEU case law in competition matters represents an exception,\textsuperscript{9} which will yet not last much longer as a recent decision suggests.\textsuperscript{10} This convergence of the case law to the benefit of the individual touched also on the material scope of the principle, which has been widened under both the ECHR and the CFR to cover not only formally criminal proceedings but also administrative punitive proceedings with a criminal nature, in light of the so-called Engel criteria.\textsuperscript{11} As a result, also the imposition of an administrative penalty à coloration pénale triggers the prohibition of bis in idem.

The winds, however, have changed ever since, and a more rigid trend towards limiting the automatism in the application of ne bis in idem now seems to draw the two courts closer together. The notion of ‘final decision’ was the first to be affected: In Kossowski,\textsuperscript{12} the CJEU considered that a detailed investigation of the case is necessary for a decision to be given after a determination of the merits of the case. Very recently, in Mihalache v Romania,\textsuperscript{13} this requirement of a detailed investigation has been taken up by the ECtHR as well for determining whether a decision to discontinue the proceedings constitutes an “acquittal” for the purposes of Art. 4 of Protocol No. 7 ECHR. Yet the most remarkable illustration of this new course is the case law on the first condition, i.e. the bis. The course started with the ECtHR’s landmark decision in A and B v Norway,\textsuperscript{14} followed by the three CJEU 2018 decisions in Menci, Garlsson and Di Puma and Zecca,\textsuperscript{15} all dealing with the so-called double-track enforcement regimes, a widespread reality in several Member States especially in the field of economic and financial crime.\textsuperscript{16} In an attempt to justify such practice, which allows a joint imposition of administrative and criminal sanctions in respect of the same conduct, the two courts revisited their approach on the notion of bis and significantly reduced the protection afforded by the ne bis in idem principle.

The present article focuses on the dialogue between the European courts in this grey area between administrative and criminal law and aims at assessing the limits under which double-track enforcement systems are currently compatible with the principle of ne bis in idem in Europe. It will be illustrated that the respective case laws of the ECtHR and CJEU have aligned in lowering their previously more protective standards and in allowing such duplication of punitive proceedings to a certain extent. It is further argued that this acquiescence towards double-track enforcement systems draws on rules that – despite certain differences – substantially converge and, what is of more concern, in both case laws are highly unclear. The uncertainty generated by these rules arguably not only involves the risk to lead to unpredictable results, but, most importantly, also tends to put pressure on other aspects of the guarantee that to date are considered as given, such as the notion of idem itself.

II. The Downgrade of ne bis in idem for Administrative Punitive Proceedings by the ECtHR

1. The ECtHR’s judgment in A and B v Norway

In 2016, the ECtHR deviated from its previous case law and substantially reduced the scope of protection of the ne bis in idem principle with regard to dual criminal and administrative punitive proceedings in respect of the same offence. Under intense pressure of the contracting States defending their practice of double-track enforcement systems, in A and B v Norway the Grand Chamber redefined the notion of bis and admitted that under certain circumstances a combination of criminal and administrative procedures does not constitute a duplication of proceedings as proscribed by Art. 4 of Protocol No. 7 ECHR.\textsuperscript{17} To the contrary, it found that where dual proceedings represent “complementary responses to socially
offensive conducts” and are combined in an integrated manner so as to form a “coherent whole” in order to address the different aspects of the offence, they should rather be considered as parts of one single procedure, and not as an infringement of the ne bis in idem principle.18 To this end, the Court requires that the two sets of proceedings be “sufficiently closely connected in substance and time” and lists the factors that determine whether there is such a close connection between them.19

As to the connection in substance, it is necessary that the dual proceedings satisfy the following four conditions:20

- They pursue complementary purposes and thus address, not only in abstracto but also in concreto, different aspects of the social misconduct involved;
- They are a foreseeable consequence, both in law and in practice, of the same impugned conduct;
- They avoid, as far as possible, any duplication in the collection and assessment of the evidence;
- They “above all” put in place an offsetting mechanism designed to ensure that the sanction imposed in the first proceedings is taken into account in the second proceedings, so that the overall amount of any penalties imposed is proportionate.

In addition to the connection in substance, a connection in time must also be present, though it is not necessary for the proceedings to be conducted simultaneously and the order in which the proceedings take place is irrelevant. Nevertheless, the Court did not provide any further guidance in this regard, apart from stressing that the individual should not be subjected to uncertainty and lengthy proceedings.21

2. Subsequent case law and criticism – the lack of clarification

The decision in A and B sparked harsh criticism, starting from the flaming one of the dissenting judge Pinto de Albuquer-que.22 The decision not only downgraded the protection offered at the conventional level by the ne bis in idem principle, but also – and more critically – laid down criteria to determine the compatibility of dual criminal and administrative proceedings, which are either “empty shells” or very ambiguous and difficult to apply in practice, and could possibly lead to arbitrary results.23 Unfortunately, the subsequent Strasbourg case law barely offered any clarification, and such dangers were proven true.

First, some uncertainty exists as to what elements should be taken into account to determine the complementarity of the proceedings. While the ECtHR in A and B drew on the distinction introduced in Jussila v Finland24 and stressed that the complementarity condition would be more likely met if the proceedings are not formally classified as criminal and do not carry any significant degree of stigma,25 it never embarked on such assessment in the subsequent cases.26

Second, whereas in A and B the Court referred to the different purpose of the sanctions and to the additional constitutive elements of the offence, namely its culpable character,27 in Nodet v France it also considered the legal interest protected by the offence as element to assess the complementarity of the proceedings.28 Furthermore, in other cases involving tax proceedings,29 the assessment was performed in a merely perfunctory manner and the Court simply accepted, without any analysis whatsoever, that the two proceedings pursued complementary purposes. Such approach not only undoubtedly risks turning “complementarity” into a void condition, but also has a more subtle effect. By attaching relevance to the legal interest protected and to the constitutive elements of the offence, it reintroduces through the back door elements that were previously expressly excluded from those necessary to determine the “idem” precisely with the purpose of enhancing the individual guarantee. The more liberal stance in Zolotukhin30 is thereby indirectly affected: a difference in the legal interest or in the constitutive elements of the offence allows once again to elude the protection of the ne bis in idem principle, albeit under the different label of the complementarity of the proceedings.31

Third, the way in which the condition of the foreseeability of dual proceedings is applied also turns it into an almost meaningless guarantee. The Court here simply ascertains whether the possibility of imposing both an administrative and a criminal sanction is provided by law, without engaging in any further analysis.32 If construed in such a way, this condition becomes tautological and simply overlaps with the legality requirement that criminal sanctions should meet to be compatible with Art. 7 ECHR in the first place.33

Furthermore, the requirement that the sanctions imposed first are offset against those applicable in the second set of proceedings, so as to ensure the proportionality of the overall punishment inflicted, seems to play a less decisive role than initially assumed.34 In Matthildur Ingvarsdottr v Iceland, the Court in fact concluded that the proceedings were sufficiently closely connected in substance despite the absence of such an offsetting mechanism.35 Hence, just like in other matters,36 the Court’s scrutiny seems to take the form of a global assessment. Although it does verify the observance of each specific condition, neither of them is a conditio sine qua non: It is only their combination that decides whether the proceedings are sufficiently connected as a whole or not. Not to mention that such a condition becomes wholly irrelevant where the first procedure has resulted in an acquittal. In this latter case, there will not
only be no sanction to offset, but a subsequent finding of guilt in the second set of proceedings will risk violating the presumption of innocence under Art. 6(2) ECHR.37

The most problematic condition, however, is the non-duplication in the gathering and assessment of the evidence. Though it initially appeared to be a “soft prohibition” that could be satisfied where the establishment of facts in the first set of proceedings is relied upon also in the second,38 in the cases that followed A and B, it has been applied in a much stricter manner. In spite of the presence of a common establishment of the facts and of other forms of coordination among the authorities, such as the sharing of the evidence gathered, the Court attached decisive weight to the subsequent and independent investigation carried out in the second set of proceedings.39 The Court thus seems to require that evidence be gathered within only one procedure, and rules out completely any possibility for the authorities intervening in the second place to carry out additional autonomous investigations. This approach represents an unreasonable restriction, since for several legitimate reasons the adoption of new additional and autonomous investigating measures in the second set of proceedings may be required.

But what is even more worrying are the possible consequences of such reasoning. Since criminal investigations often start after the administrative ones and usually last longer, the Court is substantially endorsing the transfer and use of evidence gathered in the administrative proceedings in the criminal ones. Yet, it fails to consider the complexity of the issues underlying the transfer of evidence from administrative to criminal proceedings, which inevitably ensue from the different rules and procedural safeguards to which such activity is subject in the two frameworks (among them the presumption of innocence and the right to remain silent). Such an automatic transfer of evidence, viewed as a guarantee in respect of the Charter, including Art. 50. That does not mean, however, that the ECtHR case law is automatically and systematically disregarded by the Court of Justice.

III. Ne bis in idem and Double-Track Systems in the Case Law of the CJEU

1. The fundamental rights background of Union law and the approach by the CJEU

At the Union level, the prohibition of bis in idem is not considered as an absolute right. The possibility to limit the right not to be prosecuted or punished twice under Art. 50 CFR was accepted by the CJEU for the first time in Spasic, with regard to the transnational dimension of ne bis in idem.40 Such limitation was considered legitimate as long as it complied with the requirements set forth in Art. 52(1) CFR, according to which limitations to the rights contained in the Charter shall (i) be provided for by law; (ii) respect the essence of such rights; (iii) be necessary in light of the proportionality principle, and (iv) genuinely meet the objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

In interpreting these criteria, the Court of Justice takes into account the jurisprudence of the ECtHR, which determines the minimum safeguarding content of the rights laid down in the Charter, including Art. 50. That does not mean, however, that the ECtHR case law is automatically and systematically adopted by the judges in Luxembourg. In the last decade, actually, the CJEU has repeatedly affirmed the need to develop an autonomous notion of the rights enshrined in the Charter.41 This thesis had been recently reaffirmed in the three aforementioned 2018 decisions – Menci, Gartlsson and Di Puma and Zecca – with specific regard to the ne bis in idem principle. There, again, the Court explicitly recalled that the ECtHR does not constitute, “as long as the European Union has not acceded to it, a legal instrument which has been formally incorporated into EU law,” although Art. 6(3) TEU recognises the fundamental rights of the Convention as “general principles of EU law”, and regardless of the equivalence clause contained in Art. 52(3) CFR.42 Accordingly, questions concerning the status of fundamental rights in the EU shall be examined, if not exclusively, largely “in the light of the fundamental rights guaranteed by the Charter.”43 The convergence between the interpretation of the Courts of Luxembourg and Strasbourg shall therefore, at least in the perspective of the CJEU, be certainly welcomed, but not be taken for granted. Indeed, certain
interpretative divergences between the two European courts can be observed precisely with regard to the interpretation of \textit{bis} with reference to dual criminal and administrative punitive proceedings.

2. The CJEU’s judgments on double-track systems

A relevant exception in the scope of Art. 50 was introduced by the Court of Justice already in 2013. In \textit{Fransson}, in fact, the Court specified that double-track systems could not be considered in violation of \textit{ne bis in idem} “as long as the remaining penalties are effective, proportionate and dissuasive.”\textsuperscript{50} Well before the ECtHR \textit{revirement} in \textit{A and B}, therefore, the CJEU had already opened the door to potential limitations of the double jeopardy clause in the name of the principle of effectiveness, leaving a rather high degree of uncertainty on whether, and if so, under which conditions, double-track systems were to be considered legitimate under EU law.\textsuperscript{50}

In the three cases – \textit{Menci, Garlsson and Di Puma and Zecca} – concerning the fields of tax law and market abuse, the Court then transposed this general clause as established in \textit{Fransson} into the above-mentioned parameters of Art. 52(1) CFR, thereby explicitly considering double-track systems as a limitation to the protection from \textit{bis in idem}.\textsuperscript{51}

In the absence of EU law for the harmonization of the penalties to be applied to a specific conduct, the CJEU considered that Member States have the right to provide for double-track systems to pursue “objective, complementary aims relating, as the case may be, to different aspects of the same unlawful conduct at issue.”\textsuperscript{52} Therefore, the Court of Luxembourg indirectly abandoned, as Strasbourg before, the stricter (and more safeguarding) test of \textit{Zolotukhin} on the element of \textit{bis}.

With reference to the test under Art. 52(1), the Court then considered that the protection of the integrity of financial markets (in \textit{Garlsson and Di Puma and Zecca}) and the correct collection of VAT (in \textit{Menci}) represent objectives of general interest for the Union, that could justify limitations to Art. 50 CFR (criterion (iv)).\textsuperscript{53} The existence of a legal basis (criterion (i)) was not considered especially critical in such cases, since all the examined systems were clearly provided for by national law (and, in the case of market abuse, also by EU legislation).\textsuperscript{54} The considerations of the Court with regard to the second criterion (ii), concerning the respect of the essence of the right at stake, appear in contrast rather more controversial for the value of the double jeopardy clause in EU law. Under this perspective, in fact, the CJEU seemed to deduce from the mere circumstance that national legislation allows for a duplication of proceedings and penalties “only under certain conditions which are exhaustively defined,” the consequence that “the right guaranteed by Art. 50 is not called into question as such” and therefore is respected in its essential content.\textsuperscript{55} The Court thus appeared to overlook the fact that even limitations provided only upon specific conditions can transform the nature of the double jeopardy clause from an individual fundamental right to a mere organizational rule, and that this does represent a violation to the essence of the original scope of Art. 50 CFR.\textsuperscript{56}

3. The CJEU’s proportionality test

Especially interesting, in a comparative perspective with ECtHR jurisprudence, is the third criterion (iii) that describes the proportionality requirement. The Court considered that “the proportionality of national legislation […] cannot be called into question by the mere fact that the Member State concerned chose to provide for the possibility of such a duplication, without which that Member State would be deprived of that freedom of choice.”\textsuperscript{57} Duplication of proceedings and penalties for the same conduct shall instead not “exceed what is appropriate and necessary in order to attain the objectives legitimately pursued by that legislation,” meaning that “when there is a choice between several appropriate measures, recourse must be had to the least onerous and the disadvantages caused must not be disproportionate to the aims pursued.”\textsuperscript{58}

Against this background, the Court interpreted the strict necessity requirement inherent to the proportionality principle as obliging national legislation: \textit{a}) to be foreseeable, i.e. it should provide for clear and precise rules that allow individuals to predict which acts or omissions are liable to be subject to a duplication of proceedings and penalties, and \textit{b}) to ensure that the disadvantages resulting, for the persons concerned, from such a duplication are limited to what is strictly necessary to achieve the objective(s) of general interest.

In particular, in order to assess the latter condition, national legislation shall: \textit{b1}) under a procedural perspective, ensure coordination rules so as to reduce to what is strictly necessary the additional disadvantage caused to the persons concerned by such a duplication; and \textit{b2}) under a substantive perspective, guarantee that the severity of all the penalties imposed does not exceed the seriousness of the offence concerned, i.e. that the severity of the second penalty applied takes into account that of the penalty already imposed.\textsuperscript{59}

The definition of coordination rules, and their relationship with the proportionality of the sanction imposed appear at the same time crucial and problematic in terms of fairness and foreseeability.
In *Menci*, for instance, the CJEU positively assessed the existence of coordination rules, favourably considering the national law mechanism according to which not only the enforcement of administrative punitive penalties had to be suspended during criminal proceedings on the same VAT fraud conduct, but that was also definitely prevented after the latter had been terminated with a conviction. The CJEU then pointed out that criminal penalties were to be limited to particularly serious offences (unpaid VAT exceeding EUR 50,000), and that voluntary payment of the tax debt covering also the imposed administrative penalty constituted a special mitigating factor to be taken into account in the criminal proceedings.

In *Garlsson*, on the other hand, the Court underlined the importance of the obligation for cooperation and coordination between the Italian prosecution service and the national market supervisory authority, according to which the latter is under a duty to share with the prosecution service by means of a reasoned report, the documents collected during the monitoring activity where suspicions of a crime are discovered, and both the administrative and judicial authorities shall cooperate with each other, including by means of information exchange. However, the CJEU found the safeguards against an excessive severity of the cumulated penalties to be insufficient in this case, because the offsetting mechanism was applied only to the pecuniary penalties but not between punitive administrative fines and imprisonment. Even more importantly, the Court considered, that the bringing of administrative punitive proceedings following an acquittal in the criminal trial for the same conduct was also considered exceeding the necessity required by the principle of proportionality. Given the specific circumstances of the case, and the heavy reliance on national law as for the definition of *res judicata* though, it is not clear from this case whether the latter should be considered as a confirmation of the “primacy” rule stressed in *Garlsson* (thereby considering predominant the fact that the acquittal was issued in the criminal proceedings) or whether it implied a much broader interpretation (that is, considering fundamental the acquittal in itself, while the set of criminal proceedings it derived from could be seen only as a circumstance of the specific case). So, we can extrapolate from the three 2018 decisions that the CJEU provided for some criteria on the matter of *ne bis in idem*, but did not openly opt for an explicit, and therefore clearly foreseeable, rule on how to deal with double-track systems. Indeed, the two European courts seem to share a similar approach on this uncertainty.

### 4. Divergences between CJEU and ECtHR

On the contrary, with regard to other profiles of the tests carried out by the European courts, the degree of divergence between the interpretation of the latter appears more pronounced, although uncertainties remain in both case laws.

First, the parameters identified by the CJEU do not explicitly mention the criterion of “substantial connection in time” – perhaps the most arbitrary condition of the ECtHR’s “A and B test”. Thus, the CJEU leaves open the question on whether or not this parameter should also be applied under EU law. In his Opinion AG *Campos Sánchez-Bordona* has, for his part, strongly advocated abandoning this parameter. Therefore, although in lack of explicit indications, the silence of the Court on the matter could be positively interpreted as an attempt to set aside one of the most unforeseeable criteria developed by the ECtHR.

Much more critical is a second, apparent divergence: The circumstances of the cases examined in 2018 do not provide an answer as to whether the CJEU would also include the need to concentrate the evidence gathering either in the administrative or criminal proceedings in the parameters of the “coordination rules”. This factor was specifically requested by the Court in Strasbourg to avoid a violation of *ne bis in idem*. From the transposition of Directive 2003/6/EC (the validity of which was not questioned by the Court).
Sanctions in European Criminal Law

In sum, the proportionality parameter developed by the CJEU, does not necessarily seem much more foreseeable in its application, although it might be a bit more safeguarding than the approach adopted by the ECtHR.

IV. A Shadowy Green Light to Double-Track Enforcement Systems?

In the last decade, the principle of ne bis in idem, especially in respect of administrative punitive sanctions, has become a real test bench for the affirmation of fundamental rights in the field of criminal law that once belonged almost exclusively to the realm of national law. But this shift did (and still does) not come without a price.

The path undertaken by the CJEU to define its own role as a court of human rights, in a constant dialogue with the ECtHR, may indeed succeed only if it leads to a substantial strengthening of fundamental rights. However, by striving to avoid conflicting rulings while underlying their respective autonomy, the case law of both European courts on the legitimacy of double-track punitive systems seems instead to glide towards a downward competition.

Ruling in favour of the admissibility of double-track systems (under certain conditions), both courts have lowered the level of protection previously granted to individuals, and shown that the equivalence clause is in itself insufficient to ensure an adequate level of fundamental rights safeguards. The clause is, indeed, effective only as long as the Court in Strasbourg sets a higher threshold. Admittedly, the CJEU in Menci could truly state that the new (lower) standard on ne bis in idem was compliant with the Convention, though this was only the case because the ECtHR had also previously watered down the content of this right.

But this is not the only problem: even more critically, both European courts chose to anchor the protection from bis in idem at the interface between administrative and criminal law to multiple and often practically unforeseeable criteria. They are not only hard to apply ex ante in the respective jurisdictions. They are also partially diverging from one court to the other, and contribute to the general confusion about the effective scope of this principle for individuals and national authorities.

While the debate over the best criteria to be applied (una-via model, primacy of criminal law) could in this respect remain open, what is certainly necessary is for both European courts, and especially for the CJEU, to choose a clear and foreseeable rule in the definition of the scope of the principle of ne bis in idem. In this regard, however, the lack of a total alignment between Luxembourg and Strasbourg also allows to catch a first glimpse of the potential for the CJEU to take the lead towards a more rights-friendly and pro-active approach.

In fact, the non-application of the (arbitrary) criterion of “connection in time” in EU law could be seen as a positive step towards the impoundment of the draining of the double jeopardy clause launched with A and B. Similar conclusions may be drawn also with regard to the maintenance of the several-step test of Art. 52 CFR in this matter, compared to the overall approach of the ECtHR, in which the ex ante identification of potential violations is always scarcely feasible. Equally, the rule according to which no administrative punitive proceedings seem to be allowed after a final criminal decision on the same facts could be interpreted as a way to better preserve the defendant’s rights, although the scope of application of this rule remains unclear. The lack of the criterion requesting a single acquisition of evidence could also be welcomed, although again it is not certain whether the CJEU explicitly avoided to mention it or not.

Lastly, against the implicit but relevant attempt by the judges in Strasbourg to bring back the parameter of the legal interest through the definition of bis, it is not clear what role this complementarity requirement will play in the CJEU decisions. Actually, before the Luxembourg Court, the latter is not a separate condition as in the ECtHR case law, but it is referred to within the assessment of the general objectives to be pursued. On one side, only the CJEU requests the objective of general interest to be “such as to justify” the existence of a double-track system. On the other side, however, the need for each of these proceedings to pursue “complementary aims” seems also to be necessary for the legitimacy of double proceedings, therefore conferring to the parameter of “legal interest” a value similar to that attached to it by the ECtHR. But this conclusion seems to have been recently contradicted by the (implicit) step by the CJEU towards a uniform notion of idem also in competition law, which may be seen as a silent effort to achieve a higher level of protection within the EU.

V. Which Way Forward?

All these optimistic considerations, however, hang by a thread, and will need a much more courageous and explicit affirmation to help the CJEU become the protector of fundamental rights it ought to be in the post-Lisbon Union.
In this sense, new institutional developments are likely to play a relevant and decisive role and indirectly impact the relationship between the courts. To date, part of the divergences between the two European courts could also be explained by the fact that, while the CJEU intervenes via preliminary rulings, the ECtHR has instead always judged *ex post* and *in concrete.* Things may now change: On the one hand, the new interlocutory procedure introduced by Protocol No. 16 to the Convention will enable the Court in Strasbourg to rule in the course of domestic proceedings, and potentially bring it closer to the role of the CJEU (despite the non-binding force of ECtHR decisions). In this regard, alignment between the two courts may become even more necessary, considering that national judges could decide to request a preliminary interpretation on the same cause to both European courts.

On the other hand, and perhaps even more relevant, the power of newly strengthened European bodies, such as the European Central Bank or the European Securities and Markets Authority, to impose punitive sanctions, could soon bring before the CJEU cases to be adjudicated *ex post,* thus also requiring the Luxembourg Court to act much more like the ECtHR. As a result, these proceedings may add a further level for potential *ne bis in idem* violations.

In all cases, both European courts will be required to choose between lowballing fundamental rights or finally entering into (and possibly remaining in) a game of one-upmanship against each other, from which all of us could greatly benefit. This would ultimately require clearer rules that end the current uncertainty and can thereby encourage coherent legislative solutions.

---

4 The article has been drafted together; Sofia Mirandola is the main author of sections I and II, and Giulia Lasagni of sections III, IV and V.


3 On the multiple notions of *ne bis in idem* at the European level, see J. Vervaele, *op. cit.* (n. 1), p. 211–229.


7 M. Simonato, *op. cit.* (n. 5).


11 ECtHR, Sergey Zolotukhin v Russia, *op. cit.* (n. 8); and ECJ, 26 February 2013, case C-617/10, Åkerberg Fransson, para. 37.


13 ECtHR, 8 July 2019, Mihalache v Romania [GC], Appl. No. 54012/10, paras. 97–98.

14 ECtHR, 15 November 2016, A and B v Norway [GC], Appl. No. 24130/11 et al.


16 See ECJ, 12 June 2012, case C-617/10, Åkerberg Fransson, *op. cit.* (n. 1), paras. 83.

17 ECtHR, A and B v Norway, *op. cit.* (n. 14), para. 139.

18 ECtHR, A and B v Norway, *op. cit.* (n. 14), para. 121.

19 ECtHR, A and B v Norway, *op. cit.* (n. 14), para. 130.
ECHR, A and B v Norway, op. cit. (n. 14), para. 128 and 134.
24 ECHR, 23 November 2006, Jussilia v Finland (GC), Appl. No. 73053/01.
25 ECHR, A and B v Norway, op. cit. (n. 14), para. 133.
27 ECHR, A and B v Norway, op. cit. (n. 14), para. 144.
28 ECHR, Nodet v France, op. cit. (n. 28), para. 48.
29 ECHR, Johannesson and others v Iceland, op. cit. (n. 26), para. 51; ECHR, Matthudur Ingvarsdottir v Iceland (dec.), op. cit. (n. 26), para. 58.
30 ECHR, Sergey Zolotukhin v Russia, op. cit. (n. 8).
31 To this effect see also G. Lasagni, Banking Supervision and Criminal Investigation. Comparing the EU and US Experiences, 2019, pp. 46–48.
32 ECHR, Johannesson and others v Iceland, op. cit. (n. 26), para. 51; ECHR, Matthudur Ingvarsdottir v Iceland (dec.), op. cit. (n. 26), para. 58; ECHR, Nodet v France, op. cit. (n. 28), para. 47; ECHR, Bjarni Armansson v Iceland, op. cit. (n. 26), para. 53.
33 M. Luchtm, op. cit. (n. 9), 1727.
34 To this effect see also A. Galluccio, “Non solo proporzione della pena”, 37 P. Pinto de Albuquerque, Dissenting Opinion, para. 71; parallel for a significant period (more than two years).
35 Administrative ones, even though the two sets of proceedings were conducted in parallel for a significant period (more than two years).
36 Although the period in which the second set of proceedings continued (after the final decision in the first one) was very similar, the ECHR reached opposite conclusions in Matthudur Ingvarsdottir v Iceland, op. cit. (n. 26), and in Bjarni Armansson v Iceland, op. cit. (n. 26).
37 To this effect see also M. Luchtm, op. cit. (n. 9), p. 55, who wonders what has been gained by this approach; G. Lasagni, op. cit. (n. 32), 47. See also the contribution of F. Desterbeck, in this issue.
40 ECHR, Garlsson Real Estate SA, op. cit. (n. 15), para. 24; ECHR, Menci, op. cit. (n. 15), para. 21 ff.
41 ECHR, Garlsson Real Estate SA, op. cit. (n. 15), para. 26; ECHR, Menci, op. cit. (n. 15), para. 24; ECHR, 5 May 2017, Joined cases C-217/15 and C-350/15, Criminal proceedings against Massimo Orsi and Luciano Baldetti, para. 15 and case law cited there.
42 ECHR, 26 February 2013, case C-617/10, Åklagaren v Hans Åkerberg Fransson, para. 36.
43 See, for all, J. Tomkin, op. cit. (n. 8), 1387 ff.
44 ECHR, Garlsson Real Estate SA, op. cit. (n. 15), paras. 42–43; ECHR, Menci, op. cit. (n. 15), paras. 41–42; ECHR, Di Puma and Zecca, op. cit. (n. 15), para. 41.
45 ECHR, Garlsson Real Estate SA, op. cit. (n. 15), paras. 46–47; ECHR, Menci, op. cit. (n. 15), paras. 44–46.
46 ECHR, Garlsson Real Estate SA, op. cit. (n. 15), paras. 44 and 46; ECHR, Di Puma and Zecca, op. cit. (n. 15), para. 42; ECHR, Menci, op. cit. (n. 15), para. 44.
48 ECHR, Garlsson Real Estate SA, op. cit. (n. 15), para. 45; ECHR, Menci, op. cit. (n. 15), para. 43.
49 P. Pinto de Albuquerque, Dissenting Opinion, paras. 49 and 79.
51 ECHR, Matthudur Ingvarsdottir v Iceland (dec.), op. cit. (n. 28), paras. 60–61.
53 P. Pinto de Albuquerque, Dissenting Opinion, para. 71; M. Luchtm, op. cit. (n. 9), 1728.
54 ECHR, A and B v Norway, op. cit. (n. 14), para. 146; P. Pinto de Albuquerque, Dissenting Opinion, para. 60.
55 ECHR, Nodet v France, op. cit. (n. 26), para. 49; ECHR, Johannesson and others v Iceland, op. cit. (n. 26), para. 53.
56 P. Pinto de Albuquerque, Dissenting Opinion, paras. 62–64. To this effect see also A. Galluccio, “Non solo proporzione della pena”, op. cit. (n. 35); G. Lasagni, op. cit. (n. 32), 48.
57 In ECHR, Nodet v France, op. cit. (n. 28), paras. 52–53, a lack of sufficient connection in time was found on the ground that the criminal proceedings continued for more than four years after the closing of the administrative ones, even though the two sets of proceedings were conducted in parallel for a significant period (more than two years).
58 Although the period in which the second set of proceedings continued (after the final decision in the first one) was very similar, the ECHR reached
Ne bis in idem and Tax Offences

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

Francis Desterbeck

For decades, Belgian fiscal criminal law was governed by the fundamental principle that there had to be an absolute separation between the administrative tax investigations by tax authorities and criminal prosecutions carried out by the public prosecutor. In the light of the recent case law of the European Court of Human Rights and the Court of Justice of the European Union on the duality of administrative and criminal proceedings, this principle could no longer be upheld. A new law passed on 5 May 2019 brought Belgian legislation in line with this supranational case law. A consultation mechanism (introduced in 2012) between the tax administration and the prosecution service to give guidance to tax investigations, has been made more efficient. In order to respect the “ne is in idem” principle, criminal courts must now take into account administrative sanctions of a criminal nature when sentencing tax crimes. The competences of the tax authorities have been changed at the sentencing level, in order to facilitate the recovery of evaded taxes. Within the margin of these fundamental adaptations, some supplementary changes have been carried out to make the system of criminal prosecution more efficient and fairer. This article describes in a practical manner the shift in supranational case law concerning the juxtaposition between administrative and criminal proceedings within the framework of “ne bis in idem” and how this case law laid the foundation for the new Belgian law of 5 May 2019.

I. Introduction

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

II. Ne bis in idem in the National Legal Order

1. General remarks

By virtue of the fundamental legal principle ne bis in idem, no one can be tried or punished a second time for an offence for the same facts, as is required by the fundamental legal principle ne bis in idem. For a second conviction of the same matter, the court must be satisfied that the same facts exist, in order to respect the ne bis in idem principle, criminal courts must now take into account administrative sanctions of a criminal nature when sentencing tax crimes. The competences of the tax authorities have been changed at the sentencing level, in order to facilitate the recovery of evaded taxes. Within the margin of these fundamental adaptations, some supplementary changes have been carried out to make the system of criminal prosecution more efficient and fairer. This article describes in a practical manner the shift in supranational case law concerning the juxtaposition between administrative and criminal proceedings within the framework of “ne bis in idem” and how this case law laid the foundation for the new Belgian law of 5 May 2019.