The European ne bis in idem at the Crossroads of Administrative and Criminal Law

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ABSTRACT

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, though partially converging, remain highly unclear. Through an analysis of the case law following the ECtHR's judgment in A and B v Norway and the three CJEU 2018 decisions in Menci, Garlsson and Di Puma and Zecca, it is demonstrated that the uncertainty generated as to the precise conditions under which dual criminal and administrative proceedings are permissible leads to unforeseeable outcomes. The potential consequences, most importantly, also tend to put pressure on other aspects of this fundamental guarantee, as well as on the standard of protection of other fundamental rights that to date are considered as given. Against this background, we will discuss at last whether the slight differences in the approach adopted by the CJEU to that of the ECtHR could reveal a silent effort on its part to take a more right-friendly stance.

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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[1] 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 iudicata*.[2]

At the European level, the *ne bis in idem* principle is enshrined in Art. 4 of Protocol No. 7 to the European Convention on Human 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).[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*,[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.[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."[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.[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 (ECtHR), defined it as the same set of factual circumstances, regardless of the legal classification of the offence or the legal interest protected.[8] The persisting relevance of the legal interest in the CJEU case law in competition matters represents an exception[9], which will yet not last much longer as a recent decision suggests.[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*.[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 automatisms 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*,[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*, [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*,[14] followed by the three CJEU 2018

decisions in *Menci*, *Garlsson* and *Di Puma and Zecca*,[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.[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.[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 Albuquerque*.[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 Finland*[24] 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 *Zolotukhin*[30] 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 Ingvarsdottir 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 *ne bis in idem* principle, could therefore risk running counter to the right to a fair trial under Art. 6 ECHR and therefore ultimately be equally (or even more) detrimental to the defendant.[40]

Aside from the concerns raised with regard to the conditions for determining a connection in substance, the additional requirement of a temporal connection between the proceedings is also problematic as no precise parameter is set in this regard. The Court considers, on the one hand, the overall length of the combined proceedings, and, on the other, the time during which these were conducted in parallel. Yet, the key aspect seems to be for how long the second set of proceedings has continued on its own after a final decision has been taken in the first one.[41] Admittedly, this criterion is too casuistic and leads to arbitrary results,[42] not to mention that it risks turning the *ne bis in idem* principle into a mere remedy against an excessive length of proceedings.[43]

Against this background, the new course inaugurated by *A and B* reveals several shortcomings. Driven by efficiency-oriented interests, it causes nevertheless great uncertainty to the detriment not only of the defendant, but also of the national authorities and legislators who need clear and predictable indications as to when a double-track enforcement system is compatible with the Convention requirements.[44]

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*.[45] 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.[46] This thesis had been recently reaffirmed in the three aforementioned 2018 decisions – *Menci*, *Garlsson* and *Di Puma and Zecca* – with specific regard to the *ne bis in idem* principle. There, again, the Court explicitly recalled that the ECHR 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.[47] 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."[48] 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 *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 *Fransson*, in fact, the Court specified that double-track systems could not be considered in violation of *ne bis in idem* "as long as the remaining penalties are effective, proportionate and dissuasive."[49] Well before the ECtHR *revirement* in *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 effectivity, 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.[50]

In the three cases – *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 *Fransson* into the above-mentioned parameters of Art. 52(1) CFR, thereby explicitly considering double-track systems as a limitation to the protection from *bis in idem*.[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."[52] Therefore, the Court of Luxembourg indirectly abandoned, as Strasbourg before, the stricter (and more safeguarding) test of *Zolotukhin* on the element of *bis*.

With reference to the test under Art. 52(1), the Court then considered that the protection of the integrity of financial markets (in *Garlsson* and *Di Puma and Zecca*) and the correct collection of VAT (in *Menci*) represent objectives of general interest for the Union, that could justify limitations to Art. 50 CFR (criterion (iv)).[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[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.[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.[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."[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."[58]

Against this background, the Court interpreted the strict necessity requirement inherent to the proportionality principle as obliging national legislation: *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 *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: *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 *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.[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.[60] 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.[61]

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.[62] 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 a criminal conviction "exceeds what is strictly necessary in order to achieve the objective [of general interest], in so far as that criminal conviction is such as to punish the offence committed in an effective, proportionate and dissuasive manner."[63] The CJEU did not define in which cases a criminal conviction can fulfil these conditions. Nevertheless, in the specific case, it considered the criminal sanction imposed to be effective, despite the fact that it was never enforced, because the accused could benefit from a pardon.

At first glance, it may thus seem that in *Garlsson* the CJEU introduced a stricter proportionality requirement than that promoted by the ECtHR, with a sort of primacy of the criminal proceedings over the administrative (punitive) one. The initiation of criminal proceedings after the imposition of an administrative (punitive) sanction, as in *Menci*, on the contrary, was not considered problematic as such by the Court.

Nonetheless, it appears at least peculiar that the CJEU explicitly highlighted this more demanding meaning of the proportionality requirement precisely in *Garlsson*, that is in the field of market abuse, where the duplication of punitive proceedings is a choice that does not find its legal basis in purely national law (as in the case of VAT examined in *Menci*), but derives from the transposition of Directive 2003/6/EC (the validity of which was not questioned by the Court).

Negative conclusions concerning the proportionality requirement were drawn by the CJEU also in *Di Puma and Zecca* (again in the field of market abuse), where the possibility to bring proceedings for an administrative punitive fine following an acquittal in the criminal trial for the same conduct was also considered exceeding the necessity required by the principle of proportionality.[64] 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.[65] 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 wording of the CJEU's judgments, it is indeed not possible to rule out this condition, included in the *A and B* test, with all the critical issues previously discussed. Therefore, this silence risks instead bringing into EU law further critical considerations for the effectivity of defence rights of the individual(s) affected by double proceedings or penalties as well.

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,[66] 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.[67] Admittedly, the CJEU in *Menci* could truly state that the new (lower) standard on *ne bis in idem* was compliant with the Convention,[68] 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. Such criteria 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 as well as 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*,[69] 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.[70] 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.[71] 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,[72] 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 concreto*.[73] 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).[74] 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,[75] 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.[76]

In all these 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 to set clearer rules that end the current uncertainty and can thereby encourage coherent legislative solutions.

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1. J. Vervaele, "Ne Bis in Idem: Towards a Transnational Constitutional Principle in the EU?", (2013) 9 *Utrecht Law Review*, 211, 212; C. Amalfitano, in: R. Mastroianni, O. Pollicino, S. Allegrezza, F. Pappalardo, O. Razzolini (eds.), *Carta dei diritti fondamentali dell'Unione europea*, 2017, Art. 50, 1016-1017; B. Nascimbene, "Ne bis in idem, diritto internazionale e diritto europeo", (2 May 2018), *Diritto penale contemporaneo*, <https://www.penalecontemporaneo.it/d/5993-ne-bis-in-idem-diritto-internazionale-e-diritto-europeo> accessed 30 August 2019.↩
2. It thus has both a human right and a rule of law function. See V. Mitsilegas, F. Giuffrida, "Ne Bis in Idem", in: R. Sicurella, V. Mitsilegas, R. Parizot, A. Lucifora (eds.), *General principles for a common criminal law framework in the EU. A guide for legal practitioners*, 2017, 209, 210; K. Ligeti, "Rules on the application of ne bis in idem in the EU. Is further legislative action required?", (2009) 1–2 eucrim, 37; C. Amalfitano, *op. cit.* (n. 1), 1016-1017; J. Vervaele, *op. cit.* (n. 1), p. 212–213.↩
3. On the multiple notions of *ne bis in idem* at the European level, see J. Vervaele, *op. cit.* (n. 1), p. 211–229.↩
4. By virtue of the homogeneity clause under Art. 52(3) CFR, Art. 54 CISA will not be taken into account as such in this paper as it protects only the transnational dimension of *ne bis in idem*.↩
5. M. Simonato, "Two instruments but a difficult relationship? Some upcoming decisions of the CJEU on the ne bis in idem", (15 November 2017) European Law Blog < https://europeanlawblog.eu/2017/11/15/two-instruments-but-a-difficult-relationship-some-upcoming-decisions-of-the-cjeu-on-the-ne-bis-in-idem/> accessed 30 August 2019.↩
6. P. Pinto de Albuquerque/H.S. Lim, "The Cross-fertilisation between the Court of Justice of the European Union and the European Court of Human Rights: Reframing the Discussion on Brexit", (2018) 6 *European Human Rights Law Review*, 571.↩
7. M. Simonato, *op. cit.* (n. 5).↩
8. ECJ, 9 March 2006, case C-436/04, *Van Esbroeck*, para. 42; and ECtHR [GC], 10 February 2009, *Sergey Zolotukhin v Russia*, Appl. No. 14939/03, para. 84. See J. Tomkin, in: S. Peers, T. Hervey, J Kenner, A. Ward (eds.), *The EU Charter of Fundamental Rights. A Commentary*, 2014, Art. 50, 1398; C. Amalfitano, *op. cit.* (n. 1), 1021.↩
9. ECJ, 14 February 2012, case C-17/10, *Toshiba*, para. 97. See also M. Luchtman, "The ECJ's recent case law on ne bis in idem: Implications for law enforcement in a shared legal order", (2018) 55 *Common Market Law Review*, 1724–1725; J. Tomkin, *op. cit*. (n. 8), 1411–1412; C. Amalfitano, *op. cit.* (n. 1), 1019-1021.↩
10. ECJ, 3 April 2019, case C-617/17, *Powszechny Zakład Ubezpieczeń na Życie S.A.*, para. 32. See G. Lasagni, "La Corte di giustizia e la definizione di idem nel diritto della concorrenza: verso la creazione di una nozione uniforme?", *Giurisprudenza commerciale* (forthcoming publication).↩
11. ECtHR, *Sergey Zolotukhin v Russia*, *op. cit.* (n. 8); and ECJ, 26 February 2013, case C-617/10, *Åkerberg Fransson*, para. 37.↩
12. ECJ, 26 June 2016, case C-486/14, *Kossowski*, para. 48. See A. Marletta, "A new course for mutual trust in the AFSJ? Transnational ne bis in idem and the determination of the merits of the case in Kossowski", (2017) 8 *NJECL*, 108–115; C. Amalfitano*, op. cit.* (n. 1), 1026.↩
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.↩
15. ECJ, 20 March 2018, case C-524/15, *Menci*; ECJ, 20 March 2018, case C-537/16, *Garlsson Real Estate SA*; ECJ, 20 March 2018, cases C-596/16 and C-597/16, *Di Puma and Zecca*.↩
16. See ECJ, 12 June 2012, case C-617/10, *Åkerberg Fransson*, Opinion of AG Cruz Villalón, para. 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.↩
20. ECtHR, *A and B v Norway*, *op. cit.* (n. 14), para. 132.↩
21. ECtHR, *A and B v Norway*, *op. cit.* (n. 14), paras. 128 and 134.↩
22. See also M. Luchtman*, op. cit.* (n. 9), 1725–1726; F. Viganò, "La Grande Camera della Corte di Strasburgo su ne bis in idem e doppio binario sanzionatorio", (18 November 2016), *Diritto penale contemporaneo* <https://www.penalecontemporaneo.it/d/5063-la-grande-camera-della-corte-di-strasburgo-su-ne-bis-in-idem-e-doppio-binario-sanzionatorio> accessed 30 August 2019; ECJ, *Menci*, *op. cit.* (n. 15), Opinion of AG Campos Sánchez-Bordona, 12 September 2017, paras. 55–56 and 69–73.↩
23. M. Luchtman, *op. cit.* (n. 9), 1727–1728. For critical remarks on this general approach of the ECtHR, see M. Caianiello, "You can't always counterbalance what you want", (2017) 25(4), *European Journal of Crime, Criminal Law and Criminal Justice*, 283–298.↩
24. ECtHR, 23 November 2006, *Jussila v Finland* [GC], Appl. No. 73053/01.↩

25. ECtHR, *A and B v Norway*, *op. cit.* (n. 14), para. 133.↩
26. ECtHR, 18 May 2017, *Johannesson and others v Iceland*, Appl. No. 22007/11; ECtHR, 4 December 2018, *Matthildur Ingvarsdottir v Iceland* (dec.), Appl. No. 22779/14; ECtHR, 16 April 2019, *Bjarni Armannsson v Iceland*, Appl. No. 72098/14; ECtHR, 6 June 2019, *Nodet v France*, Appl. No. 47342/14.↩
27. ECtHR, *A and B v Norway*, *op. cit.* (n. 14), para. 144.↩
28. ECtHR, *Nodet v France*, *op. cit.* (n. 26), para. 48.↩
29. ECtHR, *Johannesson and others v Iceland*, *op. cit.* (n. 26), para. 51; ECtHR, *Matthildur Ingvarsdottir v Iceland* (dec.), *op. cit.* (n. 26), para. 58.↩
30. ECtHR, *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. ECtHR, *Johannesson and others v Iceland*, *op. cit.* (n. 26), para. 51; ECtHR, *Matthildur Ingvarsdottir v Iceland* (dec.), *op. cit.* (n. 26), para. 58; ECtHR, *Nodet v France*, *op. cit.* (n. 26), para. 47; ECtHR, *Bjarni Armannsson v Iceland*, *op. cit.* (n. 26), para. 53.↩
33. M. Luchtman, *op. cit.* (n. 9), 1727.↩
34. To this effect see also A. Galluccio, "Non solo proporzione della pena: la Corte Edu ancora sul ne bis in idem", (7 May 2019), *Diritto penale contemporaneo* < https://www.penalecontemporaneo.it/d/6662-non-solo-proporzione-della-pena-la-corte-edu-ancora-sul-bis-in-idem> accessed 30 August 2019; Id., "La Grande Sezione della Corte di giustizia si pronuncia sulle attese questioni pregiudiziali in materia di *bis in idem*", (21 March 2018) *Diritto penale contemporaneo* <https://www.penalecontemporaneo.it/d/5931-la-grande-sezione-della-corte-di-giustizia-si-pronuncia-sulle-attese-questioni-pregiudiziali-in-mat> accessed 30 August 2019; M. Scoletta, "Il ne bis in idem preso sul serio: la Corte Edu sulla illegittimità del doppio binario francese in materia di abusi di mercato (e i possibili riflessi nell'ordinamento italiano)", (17 June 2019), *Diritto penale contemporaneo* <https://www.penalecontemporaneo.it/d/6733-il-ne-bis-in-idem-preso-sul-serio-la-corte-edu-sulla-illegittimita-del-doppio-binario-francese-in-m> accessed 30 August 2019.↩
35. ECtHR, *Matthildur Ingvarsdottir v Iceland* (dec.), *op. cit.* (n. 26), paras. 60–61.↩
36. For instance, when verifying the compliance with the requirements for effectiveness of the investigation under Artt. 2 and 3 ECHR, see S. Mirandola, *The Protection of Human Rights through Criminal Justice: The Right to Effective Criminal Investigations in Europe. An Integrated Analysis between the ECHR and EU Law*, 2017, available at < http://amsdottorato.unibo.it/8219/>, p. 47.↩
37. P. Pinto de Albuquerque, Dissenting Opinion, para. 71; M. Luchtman, *op. cit.* (n. 9), 1728.↩
38. ECtHR, *A and B v Norway*, *op. cit.* (n. 14), para. 146; P. Pinto de Albuquerque, Dissenting Opinion, para. 60.↩
39. ECtHR, *Nodet v France*, *op. cit.* (n. 26), para. 49; ECtHR, *Johannesson and others v Iceland*, *op. cit.* (n. 26), para. 53.↩
40. 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.↩
41. In ECtHR, *Nodet v France*, *op. cit.* (n. 26), 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).↩
42. Although the period in which the second set of proceedings continued (after the final decision in the first one) was very similar, the ECtHR reached opposite conclusions in *Matthildur Ingvarsdottir v Iceland*, *op. cit.* (n. 26), and in *Bjarni Armannsson v Iceland*, *op. cit* (n. 26).↩
43. See F. Viganò, "Una nuova sentenza di Strasburgo su *ne bis in idem* e reati tributari", (22 May 2017), *Diritto penale contemporaneo* < https://www.penalecontemporaneo.it/d/5430-una-nuova-sentenza-di-strasburgo-su-ne-bis-in-idem-e-reati-tributari > accessed 30 August 2019; ECJ, *Menci, op. cit.* (n. 22), paras. 55–56.↩
44. To this effect see also M. Luchtman, *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.↩
45. ECJ, 27 May 2014, case C-129/14 PPU, *Criminal proceedings against Zoran Spasic*, paras. 55–59; cf., *e.g.*, J.A.E. Vervaele, "Schengen and Charter-related ne bis in idem protection in the Area of Freedom, Security and Justice: M and Zoran Spasic", (2015) 52 *Common Market Law Review*, 1339–1360; N. Recchia, "Il principio europeo del *ne bis in idem* tra dimensione interna e internazionale", (2015) *Riv. Trim. dir. pen. cont.*, 71; M. Wasmeier, "*Ne Bis in Idem* and the Enforcement Condition: Balancing Freedom, Security and Justice?", (2014) 5 *NJECL*, 534–555; C. Amalfitano, *op. cit.* (n. 1), 1016 ff.↩
46. Cf. Opinion of AG Cruz Villalón, in *Åkerberg Fransson*, *op. cit.* (n. 16), paras. 81–87; ECJ, 21 December 2016, joined cases C-203/15 and C-698/15, *Tele2 Sverige AB v Post- och telestyrelsen* and *Secretary of State for the Home Department v Tom Watson and Others*, para. 127 and case law cited therein. This approach has been defined as 'Charter-centrism' by L.R. Glas, J. Krommendijk, "From Opinion 2/13 to Avotiņš: Recent Developments in the Relationship between the Luxembourg and Strasbourg Courts", (2017) 17 *Human Rights Law Review*, 567.↩
47. ECJ, *Garlsson Real Estate SA*, *op. cit.* (n. 15), para. 24; ECJ, *Menci, op. cit.* (n. 15), para. 22 ff.↩
48. ECJ, *Garlsson Real Estate SA*, *op. cit.* (n. 15), para. 26; ECJ, *Menci, op. cit.* (n. 15), para. 24; ECJ, 5 April 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.↩
49. ECJ, 26 February 2013, case C-617/10, *Åklagaren v Hans Åkerberg Fransson*, para. 36.↩
50. See, for all, J. Tomkin, *op. cit.* (n. 8), 1387 ff.↩
51. ECJ, *Garlsson Real Estate SA*, *op. cit.* (n. 15), paras. 42–43; ECJ, *Menci, op. cit.* (n. 15), paras. 41–42; ECJ, *Di Puma and Zecca*, *op. cit.* (n. 15), para. 41.↩
52. ECJ, *Garlsson Real Estate SA*, *op. cit.* (n. 15), paras 46-47; ECJ, *Menci, op. cit.* (n. 15), paras. 44–46.↩
53. ECJ, *Garlsson Real Estate SA*, *op. cit.* (n. 15), paras. 44 and 46; ECJ, *Di Puma and Zecca*, *op. cit.* (n. 15), para. 42; ECJ, *Menci, op. cit.* (n. 15), para. 44.↩
54. Cf. Directive 2003/6/EC on insider dealing and market manipulation (market abuse), *O.J.* L 96, 12.4.2003, 16–25, now substituted by Directive (EU) 2014/57/EU on criminal sanctions for market abuse, *O.J.* L 173, 12.6.2014, 179–189, and by Regulation (EU) 596/2014 on market abuse, *O.J.* L 173, 12.6.2014, 1–61.↩
55. ECJ, *Garlsson Real Estate SA*, *op. cit.* (n. 15), para. 45; ECJ, *Menci, op. cit.* (n. 15), para. 43.↩
56. P. Pinto de Albuquerque, Dissenting Opinion, paras. 49 and 79.↩

57. ECJ, *Garlsson Real Estate SA*, *op. cit.* (n. 15), para. 49; ECJ, *Menci*, *op. cit.* (n. 15), para. 47, cf. A. Galluccio, "La Grande sezione della Corte di giustizia si pronuncia sulle attese questioni pregiudiziali in materia di *bis in idem*", (21 March 2018), *Diritto penale contemporaneo* < https://www.penalecontemporaneo.it/d/5931-la-grande-sezione-della-corte-di-giustizia-si-pronuncia-sulle-attese-questioni-pregiudiziali-in-mat> accessed 30 August 2019; M. Luchtman, *op. cit*. (n. 9), 1729 ff.↩
58. ECJ, *Garlsson Real Estate SA*, *op. cit.* (n. 15), para. 48; ECJ, *Menci*, *op. cit.* (n. 15), para. 46.↩
59. ECJ, *Garlsson Real Estate SA*, *op. cit.* (n. 15), paras. 51–63; ECJ, *Menci*, *op. cit.* (n. 15), paras. 49–64.↩
60. ECJ, *Menci*, *op. cit.* (n. 15), para. 56.↩
61. ECJ, *Menci*, *op. cit.* (n. 15), paras. 54–56.↩
62. As provided for in Art. 187i of Legislative Decree No. 58 of 24 February 1998, consolidating all provisions in the field of financial intermediation (the so-called TUF); cf. ECJ, *Garlsson Real Estate SA*, *op. cit.* (n. 15), para. 57.↩
63. ECJ, *Garlsson Real Estate SA*, *op. cit.* (n. 15), para. 57.↩
64. Cf. ECJ, *Di Puma and Zecca*, *op. cit.* (n. 15), paras. 43–44.↩
65. ECJ, 12 September 2017, case C-524/15, *Menci*, Opinion of AG Campos Sánchez-Bordona, paras. 55–56.↩
66. See, V. Covolo, "Guarantees of judicial protection under the ECHR: what interactions with EU law?", in: S. Allegrezza, V. Covolo (eds.), *Effective defence rights in criminal proceedings. A European and comparative study on judicial remedies*, 2018, 133 ff.; A. Ruggeri, ""Dialogue" between European and national courts, in the pursuit of the strongest protection of fundamental rights (with specific regard to criminal and procedural law)", in: S. Ruggeri (ed.), *Human Rights in European Criminal Law*, 2015, 25.↩
67. Cf. *M. Caianiello*, *op. cit*. (n. 23), 285 ff.↩
68. ECJ, *Menci*, *op. cit.* (n. 15), paras. 60–62 and in particular, para. 62.↩
69. Cf. above, Section II (2), and ECtHR, *Nodet v France*, *op. cit.* (n. 26), para 48.↩
70. ECJ, *Menci*, *op. cit.* (n. 15), para. 63.↩
71. ECJ, *Menci*, *op. cit.* (n. 15), para. 44.↩
72. Cf. G. Lasagni, *op. cit.* (n. 10).↩
73. See also, G. Ravarani, "Remedies against breaches of defence rights: mutual influence and potential conflicts between the ECHR and the CJEU", in: S. Allegrezza (ed.), *EU Fair Trial Rights*, (forthcoming publication).↩
74. See also V. Covolo, *op. cit.* (n. 66), 158.↩
75. Cf. S. Allegrezza (ed), *The Enforcement Dimension of the Single Supervisory Mechanism (SSM). The Interplay Between Administrative and Criminal Law*, (2019, forthcoming publication); G. Lasagni, *op. cit.* (n. 31).↩
76. Cf. S. Allegrezza (ed), *op. cit.* (n. 75); V. Felisatti, "Sanctioning Powers of the European Central Bank and the Ne Bis In Idem Principle within the Single Supervisory Mechanism" (2018) 8 *EuCLR*, 378–403; G. Lasagni, *op. cit.* (n. 31).↩

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