

Editorial

The Ne Bis in Idem Rule: Do the EUCJ and the ECtHR Follow the Same Track?

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On 20 March 2018 the Grand Chamber of the EUCJ delivered three rulings on the extent to which the principle of *ne bis in idem* permits Member States from imposing jointly criminal penalties and administrative penalties of a criminal nature. The first case deals with the non-payment of VAT,¹ the second with sanctioning of market manipulation² and the last with sanctioning of insider trading.³

These three rulings are important in view of two earlier decisions of the European Court of Human Rights on the 'bis' criterion⁴ and in view of the opinions of Advocate-General M. Campos Sanchez-Bordona in the aforementioned cases, in which he suggested the Court to develop an autonomous method for analysis of combined (criminal and administrative) proceedings diverging from the recent jurisprudence of the ECtHR.⁵

In this editorial special attention is given to the *Menci*-case involving the imposition of both tax and criminal penalties for non-payment of taxes (in particular VAT).

Both the Charter of Fundamental Rights of the European Union (hereafter Charter)⁶ and the European

Convention on Human Rights (ECHR)⁷ recognize the *ne bis in idem* principle providing that a person cannot be criminally prosecuted or punished twice for the same offence.⁸ In general the ECtHR requires that four conditions must be satisfied: (1) the person prosecuted or on whom the penalty is imposed is the same ('*in idem personam*'), (2) the acts being judged are the same ('*in idem factum*'), (3) there are two sets of proceedings in which a penalty is imposed (*bis*) and (4) one of the two decisions is *final*.⁹

In view of the Articles 6(3) TEU and 52(3) of the Charter, this fundamental right constitutes also a general principle of the Union's law, the meaning and scope of which is the same as those laid down by the said ECHR. Union law may, however, provide more extensive protection.¹⁰

Article 52(1) of the Charter also allows limitations on the exercise of the rights and freedoms recognized by the Charter under the condition that they are provided for by law and that they respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others. In so far as the Charter recognizes fundamental rights as they result from the constitutional traditions common to the Member States, those rights

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¹ EUCJ, 20 Mar. 2018, C-524/15, *Menci*; C-537/16.

² EUCJ, 20 Mar. 2018, C-537/16, *Garlsson Real Estate e.a.*

³ EUCJ, 20 Mar. 2018, Joined Cases C-596/16 and C-597/16, *Di Puma and Consob*.

⁴ ECtHR, 15 Nov. 2016, Case A6-B v. Norway (Grand Chamber) and ECtHR 18 May 2017, Case *Jóhannesson e.a. v. Iceland*.

⁵ Opinion Advocate General M. Campos Sánchez-Bordona, 12 Sept. 2017, C-524/15 (*Menci*); C-537/16 (*Garlsson Real Estate e.a.*) and Joined Cases C-596/16 and C-597/16 (*Di Puma and Zecca*).

Originally the *Menci* case was joint with the *Orsi* and *Baldetti* cases (C-217/15 and C-350/15). Before the delivery of the Opinion, announced for 17 Nov. 2016, the judgment of the ECtHR in *A and B v. Norway* was published on 15 Nov. 2016. In the light of that judgment, the Court decided, on 30 Nov. 2016, to disjoin the *Menci* case from the *Orsi* and *Baldetti* cases. Only the *Menci* case was allocated to the Grand Chamber. The *Orsi* and *Baldetti* cases concerned the least problematic element of the principle *ne bis in idem*, which concerns whether the person on whom sanctions are imposed is the same ('*in idem personam*') (see *infra*). In his judgment of 5 Apr. 2017 the EUCJ concludes that there was no violation of the *ne bis in idem* principle because the latter condition was not fulfilled: in the two criminal proceedings the tax penalty and the criminal charges concerned distinct persons, namely a legal personality and a natural person.

⁶ Art. 50 of the Charter: 'No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.'

⁷ Protocol No 7 (Art. 4.1) to the European Convention for the Protection of Human Rights and Fundamental Freedoms:

'1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.'

⁸ The same principle is also mentioned in Art. 14 s. 7 of the International Covenant on Civil and Political Rights and in Art. 8 s. 4 of the American Convention on Human Rights.

⁹ For more details, ECtHR, *Right not be Tried or Punished Twice* (the Non-Bis in Idem Principle, Fact Sheet (Mar. 2018), https://www.echr.coe.int/Documents/FS_Non_bis_in_idem_ENG.pdf) (assessed 12 Apr. 2018). See also Opinion Advocate General M. Campos Sánchez-Bordona, 12 Sept. 2017, C-524/15 (*Menci*), s. 38.

¹⁰ Art. 52.3, last sentence of the Charter: 'This provision shall not prevent Union law providing more extensive protection.'

must also be interpreted in harmony with those traditions (Article 52(4) Charter).

As already mentioned, the *ne bis in idem* rule raises questions about the qualification as criminal of the sanction and procedure, about the ‘*in idem*’ character of the facts and persons and finally about the procedural ‘*bis*’ factor.

Since the Zolothukin judgment by the ECtHR¹¹ it is clear that the determination as to whether the offences in question are the same (*idem*) depends on a facts-based assessment, rather than, for example, on the formal legal assessment consisting of comparing the essential elements of the offences. The prohibition concerns prosecution or trial for a second ‘offence’ in so far as the latter arises from identical facts or facts which are substantially the same.¹²

The *ne bis in idem* principle also implies two procedures (‘*bis*’). Several sanctions within one criminal procedure are not in breach of this principle. It seems, however, clear that the duplication of criminal proceedings and penalties with administrative proceedings and penalties of a criminal nature (‘*bis*’), against the same person with respect to the same acts, can constitute a limitation of the *ne bis in idem* principle.

In the *Åkerberg Fransson*-case, the EUCJ did already have the opportunity to rule on the application of the principle *ne bis in idem* to concurrent tax and criminal penalties as a response by the State to non-payment of taxes (in particular, VAT).¹³ In that decision, the Court indirectly referred to the three Engel criteria¹⁴ to ascertain when a tax penalty is really of a ‘criminal nature’, despite being nominally framed as administrative. The concrete assessment of these criteria is left to the referring court which could lead it, as the case may be, to regard their combination as contrary to Article 50 of the Charter, as long as the remaining penalties are effective, proportionate and dissuasive.¹⁵ In other words, in assessing whether the joint imposition of tax and criminal penalties is incompatible with the principle *ne bis in idem*, the referring court must also take into account the effectiveness of the remaining penalties in view of the prosecution of fraud and the protection of the EU’s financial interests.¹⁶

Also in the *Åkerberg Fransson*-case, the Court interpreted Article 50 of the Charter in line with the hitherto dominant case law of the ECtHR¹⁷ on the principle *ne bis in idem*¹⁸: this principle ‘does not preclude a Member State from imposing successively, for the same acts of non-compliance with declaration obligations in the field of value added tax, a tax penalty and a criminal penalty **in so far as the first penalty is not criminal in nature, a matter which is for the national court to determine**’.

Until the *A & B v. Norway*-case of the ECtHR the issue whether there is one or two procedures (‘*bis*’-criterion), has hardly been discussed in the case law.¹⁹

In the *A&B v. Norway*-case, the Grand Chamber of that Court accepted, however, that in the event of penalties which are administrative in form but criminal in nature, Article 4 of Protocol No 7 is not breached by the duplication of criminal proceedings and administrative proceedings in which penalties are imposed, provided that those proceedings are **sufficiently closely connected in time and in substance**. Where the State can prove that such a temporal and substantive connection exists between the proceedings, there will be no ‘*duplication of trial or punishment*’ (‘*bis*’-criterion)²⁰ Such a connection could be demonstrated by the complementary nature of the proceedings, their duality being a foreseeable consequence both in law and in practice, of the same impugned conduct, adequate interaction between the various competent authorities so that the facts underlying one set of proceedings were used in the other set and an ability to take into account the first penalty when the second penalty is imposed in order to avoid an excessive burden.²¹

Notice that in a well-documented dissenting opinion Judge Pinto De Albuquerque expressed severe criticism

¹¹ ECtHR, 10 Feb. 2009, *Sergey Zolotukhin v. Russia*, no. 14939/03, s. 84.

¹² ECtHR, 10 Feb. 2009, *Sergey Zolotukhin v. Russia*, no. 14939/03, s. 82.

¹³ EUCJ, 26 Feb. 2013, C-617/10, *Åkerberg Fransson*.

¹⁴ The Court makes reference to its Bonda decision (C-489/10 of 5 June 2012, s. 37) in which the Grand Chamber refers to the Engel decision of the ECtHR. The first criterion is the legal classification of the offence under national law, the second is the very nature of the offence, and the third is the nature and degree of severity of the penalty that the person concerned is liable to incur (ECtHR, 8 June 1976, *Engel and Others v. the Netherlands*, ss 80–82, and ECtHR, 10 Feb. 2009, *Sergey Zolotukhin v. Russia*, no. 14939/03, ss 52 and 53).

¹⁵ EUCJ, 26 Feb. 2013, C-617/10, *Åkerberg Fransson*, ss 34–35.

¹⁶ Opinion Advocate General M. Campos Sánchez-Bordona, 12 Sept. 2017, C-524/15 (*Menci*), s. 31.

¹⁷ ECtHR, 10 Feb. 2009, *Sergey Zolotukhin v. Russia*, no 14838/03, s. 120.

¹⁸ EUCJ, 26 Feb. 2013, C-617/10, *Åkerberg Fransson*, s. 37; See also Lenaerts, K. & Gutiérrez Fons, J. A., *The Place of the Charter in the EU Institutional Edifice*, in *The EU Charter of Fundamental Rights: A Commentary* 1600 (Peers, S., Hervey, T., Kenner, J. & Ward, A. eds, Oxford: Hart Publishing 2014).

¹⁹ Exception is made for the fact that Art. 4 of Protocol No. 7 is applicable only to courts in the same State (a.o. ECtHR, 22 May 2007, *Böheim v. Italy*; ECtHR, 4 Sept. 2014 *Trabelsi v. Belgium*; ECtHR, 20 Feb. 2018 *Krombach v. France*).

²⁰ ECtHR, 15 Nov. 2016, Case *A&B v. Norway* (Grand Chamber), s. 130. See also ECtHR 18 May 2017, Case *Jóhannesson e.a. v. Iceland*, ss 49–56: in this case the Court could not find that there was a sufficiently close connection in substance and in time between the tax proceedings and the criminal proceedings in the case for them to be compatible with the *bis* criterion in Art. 4 of Protocol No. 7. Consequently, according to the Court, the applicants suffered disproportionate prejudice as a result of having been tried and punished for the same or substantially the same conduct by different authorities in two different proceedings which lacked the required connection. (Attard, R., *The ECtHR’s Recent Tax Judgments on the Non Bis in Idem Rule*, 6 EC-Tax Rev., vol. 26, 335–338 (2017)).

²¹ ECtHR, 15 Nov. 2016, Case *A&B v. Norway* (Grand Chamber), ss 131–133.

regarding this new evolution in the case law of the ECtHR.²²

In his opinion for the *Menci-Case*, Advocate-General M. Campos Sánchez-Bordona, was also critical of this new approach of the ECtHR, in particular as regards the lack of clarity about the criterion 'connection in time between the proceedings':

*The ECtHR is less precise when it comes to the criteria for establishing that there is a sufficiently close connection in time between the proceedings. The ECtHR merely states that it is not necessary for the criminal and administrative proceedings to be conducted simultaneously from beginning to end, adding that the greater the time difference between the two sets of proceedings, the more difficult it will be for the State to justify that difference.*²³

Comparing the facts in respectively the *A&B v. Norway* and the *Jóhannesson v. Iceland* case of the ECtHR he concluded that national courts must address almost insurmountable obstacles in order to ascertain *a priori*, with a minimum degree of certainty and foreseeability, when that temporal connection exists.²⁴ Whilst the Advocate General was careful to acknowledge the mutual respect between the EUCJ and the ECtHR, he considered the *A & B* judgment as a deliberate decision to 'limit the content of the right guaranteed to individuals by the principle *ne bis in idem* where penalties of the same nature (those which are criminal in substance) are imposed twice in respect of the same acts'.²⁵ He suggested the EUCJ not to abandon the level of protection previously reached in the *Åkerberg Fransson* judgment solely because the ECtHR has changed direction in its interpretation of Article 4 of Protocol No 7 in the area concerned.²⁶ According to him the case law of the ECtHR should be disregarded where, in the case of rights laid down in the Charter which are similar in content to those laid down in the ECHR and

the protocols thereto, the interpretation of the Court of Justice establishes a higher level of protection, provided that this is not detrimental to another right guaranteed by the Charter.²⁷ He concludes by proposing the EUCJ to respond that the issue of *ne bis in idem*, fundamentally requires a consideration of whether the administrative penalty imposed, in substance, is a criminal penalty in accordance with the criteria in the *Engel*-case. If so, the *ne bis in idem* principle is breached.²⁸

The EUCJ however did not follow the opinion of its Advocate-General. First, the Court clarifies under what conditions a limitation of the *ne bis in idem* principle (especially the *bis*-aspect) is justified under the Articles 50 and 51(2) of the Charter (sections 44, 49, 53, 55 and 58). Second, the Court put forward that in light of Article 52(3) of the Charter one has to judge whether or not the protection given to the *ne bis in idem*-rule, is not conflicting with Article 4 of Protocol No 7. Third, the Court makes reference to the *A & B v. Norway*-decision of the ECtHR and confirms that Article 50 of the Charter read in conjunction with Article 52(1) thereof, ensures 'a level of protection of the *ne bis in idem* principle which is not in conflict with that guaranteed by Article 4 of Protocol No 7 to the ECHR, as interpreted by the European Court of Human Rights' (sections 61 and 62). Subsequently it declares that a duplication of proceedings and penalties against the same person with respect to the same acts, does not necessarily constitute a limitation of the *ne bis in idem* principle. The Court finally repeats the conditions that may justify under EU-law a limitation in national legislation of the *ne bis in idem* principle, namely:

that that national legislation

–pursues an objective of general interest which is such as to justify such a duplication of proceedings and penalties, namely combating value added tax offences, it being necessary for those proceedings and penalties to pursue additional objectives,
–contains rules ensuring coordination which limits to what is strictly necessary the additional disadvantage which results, for the persons concerned, from a duplication of proceedings, and
–provides for rules making it possible to ensure that the severity of all of the penalties imposed is limited to what is strictly necessary in relation to the seriousness of the offence concerned. (section 63)

It is, however, for the referring court to ensure that the actual disadvantage from the duplication of the proceedings and penalties, is not excessive in relation to the seriousness of the offence committed.

Both the ECtHR and the EUCJ come to the conclusion that under certain conditions the '*ne bis in idem*' principle does not preclude national legislation enabling the

²² Dissenting Opinion Judge Pinto De Albuquerque, s. 79: 'Ne bis in idem loses its pro persona character, subverted by the Court's strict pro auctoritate stance. It is no longer an individual guarantee, but a tool to avoid the defendants' manipulation and impunity. After turning the rationale of the *ne bis in idem* principle upside down, the present judgment opens the door to an unprecedented, Leviathan-like punitive policy based on multiple State-pursued proceedings, strategically connected and put in place in order to achieve the maximum possible repressive effect'.

²³ Opinion Advocate General M. Campos Sánchez-Bordona, 12 Sept. 2017, C-524/15 (*Menci*), s. 55, with reference to ECtHR, 15 Nov. 2016, Case *A&B v. Norway* (Grand Chamber), s. 134.

²⁴ Opinion Advocate General M. Campos Sánchez-Bordona, 12 Sept. 2017, C-524/15 (*Menci*), s. 56.

²⁵ Opinion Advocate General M. Campos Sánchez-Bordona, 12 Sept. 2017, C-524/15 (*Menci*), s. 69; A. Clifford, *Diverging Opinions on Double Jeopardy in the ECJ and the ECtHR?*, Bright Line Law Portal (4 Oct. 2017), <https://www.brightlinelaw.co.uk/bll-portal/diverging-opinions-on-double-jeopardy-in-the-ecj-and-the-ecthr.html>; (assessed 14 May 2018).

²⁶ Opinion Advocate General M. Campos Sánchez-Bordona, 12 Sept. 2017, C-524/15 (*Menci*), s. 72: 'since the case-law of the Court has consolidated a statement of the law to the effect that two parallel or consecutive sets of proceedings, which lead to two substantively criminal penalties in respect of the same acts, continue to be two sets of proceedings (*bis*) and not one, I can find no sound reasons for abandoning it'.

²⁷ Opinion Advocate General M. Campos Sánchez-Bordona, 12 Sept. 2017, C-524/15 (*Menci*), s. 75.

²⁸ Opinion Advocate General M. Campos Sánchez-Bordona, 12 Sept. 2017, C-524/15 (*Menci*), s. 126.

duplication of administrative and criminal procedures resulting both in penalties. Yet, the motivation seems different. The ECtHR emphasizes exclusively the degree of integration of the two procedures. When the two procedures are 'sufficiently closely connected in substance and in time', there is only a single, coherent procedure, and so the *bis*-condition is not met. The EUCJ, on the other hand, assumes the existence of two procedures. It does not demonstrate that the two procedure are one given their close connection. The EUCJ does not deny the *bis* condition to be fulfilled, but accepts that the restriction on the *ne bis in idem* principle can be justified under the conditions quoted above, thus rendering the fundamental right on '*ne bis in idem*' be respected. In that

justification, the Court points not only to the necessary coherence, coordination and alignment of the two procedures and penalties imposed, but also to the requirement of an objective of general interest, such as in the case at hand the combating of offences relating to VAT. Therefore the EUCJ does not entirely follow the same track as the ECtHR. As indicated in the press release of 20 March 2018, the Court admits that the *ne bis in idem* principle may be limited for the purpose of protecting the financial interests of the EU and the financial markets thereof.²⁹

Only the future will make clear whether these divergent approaches of the *ne bis in idem* principle by EUCJ and the ECtHR shall lead to undesired different applications thereof *in concreto*.

²⁹ Press Release, (20 Mar. 2018), No 34/18, <https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-03/cp180034en.pdf> (assessed 14 May 2018).