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***The Ne Bis in Idem* Principle in European Union Tax Law**

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Summary

The principle of *ne bis in idem*, enshrined both in the Charter of Fundamental Rights of the European Union and in the European Convention on Human Rights, has been the object of an extensive body of case law. Therefore, the question this thesis seeks to answer is: ‘what is the current status of the principle of *ne bis in idem* under EU tax law?’

After the development of a high level of protection regarding *ne bis in idem* and VAT surcharges in the case of *Åkerberg Fransson*, the Court of Justice of the European Union took a step back in the *Luca Menci* ruling, following the European Court of Human Rights, and limiting its previous scope of safeguard. The *Menci* ruling, however, seems to confront the limitation clause in Article 52(1) and the non-regression clause in Article 53, both in the Charter. It also disregards the possibility of providing a higher level of protection than that afforded by the Convention, as provided in Article 52(3) of the Charter, which seems to have been the best response to the case.

This decrease in the standard of protection draws up to the conclusion that the Court of Justice of the European Union should not have taken the steps of the European Court of Human Rights. The current status of the principle of *ne bis in idem* in EU tax law compromises human rights protection and raises doubts regarding the future application of concurrent administrative and criminal penalties in the occurrence of VAT irregularities.

Abbreviation List

| | |
|------------------------|---|
| EU | European Union |
| CJEU | Court of Justice of the European Union |
| ECtHR | European Court of Human Rights |
| CFREU or the Charter | Charter of Fundamental Rights of the European Union |
| ECHR or the Convention | European Convention on Human Rights |
| TEU | Treaty on European Union |
| TFEU | Treaty on the Functioning of the European Union |
| CISA | Convention Implementing the Schengen Agreement |
| VAT | Value-added tax |
| EUROJUST | European Union's Judicial Cooperation Unit |

Chapter 1: Introduction

1.1. Problem

The principle of *ne bis in idem* prohibits the application of multiple criminal charges against the same person and in respect of the same offence. It has been conferred the status of a fundamental human right under the European Convention on Human Rights (ECHR or the Convention) and the Charter of Fundamental Rights of the European Union (CFREU or the Charter).

Throughout the development of its case law, the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) have reached a high level of protection regarding the application of non-double jeopardy in parallel proceedings concerning tax and criminal penalties¹.

However, the ECtHR has drastically changed its approach towards the application of *ne bis in idem* in *A & B v. Norway*². It seems that the CJEU, although strictly speaking did not follow that Court, has also taken a step back and limited the scope of the protection afforded by the principle in VAT cases. This is the conclusion attained from the CJEU's recent decision in the case of *Luca Menci*³, which recognised the possibility of limiting the non-double jeopardy rule in situations regarding VAT.

The problematic result of these judgements is that, in many circumstances, it is now possible to apply both a tax surcharge of a penal nature and a *de facto* criminal penalty for the same offence, which is clearly against the axiom of the principle of *ne bis in idem*.

1.2. Research Question and Purpose:

The central question which this thesis seeks to answer is: 'what is the current status of the principle of *ne bis in idem* in European Tax Law?'

After *Åkerberg Fransson*⁴, the repercussion of human rights in tax law matters has become self-evident in European Union law. However, constant changes and developments

¹ See further Chapter 3

² *A & B v Norway* Appl no 25130/11 and Appl no 29758/11 (ECtHR 15 November 2016) ECLI:CE:ECHR:-2016:1115JUD002413011

³ Case C-524/15 *Luca Menci* [2018] ECLI:EU:C:2018:197

⁴ Case C-617/10 *Åklagaren v Åkerberg Fransson* [2013] ECLI:EU:C:2013:105

have been observed in these linked areas of law and debates have taken the spotlight, specially regarding fundamental human rights present in both the CFREU and the ECHR.

In the midst of a major *frisson* regarding the future of the principle of *ne bis in idem* in EU law, the main aim of this thesis is to present an analysis of the reasons why the CJEU should not have limited the scope of application of the principle of *ne bis in idem* in cases involving coexisting administrative and criminal proceedings regarding a VAT irregularity, as done by the ECtHR, although based on different reasoning.

To achieve this objective, attention will be held towards the approach taken by the ECtHR in *A & B v. Norway* and by the CJEU in the long-awaited decision of *Menci* and how they have departed from the core mandate of *ne bis in idem*, which is to prevent double *criminal* punishment.

More specifically, the aim of this thesis is to explore the principle of *ne bis in idem* in the field of EU tax law, as provided in the ECHR and the CFREU and interpreted in the case law of the respective Courts regarding tax surcharges. For this purpose, this thesis will assess how the ECtHR and the CJEU have determined the criminal nature of tax penalties, possible limitations to the principle of *ne bis in idem* according to the recent case law of both Courts. and to what extent and in which circumstances such restraints infringe the Charter. It will also examine the implications and scope of the possibility of autonomous interpretation by the CJEU based on Article 52(3) of the Charter.

1.3. Methodology and Materials:

This thesis will adopt the approach of the traditional legal dogmatics method.

This method includes the literal, purposive and contextual analysis of the related instruments of EU law and of the Convention, as well as the pertinent domestic legislation.

The analysis of the case law of the ECtHR and the CJEU will be carried out, supplemented by the doctrinal view presented in the relevant literature and scientific articles on the matters this thesis intends to cover.

This thesis will present a critical assessment of the CJEU's *Menci* ruling, by means of a *de lege lata*⁵ and a *de lege ferenda*⁶ interpretation regarding the principle of *ne bis in idem*, in light of all of the material abovementioned.

⁵ The law as it exists

⁶ The law as it should be

1.4. Delimitations

This thesis will be confined to the analysis of the principle of *ne bis in idem* and its application in tax cases regarding the imposition of concurrent criminal and administrative proceedings and penalties in the legal order of the EU and in the context of the European Convention on Human Rights.

The intention of the present research is not to provide an in-depth examination of all of the particularities regarding the principle of *ne bis in idem*, such as the concept of *bis* and *idem*, or the application of the principle in pure criminal cases.

Rather, the center of analysis concerns the issues arising from cumulative penalties in the case of administrative surcharges which are, in fact, of a criminal nature and actual criminally qualified sanctions, regarding the same acts which amount to an offence related to the non-payment of VAT obligations.

Regarding the case law presented in this thesis, the analysis will be retained to the jurisprudence of the ECtHR and the CJEU. At certain points, cases that do not concern tax disputes will be brought into place in order to provide an advanced understanding of specific issues and the history underlying the Court's reasoning.

This thesis' attempt is to explain the main and core features of the principle of *ne bis in idem*, which will be necessary for the discussion concerning its preservation in the latest case law of the ECtHR and the CJEU, which is the central point of this essay.

1.5. Disposition

This thesis is divided into five chapters, the first one comprising the introductory apportionment of this study.

In the second chapter, the principle of *ne bis in idem* will effectively be analysed, by means of a historical overview, followed by a highlight on the topic of its application in double-track systems. Subsequently, the analysis of the principle within the ECHR and the CFREU and the interaction between both legislations will be made.

In the third chapter, the development of the principle will be discussed in light of the relevant case law on tax disputes and other related cases, both in the ECtHR and the CJEU,

regarding the protection provided by the principle in situations involving the application of concurrent tax surcharge and a criminal penalty. In this chapter, the judgement of *Åkerberg* will be discussed.

The fourth chapter will cover the change in the approach of the ECtHR and the CJEU regarding the right not to be punished twice. A concise analysis of the judgement of *A & B v. Norway* will be made, followed by a critical examination of *Menci* and how the CJEU has departed from the stance established in *Åkerberg*. The limitation possibility in Article 52(1), the homogeneity clause in 52(3) and the non-regression clause in Article 53 of the Charter will also be discussed, followed by a brief note on the issues are most likely to arise from the controversial *Menci* ruling.

Finally, in the last chapter a conclusion will be drawn up concerning the findings and critical assessments raised throughout this thesis.

Chapter 2: *Ne bis in idem*: General Considerations

2.1. Historical Overview

The principle of *ne bis in idem* has a long history and, although its exact origin is uncertain, a consensus that it dates back to the Roman and Greek Republic was reached amongst the doctrine⁷. Albeit an archaic interpretation of the early days, the intent of avoiding double criminal punishment of the same person for the same offence was already present, as Roman law determined: “the governor must not allow a man to be charged twice with the same offense of which he has already been acquitted”⁸.

The verbatim translation of the Latin postulate *ne bis in idem* or *non bis in idem* is *not twice in the same* and emanates from the conviction that the same person should not face multiple punishments for the same offence. It was, thus, conceived as a principle of criminal law.

⁷ For a brief historical note, see *A & B v. Norway* (n 2), Dissenting Opinion of Judge Pinto de Albuquerque, para 3. For a deeper historical analysis, see Dax Eric Lopez, ‘Not twice for the Same: How the Dual Sovereignty Doctrine Is Used to Circumvent Non Bis in Idem [notes]’ (2000) 5 *Vanderbilt Journal of Transnational Law* 1266

⁸ Lopez (n 7) 1267

In the European context, this concept further developed into the restriction of the “possibility of a defendant being *prosecuted* repeatedly on the basis of the same *offence, act or facts*”⁹.

It is founded on the safeguarding of legal certainty and as a limitation to the State’s *ius puniendi*¹⁰, considering the repressive character of criminal law and the principle of proportionality, which, in summary, represents the application of the adequate punishment for a certain act and which should not surpass the necessary means to achieve its aims¹¹. This means that, when the State exercises its punitive power through penal law, the punishment must be suitable to the offence (proportionality in abstract) and the offender (proportionality in concrete)¹² and sufficient, so as to not render necessary the application of further sanctions. It is, in this respect, an individual right linked to the guarantee of legal certainty¹³.

Additionally, and still associated with legal certainty, the *ne bis in idem* principle asseverates compliance with the doctrine of *res judicata*¹⁴, meaning that, in this context, once the *criminal* procedure has reached a final decision, the same issue (regarding the same person and same facts) is barred from being subject to a new analysis by the court, unless new facts are discovered. This “ensures respect for the authority of a national court’s decision and protects legal security by holding that the court’s decision is final”¹⁵, thus representing a two way protection: for the State and for the individual.

In this sense, it can be said that the principle of *ne bis in idem* stands on the idea that, once a criminal sanction has been applied and the decision has become final, it is rendered to be proportionate and translates the authority of the State’s ruling. As such, it is not only unnecessary to apply further punishment, but it is also prohibited. The same is true when an

⁹ Bas van Bockel, *Ne Bis in Idem in EU Law* (Cambridge University Press 2016) 13 [emphasis added]

¹⁰ *Ius puniendi* is a Latin expression which means ‘right to punish’, translated into the punitive power is attributed to the State as the sovereign authority able to criminally punish an individual.

¹¹ Carlos Eduardo Adriano Japiassú, ‘O Princípio do *Ne Bis in Idem* no Direito Penal Internacional’ (2004) *Revista da Faculdade de Direito de Campos* IV 4 and V 5 <<http://fdc.br/Arquivos/Mestrado/Revistas/Revista04e05/Docente/07.pdf>> accessed 20 Feb 2018

¹² Proportionality in abstract refers to the proportionality principle applied by the legislator when enacting criminal law, where the severeness of the penalty, determined by the black letter of the law, must be proportionate to the seriousness of the conduct. Proportionality in concrete is a criterion utilized by the judge when applying the law to an individual, where it the punishment must be proportionate to the infraction *de facto*.

¹³ Bockel (n 9) 13

¹⁴ ‘*Res judicata* translates to “a matter judged.” Generally, *res judicata* is the principle that a cause of action may not be relitigated once it has been judged on the merits. “Finality” is the term which refers to when a court renders a final judgment on the merits.’ Definition of Wex Legal Dictionary <https://www.law.cornell.edu/wex/res_judicata> accessed 10 March 2018

¹⁵ Diane Bernard ‘*Ne bis in idem* – Protector of Defendant’s Rights or Jurisdictional Pointsman?’ (2011) 4 *Journal of International Criminal Justice* 865

individual is acquitted, since the State has formally exhausted the exercise of its *ius puniendi* (the penalty execution is also part of the punitive power).

The principle of *ne bis in idem* originated as a principle applied within the boundaries of the State, within a domestic legal system¹⁶.

It is encountered in different legislative cultures and acknowledged in different manners, such as a general principle construed by case law¹⁷, codified into diplomas of criminal law¹⁸ or even embedded as a constitutional guarantee¹⁹.

The recognition of this principle between States is not a peremptory rule of International Law (*ius cogens*), rather they have decided to recognize this principle in Treaty provisions²⁰ and, thus, extended its application to an international dimension.

The need for adoption of the principle in an international context increased with the raise in cross-border criminality and the need to protect the individual and the State's sovereignty in a case of jurisdiction overlap²¹. In this context, problems begin to arise regarding, mainly, the difference in legislations and mutual recognition of the decisions pronounced by different States.

In the European Union, the bringing down of barriers and adoption of an internal market jointly with the free movement provisions, advantage the increase of transnational crimes,²² requiring special rules for the issues that arise in this context, such as the punishment of the same person for the same offence in different Member States.

Hence, through the development of the EU legal order, the *ne bis in idem* principle has now reached the status of a fundamental human right and is enshrined in the two principal human rights ordinances in Europe, the ECHR²³ and the CFREU²⁴. It is also provided in the Convention Implementing the Schengen Agreement²⁵ (CISA), which is not a human rights

¹⁶ Teresa Bravo, '*Ne Bis in Idem* as a Defence Right and a Procedural Safeguard in the EU' (2011) vol 2 issue 4 New Journal of European Criminal Law 393

¹⁷ The case law of the ECtHR is mainly responsible for the development of the *ne bis in idem* principle's concept. See, for instance, *Sergey Zolotukhin v Russia* Appl. No. 1493/03 (ECtHR 10 February 2009) ECLI:CE:ECHR:2009:0210JUD001493903 on the interpretation of the term 'same offence' in Article 4, Protocol 7 of the ECHR.

¹⁸ Article 68 of the Dutch Criminal Code

¹⁹ For example, Article 103 of the German Constitution. See also, Bockel (n 9) 13

²⁰ John Vervaele, '*Transnational ne bis in idem* Principle in the EU Mutual Recognition and Equivalent Protection of Human Rights, The [article]' (2005) vol 2 Utrecht Law Review 100

²¹ Bravo (N 16) 394

²² *ibid*

²³ Article 7 of Protocol 4 of the European Convention on Human Rights

²⁴ Article 50 of the Charter of Fundamental Rights of the European Union [2012] OJ C 326/391

²⁵ Article 54 of the Convention of 19 June 1990 implementing the Schengen Agreement [2000] OJ L239/19

instrument, but a set of rules intended to secure the gradual abolition of checks at common borders in the area of free movement between European countries (Schengen area).

The application of the *ne bis in idem* principle requires the presence of certain elements: the same person, identity of facts (*idem*), duplication of proceedings (*bis*) and that one of the decisions have become final²⁶.

In the European context, the ECtHR has highly contributed with the definition of these concepts, through an extensive analysis of such aspects of the principle in a great length of case law with the intention of providing clarification and guidance for the Convention's Contracting States²⁷. Nonetheless, the aim of this essay is not to discuss these findings, but to portray the aspect related to the criminal nature of the duplicate proceedings.

The question on the different domestic legislations and how Member States throughout the EU determine the application of criminal and/or administrative sanctions for the same offence (single and double-track systems) is an important one for the purposes of this thesis and will be discussed in the section below.

2.2. *Ne bis in idem* and Concurrent Administrative and Criminal Proceedings

When facing two penalties which are both inscribed in penal legislation and, thus, clearly of a criminal nature, the protection awarded by the principle of *ne bis in idem* is apparent and dispenses deeper analysis. However, serious doubt arises when an individual is faced with both criminal and administrative charges for the same offence.

Following the idea that criminal law should be the last recourse of the State, a movement called *decriminalization*²⁸ was born in the seventies, when countries such as Germany and Italy decided to take away the stigma and repressiveness that comes along with the criminalization of a conduct, as they transformed certain criminal offences, considered to be of less severeness,

²⁶ For the scope of application of the *ne bis in idem* principle in Europe, see Bockel (n 9) 44-52

²⁷ For instance, *Sergey Zolotukhin v Russia* (n 17) for interpretation on the concept of *idem* and *bis*; *Ruotsalainen v Finland* Appl No 10626/12 (ECtHR 14 February 2012) ECLI:CE:ECHR:2009:0616JUD001307903 on the concept of *idem*; and *Nykänen v Finland* Appl. No. 11828/11 (ECtHR 20 May 2014) ECLI:CE:ECHR:2014:0520JUD001182811 on the discontinuation of the second proceeding after the first one has been decided.

²⁸ The idea of decriminalization is to substitute a criminal charge for a civil liability or an administrative penalty, when the effect of the latter can be equivalent to a criminal restraint. For a deeper study on decriminalization, see Hans-Bernd Schäfer, 'Decriminalization, How Can It Be Legitimized and How Far Can It Go?' (2013) International Symposium on Regulatory Crimes and Overcriminalization, Seoul, Korea <<https://poseidon01.ssrn.com/delivery.php?ID=65800206507109613&EXT=pdf>> accessed 22 Feb 2018

into administrative infractions²⁹. This movement has an influence on the application of the *ne bis in idem* principle, since, as presented above, it applies in the situation of multiple *criminal* prosecutions.

With decriminalization, offences that were previously formally qualified as criminal, obtained an administrative character and, theoretically, would not be subject to the protection of *ne bis in idem* principle. However, this was not the conclusion of the ECtHR.

In *Öztürk*³⁰, the ECHR was faced with this exact issue: the decriminalization of the conduct of careless driving, turning it into a mere regulatory offence to which certain protections awarded only to criminal offences (in this case, Article 6, ECHR) did not apply. The Court understood that, even if the conduct was now considered a minor offence by Germany, it nonetheless can still be classified as a criminal offence in nature to which the Convention provides protection³¹.

In a later case concerning a tax surcharge, *Västberga Taxi*³², the offence of inaccurate tax reporting, product of the decriminalization movement in Sweden, constituted a criminal charge in nature, also subject to Article 6, ECHR.

This demonstrates the difficulty in drawing the line between the offences and the sanctions' criminal or administrative nature³³.

Since the *ne bis in idem* protection, in the context of the ECHR and the CFREU, is granted only when an individual faces multiple *criminal* punishments, determining the concept of a criminal charge is of high importance³⁴ and has been pursued by both the ECtHR and the CJEU in a number of cases, which will be explored further on in Chapter 3.

According to Marletta, the *ne bis in idem* principle has three dimensions: internal, transnational and cross-sectorial³⁵. The last cited dimension consists of the criminal and

²⁹ Cristina Mauro, 'The Concept of Criminal Charges in the European Court of Human Rights Case Law' in Georg Kofler, Poiares M Maduro and Pasquale Pistone (eds), *Human Rights and Taxation in Europe and the World* (IBFD 2011)

³⁰ *Öztürk v Federal Republic of Germany* Appl. No. 8544/79 (ECtHR 21 February 1984) ECLI:CE:ECHR:-1984:1023JUD000854479

³¹ *ibid* para 46-56

³² *Västberga Taxi AB and Vulic v Sweden* Appl. No. 36985/97 (ECtHR 21 May 2003) ECLI:CE:ECHR:2002:0723JUD003698597

³³ Mauro (n 29) 463

³⁴ *ibid* 460

³⁵ Angelo Marletta, 'The *ne bis in idem* principle in the case law of the European Court of Human Rights and the Court of Justice of the European Union' (2017) 4 Tax Magazine 179

administrative double-track enforcement system³⁶ or twin-track system³⁷, still preserved in countries in the EU, such as Italy³⁸ and France.

This type of system exists as opposed to a one-track or a single-track system, where either an administrative or a criminal proceeding takes place, not allowing both to occur concurrently.

AG Sánchez-Bordona explains in his Opinion in *Luca Menci*³⁹ that in a one-track structure, there are specific provisions of law in case of administrative proceedings regarding tax surcharges. An example might be a rule according to which the fiscal authorities may be required to send the case to the Public Prosecution Office, which can decide to bring criminal charges against the individual, thus resolving the administrative claim.

Furthermore, AG Sánchez-Bordona praises the single-track systems, asserting that:

In single-track systems, there is a compliance with the principle *ne bis in idem* [...] and the taxable person has a guarantee that he will not be tried or punished twice in criminal proceedings for the same criminal offence. The certainty that, ultimately, the most serious types of fraud will be combated effectively using criminal penalties, which may include imprisonment of the offender, endows these systems with the necessary deterrent force required for the protection of the EU's financial interests. In my view, the same does not occur in twin-track systems.⁴⁰

It follows from this reasoning that the protection against double jeopardy is, in fact, easier to accommodate in a single punitive system, which, precisely prohibits the application of concurrent criminal and administrative punishments for the same acts.

The problem then arises in double-track systems, where States determine acts that formally consist of a criminal offence and carry a penal punishment, and also define the

³⁶ *ibid* 183

³⁷ AG Sánchez-Bordona uses this terminology in his Opinion in *Luca Menci* (n 3) par 85

³⁸ The case of *Luca Menci* (n 3) is an example of Italy's double-track system, where an individual is liable to punishment in both administrative and criminal proceedings for the same facts. Another example is *Grande Stevens v Italy* Appl no 18640/10 (ECtHR 4 March 2014) ECLI:CE:ECHR:2014:0304JUD001864010, an Italian case judged by the ECtHR, regarding administrative penalties for market offences and criminal proceedings brought upon the applicant for the same facts. The Court, citing *Åkerberg* (n 4), recognized that both proceedings were, in fact, of a criminal nature to which the principle of *ne bis in idem* must apply (see paras 219-229).

³⁹ *Luca Menci* (n 3), Opinion of AG Sánchez-Bordona, para 86

⁴⁰ *ibid* para 87

application of administrative charges against the same individual and for the same offence, which are formally not criminal, but carry a criminal punishment in nature⁴¹.

However, there is no rule in EU law determining that Member States must establish one system or the other and the question regarding a double-track system has been clearly posted to the CJEU in *Åkerberg Fransson*, where the Court affirmed that the existence of such a system is compatible with EU legislation. The Court's reasoning is directly linked to the principle of *ne bis in idem* and the determination of a criminal charge in nature, which will be analyzed in depth concerning the criteria that define that nature in the third chapter of this thesis.

The center of the discussion regarding dual-track systems and the principle of *ne bis in idem* is that certain administrative penalties carry a burden of a repressive and retributive nature that, in fact, render them as a penal charge.

Mainly, an administrative penalty constitutes financial surcharges, but they can also concern other types of sanctions, such as a disciplinary punishment in the military⁴², disciplinary proceedings in prison⁴³, the withholding⁴⁴ or revocation⁴⁵ of a license and the refusal to grant a residence permit⁴⁶. The ECtHR has examined cases involving all the mentioned types of administrative penalties, but did not find that all of them constitute cases of administrative sanctions which are criminal in nature⁴⁷.

Examples of areas of law where the discussion regarding the possibility that an administrative surcharge can be deemed as holding a criminal nature can be found in military law, competition law, financial market law and tax law. However, only the latter will be the object of discussion in this essay⁴⁸.

2.3. The Scope of Protection of the CFREU and the ECHR and *Ne Bis in Idem*

Human rights are an obvious concern of the European Court of Human Rights. As for the European Union, however, the initial purpose was to form a common market with the intent of promoting free trade. Nonetheless, the CJEU had been faced with innumerable cases

⁴¹ In *Engel and Others v Netherlands* Appl no 5100/71; 5101/71; 5102/71; 5354/72; 5370/72 (ECtHR 8 June 1976) ECLI:CE:ECHR:1976:1123JUD00051007, paras 80-85, the Court discusses *autonomy of the concept of criminal* and found the need to take into account the nature of the offence and the seriousness of the punishment, rather than the formal aspects of the offence.

⁴² *Engel and Others* (n 41)

⁴³ *Toth v. Croatia* Appl no 64674/01 (ECtHR 9 July 2002) ECLI:CE:ECHR:2002:0709DEC006467401

⁴⁴ *Nilsson v Sweden* Appl no 11801/05 (ECtHR 26 February 2008) ECLI:CE:ECHR:2008:0226DEC001181105

⁴⁵ *Palmén v Sweden* Appl no 38292/15 (ECtHR 22 March 2006) ECLI:CE:ECHR:2016:0322DEC003829215

⁴⁶ *Davydov v. Estonia* Appl no 16386/03 (ECtHR 31 May 2005) ECLI:CE:ECHR:2005:0531DEC001638703

⁴⁷ This was the case in *Toth* (n 43), *Palmén* (n 45) and *Davydov* (n 46).

⁴⁸ See further Chapter 3

regarding human rights since the early days of the EU and it seemed that refraining from such issues would not be an option.

As mentioned above, before the CFREU became a binding instrument, the CJEU had been through a history of case law involving fundamental rights. That Court acknowledged the prohibition of double punishment for the same acts already in its case law in 1965 in *Gutmann*⁴⁹ where multiple disciplinary proceedings regarding the same facts were brought into question and the Court found them to be a violation of the prohibition of double jeopardy.

The need for the protection of such rights became self-evident over time, since Member States raised various issues regarding their own fundamental rights before the CJEU, leading to their later embodiment into the EU order itself.⁵⁰

The CISA⁵¹ was the first instrument to afford protection against multiple punishment for the same offence through the application of the principle of *ne bis in idem* in the EU legal order and evidenced the importance of such explicit recognition for the implementation of the area of free movement⁵². It was signed in 1990 by France, Germany, Belgium, Luxemburg and the Netherlands and was incorporated into Union law by means of a protocol to the Treaty of Amsterdam, which entered into force in 1999. It. The CISA is an instrument signed by 26 countries which form the Schengen Area, most of them Member States of the EU (except for the UK and Ireland, which opted out, and Romania, Bulgaria, Croatia and Cyprus, which have been required to join) and other non-EU States (Iceland, Norway and Switzerland)⁵³. The CISA provides the abolishment of internal border control within the Schengen Area, in order to make free movement feasible in its territorial range, and the adoption of a common external border⁵⁴. The provision concerning principle of *ne bis in idem* in the CISA, present in its Article 54, determines the prohibition of prosecution for the same acts in different Contracting Parties, if one of the States has sentenced the individual and enforced the penalty, is in the process of its enforcement or if it can no longer be enforced under its laws.

⁴⁹ Joined Cases 18/65 and 35/65 *Gutmann v. Commission* [1996] ECR-103

⁵⁰ For the relation between fundamental rights and human rights, see Georg Kofler and Pasquale Pistone, 'General Report' in Georg Kofler, Miguel P Maduro and Pasquale Pistone (eds), *Human Rights and Taxation in Europe and the World* (IBFD 2011) 4-8

⁵¹ CISA (n 25)

⁵² Bockel (n 9) 15

⁵³ The Schengen Area Country List can be found at <https://www.schengenvisainfo.com/schengen-visa-countries-list/>.

⁵⁴ For an in-depth study regarding the framework and history of the CISA, see Elizabeth Whitaker, 'Schengen Agreement and its Portent for the Freedom of Personal Movement in Europe' (1992) 1 *Georgetown Immigration Law Journal* 191

Although the analysis of the CISA is not one of the aims of this thesis, as the first EU legal document that provides protection against double jeopardy, it is a relevant piece of legislation when it comes to *ne bis in idem* in cases of purely criminal penalties imposed by different Member States in regards to the same offence. The CISA will also be discussed further in section 4.2.2. of this thesis within the case of *Zoran Spasic*⁵⁵.

In addition to the CISA, the implementation of the Area of Freedom, Security and Justice (AFSJ) through the Treaty of Amsterdam and the direct cooperation between Member States in criminal affairs and mutual recognition not only of judicial, but pre-trial decisions, only heightened the need to establish a categorical safeguard against double jeopardy in the EU as a fundamental human right⁵⁶.

However, the EU's own realm of protection regarding human rights became concrete, in fact, with the entry into force of the Treaty of Lisbon, in 2009, when the Charter of Fundamental Rights acquired the status of primary Union law⁵⁷.

The principle of *ne bis in idem* is enshrined in the Charter in Article 50, as the “right not to be tried or punished twice in criminal proceedings for the same criminal offence”, in the following terms:

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.

For a clearer perception of the principle in both human rights legislations object of this thesis, and to allow a comparison of their wording, Article 4 of Protocol no. 7 of the ECHR on the right not to be tried twice will be transcript as follows:

1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.
2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned,

⁵⁵ Case C-129/14 *Zoran Spasic* [2014] ECLI:EU:C:2014:586

⁵⁶ Vervaele (n 20) 101

⁵⁷ According to Article 6(1) TEU, the rights, freedoms and principles present in the Charter have the same legal value as the Treaties, meaning that it holds the status of primary Union law.

if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

The principle of *ne bis in idem* was not present in the ECHR from the beginning⁵⁸. It was added into the Convention by means of the Protocol no. 7, which came into force on November 1st 1988. Until the current date, three countries have not ratified this protocol, Germany, the Netherlands and the United Kingdom (which has also not signed the Protocol).⁵⁹

Additionally, the ECHR allows Contracting States to make reservations and declarations regarding Protocol No. 7, to which France and Italy, amongst other countries, have made a reservation stating that the right not to be tried twice applies only to criminal offences as determined by domestic law⁶⁰.

However, as the case law of the ECtHR asserted further in *Öztürk v. Germany*⁶¹, if it was left to the Contracting State's discretion to determine what constitutes a criminal offence under domestic law classification, the aftereffect might conflict with the aims of the Convention. This means that, if the *ne bis in idem* protection only falls upon proceedings regarding criminal offences as classified by national law, States would be able to easily circumvent the application of the ECtHR's findings.

This conclusion was also achieved by means of the formulation of certain requirements, known as the *Engel* criteria, conceived by that same Court, regarding whether the charge was in fact criminal. This case will be further discussed in the next chapter, in the case law of the ECtHR.

In this aspect, it is relevant to mention that not only the ECHR, but also the CISA allowed the contracting States to present reservations in respect of *ne bis in idem* when ratifying the Protocol, which is not the case in the CFREU. Member States did not have the possibility

⁵⁸ The ECHR was opened for signature in Rome, November 4th 1950 and came into force in 1953.

⁵⁹ Chart of Signatures and Ratifications of Treaty 117. Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms. Council of Europe. Status as of 03/03/2018 <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/117/signatures?p_auth=27X980jD> accessed 03 March 2018

⁶⁰ Reservations and Declarations for Treaty 117. Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms. Council of Europe. Status as of 03/03/2018. <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/117/declarations?p_auth=OwkiEoHP> accessed 03 March 2018

⁶¹ *Öztürk* (n 30) 49.

of presenting personal embargos to the recognition of the principle as a fundamental right cradled by the Charter.

The CISA also allows Contracting States to declare that they are not bound by the principle of *ne bis in idem* presenting several exceptions to its application, which can be made when ratifying the Agreement, according to Article 55⁶².

The Charter of Fundamental Rights, by its turn, does not provide explicit exceptions to the application of *ne bis in idem* by the Member States. However, concerning possible limitations to Article 50 of the CFREU, as pointed out in the Explanations Relating to the Charter of Fundamental Rights, ‘the very limited exceptions in those Conventions⁶³ permitting the Member States to derogate from the *non bis in idem* rule are covered by the horizontal clause in Article 52(1) of the Charter concerning limitations’. The possibility of limitations to the rights and freedoms in the Charter will be analysed in section 4.2.2.

Attention has also been held to the concise wording of Article 50 CFREU and that this was perhaps done intentionally with a view of preventing conflicts with other existing legislations⁶⁴ and, as it seems, enlarging the scope of application of the principle as a fundamental human right.

Following the literal phrasing of the Charter provision, it can be concluded that the protection covers persons who have been acquitted or convicted, not including the requirement that the penalty imposed has been enforced, is in the process of being enforced or can no longer be enforced, as determined in Article 54 of the CISA.

⁶² Article 55, CISA: 1. A Contracting Party may, when ratifying, accepting or approving this Convention, declare that it is not bound by Article 54 in one or more of the following cases:

(a) where the acts to which the foreign judgment relates took place in whole or in part in its own territory; in the latter case, however, this exception shall not apply if the acts took place in part in the territory of the Contracting Party where the judgment was delivered;

(b) where the acts to which the foreign judgment relates constitute an offence against national security or other equally essential interests of that Contracting Party;

(c) where the acts to which the foreign judgment relates were committed by officials of that Contracting Party in violation of the duties of their office.

2. A Contracting Party which has made a declaration regarding the exception referred to in paragraph 1(b) shall specify the categories of offences to which this exception may apply.

3. A Contracting Party may at any time withdraw a declaration relating to one or more of the exceptions referred to in paragraph 1.

4. The exceptions which were the subject of a declaration under paragraph 1 shall not apply where the Contracting Party concerned has, in connection with the same acts, requested the other Contracting Party to bring the prosecution or has granted extradition of the person concerned.

⁶³ See Articles 54 to 58 of the CISA (n 25), Article 7 of the Council Act of 26 July 1995 drawing up the Convention on the Protection of the European Communities’ Financial Interests [1995] OJ C 316/48 and Article 10 of the Convention on the Fight Against Corruption [1997] OJ C 195/0002

⁶⁴ Bockel (n 9) 20

In this sense, it has been questioned if the intention of the Charter provision was to compass a “stronger protective force”⁶⁵ when compared to other European legislative instruments, since it did not incorporate the enforcement requirement in Article 54 CISA and the explicit possibility of reopening of a case, as permitted by Article 4(2) of Protocol 7 ECHR.

Regardless of what the response to question set above might be, the Charter is, in fact, considered a more modern legislation and contains wider range of rights and guarantees than the Convention⁶⁶.

2.4. Scope of Application

Another important point concerning the provisions of the *ne bis in idem* principle in the ECHR and the CFREU regards the territorial scope of application of the guarantee.

Article 4 of Protocol 7 of the ECHR states that no one should be prosecuted twice under the jurisdiction of the *same* State. Therefore, the Convention’s authority is limited to proceedings within domestic boundaries, as the ECtHR has affirmed in its case law, asserting that multiple proceedings at a transnational level are not subject to the Convention and, thus, considered inadmissible⁶⁷.

Contrastingly, the Charter defines that the prohibition of double jeopardy applies *within the Union*, according to its Article 51(1).

As the explanations to the Charter clarify “in accordance with Article 50, the *non bis in idem* rule applies not only within the jurisdiction of one State, but also between the jurisdictions of several Member States. That corresponds to the *acquis* in Union law⁶⁸.”

However, it would seem logical that the Charter should not be engaged in situations that might be considered as purely internal, as it is the general rule in EU Law, demanding that more than one Member State be involved in the issue in order to trigger EU Law. Nonetheless, application of EU Law and, more specifically, of the Charter, in a situation involving a single jurisdiction can be demonstrated by the operation of the principle in tax cases.

⁶⁵ *ibid*

⁶⁶ Alison Young, “Four Reasons for Retaining the Charter Post Brexit: Part 1 – A Broader Protection of Rights” (OxHRH Blog, 2 February 2018), <<http://ohrh.law.ox.ac.uk/four-reasons-for-retaining-the-charter-post-brex-it-part-1-a-broader-protection-of-rights>> accessed 29 March 2018

⁶⁷ *Gestra v. Italy*, Appl no 21072/92 (ECtHR 6 January 1995) ECLI:CE:ECHR:1995:0116DEC002107292; *Amrollahi v Denmark* Appl no 56811/00 (ECtHR 28 June 2011) ECLI:CE:ECHR:2002:0711JUD005681100; and *Sarria v. Poland*, Appl no 80564/12 (ECtHR 13 October 2015) ECLI:CE:ECHR:2015:1013DEC008056412

⁶⁸ Explanations relating to the Charter of Fundamental Rights. Article 50. 14 December 2007. OJ C 303.

According to Wattel, there are four categories where concurrent proceedings intending the application of a punishment for the same act may arise⁶⁹:

(i) within one national legal system; (ii) through concurrence of two or more national legal systems, especially (ii)(a) of two EU Member States or (ii)(b) of an EU Member State and a third State; (iii) between the EU legal system and a Member State's internal law; and (iv) between the EU legal system and the law of a non-Member State.

In case of tax offences, Categories (ii)(b), (iii) and (iv), do not provoke application of EU Law. However, the first categories, (i) and (ii)(a), call for the application of EU Law.

In both cases, EU Law may be triggered in the case of concurrent proceedings in respect of harmonized taxes (customs duties, VAT, excise duties and capital duty). However, even in case of direct taxation, although less common, it may be possible, if there is a cross-border element, such as the limitation of a free movement right, or if it engages the application of a EU Directive on corporate income taxation, for example, which is unusual, but feasible⁷⁰.

The question regarding concurrent tax surcharge for a VAT evasion and criminal penalties in a single jurisdiction, for the same acts and falling upon the same individual was brought up in *Åkerberg Fransson*, to which the Court answered by considering the content of Article 51(1) of the Charter.

Before this case, it was not clear whether the Charter would apply to a situation such as *Åkerberg's*, which seemed to be a wholly internal situation, since it only involved Sweden.

The CJEU affirmed that, according to Article 51(1) of the CFREU, the term “implementing EU Law” means any situation falling within the scope of Union Law⁷¹, such as when a Member State pursues the application of a surcharge and a penalty regarding VAT, which is an area of harmonized EU Law by Directive 2006/112/ EC⁷².

Additionally, the matter concerned the application of Article 325 TFEU, which establishes the Member's States obligation to obstruct illegal activities that affect the EU's

⁶⁹ Peter J. Wattel, 'Ne Bis in Idem and Tax Offences in EU Law and ECHR Law' in Bas van Bockel (eds), *Ne Bis in Idem in EU Law* (Cambridge University Press 2016) 167

⁷⁰ For a detailed analysis on tax matters and the scope of EU Law, see Wattel (n 69)167-180

⁷¹ *Id.*, para. 21.

⁷² Council Directive 2006/112/EC of 28 November 2006 on the Common System of Value Added Tax [2006] OJ L 347/1

financial interests by means of effective and deterrent measures, and VAT evasion can be considered as such, since it forms part of the EU's resources⁷³.

Thus, both the administrative and the criminal proceedings brought against *Åkerberg* fell within the scope of EU Law and, consequently, of the Charter, resolving the question as to the extent and scope of application of the Charter in domestic law and asserting that its territorial sphere includes situations involving the jurisdiction of a single Member State.

Another important conclusion that has also been reached regarding the territorial scope of application of *ne bis in idem* is that, if a Member State has not ratified Protocol 7 of the ECHR and the tax matter does not concern harmonized taxation or direct taxation with a cross-border aspect, the tax payer will be left without protection, not being able to invoke Article 50 of the Charter nor covered by the safeguard provided by the Convention⁷⁴.

It is also worth mentioning that the CISA's territorial scope of application concerns a transnational situation, involving the application of penalties in different Contracting States. The context of application of the CISA suggests that the principle of *ne bis in idem* therein is confined to cases concerning pure criminal law, meaning that tax surcharges would not fall into its scope. This may be affirmed due to the police and judicial cooperation system in criminal matters pursued by the CISA. However, the lack of case law invoking the application of Article 54 of the CISA to cases concerning tax surcharges of a criminal nature and the notion under EU law that the mere qualification of a penalty as administrative does not impede it from being actually considered as a *de facto* penal sanction, renders unclear if the CISA cannot be applied to tax cases under any circumstances.

Nonetheless, the possibility of application of Article 50 of the Charter to tax surcharges of a criminal nature and, more specifically, the clear applicability of such protection in VAT cases, both in domestic and transnational situations, seem to diminish the need to answer the question of whether Article 54 CISA applies or not to tax disputes.

Chapter 3: Application of *Ne Bis in Idem* in Tax Disputes

3.1. Tax Penalties and their Criminal Nature According to the Case Law of the ECtHR: from Article 6 to Protocol 7 of the Convention

⁷³ *Åkerberg* (n 4) para 26

⁷⁴ Wattel (n 69) 171-172

The ECtHR initiated its process of establishment of the ‘criminal nature’ of an administrative charge through the analysis of cases involving Article 6 of the ECHR⁷⁵. This Article provides the right to a fair trial, by guaranteeing the right to a fair and public hearing, which should be done in a reasonable time by an impartial authority. This safeguard applies to any individual in proceedings ‘in the determination of his civil rights and obligations or of any criminal charge against him’. Therefore, there are two headings or limbs to which the right to fair trial applies: a civil and a criminal one.

As will be seen further in this section, the ECtHR reached an understanding according to which a tax dispute does not concern a ‘determination of civil rights and obligations’.

Thus, the Court endeavored to determine when the right to a fair trial and the other connected guarantees would apply in proceedings that were formally regarded as administrative, but in fact bore a surcharge that was criminal in its nature. The case law on Article 6 is, thus, of extreme relevance to the application of the principle of *ne bis in idem* to the extent of the interpretation of the term ‘any criminal charge’.

Through the progression of such case law, it seems that the ECtHR has been trying to adjust its view on tax surcharges and their criminal nature, but inconsistency has been a recurring theme in its interpretation. It should be considered that the matter regarding tax surcharges is a very sensitive one, especially in respect of the Contracting State’s internal taxation system and for the EU, as well, concerning VAT. In this sense, it may be argued that the ECtHR has struggled to reach a point where the level of protection of the taxpayer is sufficiently safeguarded and the interests of the States regarding their authority to impose penalties in face of tax irregularities are preserved. Balancing both pursuits is clearly a challenge.

Political notes aside, the ECtHR has set as its starting point for the determination of the penal nature of any sanction which is not criminal in its face, the so-called *Engel criteria* or *doctrine*.

In *Engel*, the Court established three points that must be analysed in order to ascertain the nature of a penalty: (I) the legal classification of the offence under domestic law; (II) the very nature of the offence; and (III) the nature and degree of the severity of the penalty in

⁷⁵ For an in-depth analysis of Article 6 ECHR, see the Guide on Article 6 of the European Convention on Human Rights, available at < https://www.echr.coe.int/Documents/Guide_Art_6_criminal_ENG.pdf> and <https://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf> accessed 15 May 2018

question⁷⁶. It is important to mention that the legal classification in national law, meaning that the offence is not formally criminal, does not decide actual nature of the charge. If this were not the case, States would easily be able to circumvent the principle of *ne bis in idem*, by inscribing a punitive sanction under administrative legislation⁷⁷.

In this case, the Court assessed whether disciplinary penalties under military law imposed on Mr. Engel and others were of a criminal nature. It was concluded that the sanctions that had as their *aim the imposition of serious punishments involving deprivation of liberty came within the criminal sphere*⁷⁸. However, not all the penalties imposed were regarded as being of a genuinely criminal.

The importance of *Engel* appears, thus, to be evident: the Convention is concerned with the true substance of a sanction, rather than its formal qualification as an administrative penalty.

The first cases on concurrent administrative and criminal proceedings, following *Engel*, in the mid 80's, dealt with administrative fines and the application of Article 6, ECHR, such as *Öztürk*, mentioned in point 2.3 of this paper, and *Lutz*⁷⁹. A relevant remark on these cases is that the small amounts of the fines imposed by the German authorities for minor traffic offences (30 euros and 70 euros, respectively) did not impede the ECtHR from considering them as criminal charges for the purposes of the application of the right to a fair trial in Article 6⁸⁰.

In *Bendenoun*⁸¹, 1994, the Court was faced with a case involving triple proceedings – customs, tax and criminal. The Grand Chamber found the tax surcharge to be of a criminal nature, citing *Öztürk*, but not applying *Engel*. Rather, the Court applied four factors which determined that the charge was in fact criminal. First, it analysed the classification of the offence under national law, followed by the assessment of the nature of the surcharge. The third factor is the applicability of the penalty as a general rule, finding that it had a punitive and deterrent intent, rather than a compensatory one. Lastly, it took into consideration the fact that the surcharges were substantial⁸², thus recoiling from the aforementioned judgements where minor fines were found to be penal. The same analysis was repeated in respect of the amount,

⁷⁶ *Engel* (n 41) para 82

⁷⁷ Wattel (n 69) 186

⁷⁸ *Engel* (n 41) para 85

⁷⁹ *Lutz v Germany*, Appl no 9912/8225 (ECtHR 25 August 1987) ECLI:CE:ECHR:1987:0825JUD000991282

⁸⁰ Wattel (n 69) para 187

⁸¹ *Bendenoun v France* Appl no 12547/86 (ECtHR 24 February 1994) ECLI:CE:ECHR:1994:0224-JUD001254786

⁸² *ibid* para 47

three years later, in *A.P., M.P. and T.P. v. Switzerland*⁸³, regarding a surcharge for the evasion of payment of direct taxes.

Another important finding came into place in 2001 in the case of *Ferrazzini*⁸⁴, concerning an assessment of capital taxes on a property owned by the company in which applicant held almost the entirety of the shares. The non-payment of the amounts would lead to the imposition of a penalty of 20%. The applicant's complaint before the ECtHR regarded the fourteen-year waiting period for the conclusion of the case before the Italian court and the violation to Article 6(1) of the ECHR. The Court understood that, since the parties *agreed* that the charge was not of a criminal nature, the assessment to be made would be whether the proceedings would fall under the civil limb of Article 6, this meaning, the 'determination of civil rights and obligations', as explained earlier in this section.

In a controversial and criticized⁸⁵ decision, of eleven to five votes, the ECtHR concluded that "tax matters still form part of the hard core of public-authority prerogatives, with the public nature of the relationship between the taxpayer and the community remaining predominant⁸⁶" and, therefore, are not civil rights and obligations in accordance with Article 6. The outcome of *Ferrazzini* suggests that the right to a fair trial does not apply to tax disputes,⁸⁷ unless the surcharge is considered to be of a criminal nature, a concept that, at the time, was still under development.

One of the concerns raised by this decision was confronted in the dissenting opinion of the diverging judges, citing *Bendenoun*, regarding the fact that tax penalties have been considered under the criminal head, since 'the Court has consistently considered proceedings relating to tax disputes to be criminal if tax fines, surcharges, etc., with a deterrent and punitive purpose are imposed or even if there is a risk that they may be imposed⁸⁸', but, in *Ferrazzini*, they were not even considered as civil obligations.

⁸³*A.P., M.P. and T.P. v. Switzerland* Appl no 54559/00 (ECtHR 29 August 1997)ECLI:CE:ECHR:2003:0603DEC005455900

⁸⁴ *Ferrazzini v Italy* Appl. No. 44759/98 (ECtHR 7 December 2001) ECLI:CE:ECHR:2001:0712-JUD004475998

⁸⁵ For a critical analysis of the *Ferrazzini* case, see Philip Baker 'The Decision in Ferrazzini: Time to Reconsider the Application of the European Convention on Human Rights to Tax Matters' (2001) vol 29 issue 11 INTERTAX <<http://heinonline.org/HOL/LandingPage?handle=hein.kluwer/intrtax0029&div =65&id=&page=>> accessed 18 April 2018

⁸⁶ *Ferrazzini* (n 84) 29

⁸⁷ Robert Attard, 'The Classification of Tax Disputes, Human Rights Implications', in Georg Kofler, Miguel P Maduro and Pasquale Pistone (eds), *Human Rights and Taxation in Europe and the World* (IBFD 2011) 397

⁸⁸ *Ferrazzini* (n 84), Dissenting Opinion of Judge Lorenzen, Joined by Judges Rozakis, Bonello, Stráznická, Birsan and Fischbach, para 8

In this context, a relevant question for this study would then seem to be: does “the *Ferrazzini dictum*”⁸⁹ change the approach towards the determination of tax penalties and their criminal nature? And, furthermore, if the parties ‘agree’ that the case does not concern a criminal charge and the Court, for its part, does not perceive any criminal connotation, without applying the *Engel* criteria, is the level of protection of the Convention compromised?

Baker suggests that the *Ferrazzini dictum* might extend the application of Article 6 ECHR in its criminal perspective to tax disputes⁹⁰, since the ECtHR had already considered quite broadly a number of tax penalties to fall under the criminal head of that provision⁹¹. What the mentioned author seems to indicate is that, since the ECtHR explicitly affirmed that proceedings involving tax surcharges were not subject to the right to a fair trial as a civil right or obligation under Article 6 ECHR, this would push the Court into considering tax penalties as a criminal charge in order to guarantee the application of such right.

Attard concludes affirming that, as long as the ECtHR applies the *Engel* criteria and does not consider the tax proceeding as a ‘pure tax dispute’⁹², which does not usually happen, then *Ferrazzini* would be ‘eroded’⁹³. The author explains that a ‘pure tax dispute’ consists of a proceeding in which the tax penalty is no higher than a surcharge of 25%. At the time, he came to this conclusion, based on the study done by Baker. According to Baker, the Court had been consistent in considering a tax penalty of 25% or higher to be deterrent and punitive, amounting, thus, to a criminal charge. Surcharges falling under that rate would not be considered as criminal and, after *Ferrazzini*, they would also not be considered as a civil right or obligation and, therefore, would not be subject to the protection of Article 6, ECHR at all. What Attard means by ‘eroding’ the *Ferrazzini dictum*, is that the decision in that case, which he affirmed to be ‘undesired’⁹⁴ and to ‘restrict the application of human rights safeguards to taxation disputes’⁹⁵, needed to be weakened until the case law developed to a point in which *Ferrazzini* is completely surpassed.

⁸⁹ Denomination used by Attard (n 87) 397

⁹⁰ Philip Baker ‘Taxation and the European Convention on Human Rights’ (2000) British Tax Review <<http://www.fieldtax.com/wp-content/uploads/2015/04/BTR-2000-4-211-377-Taxation-and-the-European-Convention-on-Human-Rights.pdf>> accessed 16 April 2018

⁹¹ Attard (n 87) 402

⁹² *ibid* 403

⁹³ *ibid*

⁹⁴ *ibid* 400

⁹⁵ *ibid*

The following year, *Janosevic*⁹⁶ was decided, concerning underpaid VAT amounts, to which the Swedish tax authority imposed a surcharge of 17.284 Euros. In this case, the Court confirmed that tax disputes fall outside the scope of civil rights and obligations and, hence, the analysis would follow to the determination of a criminal charge under Article 6. This confirmed Attard's conclusion mentioned above, as regards the application of the criminal heading of Article 6 to tax disputes. The *Engel* criteria was applied, including the assessment of the substantial amount of the charge within the third criterion, without, however, citing *Bendenoun*⁹⁷.

Notwithstanding, in *Morel v France*⁹⁸, decided in 2003, the Court explicitly cited *Bendenoun* and its four factors, which, accordingly, determine the criminal nature of a penalty. It also stated that the assessment in *Bendenoun* set a 'level' regarding the amount of the tax surcharge, which would only be considered to carry a criminal burden if it was 'very substantial'⁹⁹. In that case, the 10% VAT surcharge for late payment did not amount to a substantial sum (FRF 4.450), hence the proceeding was considered inadmissible.

At this point, there seems to be a lack of clarity in the ECtHR's approach regarding the criteria adopted in order to assess the criminal nature of the penalty. *Engel* and *Bendenoun* seem to be applied at the Court's will without a clear definition as to the reasons for the appropriateness of one or the other, leaving a wide room for legal uncertainty¹⁰⁰. Furthermore, in *Morel*¹⁰¹, the non-substantial sum of 10% surcharge was, in fact, the decisive factor for the inadmissibility of the case. In other words, although the penalty was found to be deterrent and punitive and a general rule applied to all citizens as tax payers, the small amount of the sanction was a decisive factor in the recognition of its non-criminal nature. This clashed with the underlying reasoning found in *Engel*, according to which the criteria for determining a penal charge must be analyzed in its entirety¹⁰².

However, *Jussila*¹⁰³ seems to have focused on shedding a light onto this situation. The case was decided in 2006 and concerned a VAT surcharge of 10% for errors in the applicant's book-keeping, amounting to a diminutive fine of 309 Euros. The Court went through its

⁹⁶ *Janosevic v Sweden* Appl no 38619/97 (ECtHR 23 July 2002) ECLI:CE:ECHR:2002:0723JUD003461997

⁹⁷ *ibid* para 69

⁹⁸ *Morel v France* Appl no 54559/00 (ECtHR 03 June 2003) ECLI:CE:ECHR:2003:0603DEC005455900

⁹⁹ *A.P., M.P. and T.P. v. Switzerland* (n 83) no paragraph numbering in this case

¹⁰⁰ Wattel (69) 187

¹⁰¹ *Morel v France* (n 98) no paragraph numbering in this case

¹⁰² *Engel and Others* (n 41) para 82, last sentence

¹⁰³ *Jussila v Finland* Appl no 73053/01 (ECtHR 23 November 2006) ECLI:CE:ECHR:2006:1123-JUD007305301

previous case law and brought the inconsistency to the surface. The conclusion reached by the Grand Chamber seemed to be a breakthrough: “[...] No established or authoritative basis has therefore emerged in the case law for holding that the minor nature of the penalty, in taxation proceedings or otherwise, may be decisive in removing an offence, otherwise criminal by nature, from the scope of Article 6”¹⁰⁴. It then established the adoption of the *Engel* criteria as the Court’s choice of assessment for the characterisation of a criminal offence and interpreted the four *Bendenoun* factors as relevant for analysing the second and third criteria of *Engel*¹⁰⁵.

Furthermore, relying on the *Öztürk* line of cases, it defended the application of procedural safeguards to minor tax cases and affirmed that *Morel* is an exception, since it renders the amount of the penalty as the decisive factor, disregarding the other elements which pointed to the criminal nature of the sanction.

If *Ferrazzini* determined that tax disputes would not be considered as “civil rights and obligations”, after *Jussila*, “virtually every tax case in which an administrative penalty is assessed will engage the criminal guarantees in Article 6 of the ECHR”¹⁰⁶.

The interpretation of the term ‘criminal’ analysed so far was extended to Article 4 of Protocol 7¹⁰⁷, which only came into force in 1988.

The first line of cases concerning *ne bis in idem* and Article 4 of Protocol 7 faced issues relating to the *bis* and *idem* components of the principle. In these cases, the principle was almost not applicable, since the restrictive interpretation of the *idem* component impeded such recognition, where most cases were perceived as not consisting of duplicate proceedings¹⁰⁸.

In *Sergey Zolotukhin*¹⁰⁹, the Court overcame its past findings regarding the *idem* issue, and found the “same offence” to mean “identical facts or facts that are substantially the same”¹¹⁰, establishing the harmonized approach to be adopted in future cases. It is worth mentioning that,

¹⁰⁴ *ibid* para 35

¹⁰⁵ *ibid* para 32

¹⁰⁶ Philip Baker, ‘The Determination of a ‘Criminal Charge’ and Tax Matters’ (2007) vol 47 issue 12 European Taxation 587

¹⁰⁷ All of the following cases concern Article 4 Protocol 7 and explicitly mention that the interpretation of the terms “criminal charge” and “penalties” are the same as the ones in Articles 6 and 7 of the Convention. See. For instance, *Manasson v Sweden* Appl no 41265/98 (ECtHR 8 April 2003) ECLI:CE:ECHR:-2004:0720JUD004126598; *Haarvig v Norway* Appl no 11187/05 (ECtHR 11 December 2007) ECLI:CE:ECHR:2007:1211DEC-001118705; *Göktan v France* Appl no 33402/96 (ECtHR 2 July 2002) ECLI:CE:ECHR:-2002:0702JUD003340296 and *Nilsson v. Sweden* (n 44)

¹⁰⁸ See, for instance, *Rosenquist v Sweden* Appl. No. 60619/00 (ECtHR 14 September 2004) ECLI:CE:ECHR:-2004:0914DEC006061900 and *Carlberg v Sweden* Appl no 9631/04 (ECtHR 27 January 2009) ECLI:CE:ECHR:2009:-0127DEC000963104.

¹⁰⁹ *Zolotukhin* (n 17) para 82

although not considered in the Court's assessment, it alluded to the CJEU's approach in *Kraaijenbrink*¹¹¹ regarding the interpretation of *idem* in Article 54 CISA, which adopted the same meaning later postulated by the ECtHR in *Zolotukhin*. This has been considered one of the first indications that the Courts were attentive to each other's decisions and bore them in mind in certain rulings¹¹².

A few months later, in *Ruotsalainen*¹¹³ the Court decided that a fee applied as a sanction for using a more leniently taxed fuel without prior notification to the competent authority to be criminal in nature. Applying the *Engel* criteria, the penal character was established without mentioning the amount of the fee imposed in its assessment, which seems to demonstrate *Jussila's* effect.

The Court applied its approach consistently in its following case law, such as *Pirttimäki*¹¹⁴, *Nykänen* and *Lucky Dev*,¹¹⁵ regarding concurrent taxation and criminal proceedings. In the first two cases, the Court applied *Engel* and *Jussila*, finding the tax surcharges to hold a criminal nature, although this was uncontested by the parties¹¹⁶. It is actually interesting to note that *Pirttimäki* and *Nykänen* were decided on the same day and the analysis of the criminal nature of the surcharge is nearly identical. In *Lucky Dev*, on the other hand, decided six months later, the Court took a different approach in its assessment. It stated, very succinctly, that, since the parties did not dispute the criminal nature of the tax charge and tax surcharges were found to be penal in many prior cases against Sweden, it could be concluded that this was also the case¹¹⁷. It did not apply the *Engel* criteria in order to appraise that finding.

The analysis of these last cases indicates that the repercussion of *Ferrazzini*, *Jussila* and *Zolotukhin* played an important role in shaping how tax surcharges came to be almost automatically perceived as a *de facto* criminal penalty. After *Ferrazzini*, it seems that not recognising a tax surcharge under the criminal head of Article 6, in fact, became a risk to the protection afforded by the Convention. *Jussila* removed any stigma regarding the minimum sum of the tax surcharge and called into order inconsistencies existing so far, setting the grounds

¹¹¹ Case C-367/05 *Norma Kraaijenbrink* [2007] ECLI:EU:C:2007:444

¹¹² Koen Lenaerts, 'Court of Justice of the European Union and the Protection of Fundamental Rights' (2011) *Polish Yearbook of International Law* 98

¹¹³ *Ruotsalainen* (n 27)

¹¹⁴ *Pirttimäki v Finland* Appl no 35232/11 (ECtHR 20 May 2014) ECLI:CE:ECHR:2014:0520-JUD003523211

¹¹⁵ *Lucky Dev v Sweden* Appl no 7356/10 (ECtHR 27 November 2014) ECLI:CE:ECHR:2014:1127-JUD000735610

¹¹⁶ *Pirttimäki* (n 114) paras 45-48 and *Nykänen* (n 27) para 38-41

¹¹⁷ *Lucky Dev* (n 115) para 51

and leveling its past jurisprudence to make way for a new and more coherent approach to these types of cases. Whilst the leap in *Jussila* pointed to a widening of the number of tax surcharge cases falling within the scope of Article 6, the blurry concept of *idem* in Article 4, Protocol 7 limited the application of the principle of *ne bis in idem*, until the decision in *Zolotukhin*.

By 2014, when the ECtHR reaches the decision in *Pirttimäki*, it seems to have highly enhanced the level of protection through the development of its case law and that its search for a superlative application of the safeguards provided by the Convention came to place. What may be implied from these findings is a notion of accomplishment, as it seems that the Court has gone as far as possible in maximizing the range of the safekeeping radius of the Convention.

What seems to become more evident through the Court's case law is that the seriousness of the application of a criminal penalty disguised as an administrative surcharge requires the far-reaching assurance provided by the principle of *ne bis in idem*.

Nevertheless, the decision in *A & B v. Norway*, in 2016, changes the perspective on the right not to be punished twice as built up by the ECtHR so far. This will be further discussed in Chapter 4 of this thesis.

3.2. The CJEU and *Åkerberg Fransson*

In the context of the EU, the main case involving the application of the principle of *ne bis in idem* in concurrent tax and criminal proceedings is the case of *Åkerberg Fransson*. It is not a surprise that a Swedish case is the landmark within the CJEU in respect of this issue, since that could be expected due to the history of Swedish cases in the ECtHR.

The case concerned a preliminary ruling and was decided in 2013, approximately four years after the Charter came into force and after *Zolotukhin* was decided, representing an important follow-up to the case law of the ECtHR in respect of tax surcharges.

Mr. Fransson was a fisherman charged with providing false information in his tax returns regarding income tax, VAT and employer's contribution, for which he was sanctioned administratively before the Swedish Tax Authority. Subsequently, he was prosecuted for the same acts by the Public Prosecutor's Office, which brought into question the compatibility of the second proceeding with Article 50 of the Charter. Therefore, the main question was if the double-track system adopted by the Swedish judicial structure infringes the *ne bis in idem* principle in light of the ECHR and the CFREU¹¹⁸.

¹¹⁸ *Åkerberg* (n 4) para 15

Before entering into the merits of the case, the CJEU determined its jurisdiction and concluded that, as for the issue relating to the breach of VAT, which fell into the scope of EU law and, hence, into the scope of the Charter, it had competence to provide guidance for the referring court¹¹⁹. This finding brought human rights into the spotlight and demonstrated its pertinence in EU law matters regarding taxation.

However, the focus of this paper remains on the material scope of the Charter in respect of Article 50 and the principle of *ne bis in idem*.

When dealing with the simultaneous proceedings system, the CJEU found it to be compatible with Article 50 of the Charter, so long as the tax penalty is not criminal in its nature¹²⁰. The Court did not mention any decisions from the ECtHR, but established the three relevant criteria to which the examination of the penalty must be submitted to (which were the same as found in *Engel*), citing its own case law in *Bonda*.¹²¹

Bonda concerned a farmer who received aid deriving from an agricultural policy scheme and, due to the incorrect declaration of certain information, Mr. Bonda lost the aid, as an administrative penalty for his acts, and was subsequently prosecuted for fraud. The applicant submitted that he had been punished twice for the same acts and invoked application of the principle of *ne bis in idem*. The question submitted by the Polish court asked what was the nature of the administrative penalties imposed on Mr. Bonda. The CJEU found that the administrative penalties did not constitute a criminal sanction in its nature and, therefore, it was not a case of double-jeopardy.

Bonda, however, did not concern the application of Article 50 of the Charter, although it was judged when the legislation in question was already operating and only one year before Mr. Fransson's decision. The Court applied the *Engel* criteria, explicitly alluding to the ECtHR's case law in *Engel* and *Zolotukhin*¹²².

Notwithstanding, in *Åkerberg*, the CJEU left to the Swedish court the task of assessing whether the tax surcharge imposed on Mr. Fransson was of a criminal nature, by applying the indicated criteria, which was, in fact, the *Engel* criteria, although not explicitly referring to the ECtHR's case law¹²³.

¹¹⁹ *ibid* paras 16–31

¹²⁰ *ibid* para 37

¹²¹ Case C-489/10 *Lukasz Marcin Bonda* [2012] ECLI:EU:C:2012:319

¹²² *ibid* para 37

¹²³ *ibid*

Two interesting notes can be made at this point. First, while examining its jurisdiction, in paragraph 29 of the ruling, the CJEU asserts that national courts are free to apply their own level of protection of fundamental rights when implementing EU Law, ‘in a situation where action of the Member States is not entirely determined by European Union law’ (such as the imposition of penalties for VAT irregularities), as long as the level of safeguards construed by the case law of the CJEU in respect of the Charter is not hampered, as well as the primacy, unity and effectiveness of EU Law¹²⁴. This first point does not raise much concern. However, it should be read in junction with the second point, present in paragraph 36.

Brokelind defends that in paragraph 36, the Court introduces an exception to the principle of *ne bis in idem*¹²⁵. Such paragraph reads as follows¹²⁶:

It is for the referring court to determine, in the light of those criteria, whether the combining of tax penalties and criminal penalties that is provided for by national law should be examined in relation to the national standards as referred to in paragraph 29 of the present judgment, which could lead it, as the case may be, to regard their combination as contrary to those standards, as long as the remaining penalties are effective, proportionate and dissuasive [...].

It can thus be inferred that CJEU allows the application of national standards of protection of human rights, inasmuch as they respect the fundamental principles of EU Law abovementioned, but allows the double jeopardy protection to be set aside, if the penalties are effective, proportionate and dissuasive.. As also noted by Brokelind¹²⁷, this exception has no reference in the ECHR or in the ECtHR’s case law.

¹²⁴ Åkerberg (n 4) para 29

¹²⁵ *ibid* para 36

¹²⁶ *ibid*

¹²⁷ Cecile Brokelind, ‘Case Note on Åkerberg Fransson (Case C-617-10)’ (2013) 53(6) European Taxation Journals IBFD <https://online-ibfd-org.ludwig.lub.lu.se/kbase/index.jsp#topic=doc&url=/collections/et/-html/et_2013_-06_e2_1.html&hash=et_2013_06_e2_1> accessed 18 April 2018

This paragraph has also been interpreted as an *obiter dictum*¹²⁸ that should be regarded as not applicable when the national standards does not respect the level of protection set by the Charter¹²⁹.

Chapter 4: The ECtHR's and CJEU's New Approach

4.1. A brief analysis of *A & B v. Norway* and the drawback on *ne bis in idem* by the ECtHR

As Wattel concluded in his study regarding the case law on *ne bis in idem* of the European Convention on Human Rights, according to the ECtHR, *all punitive tax surcharges are criminal in nature*¹³⁰. This seemed to be the conviction until *A & B Norway*.

This case was decided by the ECtHR in 2016 and concerned two individuals, A and B, who, after failing to declare a certain amount of income into their tax returns were penalized with tax surcharges, and, subsequently, convicted based on the same acts. Both applicants paid the tax assessment and surcharges and lodged appeals in the domestic court regarding the criminal decision, claiming protection against double punishment under Article 4, Protocol 7 of the ECHR.

The ECtHR began its assessment by reviewing its body of case law, giving rise to the feeling that, as it did in *Jussila* and *Zolotukhin*, it was ready to start moving towards a new direction.

The Court's focus was very clear, the reinforcement of the test of 'a sufficiently close connection in substance and in time' of the proceedings, which was first presented in *Nilsson v. Sweden*. This test influences the 'bis' component of the principle in analysis and examined whether both proceedings were connected in such a way by their substance and the time difference between them was close enough that they formed a valid scheme under national law, rendering both penalties foreseeable to the individual and, as such, not found to amount to the duplication of proceedings¹³¹.

¹²⁸ '[Latin, By the way] Words of an opinion entirely unnecessary for the decision of a case. A remark made or opinion expressed by a judge in a decision upon a cause, [...] that is, incidentally or collaterally and not directly upon the question before the court or upon a point not necessarily involved in the determination of the cause, or introduced by way of illustration or analogy or argument. Such are not binding as precedent.' Definition of the Legal Dictionary by Farlex.

¹²⁹ Magnus Gulliksson, 'Effective Sanctions as the One-dimensional Limit to the Ne Bis in Idem Principle in EU Law' in Joaquim Nergelius and Eleonor Kristoffersson (eds) *Human Rights in Contemporary European Law* (Hart Publishing 2015) 160-161

¹³⁰ Wattel (n 69)186.

¹³¹ *A & B v Norway* (n 2) paras 108-116

The Court assessed the application of Article 4 Protocol 7 ECHR in the usual way, starting with the analysis of the criminal nature of the tax surcharge. Differently from the approach taken after *Jussila*, the Court focused on the sum of the surcharge (30%) which, accordingly, constituted a criminal charge and did not actually apply the *Engel* criteria, although it said the examination would be based on that case. It was then determined that the tax surcharge was of a criminal nature, relying only on the sum of the charge¹³².

The Grand Chamber then followed to the analysis of the whether the penalties concerned the same offence (*idem*)¹³³, whether there was a final decision¹³⁴ and, finally, to the duplication of proceedings (*bis*)¹³⁵. It found that they concerned the same facts, that the first decision had become final but, surprisingly (or maybe not, after the hint at the beginning), the duplication of proceedings factor was found to not be fulfilled, since these were subsisted the test of a sufficiently close connection in substance and in time.

Hence, the conclusion was that Article 4 of Protocol 7 ECHR had not been breached in neither of the applicant's cases¹³⁶.

The ruling was followed by a strong dissenting opinion by Judge Pinto de Albuquerque, who firmly criticized the majority's stand, to which he referred to as 'pro auctoritate,¹³⁷' affirming that, through this decision, the principle of *ne bis in idem* can no longer hold the status of an individual guarantee¹³⁸.

The reason Judge Albuquerque referred to the ruling in that manner relates to one of the points raised by the majority on the different penalization systems adopted by the Contracting States (single or dual-track) and the fact that many countries have expressed their reservations towards the principle of *ne bis in idem*, which was not in present in the Convention from its beginning. The majority stated that the Contracting States should be able to choose and organize their own punishment systems and that the effect of Article 4 Protocol 7 cannot entail the prohibition for them to do so¹³⁹.

What the dissenting opinion criticizes is exactly what seems to have occurred in the majority's ruling: after building up a body of case law aimed at the highest level of protection

¹³² *ibid* paras 136-139

¹³³ *ibid* paras 140-141 first applicant and para 148 second applicant

¹³⁴ *ibid* paras 142-143 first applicant and para 148 second applicant

¹³⁵ *ibid* paras 144-147 first applicant and para 149-153 second applicant

¹³⁶ *ibid* paras 154

¹³⁷ Pro authority

¹³⁸ *A & B v Norway* (n 2) Dissenting Opinion of Judge Pinto de Albuquerque, para 79

¹³⁹ *A & B v Norway* (n 2) para 123

for the individual, the ECtHR ceded into the Member States' pressure and took a step backwards.

Another relevant point concerns how long the connection in time should be in order to be considered a 'close connection'. In the case, the proceedings against the first applicant were separated by two and a half months and, therefore, was considered as close enough. For the second applicant, however, the time lapse between the two decisions was of 9 months, a time considered as 'somewhat longer' by the majority, but was still accepted as a close connection in time, because the applicant withdrew his confession and had to be heard again, which took time¹⁴⁰.

It is thus unclear what period is relevant for the determination of the closeness of the proceedings. Moreover, as well noted by Judge Albuquerque, the applicant's use of his defence rights, which caused the delay of the second decision, turned the 'close time connection' into a 'flexible' factor, since the Court justified the acceptance of that 'somewhat longer' period on the withdrawal of the confession¹⁴¹.

Although many points of uncertainty can be raised in *A & B*, the points touched upon so far will suffice for the aims of this thesis, since the main object will be the *Luca Menci* decision, which was referred to the CJEU based on the ECtHR's change in direction.

4.2. The Case of *Luca Menci*

4.2.1. The Context of the *Menci* Case

Five years after *Åkerberg*, the Court faces the principle of *ne bis in idem* in double-track systems regarding VAT surcharges, once again, in the Italian case of *Luca Menci*.

Mr. Menci failed to pay VAT regarding transactions made by his company in the year of 2011, leading to the commencement of administrative proceedings and a subsequent prosecution, which started after the conclusion of the first litigation and the payment of the first installment of the VAT assessment and a surcharge of 30%¹⁴².

Since Italy allowed the imposition of a criminal sanction alongside an administrative penalty, possibly also of a criminal nature, the domestic court asked whether that system was compatible with Article 50 of the Charter, in light of Article 4 of Protocol 7 ECHR and its

¹⁴⁰ *ibid* para 151

¹⁴¹ Dissenting Opinion (n 138) para 46

¹⁴² *Luca Menci* (n 3) paras 11-12

relating case law in the ECtHR¹⁴³. The national court was certainly aware of the change in the approach of the Strasbourg Court.

In *Åkerberg*, the CJEU had already pronounced its interpretation regarding the exact same issue, but due to the change in the ECtHR's approach regarding *ne bis in idem* and the homogeneous interpretation clause in Article 52(3) of the Charter, which will be discussed further in this chapter, doubts arose concerning what this would mean for the EU. Would the CJEU follow the ECtHR's understanding in *A & B Norway*, even though it did not mention the latter Court's case law in *Åkerberg*, or would it preserve its standpoint, thus maintaining a higher level of protection?

What will be discussed in the next sections is the approach taken by the CJEU in *Menci*, which, in fact, did not strictly adopt either of the possible outcomes mentioned above, but introduced a justification that renders possible the application of double criminal penalties for the same acts in VAT disputes, limiting the scope of the safeguard conferred by Article 50 of the Charter.

The outcome may be seen as the next step after *Åkerberg* or, as what seems to be the correct view, as its collapse.

4.2.2. Possible Limitation of the Rights Recognised by the Charter: Article 52(1) CFREU

The CJEU's assessment in *Menci* began with the examination of the criminal nature of the administrative penalty, applying the relevant criteria in *Åkerberg* and in *Bonda* as it went through the analysis of each of the three aspects. Although it affirmed that the matter should be subject to the domestic court's scrutiny, the Grand Chamber's examination seemed to strongly indicate that the tax surcharge imposed by the Italian authority was, indeed, a criminal sanction¹⁴⁴.

It followed to the appraisal of the existence of the same offence, concluding that the proceedings were, in fact, based on the same 'set of concrete circumstances which are inextricably linked together' and have become final exempting or condemning the same person¹⁴⁵. In the case, the second proceedings led to the applicant's conviction.

So far, the CJEU had consistently followed the approach prescribed in its relevant case law, meaning *Åkerberg*. However, it did not stop after finding that both proceedings were

¹⁴³ *ibid* para 16

¹⁴⁴ *ibid* paras 26-33

¹⁴⁵ *ibid* paras 34-39

criminal and regarded the same set of facts that have become final, which is the mandate of that ruling. It proceeded to the presentation of the possibility of justifying a limitation to Article 50 of the Charter¹⁴⁶. The CJEU based such possibility on the horizontal clause in Article 52(1), CFREU.

Article 52 has been considered as the most complex provision in the Charter.¹⁴⁷ Composed by seven paragraphs, it is a ‘clause that regulates the functioning of the rights within the Charter (internal regulation) and its relationship with other sources of law related to the protection of human rights in Europe (external regulation)’¹⁴⁸.

The CJEU established in *Spasic*¹⁴⁹ that the rights and freedoms enshrined in the Charter could be subject to restrictions, according to Article 52(1), and this provision was invoked once again, in *Menci*, reading as follows:

Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

It follows from the wording above that the Charter sets a number of requirements to which the limitations of the rights therein are subject to. Accordingly, the limitation must (i) be subject to formal legality; (ii) respect the essence of the rights and freedoms; (iii) be proportionate, which includes the evaluation of the necessity of the restraint; and (iv) if it genuinely meets the objectives of general interest or the need to protect the rights and freedoms of others. This last requirement seems to reflect situations where the clash of fundamental rights need to be counterbalanced. It also follows from the analysis that these requirements are cumulative, except for the general interest and the need to safeguard the rights of others, which seem to be applied alternatively.

The first condition concerns the legality of the limitation. In *Menci*, the CJEU affirmed that the Italian system allowing concurrent criminal and administrative proceedings, even if the

¹⁴⁶ *ibid* paras 40-64

¹⁴⁷ Xavier Groussot and Ingrid Olsson, ‘Clarifying or Diluting the Application of the EU Charter of Fundamental Rights? – The Judgements in *Åkerberg Fransson* and *Melloni* from 26 February 2013’ in Cécile Brokelind (ed), *Principles of Law: Function, Status and Impact in EU Tax Law* (IBFD 2014) 62

¹⁴⁸ *ibid*

¹⁴⁹ *Spasic* (n 55) para 56

latter is criminal in its nature, was prescribed under national legislation and, therefore fulfilled the legality requirement¹⁵⁰.

It must be noted that this requirement seems to fulfill a strictly formal aspect, in the sense that even if a limitation to the principle of *ne bis in idem* is provided for by law, it may not abide with one of the remaining conditions. In this last case, according to the doctrine of the supremacy of EU law, the conflicting national rule would have to be set aside to avoid a breach of the Charter and, consequently, infringement of non-double jeopardy.

The second requirement is the respect for the essence of the rights and freedoms of the Charter.

Advocate General Campos Sánchez-Bordona, in his Opinion in *Menci*, stated that he doubted that the respect for the essence of the principle would be met with under the circumstances of the case¹⁵¹. However, he did not expand on this matter.

This requirement suggests that a more complex issue is in place and that it demands an in-depth scrutiny, which was not the case in *Menci*.

The ruling confined its appraisal of the essence of *ne bis in idem* to an abbreviated and vague paragraph, according to which the Court concludes that the essential elements of Article 50 are respected since the national legislation ‘allows the duplication of proceedings and penalties only under conditions which are exhaustively defined, thereby ensuring that the right guaranteed [...] is not called into question’¹⁵².

The exhaustively defined conditions under Italian law, referred to by the CJEU, which subject an individual to double proceedings and penalties are the failure to pay VAT until the fixed deadline and that the sum exceeds EUR 50 000 for each tax period¹⁵³.

Analysing the rule above, it is arduous to reach the conclusion presented by the Court that, in this case, safeguard to the essence of *ne bis in idem* cannot be questioned. Such a finding carries the idea that the requirement of respect for the essence of the right is merely a formal one, which will be fulfilled as long as the national provision specifies exhaustive conditions for the application of double criminal and administrative penalties. This seems to hold a close similarity to the situation that the first *Engel* criterion pursued to avoid, which is that the State

¹⁵⁰ *ibid* para 42

¹⁵¹ AG Opinion in *Menci* (n 39) para 82

¹⁵² *Menci* (n 3) para 43

¹⁵³ *ibid* para 7

be able to circumvent the criminal characterisation of a penalty by labelling it as an administrative sanction. The Court seems to open the possibility for Member States to avoid the principle of *ne bis in idem* by simply laying down a condition of failure to pay VAT until a certain deadline, for instance.

The Court's finding lacks clarity and guidance and, thus, calls for further questioning.

In that respect, what Article 52(1) of the Charter genuinely seeks to preserve when it refers to the 'essence of a right', in this case, the right not to be criminally punished twice in respect of the same facts, must be further examined. Hence, the following question arises: what is the essence of the principle of *ne bis in idem*?

In the beginning of this study, the conceptualization of *ne bis in idem* in early Rome was presented as the prohibition of punishing twice for the same offence someone that had already been found innocent¹⁵⁴. This is a starting point for the analysis of what the principle seeks to assure.

Current elucidation can be found in the European Union Judicial Cooperation Unit's guide on The Principle of *Ne Bis in Idem* in Criminal Matters in the Case Law of the CJEU¹⁵⁵. It provides explanations on the material scope of application of the principle, according to the case law of the EU Court. It lays down the requirements for a 'situation to be considered a *bis in idem*', which are the ones already mentioned in this paper: same person, final decision, same acts, criminal nature and, additionally, enforcement, in the case of Article 54 of the CISA. This last requirement will be discussed later in this section and is not prescribed in Article 50 of the Charter.

The Guide on Article 4 of Protocol 7, part of the series of Guides on the Convention¹⁵⁶, product of the ECtHR itself, presents a more elaborate structure of the principle. It highlights the three 'key components' of the principle of *ne bis in idem*, which are (i) 'whether both proceedings were criminal in nature', (ii) 'whether the offence was the same in both proceedings' and (iii) whether there was a duplication of proceedings'. The last component is

¹⁵⁴ (n 5)

¹⁵⁵ The European Union's Judicial Cooperation Unit, EUROJUST 'The Principle of Ne Bis in Idem in Criminal Matters in the Case Law of the Court of Justice of the European Union' (2017) p 8 Available at <[http://www.eurojust.europa.eu/doclibrary/Eurojustframework/caselawanalysis/The%20principle%20of%20Ne%20Bis%20in%20Idem%20in%20criminal%20matters%20in%20the%20case%20law%20of%20the%20Court%20of%20Justice%20of%20the%20EU%20\(Sept.%202017\)/2017-09_CJEU-CaseLaw-NeBisInIdem_EN.pdf](http://www.eurojust.europa.eu/doclibrary/Eurojustframework/caselawanalysis/The%20principle%20of%20Ne%20Bis%20in%20Idem%20in%20criminal%20matters%20in%20the%20case%20law%20of%20the%20Court%20of%20Justice%20of%20the%20EU%20(Sept.%202017)/2017-09_CJEU-CaseLaw-NeBisInIdem_EN.pdf)> accessed 18 April 2018

¹⁵⁶ Guide on Article 4 of Protocol No. 7. Right Not to be Tried or Punished Twice. 2017. European Court of Human Rights <https://www.echr.coe.int/Documents/Guide_Art_4_Protocol_7_ENG.pdf> accessed 12 April 2018

divided into three subcomponents, containing (a) ‘whether the first decision was final’, (b) ‘whether there were new proceedings’ and (c) ‘whether the exception in the second paragraph is applicable’.

As seen throughout the relevant case law on this matter, commonly, the starting point for the analysis of whether the principle of *ne bis in idem* applies or not to a determined case, is the appraisal of the criminal nature of the administrative penalty, since the lack of two sanctions which are criminal in nature excludes the scope of the principle’s protection. After confirmation of double *criminal* proceedings, examination of the *bis* and *idem* should take place.

It seems safe to affirm that these key components are, in fact, the essence of non-double jeopardy. The simplest way to describe this principle is that it prohibits multiple punishments towards the same person for the same offence. *Ne bis in idem* does not exist once any of these components are removed.

When it comes to concurrent administrative and criminal penalties, the decision in *Åkerberg* is, in fact, seminal, as it simplifies the application of the principle even further. The bottom line of the ruling is that double-track systems are compatible with Article 50 of the Charter, as long as both penalties are not *criminal* in nature. This seems to be the center of *ne bis in idem* in cases involving a double-track system: the administrative penalty cannot be criminal in fact.

In view of this, is it possible that any limitation to one of the three key components of the principle of *ne bis in idem* still respects its essence? The answer to this question appears to be positive. When would, then, a limitation to Article 50 be accepted? An accurate example of the application of a legitimate limitation is presented in *Spasic*. The CJEU, in fact, relied on this judgement in its decision in *Menci*, but only to say that a limitation to the principle may be permitted under Article 52(1)¹⁵⁷. It did not explain how the two cases are correlated.

Spasic concerned the interpretation of the *ne bis in idem* principle in Article 54, CISA in light of Article 50 of the Charter and in respect of police and judicial cooperation in criminal matters. The CISA provides an additional requirement to the application of the principle, which is the enforcement condition. According to this condition, the first decision must have ‘been enforced, is actually in the process of being enforced or can no longer be enforced under the

¹⁵⁷ *Menci* (n 3) para 40

laws of the sentencing Contracting Party'¹⁵⁸ in order for the double jeopardy protection to apply. Since this requirement is not found in Article 50 CFREU, the German court asked if it was compatible with the Charter¹⁵⁹.

In its reasoning, the CJEU applied Article 52(1) of the Charter, finding that, although the provision on *ne bis in idem* in the Charter was broader than the one in the CISA, the fact that the first decision must, at least, be in the process of enforcement, fulfills all the limitation requirements in Article 52(1).

In this case, the Court actually analysed the requirement of respect for the essence of the right, finding that the execution condition only aimed to secure that the individual did not benefit from unpunishment in case the first sentence was never actually enforced by the sentencing State¹⁶⁰.

No harm to the key components derives from such limitation. As a matter of fact, this restriction assumes that the State which delivered the first decision has taken all means necessary, including the mechanisms provided by EU law, to enforce the penalty¹⁶¹. If the sentencing State has done so, which is the natural and expected path after the imposition of a sanction, the occurrence of a second trial and conviction in another Member State will be hindered by the principle of *ne bis in idem*. If for any reason, however, the enforceability of the penalty has not taken place, the execution condition seeks the assurance of punishability.

The difference between *Spasic* and *Menci* is that in the first case, the limitation of the principle of *ne bis in idem* does not completely prevent its application, but sets a condition that if the penalty is not enforced in the State that first convicted, the other State may prosecute the individual and execute its sentence. It still assures that the individual does not have two penalties enforced against them. The limitation is verified by the cooperation between the Member States and is not applied indistinctively, since there are a number of instruments in EU Law which coordinate the enforcement condition¹⁶². Therefore, the 'finality' subcomponent is restricted, so the proceeding becomes final, in fact, once the penalty has, at least, begun to be enforced. Accordingly, even if the Member State can no longer enforce the penalty under its laws, the protection of *ne bis in idem* will still apply. Another important reason for allowing this limitation is that it involves the criminal punishment for the same offence in different

¹⁵⁸ Article 54, CISA (n 25)

¹⁵⁹ *Spasic* (n 55) para 41

¹⁶⁰ *ibid* para 58

¹⁶¹ *ibid* para 71

¹⁶² *ibid* paras 66-70

Member States, which can easily lead to double or no punishment at all. The CJEU was able to find that the restriction as proportionate¹⁶³ and that it met the general interests of the Union, by safeguarding the implementation of the Area of Freedom, Security and Justice (AFSJ)¹⁶⁴.

Differently, in *Menci*, the ‘criminal’ component is entirely disregarded, since the limitation to the principle of *ne bis in idem* prevents it from being applied at all in cases regarding concurrent VAT surcharge that is genuinely criminal and a formally penal sanction.

Even though Italian law stipulates application of the criminal sanction to a certain amount of unpaid VAT, nothing impedes Member States to set lower sums or to not limit the application to any determined amount, since this was one of the two ‘exhaustively defined conditions’ that the Court accepted, without providing further explanations on how this respects the essence for the right.

Furthermore, theoretically, by only determining that the criminal sanctions apply if the amounts are not payed until a certain time limit as a condition, the Member State may be deemed to have fulfilled the requirement of respect for the essence of the right not to be tried twice, according to *Menci*.

The CJEU’s reasoning in *Menci* on the respect for the essence of the principle is a shallow one and leaves room for Member States to circumvent the level of protection afforded so far to the principle, specially in regards to *Åkerberg*.

The result of this analysis is that, within the circumstances presented in *Menci*, the limitation provided for by Italian law does not respect the essence of the right not to be tried twice.

Concerning the ‘criminal’ component of such right, it is hard to envision a situation where parallel proceedings for the imposition of a criminal sanction and an essentially criminal tax surcharge will fulfill such a requirement. This conclusion flows from the *Åkerberg*¹⁶⁵ postulate, according to which subsequent sanctions of a criminal nature cannot exist. This seems to be, in fact, the core of the principle of *ne bis in idem*.

Before assessing the third requirement, the CJEU considered the fourth one, that is, that the limitation genuinely meets objectives of general interest recognised by the EU. This requirement does not seem to generate large debates. The general interest, in this case, is to

¹⁶³ *ibid* paras 60 ff

¹⁶⁴ *ibid* paras 62-63

¹⁶⁵ *ibid*

ensure the collection of VAT revenue, which is accrued by the States and transferred to the EU. Such interest derives, ultimately, from Article 4(3) TEU¹⁶⁶ and the obligation of Member States to take all appropriate measures to ensure that all duties that arise from EU law are complied with. In *Åkerberg*¹⁶⁷ the Court took this reasoning into consideration to determine that VAT issues fall into the scope of EU law and emphasized the obligation of preserving the financial interests of the Union and Article 325 TFEU¹⁶⁸.

The third requirement is that the limitation must be subject to the principle of proportionality and, in that analysis, its necessity must be taken into consideration.

This was the point defined by AG Sánchez-Bordona as the ‘key factor’¹⁶⁹ as to why the limitation in Article 52(1) does not apply in *Menci*. In brief, he defended that the need for a limitation would only exist if it was necessary for all Member States and not only for the ones which carry a twin-track structure¹⁷⁰. It has been decided in *Åkerberg* that the parallel system can exist, as long as both penalties are not criminal in their nature, which means that there is no need for a limitation¹⁷¹. Finally, his conclusion was that, if Member States have the possibility of adopting a single-track system in which different penalties can be imposed towards the same person for the same acts, without interfering with *ne bis in idem*, it is unnecessary to limit that principle in double-track systems¹⁷². Thus, the solution has already been found in *Åkerberg*, which permits concurrent proceedings, as long as they are not criminal in nature.

The CJEU, by its turn, attached the strict necessity of the limitation in the proportionality requirement of Article 52(1) CFREU to the fact that the national legislation offered ‘clear and precise rules allowing individuals to predict which acts or omissions’ would

¹⁶⁶ Article 4(3) TFEU:

Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.

¹⁶⁷ *Åkerberg* (n 4) paras 24-31

¹⁶⁸ Article 325, TFEU:

1. The Union and the Member States shall counter fraud and any other illegal activities affecting the financial interests of the Union through measures to be taken in accordance with this Article, which shall act as a deterrent and be such as to afford effective protection in the Member States, and in all the Union's institutions, bodies, offices and agencies. 2. Member States shall take the same measures to counter fraud affecting the financial interests of the Union as they take to counter fraud affecting their own financial interests. [...]

¹⁶⁹ Opinion of AG Sánchez-Bordona, *op cit* para 82

¹⁷⁰ *ibid* 82-94

¹⁷¹ *ibid* para 89

¹⁷² *ibid* para 93

lead to dual punishment¹⁷³. It, once again, described the two circumstances provided by Italian law which trigger the application of the criminal sanctions in parallel with the tax surcharge¹⁷⁴.

The AG's position seems to be the adequate response to the necessity requirement. In fact, the restraint cannot be deemed as 'necessary' if it is not so for all Member States. His analysis demonstrates that there are other means of achieving that same result, by applying a single-track system or coordinating the application of both proceedings so that they are actually regarded as one. The CJEU's approach, on the other hand, repeats the content of the requirement on the 'respect for the essence of the right' and does not touch upon necessity at all.

The CJEU proceeded to the examination of whether the aggravations suffered by the individual, by virtue of the duplication of proceedings, do not surpass what is strictly necessary for the achievement of the objective pursued by the rule, in this case, the assurance of VAT collection. According to the Court's analysis, this condition implies that national law provides coordination rules to guarantee strict necessity of such additional detriment. Moreover, there must be rules to ensure that the severity of the penalties imposed correspond to the seriousness of the offence. The Court recognised that the Italian provisions meet such conditions¹⁷⁵

That finding was based on Article 21 of the Italian Legislative Decree 74/200¹⁷⁶ on direct taxes and VAT. The mentioned article, however, does not harmonize with the Court's reasoning.

It clearly follows from Article 20 of the mentioned legislation, that the distinct sanctions are processed before different authorities and that the administrative proceedings may not be suspended to await on the outcome of the criminal charges. The wording of the article indicates the autonomy of the proceedings, even if the conclusion of the administrative one depends on the outcome of the criminal findings¹⁷⁷. This seems to be an evident signal that there is no coordination amongst the proceedings to secure that the outcome is retained to what is strictly necessary.

¹⁷³ *ibid* para 49

¹⁷⁴ *Luca Menci* (n 3) paras 49-51

¹⁷⁵ *ibid* paras 53-57

¹⁷⁶ Legislative Decree No 74, of 10 March 2000 adopting new rules on offences relating to direct taxes and value added tax, pursuant to Article 9 of Law No 205 of 25 June 1999, (GURI No 76 of 31 March 2000) p 4

¹⁷⁷ *ibid*, Article 20:

The administrative proceedings for the control of taxes for the purpose of setting the amount to recover and the proceedings before the tax court may not be suspended during the criminal proceedings covering the same facts or facts on the determination of which the outcome of the conclusion of the proceedings depends.

Article 21 of the Italian Legislative Decree establishes that the administrative sanction will only be enforceable in case of dismissal or acquittal regarding the criminal accusation. This does not, however, exclude a case such as the one in analysis, where the appellant was criminally prosecuted after the conclusion of the proceedings and payment of the first installment of the tax assessment and surcharge.

Additionally, the Court states that the deliberate payment of the tax penalty sums reflects on the criminal sanction as an attenuating element.¹⁷⁸ Arguably, this statement does not ensure that the additional disadvantage of the duplication of penalties is reduced to the strictly necessary level. As far as highlighted by the ECtHR in *Maresti*¹⁷⁹, this credit system, as referred to by the doctrine¹⁸⁰, ‘does not alter the fact that the applicant was tried twice for the same offence’¹⁸¹. The same conclusion is reached by AG Sánchez-Bordona’s Opinion¹⁸², according to whom this mitigation does not reduce the punitive effect of the tax penalties. Even further, the mere fact that these measures can be adopted in certain cases, does not suffice to regard the limitation rule in abstract assures that the results of duplicate punishments will not exceed what is strictly necessary to achieve the aim of protecting the financial interests of the EU.

Indeed, there are less harmful means to attain effective VAT collection. As pointed out by AG Sánchez-Bordona, the classification of more serious VAT acts as criminal charges entail sufficient punitive and deterrent effect¹⁸³, which make the imposition of an additional surcharge, also punitive in its nature, only a way of sharpening the State’s power to punish in detriment of the citizen’s individual protection.

This individual guarantee against the State’s maximal possible repressiveness is, essentially, the protective scope that both the ECtHR and the CJEU, by way of their case law, have construed through the principle of *ne bis in idem* and which seems to have come apart after such long resistance.

The CJEU’s conclusion, therefore, was that national legislation which allows the imposition of a criminal charge for the non-payment of VAT, after applying an administrative penalty of a punitive nature, does not infringe Article 50 of the Charter, seeing that such rule:

¹⁷⁸ *Menci* (n 4) para 56

¹⁷⁹ *Maresti v Croatia* Appl no 55759/07 (ECtHR 25 June 2009) ECLI:CE:ECHR:2009:0625JUD005575907

¹⁸⁰ Wattel (n 69) 172

¹⁸¹ *Maresti* (n179) para 65

¹⁸² AG Opinion in *Menci* (n 39) para 114

¹⁸³ *ibid* para 118

- a) ‘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,’
- b) ‘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’
- c) ‘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.’¹⁸⁴

It is not clear whether the CJEU has removed the ‘respect for the essence of the right’ requirement or if it is implied in these conditions that such a requirement is being met with or, even, if these conditions are a substitute for Article 52(1). The Court started by applying that Article, but shifted into an assemble of its own, blending the requirements from the Charter with what seems to be an adapted proportionality test.

After its assertive position in *Åkerberg*, the CJEU’s questionable *Menci* ruling leaves a wide margin for uncertainty.

4.2.3. Interpretation of Corresponding Rights in the ECHR and the CFREU: Article 52(3) CFREU

The main expectation for the *Menci* ruling concerned the CJEU’s interpretation of Article 52(3) of the Charter. This provision, also referred to as the ‘homogeneity clause’, is extremely relevant in the EU order, since it institutes a commitment regarding the correlation between the corresponding rights in the Convention and the Charter and their interpretation. The level of such commitment, however, has been the object of long discussions. The provision reads as follows:

In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

¹⁸⁴ *Menci* (n 3) para 63

The question regarding the interaction between the two instruments and the interpretation of corresponding rights by the CJEU, has been faced by this same court in prior cases, where the Court has said that, as long as the Union has not acceded to the ECHR, this latter does not constitute an instrument that has formally been incorporated into EU law¹⁸⁵. In an earlier case, the CJEU had already ruled that, as long as the rights are corresponding in the ECHR and the CFREU, it is only necessary to refer to the right in the Charter¹⁸⁶.

It seems that in *Menci* it would also be difficult to avoid clarification of this provision, since the question referred explicitly inquires how Article 50 CFREU must be interpreted in light of Article 4, Protocol 7 of the ECHR and its related case law. In other words, how should these two legislations interact, having in mind the change in the ECtHR's interpretation on *ne bis in idem* in *A & B Norway*? Indeed, the Strasbourg Court's change of heart is what provoked the Italian inquiry to the CJEU.

Different views have been exposed within the doctrine concerning the interpretation of Article 52(3) of the Charter, even before *Menci*, since its direct interpretation was avoided in *Åkerberg*.

Authors Lenaerts and Smijter argue for the binding effect resulting from the homogeneity clause. According to them, the meaning and scope of the rights present both in the Convention and the Charter is mainly formed by the interpretation provided in the case law of the ECHR and, therefore, the CJEU, when applying the Charter, will necessarily be bound by the decisions of the former Court¹⁸⁷.

Arguing in the opposite direction, Lock affirms that the CJEU is not bound by the judgements of the ECtHR. His reasoning flows from the literal interpretation of Article 52(3), where there is no explicit mentioning of the duty to strictly follow the *case law* of the ECtHR,¹⁸⁸ although he recognised its importance for the interpretation of the Charter. Additionally, he argues that until the EU has not acceded to the ECHR and, therefore, is not a Contracting Party to the Convention, it is 'not directly bound by it'¹⁸⁹.

¹⁸⁵ Joined Cases C-217/15 and C-350/15 *Massimo Orsi and Luciano Baldetti* [2017] ECLI:EU:C:2017:264, para 15

¹⁸⁶ Case C-199/11 *Otis and Others* [2012] ECLI:EU:C:2012:684

¹⁸⁷ Koen Lenaerts and Eddy de Smijter, 'The Charter and the Role of the European Courts' (2001) 8 *Maastricht Journal of European Law* 90

¹⁸⁸ Tobias Lock, 'The ECJ and the ECtHR: The Future Relationship between the Two European Courts' (2009) 8(3) *The Law and Practise of International Courts and Tribunals* 383-384

¹⁸⁹ *ibid* 376

The controversy concerning the EU's accession to the ECHR, although more inclined into a political issue, is worth briefly mentioning for the aims of the present discussion.

With the entry into force of the Treaty of Lisbon, in 2009, Article 6(2) of the Treaty on European Union provides that the EU shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. However, by means of an opinion delivered on 8th of December 2014 (Opinion 2/13), the CJEU in full indicated that the Draft of the Accession Agreement was not compatible with the requirements of EU Law. The main argument against accession concerned the autonomy of EU legal order.

This is a sensitive subject for the Union, which after building up an extensive body of case law on supremacy and autonomy of EU Law,¹⁹⁰ showed its protective instincts against the possibility of being bound by another Court. From the analysis, it follows that it is not in the EU's intention to be constrained by an external judicial body, which would also be the case if Article 52(3) were to be considered as binding the CJEU to the case law of the ECtHR.

Grossot and Ericsson present another argument against the binding effect of the homogeneity clause¹⁹¹. Besides the fact that there were innumerable unsuccessful pursuits towards including in Article 52(3) an explicit referral to 'the case law of the ECHR', paragraph 7 establishes that "the explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given *due regard* by the Courts of the Union and of the Member States". 'The explanations' are the Explanations relating to the Charter of Fundamental Rights¹⁹², a tool developed by the drafters of the Charter with elucidative notes on each Article aiming to provide guidance on its interpretation. According to the explanations, Article 52(3) also includes the case law of the ECtHR when it refers to the interpretation of the meaning and scope of corresponding rights. However, it is argued that since Article 52(7) merely requires

¹⁹⁰ The doctrine of supremacy and autonomy of EU Law has as its landmark decision in Case C-26/62 *Van Gend en Loos v. Netherlands* [1963] ECLI:EU:C:1963:1, where it was established that "the Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals, independently of the legislation of Member States. Community Law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community".

¹⁹¹ Xavier Grossot and Angelica Ericsson, '*Ne Bis in Idem* in the EU and the ECHR Legal Orders: A Matter of Uniform Interpretation' in Ban vas Bockel (eds), *Ne Bis in Idem in EU Law* (Cambridge: Cambridge University Press 2016) 73

¹⁹² European Parliament CEU/EC 'Explanations relating to the Charter of Fundamental Rights' (2007/C 303/02) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32007X1214%2801%29>> accessed 22 April 2018

that *due regard* be given to the explanations, the CJEU has margin to depart from the case law of the ECtHR when interpreting equivalent rights¹⁹³.

In other words, what the aforementioned authors contend is that the intention of the legislator, by not directly referring to the case law of the ECHR in the body of the Charter and mentioning it in the explanations, to which *only due regard* must be endowed, did not mean to bind the CJEU's interpretation of fundamental rights to the case law of the ECHR, which appears to be the appropriate perception on this matter.

Regarding the CJEU's approach in respect of Article 52(3), in *Åkerberg*, it maintained itself silent in respect of the case law of the ECtHR and, implicitly, invoked the application of the *Engel* criteria and placed it on the hands of the national Court to determine whether the surcharge was a criminal one or not. It did not mention that this was the criteria developed in the case law of the Strasbourg Court, rather it referred to its own case law mentioning *Bonda*. In this last case, the CJEU did expressly address the jurisprudence of the Strasbourg Court and the *Engel* criteria. The case was received by the Court in 2010, which means, after the Charter came into force, but due to Poland's 'opt-out' Protocol, the Charter was not invoked¹⁹⁴.

The fact that the CJEU does not mention the ECtHR in *Åkerberg* gave rise to different opinions in respect of its intent in doing so. On the one hand, it has been argued that the CJEU intended to provide a limited meaning to the homogeneity clause in Article 52(3) of the Charter and, thus, avoided quoting the Convention¹⁹⁵. Contrarily, it has been held that *Åkerberg* 'cleverly indirectly aligns the ECtHR's criteria for the determination of a criminal charge with that of the Charter'¹⁹⁶ and that the 'Charter reinforced the impact of the ECHR'¹⁹⁷. The latter opinion seems to be more adequate and in line with the ruling, since it is clear that, although only citing *Bonda*, the CJEU indirectly referenced the ECtHR in *Engel*.

Accordingly, the European Union's Judicial Cooperation Unit provided a document with an overview and guidance on the application of the principle of *ne bis in idem* in criminal matters according to the case law of the Court of Justice of the EU. In this document, the

¹⁹³ Groussot, 'Ne Bis in Idem EU and the ECHR Legal Orders' (n 191) 73

¹⁹⁴ For a discussion on this subject, see Catherine Barnard, 'The "Opt-Out" for the UK and Poland from the Charter of Fundamental Rights: Triumph of Rhetoric over Reality?' in Stefan Griller S and Jaques Ziller (eds), *The Lisbon Treaty* vol 11 (European Community Studies Association of Austria Publication Series 2008)

¹⁹⁵ Groussot, 'Ne Bis in Idem EU and the ECHR Legal Orders' (n 191) 81

¹⁹⁶ Brokelind (n 59)

¹⁹⁷ Sybe de Vries, Ulf Bernitz, Stephen Weatherill, *The EU Charter of Fundamental Rights as a Binding Instrument: Five Years Old and Growing* (Bloomsbury Publishing 2015) 168

Cooperation Unit affirms that the conclusion of *Åkerberg* announces that the CJEU aligned views with the ECtHR.¹⁹⁸

What can be derived from such findings is that: the CJEU did not face the issue regarding Article 52(3) directly in *Åkerberg*, but it did, indirectly, make use of the *Engel* criteria. It confirmed its approach in *Bonda*, which was based on an important case of the ECtHR and, thus, relied on the interpretation from the Strasbourg Court as guidance for building up on its own jurisprudence. Nonetheless, should this first conclusion be understood as meaning that the CJEU must necessarily apply the case law from the ECtHR in respect of corresponding rights from now on?

The CJEU's answer to the Opinion of AG Cruz Villalón in *Åkerberg*¹⁹⁹ might be an indication to the answer. The AG's first consideration was that the case fell outside the scope of Union Law. However, he provided an opinion in case the Court disagreed with him. He argued that the real issue that should be considered in this case was that Protocol 7 of the Convention had not been ratified by certain Contracting Parties and many others presented reservations to the application of the principle of *ne bis in idem*²⁰⁰. This was because several Contracting States wanted to maintain their own systems of applying concurrent administrative and criminal penalties for the same offence. The ECtHR, however, had been developing its case law in such a way that these dual-track systems were becoming nearly inoperative. The AG's opinion, thus, emphasized the political situation regarding the principle within the Convention in order to ascertain its interpretation in the EU legal order.

It is already known that the CJEU did not follow the AG's reasoning and did not mention the ECtHR at all in this judgement, but it indirectly relied on its interpretative approach to the principle of *ne bis in idem*. Thus, apparently, issues regarding the reservation made to the Convention did not concern the EU Court.

Therefore, the allegation according to which, the CJEU decided to adopt a 'minimalist interpretation' of Article 52(3) in *Åkerberg* seems to be correct²⁰¹. This means that, to maintain a certain distance from the ECtHR, the CJEU did not explicitly address its case law or any other issues relating to the Convention, but silently adopted the *Engel* criteria, making sure, however, that the entire focus is on the Charter and issues concerning the EU legal order. This is referred

¹⁹⁸ EUROJUST, 'The Principle of Ne Bis in Idem [...]' (n 155) 24

¹⁹⁹ *Åkerberg* (n 4) AG Opinion of Cruz Villalón

²⁰⁰ *ibid* para 68-84

²⁰¹ Groussot, 'Ne Bis in Idem EU and the ECHR Legal Orders' (n 191) 86

to by the doctrine as the ‘relative autonomy’ interpretation, which seems to be the one adopted by the CJEU regarding the homogeneity clause²⁰².

In *Åkerberg*, the CJEU, perhaps, did not feel the need to expressly mention the case law of the ECtHR, since it had already done so in *Bonda*. It is clear that the CJEU did consider the case law of the Strasbourg in *Åkerberg* when it cites *Bonda*.

The long-awaited reply in respect of Article 52(3) arrived in the judgement of *Menci*, in a straightforward manner and as a repetition of earlier case law. The CJEU affirmed, once again, that, as long as the accession to the Convention has not come into effect, the latter cannot be regarded as an ‘instrument which has been formally incorporated into EU law’²⁰³. The binding effect of the Convention was, thus, rejected.

Furthermore, the CJEU turned to ‘the explanations’ to the Charter, according to which the provision of Article 52(3) is intended to ensure the necessary consistency between the Charter and the ECHR, without thereby adversely affecting the autonomy of Union Law’²⁰⁴ and the CJEU. It then concluded that the Court’s analysis should be made based on the instruments of EU legislation and, notably, the Charter²⁰⁵.

In the last paragraphs of *Menci*, after the Court’s completed analysis, the homogeneity clause was exerted to say that Article 4, Protocol 7 ECHR must be considered, since a corresponding right was at stake²⁰⁶. The consideration was merely that the ECtHR has also decided that a duplication of criminal proceedings, as the ones at issue, does not infringe the Convention, although based on the test of a sufficiently close connection in substance and time²⁰⁷.

It seems, thus, that the latest judgement from the ECtHR was brought into play only to point out that it had also recently allowed the application of parallel criminal sanctions and tax surcharges, of a criminal nature, contrary to the approach it had adopted so far. The feeling that arises is that a blessing was conceded by the ECtHR, crowning the CJEU’s decision in *Menci*, something close to ‘if the Strasbourg Court departed from its settled position regarding *ne bis in idem*, the CJEU should be able to the same’.

²⁰² *ibid* 86-87

²⁰³ *Luca Menci* (n 3) para 22

²⁰⁴ *ibid* para 23

²⁰⁵ *ibid* para 24

²⁰⁶ *ibid* para 60

²⁰⁷ *ibid* para 61

This stance might indicate the CJEU's attempt to demonstrate the maintenance of consistency between the two legislations. It is arguable, however, that the CJEU has in fact kept such consistency through its ruling, since what it really seems to be saying is: the interpretation of *ne bis in idem* by the ECtHR has been changed, the CJEU has chosen to do the same and, even if based on completely different grounds, this reveals consistency. Thus, the CJEU's reasoning seems to consider that it has not gone below the protection afforded by the Convention, which is acceptable.

What can be attained from the ruling, however, is that the CJEU, currently, is not bound by the ECtHR and, at least, a relatively autonomous interpretation of the homogeneity clause must be accepted.

It can thus be concluded that the ECtHR's decisions do not have a binding effect, it is incontestable that the wording of Article 52(3) and 'the explanations' to the Charter indicate a commitment regarding consistency between the two diplomas, as long as that CJEU does not limit such rights in a way that negatively impacts the autonomy of EU law and of the CJEU.

This entails the understanding that the Convention is prior to the Charter and that rights such as the principle of *ne bis in idem* had already been applied in the ECtHR's case law. It was, thus, intended that the protection afforded by the Convention of the rights present both therein and in the Charter is minimally maintained by the CJEU's interpretation²⁰⁸. However, if the Strasbourg Court were to limit rights to which it had established a certain level of safeguard, the Union should not be impeded of applying or preserving more extensive protection, as explicitly stipulated in Article 52(3), second sentence.

As far as *Åkerberg* had aligned both Court's case law on *ne bis in idem*, the most well-suited way of deciding *Menci*, as regards the ECtHR's change in direction and the homogeneity clause argument, would be to apply the last sentence of Article 52(3) and sustain the higher level of protection granted by that case.

4.2.4. Non-Regression Clause: Article 53 CFREU

The provision in Article 53 is referred to as a 'non-regression clause' or as a 'standstill clause'²⁰⁹, and provides that:

Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields

²⁰⁸ Groussot, 'Clarifying or Diluting the Application of the EU Charter' (n 147) 65; Lock (n 188) 382

²⁰⁹ Lenaerts, 'Court of Justice [...]' (n 112) 98

of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.

This Article has been the object of intense debates²¹⁰ and there is more than one facet to it (such as the acknowledgement of national standards, for example), as it has been recognised as more than a mere non-regression clause²¹¹. However, the intent of this section is to demonstrate the effect of such provision and the prohibition to the interpretation of the Charter which adversely affects the level of protection previously afforded to fundamental rights.

Lenaerts presents an elucidative interpretation to the combined reading of Articles 52(3), last sentence, and 53 of the Charter, as follows²¹²:

[...] if the ECtHR ever decides to lower the level of protection below that guaranteed by EU law, by virtue of Article 53 of the Charter, the ECJ will be precluded from interpreting the provisions of the Charter in a regressive fashion. Stated differently, interpreted as a “stand-still clause”, Article 53 of the Charter preserves the constitutional autonomy of EU law.

While Article 52(3) allows the CJEU to extend the protection of corresponding rights further than what the ECtHR has been provided, Article 53 prohibits that first Court to abandon the level of safeguard recognised by Union Law towards fundamental rights.

As concerns *Menci* and the right not to be punished twice, the CJEU did not seem to find any issues regarding the non-regression clause, as this was not even mentioned in its ruling. Could this be taken to mean that this prohibition does not apply when the Court applies the possible limitation by means of Article 52(1)? The answer to this question seems to be negative.

As derives from the wording of Article 53, no interpretation of the Charter may be accepted as restricting fundamental rights as recognised by EU Law. In this case, it is known that Article 52(1) CFREU provides grounds for the limitation of the rights in therein, but, where a high level of protection has been recognised by Union Law, it does not seem to in the

²¹⁰ See, for instance, Jonas Bering Liisberg ‘Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law?’ (2011) 4(01) Jean Monnet Working Paper and Koen Lenaerts ‘Court of Justice [...]’ [n 112] 79-106

Groussot, ‘Clarifying or Diluting the Application of the EU Charter (n 147) 88

²¹² Koen Lenaerts ‘Court of Justice [...]’ (n 112) 98

legislator's intention that the Charter itself allows retrogression, as the non-regression clause uses the word 'nothing'.

In *Åkerberg*, the CJEU recognised the protection of the principle of *ne bis in idem* at a high level, prohibiting the duplication of proceedings for the imposition of tax surcharges and criminal penalties if the first one was deemed as punitive in its nature.

This ruling became the EU's standard of protection against double jeopardy arising in twin-track systems for the punishment of acts connected to VAT irregularities. The protection awarded through such standards directly influenced the safeguarding of the tax payer, who was granted the assurance of not being subject to double punitive measures in respect of a breach of his tax obligations. The EU established a system where the State's efforts to avert tax offences through the application of utmost deterrent measures was incompatible with the Charter of Fundamental Rights of the Union.

After examining the effects of the aforementioned judgement in the Swedish system, it has been concluded that:

The aftermath of the *Åkerberg* judgment does indeed provide a good example of when the interplay between the EU and ECHR legal orders results in a raised level of human rights protection, not envisioned or attainable without the input of each strand of standards.²¹³

As the CJEU decides to limit the application of the principle of *ne bis in idem* in *Menci* within the same circumstances as the ones in *Åkerberg*, it drags down the level of protection once afforded and all the safeguards that derived from it.

Thus, it follows from the analysis in this section that the provision in Article 53 of the Charter would be sufficient to impede such regression, but was not brought up by the CJEU in *Menci*.

4.2.5. Possible Issues Arising from *Menci*

The decision in *Menci* will certainly bring about changes to the current scenario of parallel imposition of administrative and criminal penalties regarding VAT. It will not come as a surprise if Member States suddenly feel at liberty to apply tax surcharges with a punitive nature in addition to criminal sanctions, since the CJEU's analysis of the limitation to the right

²¹³ Angelica Ericsson, 'The Swedish Ne Bis in Idem Saga - Painting a multi-layered picture' (2004) 17(1) *Europarättslig tidskrift* 65

not to be punished as instituted by Italian law does not raise high thresholds for the restrictions of other domestic legislations to be regarded as meeting the established conditions.

Another issue that may arise regards the application of different rules and standards throughout the Member States, since the ECtHR and the CJEU have followed different directions. The solution cannot be found in the scope of territorial application of the principle of *ne bis in idem*, since, as already exposed in this study²¹⁴, the Charter's application is not only confined to situations that transcend the country's boundaries and involve another Member State. *Menci* is a clear example of the Charter's operation within the territorial scope of a single State.

Other questions may arise, such as: how should the Member States organize their systems of concurrent sanctions? Will different rules apply for cases concerning VAT and for cases relating to other types of tax surcharges? Since *A & B Norway* and *Menci* both concerned VAT penalties and both Court's decisions may be applied in internal situations, which approach should the Member State adopt?

The importance of the alignment between the two Courts becomes evident in practical situations, as the ones described above, which should be taken within consideration when interpreting corresponding rights. The purpose of Article 52(3) of the Charter, thus, assumes a clear form.

Finally, the question as to what happens to *Åkerberg* after *Menci* must be posed. It is not clear where that first ruling stands after the CJEU's change in direction. It is here advocated that *Menci* overruled *Åkerberg*, since it is difficult to envision how the judgement can coexist. If *Åkerberg* asserted that double-track system do not infringe the Charter, as long as both penalties are not of a criminal nature, and *Menci* says that concurrent penalty systems does not infringe the Charter, even if both sanctions are criminal, and as long as the limitation fulfills certain conditions, then the command of *Åkerberg* has been lost. The rulings do not complement each other. On the contrary, they seem to be at conflict.

Chapter 5: Conclusion

The principle of *ne bis in idem* has undergone a long process in European Union Law until reaching the status of a fundamental right and of the ultimate safeguard against the

²¹⁴ See section 2.3.2 of this paper

imposition of cumulative administrative and criminal sanctions, both genuinely punitive, in respect of the same VAT related offence.

Although it seemed that a solid basis was constructed, through the case law of the ECtHR and the assertive decree of *Åkerberg*, for the principle's operation within the EU, the highly expected and controversial decision in *Menci* indicates a twist on the current status of *ne bis in idem*.

The CJEU abandoned its settled position, according to which double-track systems did not infringe Article 50 of the Charter, seeing that both penalties were not criminal in nature, and applied Article 52(1) of the same diploma to ascertain that double punitive sanctions may exist in order to protect the financial interests of the Union, such as the collection of VAT.

The importance regarding the fight against VAT fraud also becomes evident through *Menci*. Since this issue has become a central point in the political agenda of the EU, it is not too surprising that the CJEU would lead to the political pressure of the Member States and find a way to adjust the parallel penalty system with the Charter.

While Article 52(1) of the Charter does offer the possibility of restricting the rights and freedoms therein, the circumstances in *Menci* do not appear to fulfill the requirements for such limitation. The respect for the essence of the right to not be punished twice entails an in-depth analysis, which was not done by the CJEU. Instead, the requirements of Article 52(1) were superficially examined and the conclusion came to be that the criminal nature of the VAT surcharge could be accepted by means of attainment of the conditions introduced by the Court.

The result is the overruling of *Åkerberg* and the regression on the level of protection afforded by EU Law to the principle of *ne bis in idem*, in conflict with the 'stand-still' clause in Article 53 of the Charter. Moreover, the consistency between the ECtHR and the CJEU has been lost and each tribunal has adopted different views on the approach to the application of double penalties in dual-track systems in respect of VAT surcharges.

The main answer expected from *Menci*, regarding the interpretation of corresponding rights in the Convention and the Charter was delivered, but still left leeway for discussions. If the ECtHR's judgements are not binding, a question that will be on hold for the time being regards the increase in the ECtHR's level of protection in respect of corresponding rights. Will the CJEU have to raise its protection in order to maintain the minimum level granted by the

Strasbourg Court? It seems that this obligation is imposed by the Charter, regardless of the EU's accession to the Convention and, therefore, must be observed by the Luxembourg Court.

The practical issues that are deemed to arise in the future due to the CJEU's new approach to *ne bis in idem* and tax surcharges are certain and the Member State will certainly face difficulties as to the application of the Convention or the Charter, since both can be triggered in internal situations.

Considering that both Courts have lowered their level of protection, is it possible that they will align themselves again, accepting each other's new findings regarding the acceptance of double criminal punishment? It is yet unknown how they will coordinate after adopting these new approaches, since while the ECtHR based its findings on the 'sufficiently close connection in substance and time' test and the CJEU accepted national rules on the limitation of *ne bis in idem*, regardless of whether the essence of the principle were respect.

As can be seen, the judgement in *Menci* bears more doubts than answers.

The feeling that arises from the analysis of that case is that the CJEU has disregarded the underlying reasons as to the need to safeguard individuals from the extreme punitive policy embodied by certain States, by means of the guarantee of non-double-jeopardy.

The protection afforded through human rights aims at assuring appropriate individual safeguards in face of the States' powers. This is the compromise the Charter assumes as a fundamental rights instrument.

It can thus be concluded that the ruling in *Menci* has lowered the safeguard in respect of the rights of the tax payer and the prohibition of deterrent and punitive VAT surcharges cumulated with criminal sanctions with the EU legal order.

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