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## ARTICLES

### TOWARDS EUROPEAN CRIMINAL PROCEDURAL LAW – FIRST PART

edited by Araceli Turmo

## *NE BIS IN IDEM* IN EUROPEAN LAW: A DIFFICULT EXERCISE IN CONSTITUTIONAL PLURALISM

ARACELI TURMO\*

TABLE OF CONTENTS: I. A principle of European law. – II. Building coherence across European legal systems. – II.1. The challenging construction of compatible European standards. – II.2. The problem of the idem: what is criminal? – III. The attempted compromise. – IV. The revived schism. – V. Conclusion.

ABSTRACT: This *Article* analyses the recent divergence between the two European Courts on the application of *ne bis in idem* to double-track procedures from the perspective of judicial dialogue and constitutional pluralism. Although major efforts have been made towards convergence over the past decades, recent case law shows that the potential for conflict – and, possibly, incompatibility – remains wherever the incentive to follow the lead of one authority is insufficient. Pushed to find solutions by the resistance of certain national courts to their converging standards, the European Court of Human Rights and the Court of Justice have chosen very different paths to reach a similar, but not identical, compromise solution. The *Article* examines the causes of this divergence and its consequences for the protection of this fundamental right in EU Member States.

KEYWORDS: *ne bis in idem* – double-track enforcement – fundamental rights – European criminal law – judicial dialogue – criminal procedure.

### I. A PRINCIPLE OF EUROPEAN LAW

Judge Pinto de Albuquerque of the European Court of Human Rights<sup>1</sup> has described *ne bis in idem* as a “fundamental principle in European legal culture”.<sup>2</sup> This principle can

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<sup>1</sup> The terms European Court will hereafter be used to refer to the European Court of Human Rights, but the plural “European Courts” will be used to refer to the European Court of Human Rights and the CJEU concurrently.



indeed be found in similar, if not identical, terms in both European regional fundamental rights systems (that of the European Convention and that of EU law) and across all European national legal systems. Derived from the Roman law maxim *bis de eadem re ne sit actio*, the principle common to civil law systems is roughly equivalent to the doctrine of double jeopardy found in common law systems. It means that a person cannot be tried or punished twice for the same criminal offence. Its importance in the daily practice of litigation and diverse applications mean that ample bodies of case law have developed in national and European systems. This has created numerous opportunities for dialogue and interpenetration of standards across legal orders, making *ne bis in idem* an interesting topic through which to examine judicial dialogue on fundamental rights standards across Europe.<sup>3</sup>

Courts have tried to work towards similar or, at any rate, compatible standards when interpreting and implementing this principle. The case law of the Court of Justice and the European Court of Human Rights (hereafter European Court) provides many examples of cross-references to the other European system, evidencing their efforts to build a common understanding of the principle.<sup>4</sup> However, these judicial attempts have had varying success and areas of conflict remain. *Ne bis in idem* thus provides an interesting example of the limits of constitutional pluralism, defined as “the current legal reality of competing constitutional claims of final authority among different legal orders (belonging to the same legal system) and the judicial attempts at accommodating them”.<sup>5</sup> Although national and European courts may agree on (and actively work to promote) similar interpretations of important principles, the devil is, as ever, in the detail. When working on the finer points of the construction of a principle, absent a sufficient incentive to comply with a single interpretation, divergences reappear.

This *Article* focuses on one recent example of conflict between national and European courts over *ne bis in idem*. This issue appeared as a result of the growing trend in a number of European countries to resort to double track enforcement, combining administrative and criminal procedures, in order to punish certain types of offences. This trend raises questions in relation to *ne bis in idem* due to the extension of its scope beyond the strict bounds of criminal law as defined in a national legal system. The two European Courts had tried to build coherence and reach common standards which, be-

<sup>2</sup> European Court of Human Rights, judgment of 15 November 2016, nos 24130/11 and 29758/11, *A and B v. Norway*, dissenting opinion of judge Pinto de Albuquerque, para. 79.

<sup>3</sup> G. LASAGNI, S. MIRANDOLA, *The European ne bis in idem at the Crossroads of Administrative and Criminal Law*, in *Eucrim*, 2019, p. 127.

<sup>4</sup> K. LENAERTS, J. A. GUTIÉRREZ-FONS, *The Place of the Charter in the EU Constitutional Edifice*, in S. PEERS, T. HERVEY, J. KENNER, A. WARD (eds), *The EU Charter of Fundamental Rights: A Commentary*, Oxford: Hart, 2014, p. 1582.

<sup>5</sup> M. POIARES MADURO, *Three Claims of Constitutional Pluralism*, in M. AVBELJ, J. KOMÁREK (eds), *Constitutional Pluralism in the European Union and Beyond*, Oxford: Hart, 2012, p. 70.

cause they expanded the scope of the fundamental right, eventually led to conflict with several national supreme courts (section II). As the Member States lobbied in favour of a more restrictive approach which would allow double track enforcement, the two European Courts took different paths, thus creating a new rift between European fundamental rights standards. The European Court of Human Rights seemed to favour dialogue with national courts rather than the Court of Justice (section III). In response, the Court of Justice chose to find its own compromise and in so doing confirmed the rift and the potential for conflict with European Court of Human Rights standards (section IV). The result is an unsatisfactory situation which confirms the limits of constitutional pluralism in building convergence across European legal systems (section V).

## II. BUILDING COHERENCE ACROSS EUROPEAN LEGAL SYSTEMS

*Ne bis in idem* is perceived as an essential component of criminal law and criminal procedure in both European systems. In the European Convention system, the right not to be tried or punished twice appears in Art. 4 of Protocol no. 7<sup>6</sup> alongside, *inter alia*, the right of appeal in criminal matters and the right to compensation for wrongful conviction. In European Union Law, the same principle is now established in Art. 50 of the Charter of Fundamental Rights but it had previously been protected as a general principle<sup>7</sup> and as a “fundamental principle” of EU law.<sup>8</sup> Based on this common recognition of a well-established fundamental right, the European Court and the Court of Justice have worked towards compatible standards for its implementation (section II.1). One result of this convergence was a common conflict with several Member States, on the compatibility of double track enforcement with that principle (section II.2).

### II.1. THE CHALLENGING CONSTRUCTION OF COMPATIBLE EUROPEAN STANDARDS

Contrary to what may be expected considering the long history of *ne bis in idem* in European legal systems and the broad agreement over its basic components, reaching common ground in order to ensure the compatibility of standards across European and national legal systems is not an easy task. As B. van Bockel explains,<sup>9</sup> the way in which *ne bis in idem* is understood varies significantly and it has many rationales in different legal traditions, such as the protection of human rights, the protection of the individual from state abuses, justice, proportionality, legal certainty, due process, respect for res

<sup>6</sup> Protocol no. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Strasbourg, 22 November 1984.

<sup>7</sup> General Court, judgment of 18 October 2001, case T-333/99, *X v. European Central Bank*, para. 149.

<sup>8</sup> Court of Justice, judgment of 15 October 2002, joined cases C-238/99, 244/99, 245/99 P, 247, 250, 251, 252 and 254/99 P, *Limburgse Vinyl Maatschappij and Others v. Commission*, para. 59.

<sup>9</sup> B. VAN BOCKEL, *The Ne Bis In Idem Principle in EU Law*, Alphen aan den Rijn: Kluwer Law International, 2010, p. 25.

judicata, procedural efficiency, and the interest of social peace and order. *Ne bis in idem* is both an essential guarantee to prevent an individual from being repeatedly prosecuted for the same facts and an important contributor to the stability of the legal system through the finality of judicial acts.

For instance, its relationship with *res judicata* is evidenced by the fact that the maxim *nemo debet bis vexari pro una et eadem causa*<sup>10</sup> can alternatively be linked to the doctrine of *res judicata*<sup>11</sup> or to *ne bis in idem*<sup>12</sup> – a specific version of the maxim has been used in the context of criminal law: *nemo debet bis vexari pro uno et eodem delicto*.<sup>13</sup> In practice, implementing this principle will of course contribute to protecting *res judicata* by preventing further litigation of matters on which the courts have already ruled. One of the main differences is, of course, that *ne bis in idem* is generally perceived as a fundamental right, guaranteed in and of itself at the highest level of the legal order and which does not require further justification by reference to broader principles, whereas *res judicata* forms the basis for procedural mechanisms and is generally justified by general interest aims such as legal certainty. However, the proximity between the two principles can have significant consequences because the perceived (main) rationale for *ne bis in idem* has a significant impact on its normative content.

If *ne bis in idem* is associated with *res judicata* and primarily seen as ensuring the finality of a judicial decision, the “idem” will be construed narrowly as related to a specific assessment of the facts. If, on the contrary, the principle is understood primarily as a fundamental right protecting the defendant from further litigation or excessive sanctions, the tendency will naturally be a broader interpretation which allows the principle to prevent a higher number of judicial actions. This is why the Court of Justice has held that Art. 54 of the Convention Implementing the Schengen Agreement applies whenever the same set of facts is at issue, regardless of their legal assessment.<sup>14</sup> On the contrary, in the line of case law related to competition law,<sup>15</sup> the Court of Justice has introduced a “triple identity” cri-

<sup>10</sup> The maxim can be translated as: no-one shall be twice troubled for one and the same cause.

<sup>11</sup> See, for instance, England and Wales High Court, Chancery Division, judgment of 1977, *Gleeson v. J. Wippell & Co.*, and F. FERRAND (dir.), *L'étendue de l'autorité de chose jugée en droit comparé, Étude annexée au rapport de M. le conseiller rapporteur Charruault, pour l'arrêt de la Cour de cassation, Assemblée plénière, du 7 juillet 2006*, Paris: Cour de Cassation, 2006, p. 19.

<sup>12</sup> B. VAN BOCKEL, *The Ne Bis In Idem Principle*, cit., p. 31. For a discussion of the historical debate on the distinction between *res judicata* and *ne bis in idem*, see J. LELIEUR-FISCHER, *La règle ne bis in idem. Du principe de l'autorité de la chose jugée au principe d'unicité d'action répressive*, thèse soutenue à l'Université Panthéon-Sorbonne (Paris I), 2005.

<sup>13</sup> G. SPENCER BOWER, A. K. TURNER, *The Doctrine of Res Judicata*, London: Butterworth, 1969, p. 325 *et seq.*

<sup>14</sup> Court of Justice, judgment of 9 March 2006, case C-436/04, *Van Esbroeck*, para. 27 *et seq.* This interpretation was confirmed by later case law, see e.g. Court of Justice, judgment of 18 July 2007, case C-367/05, *Kraaijenbrink*.

<sup>15</sup> See for example: Court of Justice, judgment of 7 January 2004, joined cases C-204, 205, 211, 213, 217 and 219/00 P, *Aalborg Portland and Others v. Commission*, para. 338 *et seq.* See also Court of Justice, judgment of 7 June 2011, case C-520/09 P, *Arkema v. Commission*, para. 292.

terion<sup>16</sup> based on the one which applies to inadmissibility claims based on *res judicata*.<sup>17</sup> This difference may be understood as an illustration of the weight of the presuppositions and rationales associated with *ne bis in idem* in different areas of the law: the closer the issue is to the traditional scope of criminal law, the more important its status as a fundamental right, protecting the individual, becomes.

Indeed, as with all general principles, the major issues and potential for incoherence in a multilevel constitutional system reside in the standards and rules that allow their implementation. What is “the same criminal offence”? What constitutes a second trial or punishment in criminal proceedings? Those are two of the main issues which courts have to wrestle with. One major factor leading to differentiation between the two European standards is that they started out in very different contexts and very different areas of the law. Most issues related to *ne bis in idem* in EU law were initially related to cross-border situations (e.g., a person is charged in one Member State after having been sentenced in another) or multilevel issues related to the decentralised implementation of many areas of EU law (e.g., national competition authorities and the European Commission both investigating the same cases). Cases which go beyond the confines of a single legal order have been repeatedly excluded from the scope of Art. 4 of Protocol 7 whereas they are precisely the object of Art. 54 of the Convention Implementing the Schengen Agreement.<sup>18</sup>

More generally, while the European Court can be perceived as having a broader fundamental rights-centric approach, not all Member States have agreed to a full applicability of Art. 4 of Protocol 7, therefore the acceptance of its case law is potentially limited. By contrast, the CJEU was until very recently unable to delve into criminal law except in very limited exceptions. For this reason, the case law on *ne bis in idem* in EU law started to develop in separate strands related to, on the one hand, competition law and, on the other hand, judicial cooperation in criminal matters in particular with Art. 54 of the Convention Implementing the Schengen Agreement. The content of the principle

<sup>16</sup> In *Aalborg Portland and Others*, cit., para. 338, the Court of Justice holds that: “as regards observance of the principle *ne bis in idem*, the application of that principle is subject to the threefold condition of identity of the facts, unity of offender and unity of the legal interest protected”.

<sup>17</sup> CJEU case law has drawn inspiration from civil law traditions, in particular French civil law, in establishing the criteria for inadmissibility claims based on *res judicata*. Such claims are possible only if the proceedings disposed of by the previous judgment “were between the same parties, had the same purpose and were based on the same submissions” as the present case: General Court, judgment of 5 June 1996, case T-162/94, *NMB France and Others v. Commission*, para. 37. For other examples and an analysis of the relevant case law, see A. TURMO, *L'autorité de la chose jugée en droit de l'Union européenne*, Bruxelles: Bruylant, 2017, p. 159 *et seq.*

<sup>18</sup> A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party.

in these two strands remains somewhat different.<sup>19</sup> However, within the scope of EU competences, the Court of Justice has an increasingly clear ambition to impose uniform fundamental rights standards across national legal systems. The CJEU may therefore set itself more ambitious goals than the European Court of Human Rights in terms of uniform implementation of its standards before national courts.

The two European Courts naturally developed somewhat different standards for *ne bis in idem*, influenced by the different contexts in which they operate. However, the past decades showed significant efforts on both sides to work towards a common understanding of the principle. Unfortunately, those efforts were not entirely successful from the point of view of the compatibility of national standards with European law.

## II.2. THE PROBLEM OF THE *IDEM*: WHAT IS CRIMINAL?

Despite their different starting points, the convergence of the two European Courts towards a similar understanding of what constitutes criminal charges and what must be considered "*bis in idem*" has made significant progress over the past decades. Unfortunately, this convergence led to results which did not convince all national authorities and thus reinforced the potential for resistance to these common standards in the Member States.

The issue of the compatibility of double track procedures with *ne bis in idem* gained importance because of tendencies that are common to both systems, such as the effects of the expansion of the notion of "criminal" charges on the scope of the principle under Art. 4 of Protocol 7 and EU law. When trying to determine whether a given sanction should be considered "criminal" in nature, the Court of Justice relies heavily on the *Engel* criteria set by the European Court of Human Rights in 1976.<sup>20</sup> Under this approach, now common to both European Courts,<sup>21</sup> one must look not only to the legal qualification of the offence under the internal law of a given State, but also to the nature of the offence, the repressive and deterring character of the penalty, and the type and the degree of severity of the penalty for which a given individual is liable. A similar convergence has occurred concerning the "*idem*". Since its *Zolotukhin* judgment,<sup>22</sup> the European Court of Human Rights has followed a similar approach to the Court of Justice

<sup>19</sup> The extent to which *ne bis in idem* is applied differently in different areas of EU law is beyond the scope of this Article. For further analysis, see *inter alia*: D. SARMIENTO, *Ne Bis in Idem in the Case Law of the European Court of Justice*, in B. VAN BOCKEL (ed.), *Ne Bis in Idem in EU Law*, Cambridge: Cambridge University Press, 2016, p. 103 *et seq.*

<sup>20</sup> European Court of Human Rights, judgment of 8 June 1976, no. 5100/71, *Engel and Others v. the Netherlands*.

<sup>21</sup> With the exception of the Court of Justice's case law on competition law.

<sup>22</sup> European Court of Human Rights, judgment of 7 June 2007, no. 14939/03, *Sergey Zolotukhin v. Russia*.

(in criminal law) in holding that *ne bis in idem* applies to charges and procedures concerning the same set of facts regardless of their legal assessment.

As Luchtman argues, this expansion of the definition of the "*idem*" and of criminal charges and proceedings is related to an understanding of the principle that increasingly focuses on the rights of the defendant and on their ability to establish defence strategies, taking into account the risk of multiple proceedings for the same set of events.<sup>23</sup> It also allows for the application of *ne bis in idem* to prevent double procedures where both are criminal under the *Engel* criteria although one might be considered administrative under national law. This is highly problematic for a number of EU Member States, which have been expanding the use of double-track enforcement, for example concerning tax-related offences. The European Court found in several judgments that administrative proceedings for the imposition of tax surcharges were "criminal" for the purposes of Art. 4 of Protocol 7, meaning that *ne bis in idem* was, in principle, applicable if criminal charges were also brought.<sup>24</sup> In EU law, too, some rulings seemed to indicate a similar attitude where coexisting national and EU competition authorities may both be required to make a decision on a single set of facts, and are expected to take into account any previous sanctions as well as core principles such as the primacy of EU law.<sup>25</sup>

From the perspective of constitutional pluralism and the convergence of standards across European legal systems, a gradual evolution towards an identical European standard seemed to be a positive development. However, a major difficulty arises out of the asymmetrical relationships between both European systems and their Member States. In European Union law, the question of the scope of the EU's competence to define fundamental rights standards and impose them upon its Member States' is far from being clear-cut. The Court of Justice has nevertheless shown a clear ambition to construct its own standards and enforce them within its legal order.<sup>26</sup> The European Court is, however, dependent upon the signatures and ratifications of Protocol 7 in or-

<sup>23</sup> M. LUCHTMAN, *The ECJ's Recent Case Law on ne bis in idem: Implications for Law Enforcement in a Shared Legal Order*, in *Common Market Law Review*, 2018, p. 1722.

<sup>24</sup> European Court of Human Rights: judgment of 8 April 2003, no. 41265/98, *Manassson v. Sweden*; judgment of 20 May 2014, no. 35232/11, *Pirttimäki v. Finland*, paras 45-48; judgment of 27 November 2014, no. 7356/10, *Lucky Dev v. Sweden*, para. 51. The judgment of 15 November 2016, *A and B v. Norway*, cit., in fact confirms this at paras 136-139.

<sup>25</sup> Court of Justice, judgment of 13 February 1969, case 14/68, *Walt Wilhelm and Others v. Bundeskartellamt*, para. 11. On this topic, and on *ne bis in idem* in EU competition law, see R. NAZZINI, *Parallel Proceedings in EU Competition Law*, in B. VAN BOECKEL (ed.), *Ne Bis in Idem in EU Law*, cit., p. 131 et seq.

<sup>26</sup> The Court of Justice has held that the application of national standards of fundamental rights must not compromise the standard which it and other EU institutions have set under the Charter or other constitutional principles of the EU legal order, such as primacy, unity and effectiveness of EU law: Court of Justice, judgment of 26 February 2013, case C-399/11, *Melloni* [GC], para. 60. This ambition is also apparent in Court of Justice, opinion 2/13 of 18 December 2014 on the EU's Accession to the European Convention on Human Rights, in which the Court refuses to let the European Court "interfere" (para. 225) with the division of powers between the EU and its Member States in matters related to fundamental rights.



der to enforce its own standard for *ne bis in idem* across its Member States. Not all EU Member States have ratified Protocol 7. Germany and the Netherlands signed it but never ratified it.<sup>27</sup> A number of Member States have also made reservations and declarations specifically aimed at restricting the scope of this provision to that of criminal law and/or criminal offences, as defined in their own legal systems.<sup>28</sup>

The resistance with which the expansion of the scope of application of *ne bis in idem* was immediately met at the national level was not only problematic from the point of view of the enforcement of Convention standards across the continent or of convergence of standards between European States. It also meant that, even if the Court of Justice tried to uphold the same standard as its Strasbourg counterpart, it would actually be enforcing a standard through EU law which some of its Member States have effectively rejected in the context of the Convention. Nevertheless, the Court of Justice remained on a path favourable to compatible European standards and held in *Åkerberg Fransson*<sup>29</sup> that *ne bis in idem* applies to double proceedings, where both tracks can be considered criminal under the *Engel* criteria. EU case law remained unclear concerning the compatibility of such practices with the principle. However, the criteria given in EU precedents, taking into account most European Court case law, clearly leaned towards incompatibility. This is why the European Court's decision to shift the Convention standard in 2016 in fact re-opened a chasm between the two European systems.

### III. THE ATTEMPTED COMPROMISE

In a clear overruling of its previous case law, in case *A and B v. Norway*, the European Court yielded to the pressure exercised by a number of Member States and offered them a solution which makes it possible to maintain double track enforcement, even where (or rather paradoxically, insofar as!) both proceedings are criminal under the *Engel* criteria. This ruling appears to be an attempt to solve the problem posed by national authorities' resistance by proposing an interpretation of *ne bis in idem* which both retains the broad understanding of criminal charges *and* excludes many cases of double track enforcement from the scope of application of *ne bis in idem*. Thus, even if some Member States refuse to recognise the Court's definition of the scope of the principle, a number of cases of double track enforcement become compatible with the Protocol.

<sup>27</sup> Germany signed the Protocol on 19 March 1985, the Netherlands on 22 November 1984. The United Kingdom was the only EU Member State never to have signed the Protocol.

<sup>28</sup> These States are: Austria (Second Declaration contained in the instrument of ratification, deposited on 14 May 1986), France (Reservation contained in the instrument of ratification, deposited on 17<sup>th</sup> February 1986), Germany (First Declaration made at the time of signature, on 19 March 1985), Italy (Declaration contained in a letter, dated 7 November 1991, handed to the Secretary General at the time of deposit of the instrument of ratification, on 7 November 1991), and Portugal (Declaration contained in the instrument of ratification deposited on 20 December 2004).

<sup>29</sup> Court of Justice, judgment of 26 February 2013, case C-617/10, *Åkerberg Fransson* [GC].

To achieve this result, the European Court chose to rely on a specific strand of case law related to administrative measures taken to withdraw driving licences concurrently with criminal charges and trials for traffic offences.<sup>30</sup> In this line of cases, the Court had held that although withdrawing a driving licence could be considered a criminal sanction, if it concerned the same matter and there was a sufficiently close connection between it and the criminal sanction *per se*, there was no violation of *ne bis in idem*. However, as mentioned above, other judgments concerning different policy areas went in the opposite direction. In *A and B v. Norway*, the European Court expanded on the cases related to traffic offences and held that *ne bis in idem* is not violated, because there are not two separate charges and sanctions, in cases where both tracks of enforcement have been “sufficiently closely connected in substance and in time”.<sup>31</sup> This connection is established on the basis of a non-exhaustive list of factors,<sup>32</sup> such as: whether the different proceedings pursue complementary purposes addressing different aspects of the social misconduct, whether this double track enforcement is a foreseeable consequence of the misconduct, whether the different “tracks” are conducted so as to avoid duplication and assessment of evidence and, above all, to avoid creating an excessive burden by taking into account the first sanction that is imposed when setting the second one. A “connection in time” is also an important factor: if the two proceedings are too distant in time, they are less likely to be considered sufficiently closely connected to constitute a single whole.

The European Court’s new approach appears to be a compromise with Member States such as Italy, Sweden or Norway. It must, however, be noted that this approach is not without its critics and that, in particular, judge Pinto de Albuquerque presented a very convincing dissenting opinion in *A and B v. Norway*. One significant problem was the compatibility of what was clearly an overruling with Court of Justice case law,<sup>33</sup> after such significant efforts from both Courts towards convergence. Indeed, later case law proved that the compromise reached in *A and B v. Norway* was not compatible with the Court of Justice’s approach to fundamental rights.

Although the European Court presented this ruling as firmly based on its previous case law, judge Pinto de Albuquerque was right to insist that this was at least a partial overruling since it was impossible to read all of the Court’s previous case law as a coherent whole. One of the most problematic aspects of this new approach is the idea, based notably on *Jussila v. Finland*,<sup>34</sup> that some areas of the law can be considered part

<sup>30</sup> See, e.g., European Court of Human Rights, judgment of 13 December 2005, no. 73661/01, *Nilsson v. Sweden*.

<sup>31</sup> *A and B v. Norway*, cit., para. 130.

<sup>32</sup> *Ibid.*, para. 132.

<sup>33</sup> *Ibid.*, dissenting opinion of judge Pinto de Albuquerque, cit. paras 67 and 80.

<sup>34</sup> European Court of Human Rights, judgment of 23 November 2006, no. 73053/01, *Jussila v. Finland*. The concept of a “core” of criminal law can be read as an *obiter* in this judgment, as judge Pinto de Albuquerque points out in his dissenting opinion (*A and B v. Norway*, cit., dissenting opinion, paras 29-30).

of criminal law but not of its “core” and thus do not require the highest degree procedural guarantees.<sup>35</sup> As judge Pinto de Albuquerque noted, in doing so the Court “distinguished between disposable and non-disposable Convention procedural guarantees”<sup>36</sup> while not providing a clear and coherent approach as to the distinction between the supposed “core” and the rest of criminal law. In the context of *ne bis in idem*, this notion allows Member States to implement a more restrictive interpretation of the principle, a lower standard of protection, to cases that are not considered part of the “core” of criminal law. This is a significant reversal of the reasoning which is at the root of this problematic case law, namely that States have created administrative proceedings and sanctions so strict that they must be considered criminal in nature.

Despite the criticisms levelled at it by the dissenting judge and the opposition of the Court of Justice, the European Court has confirmed this new approach to *ne bis in idem* in double track enforcement in several rulings. However, the criteria set out in *A and B v. Norway* are not easy to implement. The Court found, in cases concerning tax-related offences and market manipulation, that there was a lack of sufficient “connection” between proceedings that led to largely independent collection and assessment of evidence and did not sufficiently overlap in time.<sup>37</sup> It also held, in a judgment concerning proceedings before a prosecutor and a court after a traffic offence,<sup>38</sup> that the two sets of proceedings were not sufficiently “integrated” because they were not conducted simultaneously and the penalties imposed were not combined, that they pursued the same general purpose, were based on the same legal provision and were partly conducted by the same authority on the basis of the same evidence.

The quick succession of cases before the European Court on the interpretation of the criteria set out for the new approach to the “bis” in some cases of double track enforcement gives an indication of the difficulty in utilising these criteria in order to set out which types of double track enforcement are acceptable under Protocol 7. More case law will be necessary in order to determine whether the criteria set out in *A and B v. Norway* are, in fact, a workable compromise solution to allow Member States to pursue the path of repressive administrative enforcement within the bounds of Convention standards. However, one major hurdle to overcome is the incompatibility between this compromise and the approach chosen by the Court of Justice. In trying to find a compromise solution to ensure greater convergence between Member States’ standards and its own, the European Court has unfortunately chosen a path which would prove difficult to follow for the Court of Justice and thus endangered convergence between European standards.

<sup>35</sup> *A and B v. Norway*, cit., para. 133.

<sup>36</sup> *Ibid.*, dissenting opinion, cit., para. 28.

<sup>37</sup> European Court of Human Rights, judgment of 18 May 2017, no. 22007/11, *Johannesson and Others v. Iceland*, para. 53.

<sup>38</sup> European Court of Human Rights, judgment of 8 July 2019, no. 54012/10, *Mihalache v. Romania* [GC], para. 84.

#### IV. THE REVIVED SCHISM

*A and B v. Norway* can be read as a reasonable attempt at finding a compromise solution between the European Court's standards for *ne bis in idem* and the positions of certain Member States. However, although the European Court of Human Rights tried to pretend otherwise, this judgment puts a stop to an ongoing effort in both European Courts to develop compatible standards for this principle. In *Åkerberg Fransson*, the Court of Justice had tried to follow what seemed to be the European Court's main approach in double track enforcement cases. The incompatibility between the approach chosen in *Åkerberg Fransson* and that adopted in *A and B v. Norway* was made all too clear by the European Court's choice to quote,<sup>39</sup> not the ruling, but the opinion of AG Cruz Villalón which the Court of Justice had *not* followed.<sup>40</sup> Indeed, as judge Pinto de Albuquerque notes, the European Court's own interpretation of *Åkerberg Fransson* in *Grande Stevens* was precisely that, under EU law, *ne bis in idem* prevented such double track enforcement for a single set of facts.<sup>41</sup>

The Court of Justice had two options: follow the compromise solution set out by the European Court or confirm this divergence. It chose the latter, following suit in setting a new standard which also allows Member States some freedom to pursue double track enforcement, but rejecting the *ratio decidendi* of the *A and B v. Norway* judgment. In three judgments published on 20 March 2018 in cases *Menci*,<sup>42</sup> *Garlsson Real Estate and Others*<sup>43</sup> and *Di Puma*,<sup>44</sup> the Court of Justice held that double track enforcement such as the Italian *doppio binario* was, in principle, contrary to *ne bis in idem* if both tracks were criminal in nature.

*Menci* was the most similar to the case that gave rise to *Åkerberg Fransson*. After an administrative procedure against Mr Menci for failure to pay VAT had led to a final decision, requiring him to pay not only the amount owed but also an extra 30 per cent as a sanction, criminal proceedings had been opened for the same factual conduct. *Garlsson Real Estate and Others* concerned market manipulation. In this case, one of the litigants in the national proceedings was held to be jointly and severally liable for an administrative fine and later received a criminal conviction which had become final while the appeal against the fine was still pending. In the two joined cases, Mr Di Puma and Mr Zecca had also been sentenced by criminal courts, for insider dealing, and the preliminary reference was made by the court ruling on their appeals against administrative fines for the same facts. All the national proceedings fell within the scope of EU law provisions,

<sup>39</sup> *A and B v. Norway*, cit., para. 118.

<sup>40</sup> Opinion of AG Cruz Villalón delivered on 12 June 2012, case C-617/10, *Åkerberg Fransson*, cit.

<sup>41</sup> European Court of Human Rights, judgment of 4 March 2014, no. 18640/10, *Grande Stevens and Others v. Italy*, para. 229.

<sup>42</sup> Court of Justice, judgment of 20 March 2018, case C-524/15, *Menci* [GC].

<sup>43</sup> Court of Justice, judgment of 20 March 2018, case C-537/16, *Garlsson Real Estate and Others* [GC].

<sup>44</sup> Court of Justice, judgment of 20 March 2018, joined cases C-596 et C-597/16, *Di Puma* [GC].

and therefore of Art. 50 of the Charter according to Art. 51, para. 1, as interpreted by the Court of Justice.<sup>45</sup> In all three judgments, the Court found that the administrative sanctions were of a criminal nature according to the *Engel* criteria and that both procedures were related to the same facts (*idem factum*). The core issue was therefore whether there was, indeed, a “bis” incompatible with *ne bis in idem*.

The Court of Justice held that, in principle, such procedures are incompatible with the fundamental right, but that exceptions are permitted, under Art. 52, para. 1, of the Charter, so long as they are justified by a legitimate objective under EU law, established by legislation, and that they are compatible with the essential content of the principle and with the proportionality requirement. The Court of Justice thus confirmed the lowering of the protection granted by *ne bis in idem* under European law<sup>46</sup> as well as the conflict between the two European standards.

The simplest criticism that can be formulated against these rulings is also one of the most powerful ones from the point of view of the nature of principles and the hierarchy of norms: *ne bis in idem* is supposed to provide absolute protection and limitations cannot, in principle, be justified – especially by budgetary necessities such as ensuring that taxes are collected. As AG Campos Sánchez-Bordona notes in his opinion in *Menci*, both EU and ECHR law seemed to guarantee this absolute protection: they did not allow the kind of exception which the Court of Justice has introduced.<sup>47</sup> For instance, Art. 4, para. 2, of Protocol 7 states that *ne bis in idem* does not prevent the reopening of a case where newly discovered facts justify it, but no derogation is possible under Art. 15 of the Convention.<sup>48</sup>

The Court of Justice quotes a precedent as a basis for this ruling although, as usual, it does so without providing any justification for the choice of precedent and the reference is not entirely convincing. *Spasic*<sup>49</sup> can easily be distinguished from the cases that gave rise to the 2018 rulings. The question referred to the Court in that case had to do with the compatibility with *ne bis in idem* of the requirement that a penalty “has been enforced” or is “actually in the process of being enforced” under Art. 54 of the Convention implementing the Schengen Agreement. The Court relied on the Explanations relating to the Charter in particular, to hold that the limitation which results from this additional condition for the application of *ne bis in idem* is compatible with Art. 50 of the Charter, adding that this condition met the criteria of being provided for by law, re-

<sup>45</sup> See, *inter alia*, *Åkerberg Fransson* [GC], cit., paras 21-22.

<sup>46</sup> M. VETZO, *The Past, Present and Future of the Ne Bis In Idem Dialogue between the Court of Justice of the European Union and the European Court of Human Rights: The Cases of Menci, Garlsson and Di Puma*, in *Review of European Administrative Law*, 2018, p. 76.

<sup>47</sup> Opinion of AG Sánchez Bordona delivered on 12 September 2017, case C-524/15, *Menci*, para. 78.

<sup>48</sup> See, e.g., European Court of Human Rights, *Mihalache v. Romania* [GC], cit., para. 47.

<sup>49</sup> Court of Justice, judgment of 27 May 2014, case C-129/14 PPU, *Spasic* [GC]. This judgment is quoted at paras 40 of the judgment in *Menci* [GC], cit., 42 of *Garlsson Real Estate and Others* [GC], cit., and 41 of *Di Puma* [GC], cit.

specting the essence of the right and being proportionate in view of the objective being pursued.<sup>50</sup> This objective plays a major part in the *ratio* of the *Spasic* judgment. The Court explains that the enforcement requirement aims to prevent the principle from being applied in a way that allows persons who have been definitively convicted in one Member State where the sentence has not been executed, to obtain impunity simply by moving to another Member State within the area of freedom, security and justice. The aim of this provision is therefore highly specific to cross-border issues, and the balancing act set out in the Convention on the implementation of the Schengen Agreement between freedom of movement and the need to ensure the execution of criminal convictions. These elements are entirely absent from the 2018 cases.

AG Campos Sánchez-Bordona makes a convincing argument that the reasoning used in *Spasic* cannot be applied in these three judgements. The question whether the essence of the fundamental right is affected cannot be answered in the same way in a case that concerns separate proceedings taking place in two different Member States and in a case concerning a double repressive response to the same conduct in a single State. Freedom of movement or the effective enforcement of a penalty imposed in a Member State are not at issue in *Menci*, *Garlsson Real Estate and Others* and *Di Puma*. This should have some bearing on the evaluation of the necessity of the exception to *ne bis in idem*, in the context of the proportionality review. The very fact that several Member States do not have double-track procedures shows that they are not truly necessary – moreover, Member States can freely introduce double-track enforcement where one of the tracks cannot be considered *criminal*.<sup>51</sup> Considering the range of options available to Member States to ensure an effective criminal and/or administrative response to offences, double criminal enforcement in a single Member State could certainly be deemed excessive.

The Court of Justice's approach is nonetheless relatively predictable. First of all, the way in which the reasoning is set out in the rulings follows the classic model of the EU approach to exceptions to general principles, including fundamental rights. If one accepts the Court's position that exceptions to *ne bis in idem* must be allowed, allowing EU public interest to justify such exceptions, e.g. in order to protect the EU budget, is not a stretch. *Åkerberg Fransson* clearly indicates that, according to the Court, such considerations can be balanced with fundamental rights. Using the proportionality test as the main tool for this balancing act is also unsurprising, although the way in which the test is carried out here leaves a lot to be desired. The Court of Justice's test does have one significant advantage over the European Court's: the importance given, within the proportionality test, to *res judicata*<sup>52</sup> and, more generally, the question of the existence of a

<sup>50</sup> *Spasic* [GC], cit., paras 57-74.

<sup>51</sup> Opinion of AG Sánchez-Bordona, *Menci*, cit., paras 83 and 89.

<sup>52</sup> In particular, in *Di Puma*, the Court of Justice insists on the importance of *res judicata* and holds that it prevents administrative proceedings from continuing after a final judgment ordering acquittal for the same factual conduct: *Di Puma* [GC], cit., para. 31 *et seq.*

final decision in one of the tracks being pursued. It also seems to indicate that the Court wants the EU standard to be stricter and more protective of the fundamental right at issue,<sup>53</sup> thanks in particular to the principle/exception reasoning and the somewhat stringent proportionality test. However, the Court of Justice simply avoids answering many of the Advocate General's points regarding the incompatibility of this new approach with previous case law.

The main factor, however, remains that the Court of Justice was under significant pressure to modify its case law. Since *A and B v. Norway* was clearly incompatible with EU law as it stood, the Court of Justice was put in a difficult position. It had to choose whether to modify its own case law in response to the European Court as well as to national authorities, and whether to follow the European Court's reasoning or not. The Court of Justice clearly rejected the *ratio* of *A and B v. Norway*, which is based on the idea that the "*bis*" does not exist in certain double procedures. The reasoning based on recognising that such procedures do constitute limitations on *ne bis in idem* but that such limitations can be justified allowed it to grant Member States the leeway to pursue such policies under EU law. Another advantage of the chosen approach results from the limitation of Member States' ability to pursue dual track enforcement, within the scope of application of the Charter, to cases where it is justified by EU public interest objectives and proportionate. This could allow the Court of Justice to ensure that similar standards are set across Member States for the necessity and functioning of such procedures.

The fact remains that the Court of Justice has chosen a very different path from the European Court in order to enable Member States to retain or introduce dual track enforcement. To this day there has been no further case law from the Court of Justice on this aspect of *ne bis in idem*. The compatibility of this case law with the standard set by the European Court is doubtful. While the result was, in both cases, to make certain types of double-track enforcement compatible with both European standards, and thus to a certain extent to work towards a more uniform approach to *ne bis in idem* across national, EU and ECHR law, the *ratios* are very explicitly incompatible. It remains unclear whether national authorities can comply with both European standards simultaneously. Thus, although the European Courts have tried to create rules which take into account the desiderata of national courts, the result is clearly not convergence towards a common standard.

The difficulties raised by this new case law from both European Courts is evident in a recent request for a preliminary ruling, made by the Tribunal correctionnel de Bordeaux (France)<sup>54</sup>. This criminal court has referred three questions related to *ne bis in idem*. The first question asks the Court of Justice to state whether Art. 50 of the Charter

<sup>53</sup> G. LASAGNI, S. MIRANDOLA, *The European ne bis in idem at the Crossroads of Administrative and Criminal Law*, cit., p. 132.

<sup>54</sup> Request for a preliminary ruling from the Tribunal correctionnel de Bordeaux (France) lodged on 20 February 2020, case C-88/20, *Procureur de la République v. ENR Grenelle Habitat SARL, EP, FQ*.

precludes a combination of criminal proceedings and administrative proceedings of a criminal nature whose subject matter is a single act prosecuted under two different classifications, when “interpreted in the light of Article 4 of Protocol No 7”. The French court is clearly asking the Court of Justice to respond not only on the basis of its own case law but also to keep in mind European Court case law and take a stand on its compatibility with the new EU standard. The second and third questions clearly show the influence of the new categorisations established by the European Court, between “real” double-track enforcement and other cases where the two tracks must be treated as one, and between a “core” of criminal law and the other, less serious cases – but also of the proportionality test introduced by the Court of Justice. Both questions ask the Court of Justice to reflect on the consequences of the answer given to the first question, in particular in view of the principles of legality and proportionality of criminal offences and penalties, enshrined in Art. 49 of the Charter. If *ne bis in idem* does preclude such duplication, the court asks, should the conditions and criteria for the single set of proceedings allowed in such cases be defined in advance? If it does not, shouldn’t this possibility of double-track enforcement be restricted to the most serious cases and, if so, how and when should the criteria determining gravity be defined?

## V. CONCLUSION

As the questions raised by the Bordeaux court show, the attempt at a halfway compromise by the Court of Justice, and the tacit overruling by the European Court which it follows, perhaps raise more problems than they solve. Certainly, they allow national authorities some leeway in pursuing stricter policies and sanctions against certain acts. In ceding ground to the Member States that wish to maintain or increase the use of double-track, the European Courts have made their own standards more compatible with those of national supreme courts. However, in creating at least partly incompatible standards that require further elaboration, they do not present a clear picture of the extent of these new exceptions or the applicable criteria.

It can be argued that the European Court should have held their ground: the simultaneous trend towards “decriminalising” certain offences and intensification of administrative sanctions, which has led to offences which have serious impacts on society being dealt with through administrative law, must be re-examined. As judge Pinto de Albuquerque noted, this tendency has resulted in very significant financial sanctions, sometimes coupled with other measures such as the suspension or the withdrawal of certain rights, being imposed outside the realm of criminal procedure.<sup>55</sup> Administrative authorities have acquired intrusive powers related to the investigation of these offences. The consequence of this evolution is that, in the name of efficiency, individuals are being

<sup>55</sup> Dissenting opinion of judge Pinto de Albuquerque, *A and B v. Norway*, cit., paras 18-22.



subjected to a form of criminal policy without the procedural and substantive safeguards of criminal law. The problems posed by these trends include the situations where individuals end up being subjected to two sets of proceedings and sanctions for the same conduct, but they go much further and require a reappraisal of the distinction between administrative and criminal policy and law enforcement. The choices made by both European Courts do not address the broader policy issues and can feel like an abdication of their responsibility to protect the rights of litigants.

However, in a context of constantly evolving fundamental rights standards across European legal systems and mutual influences through judicial dialogue, this case law also shows the limits of constitutional pluralism. If national courts resist a change in European case law, should European Courts reconsider? Which European Court should have the last say on the specific standards attached to a principle? The fact remains that, insofar as these questions have no firm answer, the potential for divergence exists.