Reports of Cases

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 12 September 2017[1]

Case C-524/15

Luca Menci
intervener:
Procura della Repubblica

(Request for a preliminary ruling from the Tribunale di Bergamo (District Court, Bergamo, Italy))

(Charter of Fundamental Rights of the European Union — National law which provides for an administrative penalty and a criminal penalty for the same acts, relating to non-payment of VAT — Infringement of the principle *ne bis in idem* — Identical acts — Duplication of proceedings or penalties — Exceptions to the *ne bis in idem* prohibition — Sufficiently close connection in substance and in time between the proceedings)

1. Under what conditions does the principle *ne bis in idem* apply when the laws of some Member States make it possible to combine administrative and criminal penalties to punish non-payment of high amounts of value added tax ('VAT')? That is, in summary, the difficulty with which the Court is once again faced.

2. In its judgment of 26 February 2013, *Åkerberg Fransson*,[2] the Court established the line to be taken by national courts with regard to a person's right not to be tried twice for a single breach of the obligation to pay VAT. It did so by incorporating solutions developed by the European Court of Human Rights ('ECtHR') but the application of the reply given in that judgment has created difficulties and disagreements between the courts of some Member States, such as Italy.

3. Furthermore, the ECtHR significantly amended its case-law on the principle *ne bis in idem* in the judgment of 15 November 2016, *A and B v. Norway*.[3] The Court must decide whether to adopt that new, more restrictive approach to the principle *ne bis in idem* or to retain a higher level of protection. When clarifying the *Åkerberg Fransson* judgment, it will therefore be necessary to determine whether the limitation of the principle *ne bis in idem* recently approved by the ECtHR is applicable in EU law.

4. This Opinion is delivered at the same time as the Opinions in *Garlsson Real State* (C-537/16), *Di Puma* (C-596/16) and *Consob* (C-597/16), in view of the connection between these cases.

1 Original language: Spanish.
2 C-617/10 ('*Åkerberg Fransson* judgment'), EU:C:2013:105.
3 CE:ECHR:2016:1115:JUD002413011 ('judgment in *A and B v. Norway*').

I. Legal framework

A. European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 ('ECHR')

5. Article 4 of Protocol No 7 annexed to the ECHR, signed in Strasbourg on 22 November 1984 ('Protocol No 7') governs the 'Right not to be tried or punished twice', 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 the penal procedure of the State concerned, 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.

3. No derogation from this Article shall be made under Article 15 of the Convention.'

B. European Union law

6. Article 50 of the Charter of Fundamental Rights of the European Union ('the Charter') states:

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

7. Article 51 of the Charter defines the Charter's field of application:

'1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.

2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.'

8. Article 52 governs the scope and interpretation of the rights and principles recognised in the Charter in the following terms:

'1. 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.

…

3. 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.

4. In so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.

…

6. Full account shall be taken of national laws and practices as specified in this Charter.'

C. Italian law

9. Article 13(1) of Legislative Decree No 471 of 18 December 1997 [4] provides:

'Any person who fails to pay, in whole or in part, within the prescribed periods, instalments, periodic payments, the equalisation payment or the balance of tax due on the tax return, after deduction in those cases of the amount of the periodic payments and instalments, even if they have not been paid, shall be liable to an administrative penalty amounting to 30% of each outstanding amount, even where, after the correction of clerical or calculation errors noted during the inspection of the annual tax return, it transpires that the tax is greater or that the deductible surplus is less. For payments made with a delay not exceeding 15 days, the penalty referred to in the first sentence, without prejudice to the provisions of Article 13(1) of Legislative Decree No 472 of 18 December 1997, shall be further reduced to an amount equivalent to one-fifteenth for each day of delay. The same penalty applies in the case of assessment of the tax increased under Articles 36a and 36b of Decree No 600 of the President of the Republic of 29 September 1973, and Article 54a of Decree No 633 of the President of the Republic of 26 October 1972.' [5]

10. Article 10b of Legislative Decree No 74/2000 of 10 March 2000 on offences relating to direct taxes and VAT [6] ('Legislative Decree 74/2000') governs 'Failure to pay VAT' as follows:

'Article 10a shall also apply, within the limits there determined, to any person who fails to pay the value added tax owed on the basis of the annual return by the deadline for the payment on account relating to the subsequent tax period.'

4 Decreto Legislativo 18 dicembre 1997, n. 471, Riforma delle sanzioni tributarie non penali in materia di imposte dirette, di imposta sul valore aggiunto e di riscossione dei tributi, a norma dell'articolo 3, comma 133, lettera q), della legge 23 dicembre 1996, n. 662 (Legislative Decree No 471 of 18 December 1997 on the reform of non-criminal tax penalties in the field of direct taxation, value added tax and tax collection, in accordance with Article 3(133)(q) of Law No 662 of 23 December 1996) (GURI No 5 of 8 January 1998 — Ordinary Supplement No 4).

5 Decreto Legislativo 18 dicembre de 1997, n. 472, Disposizioni generali in materia di sanzioni amministrative per le violazioni di norme tributarie, a norma dell'articolo 3, comma 133, della legge 23 dicembre 1996, n. 662 (Legislative Decree No 472 of 18 December 1997 laying down general provisions on administrative penalties for infringement of tax laws in accordance with Article 3(133) of Law No 662 of 23 December 1996) (GURI No 5 of 8 January 1998 — Ordinary Supplement No 4), Article 13 of which provides that penalties for non-payment of taxes may be reduced.

6 Decreto Legislativo 10 marzo 2000, n. 74, Nuova disciplina dei reati in materia di imposte sui redditi e sul valore aggiunto, a norma dell'art. 9 della legge 25 giugno 1999, n. 205 (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).

11. In accordance with Article 10a of Legislative Decree 74/2000:

‘Any person who fails to pay, by the deadline fixed for the filing of the withholding agent’s annual tax return, the withholding tax resulting from the certification issued to the taxpayers in respect of whom tax is withheld shall be liable to a term of imprisonment of between six months and two years in the case where that amount exceeds EUR 50 000 for each tax period.’

12. Articles 19 to 21 of Legislative Decree 74/2000, under the heading ‘Relationships with the administrative penalty system and between procedures’, provide, in short, that: (a) the special rule applies where the same offence is punished under a provision in Title II and a provision which provides for an administrative penalty; (b) criminal proceedings and administrative proceedings are to progress separately, that is to say, neither may be stayed pending the outcome of the other; (c) the competent authority is to impose the administrative penalties relating to the tax breaches that are the subject of the criminal offence; and (d) nevertheless, such penalties are not enforceable unless the criminal proceedings are brought to an end by dismissal of the case or by a final decision to acquit which excludes criminal liability, in which case the period for recovery is to run from the date of notification of the exculpatory measure.

13. Following the commission of the offences giving rise to the present request for a preliminary ruling, the Italian legislation was amended by Legislative Decree No 158 of 24 September 2015[7] (‘Legislative Decree 158/2015’), which affected Articles l0a and l0b of Legislative Decree 74/2000 and inserted a further ground for exemption from punishment through the new Article 13 of Legislative Decree 74/2000.

14. In accordance with Article 7 of Legislative Decree 158/2015, Article 10a of Legislative Decree 74/2000 is now worded as follows:

‘Anyone who fails to make payment, by the deadline fixed for the filing of the annual tax return for the withholding tax resulting from the certification issued to withholding agents, shall be liable to a term of imprisonment of between six months and two years in the case where that amount exceeds EUR 150 000 for each tax period.’

15. In accordance with Article 8 of Legislative Decree 158/2015, the wording of Article 10b of Legislative Decree 74/2000 changed with effect from 22 October 2015:

‘Whoever fails to pay, within the period fixed for payment on account in relation to the following tax period, the value added tax payable on the basis of the annual return, shall be sentenced to a term of imprisonment of six months to two years when that amount exceeds EUR 250 000 for each tax period.’

II. The dispute in the main proceedings and the question referred for a preliminary ruling

16. Luca Menci, in his capacity as proprietor of the sole trading business of the same name, was subject to an investigation by the Italian tax authorities as a result of non-payment of VAT for the tax year 2011 in the total amount of EUR 282495.76. The investigation concluded with the relevant notice of assessment on 6 November 2013 and the imposition on Mr Menci of a penalty of EUR 84748.74. The tax authorities agreed to Mr Menci’s request to pay in instalments and he paid the first instalments.

7 Decreto Legislativo 24 settembre 2015, n. 158, Revisione del sistema sanzionatorio, in attuazione dell’articolo 8, comma 1, della legge 11 marzo 2014, n. 23 (Legislative Decree No 158 of 24 September 2015, Revision of the system of penalties implementing Article 8(1) of Law No 23 of 11 March 2014) (GURI No 233 of 7 October 2015 — Ordinary Supplement No 55).

17. On conclusion of the administrative proceedings resulting in the imposition of a penalty, the Public Prosecutor's Office commenced criminal proceedings against Mr Menci on 13 November 2014, on the ground that non-payment of VAT was an offence contrary to Article 10b of Legislative Decree 74/2000.

18. In the context of those criminal proceedings, the Tribunale di Bergamo (District Court, Bergamo, Italy) has referred the following question to the Court for a preliminary ruling:

'Does Article 50 [of the Charter], interpreted in the light of Article 4 [of Protocol] No 7 [to the ECHR] and the related case-law of the ECtHR, preclude the possibility of conducting criminal proceedings concerning an act (non-payment of VAT) for which a definitive administrative penalty has been imposed on the defendant?'

19. The Court joined this reference for a preliminary ruling with the *Orsi* (C-217/15) and *Baldetti* (C-350/15) cases. Written observations were lodged by the representatives of Mr Menci, the Italian Government and the European Commission, and the hearing (a joint hearing for the three cases) was held on 8 September 2016.

20. Before the delivery of the Opinion, announced for 17 November 2016, the judgment of the ECtHR in *A and B v. Norway* was published on 15 November 2016. In the light of that judgment, the Court decided, on 30 November 2016, to disjoin the *Menci* case from the two cases referred to above and proposed that the case should be allocated to the Grand Chamber. [8]

21. In its order of 25 January 2017, the Grand Chamber ordered the reopening of the oral procedure, and the hearing was held on 30 May 2017 together with the hearing in *Garlsson Real State* (C-537/16), *Di Puma* (C-596/16) and *Consob* (C-597/16). [9] At the hearing, oral argument relating to the issues relevant to the present reference for a preliminary ruling was presented by Mr Menci, the Commission and the Italian and German Governments.

III. Examination of the question referred for a preliminary ruling

22. The methodological approach used by the Court in the judgment of 5 April 2017, *Orsi and Baldetti*, [10] for analysing Article 50 of the Charter in conjunction with Article 4 of Protocol No 7 is set out as follows in paragraphs 15 and 24 of that judgment:

– '[T]he examination of the question referred must be undertaken solely in the light of the fundamental rights guaranteed by the Charter'.

– At the end of that examination, 'in accordance with Article 52(3) of the Charter, in so far as Article 50 thereof contains a right corresponding to that provided for in Article 4 of Protocol No 7 to the ECHR, it is necessary to ensure that the above interpretation of Article 50 thereof does not disregard the level of protection guaranteed by the ECHR'.

8 Judgment in both those cases was delivered on 5 April 2017, *Orsi and Baldetti* (C-217/15 and C-350/15, EU:C:2017:264).

9 Those three cases also concern the application of the principle *ne bis in idem* to the joint imposition of criminal and administrative penalties, albeit in relation to market abuse.

10 C-217/15 and C-350/15, EU:C:2017:264.

23. In addition, for the purposes of interpreting Article 50 of the Charter, it is important to bear in mind that, according to Article 52(3) thereof, '[i]n 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.' [11]

24. Therefore, I shall deal first with the analysis of the case-law of the Court relating to Article 50 of the Charter, as a mandatory point of reference for the application of the principle *ne bis in idem* to cases involving the imposition of both tax and criminal penalties for non-payment of VAT.

25. Next, I shall give my view on the effect which the case-law of the ECtHR, including that in the judgment in *A and B v. Norway*, may have on that case-law. I shall also explore whether it might be possible for the Court to develop an autonomous method for analysis of combined (criminal and administrative) proceedings which are sufficiently closely connected in substance and in time.

26. Finally, after completing those analyses, I shall return to the facts of these preliminary-ruling proceedings to suggest an answer which will enable the national court to give judgment on the dispute.

A. The case-law of the Court on the application of Article 50 of the Charter to the joint imposition of tax and criminal penalties

27. There are several variants of the principle *ne bis in idem* in EU law [12] and the approach to these has not yet been harmonised by the Court, despite calls for it to do so by a number of Advocates General. [13] I shall not analyse in detail the more restrictive case-law which interprets the principle in the context of the provisions on the protection of free competition, or the case-law relating to Article 54 of the Convention implementing the Schengen Agreement, which is broader and affords greater protection to the rights of defendants in that area.

28. The case-law of the Court on the application of the principle *ne bis in idem* to concurrent tax and criminal penalties as a response by the State to non-payment of taxes (in particular, VAT) was laid down in the *Åkerberg Fransson* judgment. After using the Engel criteria to ascertain when a tax penalty is really of a 'criminal nature', despite being nominally framed as administrative, the Court included an explicit reference to the effectiveness of penalties, which it may be difficult to link to the case-law of the ECtHR.

11 The explanatory note on that article states that 'paragraph 3 is intended to ensure the necessary consistency between the Charter and the ECHR by establishing the rule that, in so far as the rights in the present Charter also correspond to rights guaranteed by the ECHR, the meaning and scope of those rights, including authorised limitations, are the same as those laid down by the ECHR'.

12 I refer to the works by Van Bockel, B., *The* ne bis in idem *principle in EU Law*, Kluwer, 2010, and Van Bockel, B. (ed.), Ne Bis in Idem *in EU Law*, Cambridge University Press, 2016. See, also, Oliver, P. and Bombois, T., '*Ne bis in idem* en droit européen: un principe à plusieurs variantes', *Journal de droit européen*, 2012, pp. 266 to 272, and Tomkin, J., 'Article 50, Right not to be tried or punished twice in criminal proceedings for the same criminal offence', in Peers, S., Hervey, T., Kenner, J. and Ward, A., *The EU Charter of Fundamental Rights: a Commentary*, Hart Publishing, Oxford, 2014, pp. 1373 to 1412.

13 See the Opinion of Advocate General Kokott of 15 December 2011 in *Bonda* (C-489/10, EU:C:2011:845), point 33, and the other Opinions cited therein.

29. In the *Åkerberg Fransson* judgment,[14] after accepting that it had jurisdiction to give a preliminary ruling,[15] the Court observed that the principle *ne bis in idem* 'does not preclude a Member State from imposing successively, for the same acts of non-compliance with declaration obligations in the field of VAT, a tax penalty and a criminal penalty in so far as the first penalty is not criminal in nature, a matter which is for the national court to determine'.[16] The freedom of Member States to choose penalties is justified by the need to ensure that all VAT revenue is collected and, in so doing, that the financial interests of the European Union are protected.[17]

30. However, the Court of Justice imposed a limit on the imposition of both tax and criminal penalties: 'if the tax penalty is criminal in nature for the purposes of Article 50 of the Charter and has become final … that provision precludes criminal proceedings in respect of the same acts from being brought against the same person'. Therefore, it is possible to impose tax and criminal penalties concurrently but not to impose a nominally administrative penalty which is really of a criminal nature in addition to another criminal penalty.[18]

31. As I have already observed, in order to establish, for its part, whether a tax penalty is criminal in nature, the Court used the 'Engel criteria' which it had previously adopted in *Bonda*.[19] However, rather than apply those criteria itself to a law like the Swedish law, the Court entrusted the referring court with the task,[20] warning that it would only be able to find that the imposition of both tax and criminal penalties was contrary to Article 50 of the Charter if the remaining penalties were effective, proportionate and dissuasive.[21]

32. The effective prosecution of fraud and protection of the EU's financial interests therefore appear as a counterpoint for assessing whether the joint imposition of tax and criminal penalties is incompatible with the principle *ne bis in idem* in the case of taxes which affect those interests.

33. The requirement that penalties must be effective is, according to the judgment in *Taricco and Others*,[22] a condition which limits the freedom of choice of the Member States, for 'criminal penalties may … be essential to combat certain serious cases of VAT evasion in an effective and dissuasive manner'. The limitation is, moreover, based on Article 325 TFEU, pursuant to which the Member

14 The situation at issue in that case was almost identical to this one: Mr Åkerberg Fransson had received a penalty in administrative proceedings for failure to pay large sums of VAT and, at the end of those proceedings, further proceedings, this time criminal, were brought against him in relation to the same acts.

15 The Court declared that it had jurisdiction because Articles 2, 250(1) and 273 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1) and Article 325 TFEU were applicable, since it was a situation involving the implementation of EU law for the purposes of Article 51(1) of the Charter. Since then, the application of the Charter to such cases has not been in doubt. However, the tax and criminal penalties adopted in Italy for non-payment of income tax do not involve the implementation of EU law for the purposes of Article 51(1) of the Charter, which is the reason why the Court held that it manifestly lacked jurisdiction to give a preliminary ruling in the order of 15 April 2015, *Burzio* (C-497/14, not published, EU:C:2015:251).

16 *Åkerberg Fransson* judgment, paragraph 37.

17 Ibid., paragraph 34.

18 Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests (OJ 1995 L 312, p. 1) includes, in Article 6, provisions intended to ensure respect for the principle *ne bis in idem* which seek to prevent the joint imposition of EU administrative penalties and criminal penalties of the Member States.

19 *Åkerberg Fransson* judgment, paragraph 35, and judgment of 5 June 2012, *Bonda* (C-489/10, EU:C:2012:319), paragraph 37. The latter case concerned criminal proceedings in Poland which were brought in addition to the imposition of European Union administrative penalties on recipients of agricultural aid.

20 Some writers have criticised the different approaches of the Court in *Bonda* (judgment of 5 June 2012, C-489/10, EU:C:2012:319) and *Åkerberg Fransson*, since, in the former, it applied the Engel criteria itself before accepting that the administrative penalty imposed on farmers in receipt of unlawful aid was criminal in nature; in the latter, however, the Court referred the application of those criteria to the Swedish court. See Vervaele, J.A.E., 'Ne bis in idem: ¿un principio transnacional de rango constitucional en la Unión Europea?', *Indret: Revista para el Análisis del Derecho*, 2014, No 1, p. 28.

21 *Åkerberg Fransson* judgment, paragraph 36. As a result of that judgment, the Swedish Supreme Court changed its case-law and, in two decisions in June and July 2013, it held that the Swedish legislation which permitted the combining of tax and criminal penalties for non-payment of VAT infringed the principle *ne bis in idem*.

22 Judgment of 8 September 2015, C-105/14, EU:C:2015:555, paragraph 39.

States must counter illegal activities affecting the financial interests of the European Union through effective deterrent measures and, in particular, must take the same measures to counter fraud affecting the financial interests of the European Union as they take to counter fraud affecting their own interests.[23]

34. In short, in *Bonda*[24] and *Åkerberg Fransson*, the Court interpreted Article 50 of the Charter in line[25] with the hitherto dominant case-law of the ECtHR on the principle *ne bis idem.*[26] That common approach was logical, in view of the similarity between the provisions governing the principle *ne bis in idem* in Article 4 of Protocol No 7 and those in Article 50 of the Charter.[27]

B. The case-law of the ECtHR on the principle ne bis in idem and the joint imposition of tax and criminal penalties

35. Protection of the principle *ne bis in idem* within the Council of Europe is not without complications. That right was not included in the ECHR, signed in Rome on 4 November 1950, and protection of the right was effected subsequently by means of Protocol No 7, ratified by 44 of the 47 Member States of the Council of Europe. The United Kingdom has not signed that protocol and Germany and the Netherlands are reluctant to ratify it. Germany, at the time of signature of the protocol, and a number of other States (Austria, France, Portugal and Italy), at the time of conclusion of the protocol, framed reservations or declarations in their instruments of ratification in order to restrict the jurisdiction of the ECtHR to strictly criminal matters so that they may retain the joint imposition of administrative and criminal penalties for the same acts.[28]

36. The case-law of the ECtHR has limited the effects of those reservations or declarations by requiring, in accordance with Article 57 ECHR, that they comply with the following conditions in order to be valid: they must be made at the time the Protocol is signed; they must relate to provisions in force on the date of ratification; they must not be of a general character; and they must contain a brief statement of the provisions concerned.[29] In holding that those conditions were not fulfilled, the judgment of the ECtHR in *Grande Stevens and Others v. Italy*[30] found that Italy's declaration in the instrument of ratification of Protocol No 7, which sought to restrict its application solely to penalties and proceedings classified as criminal under Italian law, was invalid.

23 Judgment of 8 September 2015, *Taricco and Others* (C-105/14, EU:C:2015:555), paragraph 37, and *Åkerberg Fransson* judgment, paragraph 26 and the case-law cited. That same obligation is included in Article 2 of the Convention on the protection of the European Communities' financial interests of 26 July 1995 (OJ 1995 C 316, p. 48), drawn up under Article K.3 of the Treaty on European Union. Following the entry into force of the Treaty of Lisbon, its subject-matter must be 'communitised' and the adoption of the Proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law (COM(2012) 363 final), of 11 July 2012, is pending. Following the political agreement within the Council of 7 February 2017, it appears that this important piece of legislation may be adopted swiftly.

24 Judgment of 5 June 2012, C-489/10, EU:C:2012:319.

25 Lenaerts, K. and Gutiérrez Fons. J. A., 'The place of the Charter in the EU institutional edifice', in Peers, S., Hervey, T., Kenner, J. and Ward, A., *The EU Charter of Fundamental Rights: a commentary*, Hart Publishing, Oxford, 2014, p. 1600.

26 Previously, the influence of the case-law of the Court concerning Article 54 of the Convention implementing the Schengen Agreement made itself felt in the case-law of the ECtHR, particularly in the judgment of 10 February 2009, *Zolotoukhin v. Russia* (CE:ECHR:2009:0210JUD001493903), to which I shall refer below.

27 Explicitly citing the *Åkerberg Fransson* judgment, the ECtHR has also made reference to the common approach of the two European courts concerning the assessment of the criminal nature of tax proceedings and, a fortiori, concerning the application of the principle *ne bis in idem* in the fiscal and criminal spheres. See the judgment of the ECtHR of 30 April 2015, *Kapetanios and Others v. Greece* (CE:ECHR:2015:0430JUD000345312), § 73.

28 Garin, A., '*Non bis in idem* et Convention européenne des droits de l'homme. Du nébuleux au clair-obscur: état des lieux d'un principe ambivalent', *Revue trimestrielle de droits de l'homme*, 2016, pp. 402 to 410.

29 Decision of the ECtHR of 26 April 2005, *Põder and Others v. Estonia* (CE:ECHR:2005:0426DEC006772301), confirmed by the decision of 2 November 2010, *Liepājnieks v. Latvia* (CE:ECHR:2010:1102DEC003758606), § 45.

30 Judgment of the ECtHR of 4 March 2014, CE:ECHR:2014:0304JUD001864010, §§ 204 to 211. Previously, the ECtHR also held that the Austrian reservation was invalid in the judgment of 23 October 1995, *Gradinger v. Austria*, CE:ECHR:1995:1023JUD001596390.

37. According to the case-law of the ECtHR, the principle *ne bis in idem* prohibits the commencement of two or more sets of criminal proceedings (double prosecution) and the imposition of two or more criminal penalties by a final judgment (double criminality) against the same person in respect of the same acts. The aim of that principle is to prevent the repetition of criminal proceedings which have already come to an end and to guarantee legal certainty for the individual concerned by protecting that individual against the uncertainty that he may be subject to double prosecution, two sets of proceedings or double punishment. Much of that case-law of the ECtHR is specifically concerned with the duplication of tax and criminal penalties.

38. For the purposes of application of the principle *ne bis in idem*, the ECtHR requires that four conditions must be satisfied: (1) the person prosecuted or on whom the penalty is imposed is the same, (2) the acts being judged are the same (*idem*), (3) there are two sets of proceedings in which a penalty is imposed (*bis*) and (4) one of the two decisions is final. The conditions which are relevant to this case, and which have given rise to the most extensive and the most disputed case-law of the ECtHR, are the existence of the same acts (*idem*) and the existence of two sets of proceedings (*bis*).

1. The existence of the same acts (concept of idem*)*

39. This element of the principle *ne bis in idem* calls for a determination of whether the duplicated proceedings must concern only the same conduct (*idem factum*) or whether it is necessary also for the same legal classification to be applied (*idem crimen*).

40. The initial case-law of the ECtHR was very diverse and, in a number of cases involving the joint imposition of criminal and tax penalties, the ECtHR held that the same acts could be subject to a criminal and an administrative penalty because the two penalties did not take the same elements into account.[31]

41. Influenced by the case-law of the Court of Justice on Article 54 of the Convention implementing the Schengen Agreement,[32] the ECtHR carried out a review and reorganisation of its case-law in the crucial judgment in *Zolotoukhin v. Russia*,[33] in which it stated that Article 4 of Protocol No 7 prohibits the punishment of a second offence on the basis of acts which are identical to or substantially the same as those which were the basis for the first offence, whatever its legal classification (clear choice in favour of *idem factum* and rejection of *idem crimen*). The ECtHR described identical facts as a set of concrete factual circumstances involving the same defendant and inextricably linked together in time and space.[34]

42. In its later case-law,[35] the ECtHR maintained that approach which favours the guarantees for individuals and consists in an assessment of the concept of *idem factum* rather than that of *idem crimen*. That approach was confirmed again by the Grand Chamber of the ECtHR in its judgment in *A and B v. Norway*.[36]

31 Decision of the ECtHR of 14 September 1999, *Ponsetti and Chesnel v. France*, CE:ECHR:1999:0914DEC003685597.

32 Convention implementing the Schengen Agreement, signed at Schengen on 19 June 1990 (OJ 2000 L 239, p. 19). See, inter alia, judgments of 11 February 2003, *Gözütok and Brügge* (C-187/01 and C-385/01, EU:C:2003:87); of 10 March 2005, *Miraglia* (C-469/03, EU:C:2006:156); of 9 March 2006, *Van Esbroeck* (C-436/04, EU:C:2006:165); of 28 September 2006, *Van Straaten* (C-150/05, EU:C:2006:614); and of 27 May 2014, *Spasic* (C-129/14 PPU, EU:C:2014:586).

33 Judgment of the ECtHR of 10 February 2009, CE:ECHR:2009:0210JUD001493903.

34 Judgment of the ECtHR of 10 February 2009, *Zolotukhin v. Russia* (CE:ECHR:2009:0210JUD001493903), §§ 82 and 84.

35 Judgments of the ECtHR of 4 March 2014, *Grande Stevens and Others v. Italy* (CE:ECHR:2014:0304JUD001864010), §§ 219 to 228; of 20 May 2014, *Nykänen v. Finland* (CE:ECHR:2014:0520JUD001182811), § 42; of 27 January 2015, *Rinas v. Finland* (CE:ECHR:2015:0127JUD001703913), §§ 44 and 45; and of 30 April 2015, *Kapetanios and Others v. Greece* (CE:ECHR:2015:0430JUD000345312), §§ 62 to 64.

36 § 108.

2. The duplication of proceedings in which a penalty is imposed (concept of bis*)*

43. The duplication of criminal proceedings in which a penalty is imposed is the element which has given rise to the greatest difficulties in the application of Article 4 of Protocol No 7. Where more than one set of proceedings, or the imposition of more than one penalty in respect of identical acts, are dealt with by a criminal court, application of the principle does not present any great difficulties. However, there are provisions imposing punishments which national legislatures may frame in terms of administrative law rather than criminal law in order to avoid the application of the safeguards and guarantees inherent in criminal proceedings.[37]

(a) The general case-law of the ECtHR

44. The proliferation of administrative law penalties of a repressive nature explains why the ECtHR has, since its judgment in *Engel and Others v. Netherlands*,[38] developed specific and independent criteria in order to clarify the concept of 'charged with a criminal offence' in Article 6 of the ECHR and the concept of 'penalty' in Article 7 of the ECHR. In particular, in order to interpret Article 4 of Protocol No 7, the ECtHR has also used the criteria known as the 'Engel criteria',[39] namely, the legal classification of the offence under national law, the nature of the offence, and the nature and intensity or degree of severity of the penalty imposed on the offender. The last two criteria are alternatives but the ECtHR may, depending on the particular circumstances of the case, assess them cumulatively.[40]

45. In its judgment in *A and B v. Norway*, the ECtHR reaffirmed the exclusive use of the *Engel* criteria, even though some of the States intervening in those proceedings suggested other additional criteria to tighten up their application, beyond the strict boundaries of criminal law.[41]

46. The first 'Engel' criterion concerns the classification of the offence under national law, which the ECtHR considers to be merely a starting point for ascertaining whether a penalty is of a 'criminal nature'. It is not a decisive rule unless national law categorises both penalties as criminal, in which case, logically, the *ne bis in idem* principle will apply immediately. If, on the other hand, national law classifies the penalty as administrative, it will be necessary to analyse it in the light of the other two criteria, as a result of which it must be decided whether that penalty is nevertheless of a 'criminal nature' for the purposes of Article 4 of Protocol No 7.

47. The second 'Engel' criterion concerns the nature of the offence. According to the case-law of the ECtHR, in order to determine whether a tax offence of an administrative nature is in fact of a criminal nature, regard is to be had to factors such as: (a) the addressee of the provision imposing the penalty, so that if that provision is directed at the general public and not at a well-defined group of persons, it will usually be of a 'criminal nature';[42] (b) the aim of that provision, since the offence will not be of a 'criminal nature' if the penalty provided for is intended only to compensate for pecuniary damage,[43]

37 Some legal commentators talk about 'criministrative law'. See, for example, Bailleux, A., 'The Fiftieth Shade of Grey. Competition Law, "criministrative law" and "Fairly Fair Trials"', in Galli, F.; Weyembergh, A. (eds), *Do labels still matter? Blurring boundaries between administrative and criminal law — The influence of the EU*, editions de l'ULB, Brussels, 2014, p. 137.

38 Judgment of the ECtHR of 8 June 1976, CE:ECHR:1976:0608JUD000510071, § 82.

39 Judgment of the ECtHR of 10 February 2015, *Kiiveri v. Finland* (CE:ECHR:2015:0210JUD005375312), § 30 and the case-law cited.

40 See, inter alia, judgment of the ECtHR of 9 June 2016, *Sismanidis and Sitaridis v. Greece* (CE:ECHR:2016:0609JUD006660209), § 31, and of 23 November 2006, *Jussila v. Finland* (CE:ECHR:2006:1123JUD007305301), §§ 30 and 31.

41 Judgment in *A and B v. Norway*, §§ 105 to 107.

42 Judgment of the ECtHR of 2 September 1998, *Lauko v. Slovakia* (CE:ECHR:1998:0902JUD002613895), § 58.

43 Judgment of the ECtHR of 23 November 2006, *Jussila v. Finland* (CE:ECHR:2006:1123JUD007305301), § 38.

and it will be of a 'criminal nature' if it is established for the purposes of punishment and deterrence;[44] and (c) the legal interest protected by the national provision imposing the penalty, which will be criminal in nature if its aim is to protect legal interests whose protection is normally guaranteed by provisions of criminal law.[45]

48. The third 'Engel' criterion concerns the nature and degree of severity of the penalty. Penalties involving the loss of liberty are, in themselves, criminal in nature[46] and the same applies to pecuniary penalties where non-compliance can result in imprisonment as a substitute or which entail an entry in the criminal record.[47]

49. In applying those criteria to tax penalties that are combined with criminal penalties, the ECtHR has held on more than one occasion that the former are of a 'criminal nature' for the purposes of Articles 6 and 7 ECHR and, by extension, Article 4 of Protocol No 7 thereto.[48] It has done so, in particular, in cases where pecuniary penalties were imposed in administrative proceedings for non-payment of taxes even though the amount owed was minor.[49] In reaching that conclusion, the ECtHR examined the nature and severity of the penalty by examining whether it was possible to impose the penalty in full, that is without taking into account the final amount resulting from any reductions granted by the tax authorities.[50] In that connection, the ECtHR has held that it is irrelevant that the first penalty has been deducted from the second in order to mitigate the double punishment.[51]

50. On the other hand, the ECtHR has asserted that procedures and fiscal measures aimed at recovering unpaid tax and collecting default interest are not of a criminal nature, regardless of the amount of the tax and interest.[52]

51. In other rulings, the ECtHR has held that the guarantee inherent in the principle *ne bis in idem* is applicable not only to instances of double punishment but also to those of double prosecution; in other words, to individuals whose prosecutions have ended without punishment. The ECtHR has also held that it is immaterial whether the administrative proceedings precede or follow the criminal proceedings, the first penalty is offset against the penalty applied in the second proceedings, or the person concerned is exonerated at the end of the second or the first proceedings.[53]

52. The expansive force of that case-law of the ECtHR has favoured the protection of individuals against the power of national authorities to impose punishment. That factor might explain the reaction of some States, which was reflected in the arguments they put forward in *A and B v. Norway*[54] and to which the ECtHR was sensitive.

44 Judgments of the ECtHR of 10 February 2009, *Zolotukhin v. Russia* (CE:ECHR:2009:0210JUD001493903), § 55, and of 25 June 2009, *Maresti v. Croatia* (CE:ECHR:2009:0625JUD005575907), § 59.

45 Judgment of the ECtHR of 10 February 2009, *Zolotukhin v. Russia* (CE:ECHR:2009:0210JUD001493903), § 55, and of 25 June 2009, *Maresti v. Croatia* (CE:ECHR:2009:0625JUD005575907), § 59.

46 Judgment of the ECtHR of 8 June 1976, *Engel and Others v. Netherlands* (CE:ECHR:1976:0608JUD000510071), § 82.

47 Judgment of the ECtHR of 31 May 2011, *Žugić v. Croatia* (CE:ECHR:2011:0531JUD000369908), § 68.

48 See, inter alia, judgments of 20 May 2014, *Nykänen v. Finland* (CE:ECHR:2014:0520JUD001182811); of 20 May 2014, *Häkkä v. Finland* (CE:ECHR:2014:0520JUD000075811); of 10 February 2015, *Kiiveri v. Finland* (CE:ECHR:2015:0210JUD005375312); and of 30 April 2015, *Kapetanios and Others v. Greece* (CE:ECHR:2015:0430JUD000345312).

49 Judgments of the ECtHR of 23 November 2006, *Jussila v. Finland* (CE:ECHR:2006:1123JUD007305301), §§ 37 and 38; of 20 May 2014, *Nykänen v. Finland* (CE:ECHR:2014:0520JUD001182811), § 40; and of 10 February 2015, *Kiiveri v. Finland* (CE:ECHR:2015:0210JUD005375312), § 31.

50 Judgments of the ECtHR of 4 March 2014, *Grande Stevens and Others v. Italy* (CE:ECHR:2014:0304JUD001864010), § 98; of 11 September 2009, *Dubus S.A. v. France* (CE:ECHR:2009:0611JUD000524204), § 37; and of 30 April 2015, *Kapetanios and Others v. Greece* (CE:ECHR:2015:0430JUD000345312), § 55.

51 Judgment of the ECtHR of 18 October 2011, *Tomasovic v. Croatia* (CE:ECHR:2011:1018JUD005378509), § 23.

52 Judgment of the ECtHR of 18 October 2001, *Finkelberg v. Latvia* (CE:ECHR:2001:1018DEC005509100).

53 The ECtHR held that the principle *ne bis in idem* had been breached because the tax authorities imposed fines or increased taxes when the criminal courts had exonerated the offenders in parallel or subsequent proceedings (judgments of 30 April 2015, *Kapetanios and Others v. Greece*, CE:ECHR:2015:0430JUD000345312, and of 9 June 2016, *Sismanidis and Sitaridis v. Greece*, CE:ECHR:2016:0609JUD006660209).

54 § 119.

(b) The exception applicable to combined proceedings that are sufficiently closely connected in time and in substance: the judgment in A and B v. Norway

53. In *A and B v. Norway*, the ECtHR accepted that, in the event of penalties which are administrative in form but criminal in nature, Article 4 of Protocol No 7 is not breached by the duplication of criminal proceedings and administrative proceedings in which penalties are imposed, provided that those proceedings are sufficiently closely connected in time and in substance. Where the State proves that such a temporal and substantive connection exists between the proceedings, there will be no 'duplication of trial or punishment (*bis*)'.[55]

54. According to the ECtHR, in order to ascertain whether there is a sufficiently close substantive link between criminal proceedings and administrative proceedings in which penalties are imposed, regard must be had *in particular* to the following criteria:[56]

– The complementary purposes of the proceedings and their relationship with different aspects of the social misconduct involved. The degree of complementarity and coherence will be greater the further removed the penalties in the administrative proceedings are from the 'hard core of criminal law', and vice versa.[57]

– The duality of the proceedings in law and in practice, where this is a foreseeable consequence of the same impugned conduct.

– The complementary conduct of proceedings avoids as far as possible any duplication in the collection as well as the assessment of the evidence, through adequate interaction between the various authorities so that the establishment of facts in one set of proceedings is also used in the other set.

– The penalty imposed in the first proceedings is taken into account when the penalty is imposed in the second proceedings, so that the penalty imposed on the individual concerned does not entail an excessive burden, the existence of an offsetting procedure being sufficient to prevent this risk.

55. The ECtHR is less precise when it comes to the criteria for establishing that there is a sufficiently close connection in time between the proceedings. The ECtHR merely states that it is not necessary for the criminal and administrative proceedings to be conducted simultaneously from beginning to end, adding that the greater the time difference between the two sets of proceedings, the more difficult it will be for the State to justify that difference.[58]

56. Comparison of the acts adjudicated on in *A and B v. Norway*, on the one hand, and in the more recent judgment of 18 May 2017, *Jóhannesson and Others v. Iceland*,[59] on the other, emphasises the almost insurmountable obstacles which national courts must address in order to ascertain a priori, with a minimum degree of certainty and foreseeability, when that temporal connection exists.

55 § 130.

56 Judgment in *A and B v. Norway*, § 132: 'Material factors … *include*' (italics added). Therefore, the list of criteria is not exhaustive, as the Government of the Czech Republic states in its replies to the written questions of the Court.

57 Judgment in *A and B v. Norway*, § 133.

58 Judgment in *A and B v. Norway*, § 134.

59 CE:ECHR:2017:0518JUD002200711.

C. The impact of the judgment in A and B v. Norway on EU law

57. In accordance with Article 52(3) of the Charter, the meaning and scope of Article 50 of the Charter is to be 'the same as those laid down by' the associated provision of the ECHR. The right protected by Article 50 of the Charter should not be separated, as far as its interpretation is concerned, from Article 4 of Protocol No 7, while the absence of ratification and the reservations and declarations of certain States [60] in relation to that protocol have no relevance to the Court of Justice.

58. That is the approach implicitly taken in the *Åkerberg Fransson* judgment, in which it was not accepted that the level of ratification of a protocol to the ECHR should have a bearing on its use as a criterion for interpreting Article 50 of the Charter, notwithstanding the precautions stipulated in that regard. [61]

59. The explanatory note on Article 52(3) of the Charter states that '[t]he reference to the ECHR covers both the Convention and the Protocols to it.' It makes no distinction based on whether or not those protocols are binding on all the Member States of the EU. [62] Moreover, such a distinction could lead to a non-uniform interpretation and application of the Charter, [63] depending on whether or not the State concerned is bound by a protocol annexed to the ECHR.

60. The change in the case-law effected by the ECtHR in its judgment in *A and B v. Norway* presents the Court of Justice with a significant challenge. The institutional respect between the two courts precludes any kind of critical comment [64] but it does not prevent the observation that, with its new approach, the ECtHR significantly altered the scope it had hitherto attributed to the principle *ne bis in idem*.

61. In those circumstances, I believe that the Court of Justice may choose one of the two following approaches:

– Simply accept the limitation of the principle *ne bis in idem* laid down in the judgment in *A and B v. Norway* and apply it in the context of Article 50 of the Charter, taking into account Article 52(3) thereof.

– Reject that limitation and retain the level of protection set in the *Åkerberg Fransson* judgment by reference to the (earlier) general case-law of the ECtHR. That would activate the clause in Article 52(3), in fine, to the effect that the duty to interpret uniformly provisions of the Charter having similar content to provisions of the ECHR 'shall not prevent Union law providing more extensive protection.'

60 As I have stated before, the case-law of the ECtHR has in large measure neutralised the effects of the reservations or declarations of some Member States (including Italy) on Article 4 of Protocol No 7.

61 It should be recalled that, at point 85 of his Opinion in *Åkerberg Fransson* (C-617/10, EU:C:2012:340), Advocate General Cruz Villalón argued in favour of a partially autonomous interpretation of Article 50 of the Charter, after observing that 'the requirement that the Charter is to be interpreted in the light of the ECHR must be qualified when the fundamental right in question, or an aspect of it (as is the case of the applicability of Article 4 of Protocol No 7 to the ECHR to the imposition of both administrative and criminal penalties for the same offence), has not been incorporated fully into national law by the Member States.' See, in that same context, Bas van Bockel, Peter Wattel, 'New wine into old wineskins: the scope of the Charter of Fundamental Rights of the EU after Åkerberg Fransson', *European Law Review*, 2013, p. 880.

62 Admittedly, a Member State may thus find it necessary to comply with the provisions of a protocol (and with the case-law of the ECtHR which interprets that protocol), but only to the extent that those provisions are 'incorporated' into the subject-matter of the right protected by the Charter in areas covered by Article 51 thereof. Of course, a Member State may not rely on the absence of ratification or on reservations to a protocol annexed to the ECHR as a ground for non-implementation of a right governed by the Charter the subject-matter of which is similar to the equivalent right protected under that protocol.

63 That argument was also put forward by Advocate General Jääskinen in his View in *Spasic* (C-129/14 PPU, EU:C:2014:739), point 63.

64 The judgment in *A and B v. Norway*, adopted by a large majority of judges of the Grand Chamber (16 out of 17), includes a dissenting opinion of Judge Pinto de Alburquerque, who criticises the judgment in particularly strong terms.

62. Leaving aside those two options in the light of the judgment in *A and B v. Norway*, the Court may, of course, develop specific case-law for determining whether so-called ‘combined (administrative and criminal) proceedings which are sufficiently closely connected’ are compatible with Article 50 of the Charter.

1. Alignment with the new case-law of the ECtHR

63. This solution is, of course, consistent with the duty to carry out a harmonised interpretation of the provisions of the Charter and the provisions of the ECHR (and the protocols thereto), in accordance with Article 52(3) of the Charter.

64. A number of Governments which have intervened in the proceedings argue in favour of such an alignment, relying, moreover, on the rules of interpretation of the Charter, laid down in Article 52(4) and (6) thereof. The first rule states that ‘[i]n so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.’ In accordance with the second rule, ‘[f]ull account shall be taken of national laws and practices as specified in this Charter.’

65. Those governments observe that national laws and practices vary widely with regard to the possibility of imposing both criminal and administrative penalties for the same acts. In the light of that heterogeneous reality, they advocate a restrictive interpretation of Article 50 of the Charter, which guarantees States an appropriate power to impose punishment, as the ECtHR did in its judgment in *A and B v. Norway*.

66. I disagree with those arguments. The rule for interpretation in Article 52(6) is not applicable to Article 50 of the Charter, since, as the Commission has stated, that provision does not include any reference to national laws and practices (unlike others, such as Articles 16, 27, 28, 30, 34, 35 and 36 of the Charter).

67. Nor is the rule in Article 52(4) relevant for the purposes of determining the scope of Article 50 of the Charter. First, the Governments concerned agree that there are no common constitutional traditions concerning the subject-matter of that right.[65] Secondly, the traditions of those States which restrict the effectiveness of the principle *ne bis in idem* exclusively to criminal law would lead to an interpretation of Article 50 which is even more restrictive than that of the ECtHR in relation to Article 4 of Protocol No 7.

68. That outcome is incompatible with Article 52(3) of the Charter, with the result that the common constitutional traditions, should they exist in this area, may only operate as a criterion for interpretation of Article 50 of the Charter if they lead to a higher level of protection of the right.[66]

65 Which explains the reservations lodged in relation to Article 4 of Protocol No 7.

66 The explanatory note on Article 52 states that, according to the rule of interpretation in paragraph 4, ‘rather than following a rigid approach of “a lowest common denominator”, the Charter rights concerned should be interpreted in a way offering a high standard of protection which is adequate for the law of the Union and in harmony with the common constitutional traditions.’

69. For my part, I see no reasons why the Court of Justice should follow the ECtHR in its decision to limit the content of the right guaranteed to individuals by the principle *ne bis in idem* where penalties of the same nature (those which are criminal in substance) are imposed twice in respect of the same acts; indeed, I see only reasons not to do so. I find it difficult to abandon the level of protection previously reached in the *Åkerberg Fransson* judgment solely because the ECtHR has changed direction [67] in its interpretation of Article 4 of Protocol No 7 in the area concerned.

70. First, the ECtHR itself acknowledges [68] that the best way of respecting the principle *ne bis in idem*, provided for in Article 4 of Protocol No 7, is the single procedure in which a penalty is imposed, meaning that the ECtHR regards the dual procedure in the case of combined proceedings as an exception to that general rule. If there are dual proceedings, even if they are combined proceedings, this will normally result in infringement of the principle *ne bis in idem*.

71. Secondly, the change in the case-law to exempt 'combined proceedings that are sufficiently closely connected in substance and in time' is based on a position of deference towards the arguments of the State Parties to the ECHR. [69] The ECtHR attaches importance to the fact that the principle *ne bis in idem* was not included in the ECHR and only became part of it in 1984 (by means of Protocol No 7), with reservations and declarations by a number of signatories. The reluctance of certain States to accept the principle *ne bis in idem* and the differences between national laws appear to have had a bearing on the acceptance of that notable exception to application of the principle (which is not provided for — at least not explicitly — in Article 4 Protocol No 7). [70]

72. I repeat that I do not believe that the Court of Justice should follow the ECtHR down that route. The interpretation of Article 50 of the Charter cannot depend on the degree of willingness of States to comply with its legally binding provisions. And since the case-law of the Court has consolidated a statement of the law to the effect that two parallel or consecutive sets of proceedings, which lead to two substantively criminal penalties in respect of the same acts, continue to be two sets of proceedings (*bis*) and not one, I can find no sound reasons for abandoning it.

73. Further, the introduction into EU law of a criterion for interpretation of Article 50 of the Charter which rests on the degree of the substantive and temporal connection between one type of proceedings (criminal proceedings) and another (administrative proceedings in which a penalty is imposed) would add significant uncertainty and complexity to the right of individuals not to be tried or punished twice for the same acts. The fundamental rights recognised in the Charter must be easily understood by all and the exercise of those rights calls for a foreseeability and certainty which, in my view, are not compatible with that criterion.

67 In the judgment in *A and B v. Norway*, the ECtHR refers to certain precedents (particularly the judgment of 13 December 2015, *Nilsson v. Sweden* CE:ECHR:2005:1213DEC007366101), in which reference was made to the substantive and temporal connection between different proceedings in which a penalty is imposed. However, I believe that the fundamental change of direction really occurred in the judgment in *A and B v. Norway*.

68 Judgment in *A and B v. Norway*, § 130.

69 Judgment in *A and B v. Norway*, §§ 119 to 124. Based on the autonomy of States to organise their legal systems, the ECtHR stated that States must have freedom to give complementary legal responses to a single unlawful act, using distinct procedures conducted by different authorities, provided that they form a coherent whole and do not involve an excessive burden for the individual concerned. Thus, the ECtHR agreed that Article 4 of Protocol No 7 should not prevent Member States from taking action against tax offences by means of administrative proceedings and criminal proceedings for tax fraud, if the conduct of those proceedings and the penalties imposed in them are sufficiently integrated.

70 In that respect, the ECtHR bases its reasoning on the Opinion of Advocate General Cruz Villalón in *Åkerberg Fransson* (C-617/10, EU:C:2012:340), point 70, which reflected the disparities between national legal systems and referred to the established nature in the domestic laws of many States of the imposition of both administrative and criminal penalties.

2. Higher level of protection of the principle ne bis in idem *in EU law*

74. The Court has reiterated that whilst Article 52(3) of the Charter requires rights contained in the Charter which correspond to rights guaranteed by the ECHR to be given the same meaning and scope as those laid down by the ECHR, the latter does not constitute, as long as the European Union has not acceded to it, a legal instrument which has been formally incorporated into EU law.[71]

75. That case-law emphasises the autonomy of the Court of Justice when it interprets the provisions of the Charter, which are the sole provisions applicable in the context of EU law. Therefore, the case-law of the ECtHR should be disregarded where, in the case of rights laid down in the Charter which are similar in content to those laid down in the ECHR and the protocols thereto, the interpretation of the Court of Justice establishes a higher level of protection, provided that this is not detrimental to another right guaranteed by the Charter.[72]

76. When it exercises that autonomy, the Court may carry out its own interpretation of Article 50 of the Charter, which respects the status quo and differs from the line of case-law represented by the judgment in *A and B v. Norway*. It is sufficient to ensure that that interpretation does not disregard,[73] and exceeds, the level of protection guaranteed by Article 4 of Protocol No 7, as construed by the ECtHR.

77. Since the judgment in *A and B v. Norway* limits the guarantees for individuals derived from that provision, by permitting the duplication of proceedings, punishments and administrative penalties of a substantively criminal nature, in the circumstances indicated above, the Court will ensure a higher level of protection, in the context of Article 50 of the Charter, by maintaining without reservations its previous case-law in line with its judgment in *Åkerberg Fransson*.

D. An autonomous approach for moderating the scope of Article 50 of the Charter?

78. Article 50 of the Charter, like Article 4 of Protocol No 7, enshrines the principle *ne bis in idem* as a fundamental right of individuals, which is not subject to exceptions. There is, on occasions, a failure to take proper account of that quality and that fundamental right is subordinated to financial considerations (the situation of the public finances, for example) which, while perfectly legitimate in other areas, are not sufficient to justify limitation of the right.[74]

79. In *Spasic*,[75] the Court accepted certain limitations of the protection of the principle *ne bis in idem* in the context of Article 50 of the Charter. In particular, the Court held that Article 54 of the Convention implementing the Schengen Agreement (which makes the application of that principle subject to the condition that, upon conviction and sentencing, the penalty imposed 'has been enforced', is 'actually in the process of being enforced' or can no longer be enforced), is compatible with Article 50 of the Charter.

71 *Åkerberg Fransson* judgment, paragraph 44; judgments of 15 February 2016, *N.* (C-601/15 PPU, EU:C:2016:84), paragraph 45; of 28 July 2016, *Ordre des barreaux francophones et germanophone and Others* (C-543/14, EU:C:2016:605), paragraph 23; of 6 October 2016, *Paoletti and Others* (C-218/15, EU:C:2016:748), paragraph 21; and of 5 April 2017, *Orsi and Baldetti* (C-217/15 and C-350/15, EU:C:2017:264), paragraph 15.

72 The explanations relating to Article 52 of the Charter indicate that paragraph 3 of that article is intended to ensure the necessary consistency between the Charter and the ECHR, 'without thereby adversely affecting the autonomy of Union law and … that of the Court of Justice of the European Union' (judgment of 15 February 2016, *N*, C-601/15 PPU, EU:C:2016:84, paragraph 47). As stated in the second sentence of Article 52(3) of the Charter, the first sentence of Article 52(3) does not preclude Union law from providing protection that is more extensive than the ECHR (judgment of 21 December 2016, *Tele2 Sverige and Watson and Others*, C-203/15 and C-689/15, EU:C:2016:970, paragraph 129).

73 Judgment of 5 April 2017, *Orsi and Baldetti* (C-217/15 and C-350/15, EU:C:2017:264), paragraph 24, and, by analogy, judgment of 15 February 2016, *N* (C-601/15 PPU, EU:C:2016:84), paragraph 77.

74 It is not even possible to derogate from Article 4 of Protocol No 7 under the general time of emergency clause in Article 15 of the ECHR, which refers to time of war or other public emergency threatening the life of the nation.

75 Judgment of 27 May 2014, *Spasic*, C-129/14 PPU, EU:C:2014:586, paragraph 55.

80. In the same vein, can the joint imposition of criminal penalties and tax penalties of a substantively criminal nature in respect of the same acts be permitted in the case of parallel proceedings? In accordance with the horizontal clause in the first sentence of Article 52(1) of the Charter, any limitation on the exercise of the right of *ne bis in idem* must be provided for by law and respect the essence of that right. In accordance with the second sentence of Article 52(1), subject to the principle of proportionality, limitations may be made to the right of *ne bis in idem* 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. [76]

81. Of the four essential conditions for legitimising the limitation of a fundamental right, the first and the last do not present any particular difficulties in this case. National law provides for double prosecution and that satisfies an aim of general interest recognised by EU law (that is, the requirement that penalties for serious VAT fraud must be effective and dissuasive, referred to in the *Åkerberg Fransson* judgment and confirmed subsequently in *Taricco and Others*). [77]

82. However, I doubt whether, in these circumstances, there is respect for the essence of the right not to be tried or punished twice in criminal proceedings for the same criminal offence. At all events — and this is the key factor — I believe that the limitation I am now examining is unnecessary, for the purposes of Article 52(1) of the Charter.

83. To my mind, the fact that the legislation of the Member States provides for different solutions in this regard itself demonstrates that that limitation is unnecessary. If the limitation were really necessary, in accordance with Article 52(1) of the Charter, it would be necessary for all and not only some of the Member States.

84. A perusal of the legislation of a number of Member States reveals that there are at least two different systems for penalising fraud involving non-payment of VAT.

85. First, systems which may be classified as twin-track systems (the Italian system of ‘doppio binario penale-amministrativo in materia tributaria’ or the Swedish system examined in the *Åkerberg Fransson* judgment) enable the parallel conduct of administrative proceedings, for which the tax authorities are responsible, and criminal proceedings, for which the public prosecutor’s office and the courts are responsible, and these systems make it possible for both tax penalties and criminal penalties (including penalties involving the loss of liberty, pecuniary penalties, and other penalties involving the loss of rights) to be imposed in cases of high-value fraud.

86. Secondly, systems which may be classified as single-track systems permit, where the non-payment of high amounts of VAT is concerned, the commencement of proceedings and the imposition of either tax penalties or criminal penalties, but prohibit the imposition of both types of penalty. If the amount of the fraud exceeds a specified threshold, national legal systems often treat such conduct as criminal and provide for it to be punished solely by means of criminal penalties (again, penalties involving the loss of liberty and fines, among others), [78] although, logically, the tax authorities will, where appropriate, draw up an assessment for the amount which the person liable for VAT has failed to pay.

76 Judgment of 27 May 2014, *Spasic* (C-129/14 PPU, EU:C:2014:586), paragraph 56.

77 C-105/14, EU:C:2015:555, paragraph 40.

78 In these cases, there is generally provision for the case-file to be sent by the tax authorities to the prosecutor’s office so that the latter can initiate a prosecution and the administrative proceedings conclude without the imposition of tax penalties.

87. In single-track systems, there is compliance with the principle *ne bis in idem* laid down in Article 50 of the Charter 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.

88. The duality of parallel (administrative and criminal) proceedings, regardless of their degree of closeness in time, and of the associated penalties of a criminal nature at the end of those proceedings imposed by the punitive authorities of the State which rule on the same unlawful acts, is not a *necessary* requirement permitting the limitation of the right protected by the principle *ne bis in idem*, even if it has the laudable aim of protecting the Union's financial interests and ensuring that serious fraud does not go unpunished.

89. There is nothing to prevent the Member States from imposing both criminal and administrative penalties in respect of the same acts where the administrative penalties are not of a criminal nature. In my view, that should be the focus of the discussion. Rather than blur the clarity which should imbue the right protected by the principle *ne bis in idem*, by making it subject to disproportionately complex assessments, it is sufficient to retrace the steps which led to the treatment of pecuniary penalties imposed by the tax authorities as being criminal in nature.

90. If, on the other hand, the *substantively* criminal nature of those penalties is retained, as I believe is appropriate, the guarantee in Article 50 of the Charter should be safeguarded in full where the same act is contrary to both tax provisions which entail a substantively criminal response, and to criminal provisions in the strict sense (that is, provisions which create offences).

91. What happens in those situations is something well known in criminal law: a conflict of laws or rules (not offences) which must be settled in a unitary manner. Where the same act is capable of coming under two (or more) provisions which provide for the imposition of a penalty, the punitive response must be found in the provision which applies by way of priority. [79]

92. Furthermore, a single punitive response to the same act does not restrict the broad legislative capacity of the national legislature to give concrete expression to the content of that response. There is nothing to preclude that response, which must be given only once in order to respect the right of *ne bis in idem*, from providing for penalties involving the loss of liberty, fines and the deprivation of rights (such as disqualifications, prohibitions on entering into contracts or prohibitions on carrying out certain activities). [80] Moreover, to satisfy the objective of deterrence, to which I referred above, the most serious tax offences may be punished through a combination of those penalties, subject to the principle of proportionality.

93. Since, as I have noted, the possibility of including a number of types of punitive measures in a single response dispels the concern regarding the impunity of those who commit tax fraud, it is not *necessary*, in the sense explained above, to limit the principle *ne bis in idem* by excluding from the scope of the protection of that right the (joint) imposition of penalties in (two or more) proceedings — be they described as parallel, combined or concurrent — which are intended to punish the same acts.

79 The criteria for determining which provision must be applied will depend on the relevant criminal code or the equivalent national legislation. Those criteria include the criterion of speciality (a special provision takes priority over a general provision), the criterion of subsidiarity (a subsidiary provision applies if the main provision does not) and the criterion of subsumption or absorption (the broadest provision absorbs the provisions which provide for punishment of the offences subsumed under that provision),

80 It is almost unnecessary to state that the punitive response — or the acquittal of the accused — does not affect the powers of the tax authorities to issue an assessment for the tax owed, to which may be added, as appropriate, late-payment surcharges or other surcharges which are not of a *substantively* criminal nature.

94. In short, I propose that the Court should carry out an interpretation of Article 50 of the Charter which progresses along the lines of its previous case-law but which does not limit the content of that right in terms of the judgment in *A and B v. Norway* or pursuant to Article 52(1) of the Charter.

E. Reply to the question referred for a preliminary ruling

95. After that long but unavoidable analysis of the case-law of the ECtHR and of the Court of Justice on the principle *ne bis in idem*, I shall now return to the *Menci* case and address the question raised by the national court.

96. Armed with the *Åkerberg Fransson* judgment, I could propose that a very simple, although certainly not very helpful, reply be given to the referring court: it would suffice to remind that court of the *Åkerberg Fransson* judgment and invite the court to apply the *Engel* criteria itself, without providing it with any other criteria for assessment.

97. However, I believe that, against the background of the differences of opinion between Italian courts[81] regarding the effects of the *Åkerberg Fransson* judgment and the case-law of the ECtHR in this area, particularly after the change in the case-law in the judgment in *A and B v. Norway*, the Court should provide some additional steps which will facilitate the application by national courts of Article 50 of the Charter.

98. Based on that premiss, I propose to analyse in turn whether, in this reference for a preliminary ruling: (a) the acts being judged are the same, and (b) there are two sets of proceedings in which a penalty is imposed. It is clear that, in a situation like that at issue in the present case, the person on whom the penalty is imposed is the same and the penalty is definitive in nature, without any further explanation being required. Finally, I shall consider whether it is possible to allow any exceptions to the prohibition in Article 50, along the lines indicated by the ECtHR in its judgment in *A and B v. Norway* or following the path marked by the Court of Justice in its judgment in *Spasic*.[82]

*1. The same acts (*idem*)*

99. As regards the concept of *idem* — that is, the same acts — in the case-law of the Court (in particular, the case-law concerning Article 54 of the Schengen Convention) and in the case-law of the ECtHR following the judgment in *Zolotukhin v. Russia*,[83] there are sufficient criteria which can be extrapolated to the application of Article 50 of the Charter where both tax penalties and criminal penalties are imposed for non-payment of VAT.

100. According to the predominant view in that case-law, the prohibition of double punishment refers to the same material acts (*idem factum*), understood as a set of concrete circumstances which are inextricably linked together, irrespective of the legal classification given to them (*idem crimen*) or the legal interest protected.

101. The referring court has to establish, in accordance with the rule set out, whether the tax penalties for non-payment of VAT and the criminal penalties for failure to pay VAT owed annually apply to identical acts.

81 That situation is addressed, inter alia, in Dova, M., '*Ne bis in idem* e reati tributari: a che punto siamo?', *Diritto penale contemporaneo*, 9 February 2016, and Viganò, F., 'Omesso versamento di IVA e diretta applicazione delle norme europee in materia di *ne bis in idem*?', *Diritto penale contemporaneo*, 11 July 2016.

82 Judgment of 27 May 2014, C-129/14 PPU, EU:C:2014:586.

83 Judgment of the ECtHR of 10 February 2009, CE:ECHR:2009:0210JUD001493903.

102. In its written observations, the Government of the Czech Republic understands that that concept must be interpreted restrictively where the imposition of both tax and criminal penalties is concerned, taking the same line as that established by the Court in cases concerning competition.[84] The Czech Government refers specifically to the threefold requirement of the same acts, unity of offender and unity of the legal interest protected.[85]

103. Although, like other Advocates General, I believe that the Court should homogenise its case-law on the application of the principle *ne bis in idem* in the area of competition[86] with the case-law it has developed in relation to Article 54 of the Schengen Convention and other provisions on the area of freedom, security and justice (which is more pressing since the development which occurred in the judgment of the ECtHR in *Zolotoukhin v. Russia*),[87] I do not think that the subtle difference to which the Czech Government draws attention is relevant in this case. Suffice it to note that, by my assessment, the legal interest protected by the tax penalties provided for in respect of non-payment of VAT is the same as that protected by the criminal penalties for that act.

104. More difficulties are raised by the assertion of the Italian Government, which relies for support on the case-law of the Corte di cassazione (Supreme Court of Cassation), according to which the acts are not identical where the administrative offences punish failure to make periodic payments of VAT each month or quarter, after it falls due, while the criminal offence punishes non-payment (in an amount exceeding EUR 50 000 or EUR 250 000, depending on the applicable law at the time) in relation to a one-year period. In short, that court takes the view that the identity required is not present in those situations,[88] and also states that the principle *ne bis in idem* only concerns criminal proceedings and, therefore, cannot be applied to the joint imposition of criminal penalties and tax penalties, meaning that the Italian legislation is not contrary to Article 50 of the Charter or Article 4 of Protocol No 7.

105. However, the Commission, in its written observations, puts forward a contrary view with which I agree, since it seems to me to be more in keeping with the case-law of the Court of Justice and the ECtHR on the criterion of identical acts.

106. Where an omission consists of failure to fulfil the obligation to pay the amount due in respect of VAT, what is important is the set of concrete factual circumstances involving the same defendant and inextricably linked together in time and space. As regards both the tax offences and the criminal offences at issue in the main proceedings, the differences which, according to the Italian Government,

84 The principle *ne bis in idem* must be observed in the sphere of competition law and it *precludes an undertaking from being found guilty or proceedings from being brought against it a second time on the grounds of anti-competitive conduct in respect of which it has been penalised or declared not liable by a previous unappealable decision* (judgment of 15 October 2002, *Limburgse Vinyl Maatschappij and Others* v *Commission*, C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, EU:C:2002:582, paragraph 59).

85 Judgments of 7 January 2004, *Aalborg Portland and Others* v *Commission* (C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6), paragraph 338, and of 14 February 2012, *Toshiba Corporation and Others* (C-17/10, EU:C:2012:72), paragraph 97.

86 The Commission argued at the hearing that the Court should not rule on the *idem* requirement since the consideration of *idem factum* is required in general in relation to all fields of EU law. The Commission submitted that, in fields such as competition law, in which national administrative proceedings in which a penalty is imposed may coexist with other proceedings brought by the Commission, the notion of *idem crimen* should be used to assess whether the facts are the same for the purpose of application of the principle *ne bis in idem*. The unity of the legal interest protected would therefore be relevant and the Commission asked the Court to refrain in this case from amending its case-law referred to in the previous footnote until the arrival of other cases more suitable for discussion of this issue.

87 Judgment of the ECtHR of 10 February 2009, CE:ECHR:2009:0210JUD001493903.

88 Criminal appeal in cassation, full court, No 37424, 12 September 2013. According to the reasoning of the Corte di cassazione (Supreme Court of Cassation), '… In the case of the administrative offence provided for in Article 13(1) of Legislative Decree No 471 of 18 December 1997, the essential condition is the carrying out of taxable transactions which give rise to the obligation to make periodic payments of VAT …, the omission specifically consists of the failure to make periodic payments of VAT and the time-limit for compliance with that obligation is set as the 16th day of the month (or quarter) following the date on which the tax became due … In the case of the tax offence governed by Article 10b of Legislative Decree No 74 of 10 March 2000, the essential condition is either the carrying out of taxable transactions which give rise to the obligation to make periodic payments of VAT … or the filing … of the annual VAT return in respect of the previous year; the omission specifically consists of the non-payment, in an amount exceeding EUR 50 000, of VAT owed as a result of the annual return and the time-limit for compliance is that stipulated for the payment on account of VAT in respect of the following tax period'.

are at the origin of the imposition of both types of penalty are not factual but legal in nature.[89] The material act is the same in all cases: non-payment of a high amount of VAT; while the requirements that, in addition to non-payment, there must also be filing of the annual VAT return, a minimum threshold and a reference period are legal, not factual constraints.

107. The case-law of the Court of Justice (and of the ECtHR) to which I have referred above[90] emphasises that the legal classification of the acts is not to be taken into account when assessing whether those acts are identical. It is the *idem factum* and not the *idem crimen* which matters. While the Italian Government is right to point out, in relation to the line of judgments of the Corte di cassazione (Supreme Court of Cassation), that attention must be paid to a 'specific assessment' of the facts, I am not persuaded by its argument regarding the 'progression of the offence' in the act of non-payment of VAT as a basis for concluding that, in these cases, the acts penalised twice are not identical. Thus, as concerns Mr Menci, the specific facts which led to the imposition of the tax penalty and which may also lead the imposition on him of a criminal penalty are the same: non-payment of VAT in the amount of EUR 282495.76 in respect of the tax period from 1 January to 31 December 2011. The tax penalty is applied to those acts by reference to legal criteria whereas the criminal penalty requires an assessment of other legal criteria; I repeat, however, that the factual circumstances are the same.

108. A final point must be made in relation to the compatibility of the interpretation I propose with the obligation of the Member States to apply effective, deterrent and proportionate penalties which guarantee the collection of VAT and the protection of the EU's financial interests. As I have stated, there is no reason why the use of a twin-track system to punish VAT fraud should be more effective than the use of a single-track system. If the need to use two sets of proceedings and two penalties is essentially derived from defects in the administrative or judicial structures for the combating of VAT fraud, those aims could also be attained through the improvement of those procedures rather than by sacrificing the fundamental right not to be tried or punished twice in criminal proceedings for the same criminal offence.

*2. Duplication of the proceedings or of the penalties (*bis*)*

109. As I have observed, in accordance with the *Åkerberg Fransson* judgment, Article 50 of the Charter:

– Permits the existence of a twin-track (administrative and criminal) system for penalising fraud resulting from non-payment of VAT, in view of the freedom of Member States to choose the detailed rules for punishment of VAT fraud.

– Does not, however, permit double punishment by way of a criminal penalty (or proceedings), on the one hand, and by way of a tax penalty (or proceedings), on the other, where it can be said that the latter is *genuinely* criminal in nature, notwithstanding that it is classified under national law as

89 The Corte di cassazione (Supreme Court of Cassation) held that some of the essential conditions (the carrying out of taxable transactions giving rise to the obligation to make periodic payments of VAT) and the act (failure to pay one or more of the periodic payments due) are the same but that the components of the two types of offence differ in other respects which it regarded as essential (filing of the annual VAT return and the minimum threshold for the omission, required only in the case of the tax offence, and the reference period). It therefore held that the relationship between the two types of offence is framed in terms of 'progression of the offence', so that the criminal offence is essentially a much more serious offence than the administrative offence and, even though it necessarily encompasses the administrative offence (without the failure to comply with the periodic time-limit, one of the essential conditions of the offence would be lacking), it supplements it with essential elements, such as the threshold and the extension of the time-limit, which do not fit perfectly into the category of the special provision (if the latter were to apply, only the criminal offence would be taken into account).

90 See points 39 to 42 of this Opinion.

solely administrative. I repeat that, in those circumstances, 'if the tax penalty is criminal in nature for the purposes of Article 50 of the Charter and has become final [[91]]… that provision precludes criminal proceedings in respect of the same acts from being brought against the same person.'[92]

110. According to that same judgment, it is the national referring court which has to decide whether the tax penalties imposed by the Italian tax authorities are, in fact, criminal in nature. As already stated, that court will have to apply the 'Engel criteria' itself, an approach which is logical (for the national court has a better knowledge of its national law than the Court of Justice) but also risky.[93] That is why it is appropriate to provide the referring court with a number of additional criteria for interpretation which will assist it to define those criteria better in the disputes concerned, in particular the second and third criteria.

111. The *first Engel criterion* (legal classification of the offence under national law) is of very little relevance in this case for, as the Italian Government explained in its observations, the tax penalties for non-payment of VAT are, nominally, of an administrative nature under Italian law, both in terms of their name and the courts which impose them and the procedure they follow. However, that must not preclude a subsequent analysis of the tax penalties in the light of the other two criteria.[94]

112. The *second Engel criterion* refers to the legal nature of the offence and must be examined by the national court, which, for that purpose, may be guided, drawing inspiration from the case-law of the ECtHR to which I referred above,[95] by a set of identifying factors, one of which is the personal scope, that is the group of persons at which the rule establishing the offence is aimed. In the case of tax offences resulting from non-payment of VAT, which are punished by fines in administrative proceedings, this group comprises all taxable persons liable to pay the tax and not a defined or closed group of potential tax evaders.

113. In that situation, the purpose of the provision imposing the penalty is more relevant, and, as I have pointed out, the ECtHR[96] and the Court of Justice, in the judgment of 5 June 2012, *Bonda*,[97] have both referred to this. The criminal nature of the offence is bolstered by the fact that the penalty for that offence is intended to punish and deter unlawful conduct and not simply to make reparation for pecuniary damage. It would be difficult to deny that provisions of tax law providing for penalties are aimed at punishing taxable persons whose frauds have been detected while at the same time serving as a warning or deterrent to others, in order to prevent those persons from giving in to the temptation of not paying their taxes. Admittedly, since administrative and criminal penalties are a reflection of the State's right to punish, I cannot see how (other than by means of an artificial, merely

91 In the dispute which gave rise to the present reference for a preliminary ruling, there does not appear to be any doubt that the penalties imposed by the Italian authorities have become final. However, it will be for the referring court to determine whether, in accordance with its national law, the decisions of the Italian tax authority are final and whether those decisions have settled the case as to the substance.

92 *Åkerberg Fransson* judgment, paragraph 34.

93 The courts of the same Member State may reach different, and even contradictory, conclusions. In Italy, as I have already pointed out, the Corte suprema di cassazione (Supreme Court of Cassation) found a twin-track (administrative and criminal) system for penalising fraud resulting from non-payment of VAT to be compatible with the *Åkerberg Fransson* judgment and the Engel criteria, whereas the referring court appears to take the opposite view.

94 See point 46 of this Opinion.

95 See point 47 of this Opinion.

96 See judgments of the ECtHR cited in footnotes 43 and 44.

97 C-489/10, EU:C:2012:319, paragraphs 39 to 42.

doctrinal construction) it is possible to deny that the former have a dual aim of deterrence and punishment, leading them to resemble provisions of a strictly criminal nature. [98] Moreover, I believe that, in reality, all penalties have a punitive element and their preventive or deterrent effect is derived specifically from the punishment they involve. [99]

114. Moreover, contrary to the Italian Government's argument, the punitive effect of the tax penalties does not disappear because national law, in certain cases, enables the amount of those penalties to be reduced as a result of subsequent payment of the tax or permits the administrative authorities to waive those penalties under certain conditions or to reach agreements, compromises and settlements with tax evaders where they acknowledge their guilt and refrain from challenging the penalties. The latter measures, or other similar ones, may also exist in criminal proceedings, [100] without this casting doubt on the fact that the penalties provided for in the Criminal Code (or in special laws) for tax offences have that nature. The national legal systems may, for example, stipulate that regularisation a posteriori of a tax position leads, in certain circumstances, either to the disappearance of the unlawfulness inherent in the original breach of the tax obligation (with the subsequent disappearance of the criminal penalty) or to the mitigation of the punitive response.

115. A final factor to be taken into consideration with regard to the interpretation inspired by the case-law of the ECtHR is the legal right protected by the national provision which provides for punishment of the offence. In principle, that provision will be criminal in nature if its aim is to safeguard legal rights the protection of which is normally guaranteed by provisions of criminal law. [101]

116. The purpose of tax penalties for non-payment of VAT is, specifically, to ensure the proper collection of that tax and the simultaneous protection of the financial interests of the Member States and the European Union. The legal rights concerned are, therefore, ones which, in the most serious cases, also have to be protected by criminal law, as the Court pointed out in the judgment of 8 September 2015, *Taricco and Others*, [102] and the Member States have a duty to punish fraud effectively in that sphere.

98 See, inter alia, judgments of the ECtHR of 20 May 2014, *Nykänen v. Finland* (CE:ECHR:2014:0520JUD001182811), §§ 39 and 40; of 20 May 2014, *Häkkä v. Finland* (CE:ECHR:2014:0520JUD000075811), §§ 38 and 39; of 10 February 2015, *Kiiveri v. Finland* (CE:ECHR:2015:0210JUD005375312); and of 30 April 2015, *Kapetanios and Others v. Greece* (CE:ECHR:2015:0430JUD000345312). Legal commentators describe those measures as 'punitive administrative sanctions', stating that they share with criminal penalties their punitive purpose in the broad sense and also their content, in the form of payment of a sum of money and/or loss of rights, such as the right to pursue a profession or participate in public tendering procedures (Weyembergh, A. and Joncheray, N., 'Punitive Administrative Sanctions and Procedural Safeguards', *New Journal of European Criminal Law*, 2016, No 2, pp. 194 to 199; Caeiro, P., 'The influence of the EU on the blurring between administrative and criminal law', in Galli, F. and Weyembergh, A. (eds), *Do labels still matter? Blurring boundaries between administrative and criminal law — The influence of the EU*, editions de l'ULB, Brussels, 2014, p. 174).

99 The academic (sometimes philosophical) debate concerning the basis, justification and aim, or aims, of punishment has lasted for centuries and involves differing theories, some of which place the emphasis on its retributive aspects and others on its preventive (general prevention or special prevention) or deterrent effects. A similar, more recent but also unresolved, disagreement arose in relation to whether there are qualitative criteria for distinguishing between offences which are criminal and those which are merely administrative, and there is no consensus in that regard either. It is really difficult to identify those qualitative criteria where, in the case of tax infringements and offences such as those in the present case, non-payment of VAT in excess of EUR 250 000 is criminal in nature while non-payment of VAT in an amount of EUR 249 000 is not.

100 The Italian Government accepted as much at the hearing, since, in Italian law, it is possible to waive (in whole or in part) the right to bring a prosecution in certain cases, under certain conditions, and to adopt 'decisions agreed' between the Public Prosecutor's Office and the accused which avoid the holding of a trial. In some Member States mechanisms exist for reducing the penalty imposed on defendants who, once the criminal proceedings have started, pay the tax due or cooperate in the judicial investigation.

101 See judgments of the ECtHR cited in footnote 45 of this Opinion.

102 C-105/14, EU:C:2015:555, paragraph 40.

117. In the light of that duty, it is necessary to consider whether the best option would be to impose both tax penalties and criminal penalties for the same offences, which, in all likelihood, would lead to increased effectiveness in the suppression of fraud (at least serious fraud) in relation to VAT. Symmetrically, such double criminality would reduce the advantage which application of the principle *ne bis in idem* would entail for taxable persons with greater economic power if it were found that the administrative penalty precludes a subsequent criminal penalty in respect of the same acts.[103]

118. However, I do not believe that that objection is persuasive. Without it being necessary to bring both administrative and criminal proceedings in which penalties are imposed in respect of the same acts, the proper classification as offences of the most serious acts of fraud or non-payment of tax, together with diligent action by the criminal courts in each Member State, would make sufficiently sure that the punishment of those offences involved the maximum deterrent effect while precluding the infringement of a guarantee as important for taxable persons as the right not to be tried or punished twice for the same offence.

119. The *third Engel criterion* concerns the nature and degree of severity of the penalty. Drawing inspiration from the case-law of the ECtHR, which must be applied to the interpretation of Article 50 of the Charter, the national courts should bear in mind, as the ECtHR has reiterated, that the fact that a pecuniary penalty imposed in administrative proceedings for non-payment of taxes is minor in amount does not preclude it from being of a criminal nature.[104] Indeed, the order for reference states that the tax penalty provided for in Article 13 of Legislative Decree No 471 of 18 December 1997 (30% of the amount of unpaid VAT) is, by its nature and size, of a criminal nature, without this precluding other penalties from increasing that percentage to 100% or more.[105]

3. The possible limitations of the prohibition of the principle ne bis in idem *in this case*

120. In the light of the facts described by the referring court in its order, the final assessment of which falls to that court, the two sets of proceedings brought against Mr Menci in respect of a single act (failure to pay VAT) may infringe his right not to be tried and punished twice for the same acts.

121. Since I have ruled out acceptance of the limitation in Article 52(1) of the Charter in relation to application of the principle *ne bis in idem* to cases of tax fraud governed by EU law (*Spasic*),[106] I could finish at this juncture.

122. However, should the Court decide to explore that approach, it is my view, in the alternative, that it is not possible to apply that limitation to this case. The limitation is not necessary, within the meaning of Article 52(1) of the Charter, and nor does the duplication of proceedings and penalties provided for in national law pass the proportionality test for it to be covered by that provision.

123. For the purposes of proportionality, an examination might be made of whether there is coordination of the different proceedings, whether there is cooperation between the authorities while those proceedings are underway, and whether it is possible to offset any penalties. Those criteria appear to work against legislation like the Italian legislation applied to Mr Menci, which: (i) does not

103 The imposition by a final judgment of a tax penalty for fraud would make the subsequent imposition of a criminal penalty impossible, meaning that taxable persons with greater economic power would be tempted to avoid payment of VAT in the knowledge that they would only be liable to pay a fine but not to criminal penalties if the tax authorities discovered their unlawful conduct.

104 Judgments of the ECtHR of 23 November 2006, *Jussila v. Finland* (CE:ECHR:2006:1123JUD007305301), §§ 37 to 38; of 20 May 2014, *Nykänen v. Finland* (CE:ECHR:2014:0520JUD001182811), § 40; and of 10 February 2015, *Kiiveri v. Finland* (CE:ECHR:2015:0210JUD005375312), § 31.

105 I have already pointed out, moreover, that the nature and degree of severity of the penalty must be assessed by taking account of whether it is possible to impose the penalty in full, that is without regard to the final sum which would result if, in a particular situation, the sum had been reduced as a result of reductions granted by the tax authorities. See judgments of the ECtHR of 4 March 2014, *Grande Stevens and Others v. Italy* (CE:ECHR:2014:0304JUD001864010), § 98; of 11 September 2009, *Dubus S.A. v. France* (CE:ECHR:2009:0611JUD000524204), § 37; and of 30 April 2015, *Kapetanios and Others v. Greece* (CE:ECHR:2015:0430JUD000345312), § 55.

106 Judgment of 27 May 2014, C-129/14 PPU, EU:C:2014:586,

provide for coordination of the criminal and administrative proceedings, (ii) does not require cooperation between the authorities involved in the two sets of proceedings in order to avoid excessive disruption to the individual concerned, and (iii) does not create a mechanism for coordination or offsetting of penalties, providing only that the administrative penalties cannot be enforced until the end of the criminal proceedings.

124. In the further alternative, should the Court decide to follow the approach established by the judgment in *A and B v. Norway* for interpreting Article 50 of the Charter, I believe that a situation like that of Mr Menci is not compatible with the statement of the law in that judgment.

125. By way of confirmation, it is sufficient to state that, in the light of the information in the case-file, the (criminal and administrative) proceedings in this case are neither complementary nor combined. Although the final assessment of what occurred in relation to Mr Menci falls to the referring court, everything indicates that there was a clear separation between the administrative proceedings and the criminal proceedings. Nor is it possible to identify a close connection in time between the two proceedings (there is a gap of at least one year between the proceedings, and the criminal proceedings were commenced once the administrative proceedings had finished and the judgment imposing the penalty in those proceedings had become final).

IV. Conclusion

126. In the light of the foregoing considerations, I propose that the Court reply as follows to the question referred for a preliminary ruling by the Tribunale di Bergamo (District Court, Bergamo, Italy):

Article 50 of the Charter of Fundamental Rights of the European Union:

– Requires for its application the existence of the same material facts which, regardless of their legal classification, must be the basis for the imposition of the tax penalties and the criminal penalties.

– Is infringed if criminal proceedings are commenced or a penalty of a criminal nature is imposed on a person who, in respect of the same act has previously had a tax penalty imposed on him by a judgment which has become final, where, despite its name, that penalty is in fact criminal in nature. The national court must establish that fact using the following criteria: the legal classification of the offence under national law; the nature of the offence, which is to be assessed by reference to the aim of the provision, the persons to whom it is addressed and the legal right which it protects; and the nature and degree of severity of the penalty.