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# The Past, Present and Future of the *Ne Bis In Idem* Dialogue between the Court of Justice of the European Union and the European Court of Human Rights: The Cases of *Menci*, *Garlsson* and *Di Puma*

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## Abstract

*The cases of Menci (C-524/15), Garlsson (C-537/16) and Di Puma (C-596/16 and C-597/16) deal with the duplication of criminal and punitive administrative proceedings for the same conduct in the area of VAT and market abuse. The Court of Justice of the European Union (CJEU) held that this duplication of proceedings constitutes a limitation of the ne bis in idem principle of Article 50 of the Charter of Fundamental Rights (Charter). This infringement is only justified if the requirements of the limitation clause of Article 52(1) of the Charter are met. The judgments were highly anticipated as they constitute the response of the CJEU to the judgment in A and B v Norway delivered by the European Court of Human Rights (ECtHR), in which the ECtHR lowered the level of protection afforded by the ne bis in idem principle of Article 4 of Protocol No. 7 to the European Convention of Human Rights (A4P7 ECHR). While there are differences between the approaches taken by both courts, it appears that the reasoning of the CJEU in the judgments largely mirrors that of the ECtHR in A and B v Norway. This article frames the judgments in terms of the dialogue between the CJEU and ECtHR on the ne bis in idem principle. It does so chronologically, by focusing on the past, present and future of the ne bis in idem dialogue between both European courts.*

## 1. Introduction

### 1.1. Setting the scene: the European *ne bis in idem* dialogue

The *ne bis in idem* principle is codified at many levels, has manifold rationales and, accordingly, 'does not easily lend itself to a brief

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characterisation."[1] In essence, the *ne bis in idem* principle prevents repeated prosecution or punishment for the same acts or offences, thereby protecting both the authority of final judgments (*res judicata*) and the individual citizen against abuse of the state's right to impose punishment (*ius puniendi*).[2] At the European level, the *ne bis in idem* principle is codified as an individual right in A4P7 ECHR, Article 50 of the Charter and Article 54 of the Convention Implementing the Schengen Agreement (CISA).[3] These provisions do not operate in isolation. Under the homogeneity clause of Article 52(3) of the Charter, the meaning and scope of A4P7 ECHR and Article 50 of the Charter 'shall be the same', notwithstanding the possibility for EU law to provide more protection.[4] The development of the *ne bis in idem* principle in the EU legal order is in large part determined by the interrelated case law of the two courts vested with the responsibility to protect these *ne bis in idem* provisions: the CJEU and ECtHR. This interrelation can be framed in terms of judicial dialogue, which, in this article, refers to the cross-fertilisation and mutual influence between both courts, as appears from references made to each other's case law.[5]

When observed through the prism of judicial dialogue, the judgments of *Menci*,[6] *Garlsson*[7] and *Di Puma*[8] – all issued on 20 March 2018 – are the latest step of the CJEU in its '*ne bis in idem* dialogue' with the ECtHR. The judgments occupy an important position in this dialogue, as they constitute the response of the CJEU to *A and B v Norway*.[9] In that case, the ECtHR restricted the protective scope of A4P7 ECHR by allowing the combination of punitive administrative and criminal proceedings, provided that they are sufficiently connected

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1 Michiel Luchtman, 'Transnational Law Enforcement in the European Union and the *Ne Bis in Idem* Principle', *Review of European Administrative Law* (2011), 5 and 7.

2 *Ibid*. For additional rationales see e.g. Bas van Bockel, *The ne bis in idem principle in EU law* (Kluwer International, 2010), 28-33; Anne Weyembergh & Inés Armada, 'The principle of *ne bis in idem* in Europe's Area of Freedom, Security and Justice', *Valsamis Mitsilegas*; Maria Bergström & Theodore Konstadinides (eds.), *Research Handbook on EU Criminal Law* (Edward Elgar Publishing, 2016), 191-194.

3 The principle can also be found in the domestic law of many European states, sometimes as a constitutional right (e.g. Art. 103(3) of the German Constitution), as well as in other international instruments (e.g. Art. 14(7) of the International Covenant on Civil and Political Rights and Art. 20 of the Rome Statute of the International Criminal Court). The principle also serves as a bar to cooperation in criminal matters between States (e.g. Art. 3(2) of the Framework Decision on the European Arrest Warrant).

4 As to the relation between Art. 54 CISA and Art. 50 of the Charter: the former article being secondary EU law, must be interpreted in light of the latter. See C-398/12, *M.*, ECLI:EU:C:2014:1057, para. 35 and C-486/14, *Kossowski*, ECLI:EU:C:2016:483, para. 31.

5 See *infra* s. 1.2 on the use of the term 'judicial dialogue'.

6 C-524/15, *Luca Menci*, ECLI:EU:C:2018:197.

7 C-537/16, *Garlsson Real Estate and Others*, ECLI:EU:C:2018:193.

8 C-596/16 and C-597/16, *Enzo di Puma and Antonio Zecca*, ECLI:EU:C:2018:192.

9 ECtHR 15 November 2016, *A and B v Norway*, Appl. Nos. 24130/11 and 29758/11, ECLI:CE:ECHR:2016:1115JUD002413011.

in substance and time. The judgment was criticised strongly.[10] In deciding the cases of *Menci*, *Garlsson* and *Di Puma*, the CJEU faced an important choice. It could either reject the limitation of the *ne bis in idem* principle by the ECtHR and stick to a more protective interpretation in line with its own previous case law,[11] or it could follow the ECtHR in allowing for dual-track (administrative and criminal) enforcement in response to the same acts and thereby lower the protection afforded by the *ne bis in idem* principle of Article 50 of the Charter. It appears that the CJEU allows for a combination of punitive administrative and criminal proceedings on its own conditions. These conditions largely resemble that of the ECtHR, but some distinctive differences can be identified between the respective approaches of the two courts. While these differences lead to a higher level of protection under the Charter in some cases, the ECHR might provide more protection in others

This article discusses the choices made by the CJEU in *Menci*, *Garlsson* and *Di Puma* and positions the judgments in the context of the ongoing *ne bis in idem* dialogue between the two courts. First, in section 1.2 some preliminary observations will be made on the term judicial dialogue. The subsequent analysis is conducted chronologically by looking at the past, present and future of the '*ne bis in idem* dialogue' between the CJEU and ECtHR. Section 1.3 contains a discussion of several milestones in the dialogue on the principle before the CJEU issued its judgments in the cases under consideration (reflecting 'the past'). *Menci*, *Garlsson* and *Di Puma*, being the most recent judgments of the CJEU on the matter, constitute the 'present' of the dialogue. The facts of these cases will be summarised (section 2), followed by a description of the Advocate General's Opinion (section 3) and an examination of the reasoning of the CJEU (section 4). In section 5.1 the present dialogue is analysed by comparing the judgments to *A and B v Norway* and evaluating the present state of the *ne bis in idem* principle in the EU. In section 5.2 the present *ne bis in idem* dialogue is framed in the broader dialogue between the CJEU and ECtHR. Finally, in section 5.3, some tentative predictions on the direction of 'the future' of the *ne bis in idem* dialogue are provided.

### 1.2. Judicial dialogue: preliminary observations

Some brief, preliminary observations on the term judicial dialogue are to be made, as widespread and inconsistent use has mystified its

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[10] Not in the last place by Judge Pinto de Albuquerque in an extensive dissenting opinion, see ECtHR 15 November 2016, *A and B v Norway*, Appl. Nos. 24130/11 and 29758/11, ECLI:CE:ECHR:2016:1115JUD002413011, Dissenting Opinion of Judge Pinto De Albuquerque.

[11] C-617/10, *Åkerberg Fransson*, ECLI:EU:C:2013:105.

meaning.[12] In this article, judicial dialogue will be used to describe the mutual influence between the CJEU and ECtHR as appears from the cross-citation and discussion of each other's judgments.[13] It is to be noted that judicial dialogue can be given a wide range of (other) meanings, especially in the area of (European and comparative) constitutional law and international law.[14]

In a general sense, judicial dialogue can be defined as a process of engagement in which the decision of one court influences the opinion and judgments of the other court. This 'activity' can take numerous shapes and forms, occurring between courts belonging to different jurisdictions, as well as between courts within the same legal system.[15] For analytical purposes, it is useful to acknowledge that next to dialogue in a descriptive sense – aimed at depicting interaction and mutual influence between courts – a normative use of the term has come to rise, in which attention is paid to dialogue as a source of legitimacy of adjudication by (particularly) supranational courts.[16] Also, a distinction can be drawn between 'formal' and 'informal' dialogue. While the former focuses on interaction between courts as appears from the texts of their judgments, the latter encapsulates conversation and dialogue through 'other means', such as bilateral meetings between judges or judicial networks.[17]

In light of the foregoing, judicial dialogue as interpreted at the start of this sub-section signifies a descriptive, analytical focus on the formal dialogue between the CJEU and ECtHR. As the analysis is limited to the dialogue on the substantive topic of the *ne bis in idem* principle, this article specifically deals with – what will be referred to as – the '*ne bis in idem* dialogue' between both European courts.

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12 See e.g. Aida Torres Perez, *Conflicts of Rights in the European Union. A Theory of Supranational Adjudication* (OUP, 2009), 106.

13 Cf. the use of the term (albeit in a different substantive context) by e.g. Philippa Webb, 'Immunities and Human Rights: Dissecting the Dialogue in National and International Courts' in Ole Kristian Fauchald & André Nollkaemper (eds.), *The Practice of International and National Courts and the De-Fragmentation of International Law* (Hart Publishing, 2012), 245.

14 E.g. Carla Zoethout, 'On the Different Meanings of Judicial Dialogue', *European Constitutional Law Review* (2014), 175, and, elaborately, Lize Glas, *The Theory, Potential and Practice of Procedural Dialogue in the European Convention on Human Rights System* (Intersentia, 2016), 70-105.

15 Antonios Tzanakopoulos, 'Judicial Dialogue as A Means of Interpretation', in Helmut Philipp Aust and Georg Nolte (eds.), *The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence* (OUP, 2016), especially s. II 'Judicial dialogue defined and categorised' and Anne-Marie Slaughter, 'A Typology of Transjudicial Communication', *University of Richmond Law Review* 99 (1994).

16 Torres Peres 2016 (n 12), 106-109.

17 E.g. Monica Claes & Maartje de Visser, 'Are You Networked Yet? On Dialogues in European Judicial Networks', *Utrecht Law Review* (2012), 100-114.

### 1.3. The past of the *ne bis in idem* dialogue between the CJEU and ECtHR

#### 1.3.1. *Ne bis in idem* in Europe: an example of convergence

The *ne bis in idem* principle has four constituent elements: (1) there are two sets of punitive proceedings (*bis*), (2) one of which has led to a final decision; (3) the person who is the subject of those proceedings is the same; and (4) the acts being judged are the same (*idem*).[18] All four elements have to be satisfied for a *ne bis in idem* situation to exist. As the discussion below shows, in interpreting these elements, the CJEU and ECtHR took due notice of each other's case law. Consequently, the interpretation of the principle by the CJEU and ECtHR turned out to be largely similar. This made the *ne bis in idem* principle 'an example of convergence' between the Charter and the ECHR.[19]

To satisfy the *bis*-requirement (element 1), the two proceedings or penalties must qualify as punitive. In *Engel*, the ECtHR established its three-step test to determine what counts as a 'criminal charge' under Article 6 ECHR.[20] The *Engel*-test has also been adopted by the ECtHR in cases concerning A4P7 ECHR.[21] An important further question that can been raised in this regard is whether the *ne bis in idem* principle covers a combination of punitive administrative and criminal proceedings. In the seminal case of *Åkerberg Fransson*, the CJEU faced this issue, as it had to rule on the lawfulness of a combination of administrative tax penalties and criminal prosecution under Article 50 of the Charter.[22] To answer this question, the CJEU first had to decide whether the tax penalties are of a criminal nature. In doing so, the CJEU referred to its previous judgment in *Bonda*,[23] in which it incorporated the *Engel*-criteria, thereby ensuring homogeneity between the two courts on this important issue. Sub-

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18 See C-524/15, *Menci*, Opinion AG Campos Sánchez-Bordona, ECLI:EU:C:2017:667, para. 38.

19 Koen Lenaerts & José Antonio Gutiérrez-Fons, 'The Place of the Charter in the EU Constitutional Edifice' in Steve Peers, Tamara Hervey, Jeff Kenner & Angela Ward (eds.), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing, 2014), 1582. See also Piet Hein van Kempen & Joeri Bemelmans, 'EU protection of the substantive criminal law principles of guilt and *ne bis in idem* under the Charter of Fundamental rights: underdevelopment and overdevelopment in an incomplete criminal justice framework', *New Journal of European Criminal Law* 247 (2018), 260.

20 ECtHR 8 June 1976, *Engel and Others v the Netherlands*, Appl. Nos. 5100/71; 5101/71; 5102/71; 5354/72 and 5370/72, ECLI:CE:ECHR:1976:0608JUD000510071. The three criteria are the classification of the offence under national law, the nature of the offence and the severity of the penalty.

21 See ECtHR 10 February 2015, *Kiiveri v Finland*, Appl. No. 53753/12, ECLI:CE:ECHR:2015:0210JUD005375312, para. 30 and the cases referred to in that paragraph.

22 *Åkerberg Fransson* (n 11).

23 C-489/10, *Bonda*, ECLI:EU:C:2012:319.

sequently, the CJEU held that Article 50 of the Charter does *not* preclude the successive imposition of tax penalties and criminal penalties for the same conduct, provided that the first penalty is *not* criminal in nature. The CJEU left the question whether the tax penalty in the case under consideration was criminal in nature to the referring court and thereby refrained from deciding explicitly on the question whether Article 50 of the Charter allows a combination of administrative and criminal sanctions. It has been suggested that the CJEU did not pass an explicit judgment on the matter as it did not want to get 'under the ECtHR's feet' while several Swedish tax cases on *ne bis in idem* were pending before the ECtHR.[24] However, in *Janosevic v Sweden*,[25] the ECtHR – applying the *Engel*-criteria – had already held that nearly identical tax surcharges as imposed in *Åkerberg Fransson* are of a criminal nature. The subsequent incorporation of the *Engel*-criteria in *Bonda*, as referred to in *Åkerberg Fransson*, made it hardly possible for the referring court in *Åkerberg* not to qualify the tax sanction under review as punitive. In light of the foregoing, and even in the absence of an explicit judgment of the CJEU on the matter, it can be deduced from *Åkerberg Fransson* that Article 50 prevents the combination of administrative tax penalties and criminal sanctions for the same factual conduct.[26] At the very least, this appears to be the interpretation of *Åkerberg Fransson* by the ECtHR in *Grande Stevens*.[27] In that case, the ECtHR rejected the combination of administrative and criminal penalties under A4P7 ECHR. The indirect incorporation of the *Engel*-criteria in *Åkerberg* and the alignment on the issue of combined administrative and criminal proceedings resulted in remarkable convergence between both courts.[28] This was recognised explicitly by the ECtHR.[29]

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24 Peter Wattel, '*Ne Bis in Idem* and Tax Offences in EU law and ECHR law' in Bas van Bockel (ed.), *Ne Bis in Idem in EU Law* (CUP, 2016), 184.

25 ECtHR 21 May 2003, *Janosevic v Sweden*, Appl. No. 34619/97, ECLI:CE:ECHR:2002:0723JUD003461997.

26 See e.g. Rob Widdershoven, HvJ EU 26-02-2013 (*Åkerberg Fransson*) [2013] Administratiefrechtelijke Beslissingen (AB) 2013/131 (case note), pt. 7 and *A and B v Norway*, Dissenting Opinion of Judge Pinto De Albuquerque (n 10), paras 14 and 80.

27 ECtHR 4 March 2014, *Grande Stevens v Italy*, Appl. No. 18640/10, ECLI:CE:ECHR:2014:0304JUD001864010, para. 229 as to which see *A and B v Norway*, Dissenting Opinion of Judge Pinto De Albuquerque (n 10), paras 66 and 80.

28 *A and B v Norway*, Dissenting Opinion of Judge Pinto De Albuquerque (n 10), para. 14; Lenaerts and Gutiérrez-Fons 2014 (n 19), 1583. The fact that the CJEU did not directly cite ECtHR case law in *Åkerberg*, however, has also led some to argue that the Luxembourg Court refuses to engage with arguments drawn from the ECHR and that it gives a limited meaning to Art. 52(3) of the Charter. See Xavier Groussot and Angelica Ericsson, 'Ne Bis in Idem in the EU and ECHR Legal Orders. A Matter of Uniform Interpretation' in Bas van Bockel (ed.), *Ne Bis in Idem in EU Law* (CUP, 2016), 86.

29 See ECtHR 30 April 2015, *Kapetanios and Others v Greece*, Appl. Nos. 3453/12, 42941/12 and 9028/13, ECLI:CE:ECHR:2015:0430JUD000345312, para. 73.

Dialogue can also be identified with regard to the notion of finality (element 2). The ECtHR has held that a judicial decision is final if it has acquired the force of *res judicata*, i.e. when no further ordinary remedies are available (anymore).[30] In *M.*, with due regard to the approach of the ECtHR, the CJEU held that the final nature of a procedure is not affected by the possibility of reopening criminal investigations if new facts and/or evidence become available.[31]

A similar development can be observed with regard to the personal scope of the principle (element 3). In cases concerning subsequent punishment of a legal person and the natural person representing it, the CJEU and ECtHR adopt a similar approach. In *Pirttimäki v Finland*, the ECtHR held that the *ne bis in idem* principle is not violated where multiple penalties are imposed on natural and legal persons who are legally distinct.[32] In *Orsi and Baldetti*, the CJEU equally reasoned that where a tax penalty is imposed on a company and criminal charges are brought against the natural person representing the company, Article 50 of the Charter is not infringed.[33] In deciding these cases, the Luxembourg Court referred to *Pirttimäki* to ensure that the protection afforded by the Charter does not fall below the standards of the ECHR.[34]

For a long time, the element of *idem* (element 4) was considered the most challenging element of the *ne bis in idem* principle.[35] In this regard, a distinction can be made between an *idem crimen* and an *idem factum* approach. Whereas a *ne bis in idem* principle based on *idem factum* protects against repeated prosecution for the same factual conduct, the *idem crimen* approach takes into account the legal qualification of that conduct and prevents double prosecution for the same offence. A factual *idem* approach provides more protection, as it rules out double prosecution based on different offences relating to the same factual circumstances. The ECtHR struggled with the choice between these two types of *idem*. The Strasbourg Court referred to factual *idem*,[36] as well as legal *idem*,[37]

30 ECtHR 10 February 2009, *Sergey Zolotukhin v Russia*, Appl. No. 14939/03, ECLI:CE:ECHR:2009:0210JUD001493903, paras 107-108.
31 C-398/12, *M.*, ECLI:EU:C:2014:1057, paras 37-41.
32 ECtHR 20 May 2014, *Pirttimäki v Finland*, Appl. No. 35232/11, ECLI:CE:ECHR:2014:0520JUD003523211, paras 49-52.
33 C-217/15 and C-350/15, *Orsi and Baldetti*, ECLI:EU:C:2017:264, para. 27.
34 *Ibid*, paras 24-25.
35 Van Bockel 2010 (n 2), 11.
36 In e.g. ECtHR 23 October 1995, *Gradinger v Austria*, Appl. No. 15963/90, ECLI:CE:ECHR:1995:1023JUD001596390.
37 In e.g. ECtHR 30 July 1998, *Oliveira v Switzerland*, Appl. No. 25711/94, ECLI:CE:ECHR:1998:0730JUD002571194, ECtHR 2 July 2002, *Göktan v France*, Appl. No. 33402/96, ECLI:CE:ECHR:2002:0702JUD003340296; ECtHR 24 June 2003, *Gauthier v France*, Appl. No. 61178/00, ECLI:CE:ECHR:2003:0624DEC006117800 and ECtHR 10 October 2006, *Öngün v Turkey*, Appl. No. 15737/02, ECLI:CE:ECHR:2009:0623JUD001573702.

and also introduced an intermediate *idem*-test in *Franz Fischer v Austria*,[38] based on the 'essential elements' of the offences concerned.[39] On the contrary, the CJEU did make a clear choice, at least for the purposes of Article 54 CISA.[40] In a line of cases beginning with *Van Esbroeck*, the CJEU held that the only relevant *idem*-criterion is identity of the material acts, understood in the sense of the existence of a set of concrete circumstances which are inextricably linked together.[41] The CJEU's *idem factum* approach is largely motivated by the fact that the objective of Article 54 CISA, which only applies transnationally, is to ensure that no one is prosecuted for the same acts in several Member States on account of having exercised his right to freedom of movement. As the legal definitions of offences may vary between Member States, adopting a *legal idem* approach would frustrate free movement.[42] In *Zolotukhin*, the ECtHR acknowledges the legal uncertainty engendered by the existence of a variety of answers to the *idem*-question.[43] After extensively quoting the case law of other (international) courts, including the CJEU,[44] the ECtHR adopts an *idem factum* approach. The Strasbourg Court concludes that A4P7 prohibits repeated prosecution or trial relating to 'identical facts or facts which are substantially the same', and therefore '[t]he Court's inquiry should (...) focus on those facts which constitute a set of concrete factual circumstances involving the same defendant and inextricably linked together in time and space.'[45] The extensive references to the case law of the CJEU and the use of nearly identical language indicate that the ECtHR intended to safeguarded homogeneity with the CJEU's interpretation of Article 54 CISA.[46] This convergence might strike one as odd, as the *idem*-criterion adopted by the CJEU was clearly inspired by the transnational application of

38 ECtHR 29 May 2001, *Franz Fischer v Austria*, Appl. No. ECLI:CE:ECHR:2001:0529JUD003795097.

39 See John Vervaele, '*Ne Bis In Idem*: Towards a Transnational Constitutional Principle in the EU?', *Utrecht Law Review* 211 (2013), 214-215.

40 In competition law the CJEU adheres to a different definition of idem, which leads to a lack of internal consistency. See e.g. Renato Nazzini, 'Parallel Proceedings in EU Competition Law. *Ne Bis in Idem* as a Limiting Principle', in Bas van Bockel (ed.), *Ne Bis in Idem in EU Law* (CUP, 2016), 141-145, and the Opinion of AG Kokott in Case C-17/10, *Toshiba Corporation*, ECLI:EU:C:2017:299, paras 116-118.

41 C-436/04, *Van Esbroeck*, ECLI:EU:C:2006:165, para. 36; C-150/05, *Van Straaten*, ECLI:EU:C:2006:614, para. 48; C-467/04, *Gasparini*, ECLI:EU:C:2006:610, para. 54 and C-288/05, *Kretzinger*, ECLI:EU:C:2007:441, para. 34 and C-367/05, *Kraaijenbrink*, ECLI:EU:C:2007:444, para. 27.

42 E.g. *Van Esbroeck* (n 41), paras 33-35.

43 *Zolotukhin* (n 30), para. 78.

44 E.g. *Van Esbroeck* (n 41) & *Kraaijebrink* (n 41); *Zolotukhin* (n 30), paras 33-38.

45 *Zolotukhin* (n 30), paras 82 and 84. *Zolotukhin* has been confirmed in a number other cases, see e.g. ECtHR 18 October 2011, *Tomasović v Croatia*, Appl. No. 73053/01, ECLI:CE:ECHR:2011:1018JUD005378509; ECtHR 27 November 2014, *Lucky Dev v Sweden*, Appl. No. 7356/10, ECLI:CE:ECHR:2014:1127JUD000735610 and *A and B v Norway* (n 9).

46 Wattel 2016 (n 24), 179; Groussot & Ericsson 2016 (n 28), 57.

Article 54 CISA and the free movement rationale behind it. As A4P7 ECHR only applies within a state, these underlying motives for a broad, factual interpretation of *idem* are absent.[47] Nevertheless, what stands out is that a constructive dialogue on the *idem*-element led to clear convergence between the case law of both courts, which increased the minimum level of protection afforded by the ECtHR.[48]

The past of the *ne bis in idem* dialogue is characterised by alignment and a high level of protection. Both courts opted for a broad, factual definition of *idem* and – so it appears – rejected the combination of punitive administrative and criminal penalties.

### 1.3.2. The ECtHR's revirement in *A and B v Norway*

In November 2016, the ECtHR changed its course on the *bis*-element in *A and B v Norway*, which concerned a combination of tax sanctions and criminal proceedings. A and B were confronted with tax penalties, which became final in December 2008, and criminal proceedings for tax fraud, leading to a final sentence in October 2010. The ECtHR held that dual criminal and administrative proceedings, irrespective of the order in which they take place,[49] are allowed provided that they are 'sufficiently closely connected in substance and time'.[50] With regard to the existence of a sufficiently close connection in substance, the ECtHR defined a set of 'material factors',[51] which include:

1. whether the different proceedings pursue complementary purposes and thus address different aspects of the social misconduct involved;
2. whether the dual proceedings are a foreseeable consequence, in law and in practice, of the prohibited conduct;
3. whether the proceedings are conducted in such a manner as to avoid as far as possible any duplication in the collection as well as the assessment of the evidence;

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47 Wattel 2016 (n 24), 180.

48 Magnus Gulliksson, 'Effective Sanctions as the One-dimensional Limit to the *Ne Bis in Idem* Principle in EU Law' in Joakim Nergelius & Eleonor Kristoffersson, *Human Rights in Contemporary European Law* (Hart Publishing, 2015), 141-143. For a critical assessment of this convergence, see Michael O. Floinn, 'The Concept of Idem in the European Courts: Extricating the Inextricable Link in European Double Jeopardy Law', *Columbia Journal of European Law* (2017), 75.

49 *A and B v Norway* (n 9), para. 128.

50 While it as assumed that 'the fundamental change of direction really occurred in the judgment in *A and B v. Norway*.' (*Menci*, Opinion AG (n 18), para. 69, footnote 67), this criterion did not come out of nowhere. See *A and B v Norway* (n 9), paras 112-116.

51 *A and B v Norway* (n 9), para. 132. The ECtHR elaborates on these criteria in paras 133-134.

4. and, above all, whether the sanction imposed in the proceedings which become final first is taken into account in those which become final last, so that the proportionality of the overall amount of penalties is ensured.

Where the connection in substance is sufficiently strong, the requirement of a connection in time nonetheless remains and must be satisfied.[52] If there is a sufficiently close connection in both substance and time, then it would be 'artificial' to view the administrative and criminal proceedings concerned as the repeated exercise of the *ius puniendi*. Rather, the proceedings then form a coherent whole, no *bis* exists and the situation does not fall within the scope of A4P7 ECHR.[53] Applying these criteria to the facts of the case, the ECtHR concludes that there has been no violation of A4P7 ECHR.

*A and B v Norway* has not been warmly received . The ECtHR has been said to have cracked under the pressure of several intervening states who were keen on maintaining their system of dual-track law enforcement.[54] It has allegedly opened the floodgates for maximum repression through double punitive proceedings with respect to the same factual conduct and used vague criteria engendering legal uncertainty.[55] While others expressed more moderate views on the judgment,[56] one thing is clear: in *A and B v Norway*, the ECtHR lowered the level of protection afforded by A4P7 ECHR. It did so in at least two important respects.[57] Firstly, contrary to what was assumed thus far,[58] dual punitive administrative and criminal proceedings can be allowed under certain circumstances. Secondly, prior to *A and B v Norway*, the ECtHR held that once a first proceeding of a criminal nature had become final, a second proceeding could no longer commence or must be halted.[59] This so-called 'finality system', based on the *Erledigungsprinzip*, protects against double prosecution (*ne bis vexari*) and is also considered to be the system of Article 54 CISA and Article 50 of the Charter.[60] In *A and B v Norway,* with its heavy emphasis on the proportionality of the total 'package' of sanctions, the ECtHR has moved towards a less protective 'credit system', based on the *Anrechnungsprinzip*. In this system, the first sanction

52 *Ibid*, para. 134.
53 *Ibid*, paras 112 and 130.
54 See e.g. *Menci*, Opinion AG (n 18), para. 71.
55 *A and B v. Norway*, Dissenting Opinion of Judge Pinto De Albuquerque (n 10), e.g. paras 46 and 79-80.
56 E.g. Bas van Bockel, *EHRM, 15-11-2016, 24130/11, 29758/11* [2017] European Human Rights Cases 2017/61 (case note).
57 See e.g. Peter Wattel, 'Bis in idem', *Nederlands Juristenblad* (2017), 239.
58 *Infra* notes 26 and 27.
59 See e.g. *Grande Stevens* (n 27), para. 220; *Zolotukhin* (n 30), para. 83 and ECtHR 25 June 2009, *Maresti v Croatia*, Appl. No. 55759/07, ECLI:CE:ECHR:2009:0625JUD005575907, para. 65.
60 Wattel 2016 (n 24), 175-176.

merely has to be taken into account when the second sanction is imposed (*ne bis punieri*; no double punishment).[61]

In his Dissenting Opinion, Judge Pinto de Albuquerque concludes that the ECtHR 'willingly distances itself from the Luxembourg Court', thereby putting the 'progressive and mutual collaboration between the two European courts' at risk.[62] In *Menci, Garlsson* and *Di Puma* the CJEU sets out how the ECtHR's *revirement* impacts the *ne bis in idem* principle as defined in the Charter and, in doing so, provides an answer to the question whether the risk predicted by the Dissenting Judge in *A and B v Norway* has materialised.

## 2. The facts of the cases

As a result of the non-payment of VAT, Luca Menci became subject of administrative proceedings, which resulted in the imposition of a tax penalty of nearly € 85.000 in 2013. After the conclusion of the administrative proceedings, criminal proceedings regarding the same act were initiated against Mr Menci before the District Court of Bergamo in 2014.[63] The District Court subsequently referred a preliminary question to the CJEU.

In *Garlsson*, the public authority responsible for regulating the Italian financial markets (CONSOB) imposed an administrative penalty of €10.2 million on a natural person and two legal persons for acts amounting to market manipulation in September 2007. Appeals were lodged against this fine and meanwhile criminal proceedings were initiated. The latter proceedings led to a prison sentence that became final in September 2009, while the administrative proceedings were still pending.[64] The Supreme Court of Cassation, deciding on the appeal against the administrative fine, referred a preliminary question to the CJEU in September 2016.

In September 2009, CONSOB imposed an administrative fine on Mr Di Puma and Mr Zecca for insider trading. The defendants appealed against the fines and, in the meantime, criminal proceedings commenced in December 2011. These proceedings led to the acquittal of both defendants, while the administrative proceedings were still pending.[65] The Supreme Court of Cassation,

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61 For a discussion of these two 'versions' of the principle, see Van Bockel 2010 (n 2), 33-39.

62 *A and B v Norway*, Dissenting Opinion of Judge Pinto De Albuquerque (n 10), paras 67 and 80.

63 *Menci* (n 6), paras 11-15. The facts of this case largely resemble that of *Åkerberg Fransson* (n 11), see *Menci*, Opinion AG (n 18), para. 29.

64 *Garlsson* (n 7), paras 11-19.

65 *Di Puma* (n 8), paras 13-21.

eventually deciding on the appeal against the administrative fines, subsequently referred preliminary questions to the CJEU in November 2016.

In the questions referred to it, the CJEU was asked whether Article 50 of the Charter (interpreted in light of A4P7 ECHR) precludes the possibility of:

- conducting criminal proceedings after the imposition of a final administrative penalty with respect to the same acts constituting the non-payment of VAT (in *Menci*);[66]
- conducting administrative proceedings after the imposition of a sentence in criminal proceedings with respect to the same acts constituting market manipulation (in *Garlsson*);[67]
- conducting administrative proceedings after an acquittal on counts of insider trading in criminal proceedings with respect to the same acts (in *Di Puma*).[68]

## 3. The Advocate General's Opinions

In his Opinions, the Advocate General sets out the two main options available to the CJEU in response to the recent case law of the ECtHR: (1) accept the exception to the *bis*-element made in *A and B v Norway,* or (2) reject this limitation, maintain a higher level of protection and further develop its own autonomous approach.

The first option is rejected by the Advocate General. The ECtHR's reasoning in *A and B v Norway* was based on a position of deference towards the arguments of the State Parties to the ECHR, as the ECtHR emphasised the autonomy of the States in organising their legal system and took due notice of the fact that several State Parties have not ratified A4P7 ECHR. On the contrary, according to the Advocate General, the interpretation of Article 50 of the Charter cannot depend on the willingness of Member States to comply with it. Furthermore, the ECtHR's criteria led to significant uncertainty and complexity, whereas the rights of the Charter should be easily understood by all and their exercise calls for foreseeability and certainty.[69]

66 *Menci* (n 6), para. 16.
67 *Garlsson* (n 7), para. 20. The Court of Cassation also referred a second question, in response to which the CJEU confirmed the direct effect of Art. 50 the Charter.
68 The reference as understood by the CJEU, *Di Puma* (n 8), para. 25.
69 *Menci*, Opinion AG (n 18), paras 69-73.

The Advocate General then considers the second option. A rejection of the ECtHR's *bis*-exception would lead to the conclusion that double punitive proceedings infringe Article 50 of the Charter. This would lead to a higher level of protection under the Charter, as allowed by Article 52(3). However, under the horizontal clause of Article 52(1) of the Charter, infringements of the rights contained in the Charter can be justified if certain conditions are met, i.e. limitations must be provided by law and respect the essence of the Charter right concerned. Moreover, subject to the principle of proportionality, limitations must be necessary and meet the objectives of general interest recognised by Union law. The Advocate General therefore discusses whether, pursuant to Article 52(1), the joint imposition of criminal sanctions and administrative penalties of a criminal nature with respect to the same acts qualifies as a justified limitation of Article 50 of the Charter. The Advocate General comes to a negative conclusion in this regard. He briefly hints at the possibility that a duplication of punitive proceedings does not respect the essence of the *ne bis in idem* principle,[70] but, most importantly, sticks to the view that the limitation is unnecessary. Several Member States adopt a single-track (*una via*) enforcement system and thereby prevent limiting the *ne bis in idem* principle.[71] If a dual-track enforcement system were necessary, it would be necessary in all, not only in some, Member States.[72] This argument shapes the Advocate General's conclusion that dual-track punitive proceedings cannot be justified in the cases under consideration. The Advocate General thus advices the CJEU to maintain a high level of protection and depart from the recent case law of the ECtHR.

## 4. Judgments

In *Menci*, the Court first emphasises the importance of the adequate enforcement of Union law. After stressing the obligation of the Member States to counter fraud affecting the financial interests of the EU (including VAT fraud),[73] the CJEU confirms that the Charter is applicable in the present case and discusses the relationship with the EC(t)HR in general terms.

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70 *Menci*, Opinion AG (n 18), para. 82.

71 *Ibid*, paras 82-94; C-537/16, *Garlsson*, Opinion AG Campos Sánchez-Bordona, ECLI:EU:C:2017:668, paras 77-78; C-596/16 and C-597/16, *Di Puma*, Opinion AG Campos Sánchez-Bordona, ECLI:EU:C:2017:669, paras 80-85.

72 According to Simonato, this argument is probably the 'least persuading 'comparative' argument'. The reasoning employed by the Advocate General makes it very difficult to find a 'necessary limitation' of a Charter right, as this limitation should apparently be provided in every Member State. See Michele Simonato, 'Two Instruments but a Difficult Relationship? Some Upcoming Decisions of the CJEU on the *Ne Bis in Idem*' (*European Law Blog*, 15 November 2017), https://europeanlawblog.eu/tag/ne-bis-in-idem/ (last accessed 10 September 2018).

73 *Menci* (n 6), paras 18-20. In this regard the CJEU refers to its decision in C-42/17, *M.A.S. and M.B. (Taricco II)*, ECLI:EU:C:2017:936.

While Article 52(3) of the Charter provides that Charter rights with an equivalent in the ECHR are to have the same meaning and scope as the Convention rights, the ECHR does not (yet) constitute a legal instrument formally incorporated into EU law. Referring to its recent decisions in *J.N.*[74] and *K.*,[75] the Luxembourg Court emphasises the autonomy of the Charter by pointing out that Article 52(3) of the Charter intends to ensure consistency between the ECHR and the Charter 'without thereby affecting the autonomy of Union law and... that of the Court of Justice of the European Union'.[76] It follows that the preliminary question must be answered in light of the Charter, and, in particular, Article 50 thereof.

The CJEU establishes that both proceedings are of a criminal nature[77] and relate to the same offence (*idem*).[78] In line with the Advocate General, the CJEU concludes that the duplication of those proceedings amounts to a limitation of Article 50, which must be justified under Article 52(1) of the Charter.[79] The CJEU swiftly concludes that the duplication of punitive proceedings is provided by law and respects the essence of Article 50 of the Charter.[80] In assessing whether the other requirements of Article 52(1) are met, the CJEU develops criteria that largely mirror that of the ECtHR in *A and B v Norway*:

1. In determining whether the limitation of *ne bis in idem* meets an objective of general interest, the CJEU stresses the importance attached to the objective of combatting VAT fraud, which is served by legislation allowing for a duplication of punitive proceedings. Such a duplication 'may be justified where those proceedings and penalties pursue, for the purpose of achieving such an objective, complementary aims relating, as the case may be, to different aspects of the same unlawful conduct at issue';[81]
2. With regard to the necessity of the limitation, the national legislation allowing for a duplication of punitive proceedings must 'provide for clear and precise rules allowing individuals to predict which acts or omissions are liable to be subject to such a duplication of proceedings and penalties';[82]
3. Moreover, the notion of strict necessity 'implies the existence of rules ensuring coordination so as to reduce to what is strictly necessary the ad-

74 C-601/15 PPU, J.N., ECLI:EU:C:2016:84.
75 C-18/16 *K.*, ECLI:EU:C:2017:680.
76 *Menci* (n 6), paras 22-23.
77 Referring to *Bonda* (n 23); *Menci* (n 6), paras 26-33.
78 *Ibid*, paras 34-38.
79 *Ibid*, paras 39-40.
80 *Ibid*, paras 42-43.
81 *Ibid*, para. 44.
82 *Ibid*, para. 49.

ditional disadvantage associated with such a duplication for the persons concerned';[83]

4. Also, and line with the principle of proportionality of penalties laid down in Article 49(3) of the Charter, when a second penalty is imposed, it must be ensured that 'the severity of all of the penalties imposed does not exceed the seriousness of the offence identified.'[84]

In applying the first criterion to the facts of the case, the CJEU indicates that. in relation to VAT offences, it appears legitimate to adopt a system in which fixed administrative penalties are followed by more severe criminal penalties to deter and punish particularly serious violations. Regarding the second criterion, the Italian legislation at issue meets the requirement of foreseeability as it clearly and precisely lays down when a person can become subject of a duplication of proceedings. In the present case, criminal proceedings took place after the administrative proceedings were finished, with no overlap between the two. While one might expect this to be problematic in light of the third criterion, the CJEU deems it sufficient that under Italian law criminal proceedings may only be brought after completion of administrative proceedings if they concern particularly serious cases of VAT fraud. As Italian law prevents enforcement of a previously imposed administrative fine after a criminal conviction for the same offence, the fourth criterion is also satisfied. Bearing in mind the aforementioned conditions and their application in the present case, the CJEU explicitly adds that the level of protection afforded by Article 50 of the Charter does not fall below that of A4P7 ECHR as interpreted in *A and B v Norway*.[85] Though the CJEU eventually leaves it up to the referring District Court to decide on the excessiveness of the duplication of procedures, the Court's own application of the criteria indicate that the limitation of Article 50 of the Charter in *Menci* can be justified under Article 52 of the Charter.

The reasoning of the CJEU in *Garlsson* is similar to that in *Menci*.[86] However, in applying the criteria developed under Article 52(1) to the facts of *Garlsson*, the CJEU adopts a stricter stance. The CJEU states that once criminal proceedings have led to a conviction on counts of market abuse, the bringing of administrative proceedings relating to an administrative fine for the same acts exceeds what is strictly necessary, at least in as far as the criminal conviction led to effective, proportionate and dissuasive punishment.[87] It follows that if the violation

83 *Ibid*, para. 53.
84 *Ibid*, para. 55.
85 *Menci* (n 6), paras 62-63.
86 Subject to modification with regard to the legal regime applicable to market abuse and the facts of the case, the paras 21-56 in *Garlsson* (n 7) are similar to *Menci* (n 6).
87 *Garlsson* (n 7), paras 57 and 59.

of market abuse rules has been adequately dealt with in criminal proceedings, administrative proceedings no longer have a role to play. Moreover, the requirement of proportionate sanctioning is not met, as the Italian market abuse legislation ensuring the proportionality of sanctions for the same offence only applies to pecuniary sanctions and does not cover terms of imprisonment.[88] Article 50 of the Charter thus precludes the duplication of proceedings as it occurred in *Garlsson*.

The case of *DiPuma* differs from that of *Garlsson* as the criminal proceedings in the former case resulted in an acquittal rather than a conviction.[89] This led the referring Court to ask whether, in light of the obligation to ensure effective, proportionate and dissuasive sanctioning of the EU rules on market abuse, the subsequent bringing of proceedings for an administrative fine is authorised by Article 50 of the Charter. The CJEU maintains that, in those circumstances, subsequent administrative proceedings 'clearly exceed' what is strictly necessary. If a criminal court issues a judgment of acquittal, holding that there are no factors constituting an offence amounting to market abuse, the bringing of administrative proceedings 'seems to be devoid of any basis.'[90] Article 50 of the Charter precludes such a duplication of proceedings.

## 5. Analysis

### 5.1. The current state of the *ne bis in idem* principle in the EU

The CJEU, contrary to the Advocate General, largely follows the lines set out by the Strasbourg Court, but it does so on its own terms. As a consequence, there are differences between the approaches of both European courts which lead to a higher level of protection under the Charter in some circumstances, while in others the ECHR provides more protection.

#### 5.1.1. Similarities

There is a striking resemblance between the criteria adopted by the CJEU and ECtHR. Both courts: 1) deem it relevant that the proceedings pursue complementary aims, 2) desire the foreseeability of double proceedings, 3) require coordination between the two authorities involved in the proceedings,

88 *Ibid*, para. 60.

89 The case also differs from the other two cases because of the *res judicata* issues raised by it. This subject is dealt with separately by the CJEU (see *Di Puma* (n 8), paras 28-36) and will not be discussed as such in this article.

90 *Ibid*, paras 44-45.

and 4) insist on the proportionality of the combination of sanctions.[91] Based on these similarities, it can indeed be argued that, in *ne bis in idem* cases concerning a duplication of punitive administrative and criminal proceedings, the outcome before both European courts will likely be the same.[92]

#### 5.1.2. Differences

However, some differences between the approaches of the courts can be discerned. Since they might not be as evident as the similarities, they merit further discussion.

The first difference is of a conceptual nature and relates to the respective systems of rights limitation under the ECHR and the Charter. The ECtHR regards the permissibility of dual proceedings as a question regarding the *scope* of A4P7 ECHR. If two punitive proceedings are sufficiently connected in substance and time, they are to be regarded as one. As a consequence, the *bis*-requirement is not fulfilled, and the situation is not covered by the *ne bis in idem* principle of the ECHR. By contrast, the CJEU still considers two parallel or consecutive set of punitive proceedings to be two proceedings (*bis*), and not one. A duplication of punitive administrative and criminal proceedings for the same acts amounts to an infringement of the *ne bis in idem* principle of Article 50 Charter, which can be *justified* under Article 52(1) of the Charter. The approach of the ECtHR can be explained by the fact that A4P7 is of an apparently absolute nature. Its text does not allow for limitations and the Article has a non-derogable character, which is apparent from Article 4(3) of Protocol 7 to the ECHR – no derogation is allowed even in times of war or other public emergency.[93] By inserting a 'balancing test' in the determination of the scope of A4P7, the ECtHR sidestepped this absolute character in *A and B v Norway* to meet the demands of present-day, dual-track law enforcement. Given the fact that inroads on the protective scope of A4P7 ECHR can be made with such ease, the perceived absolute status of that Article can now be put in doubt. As Article 52(1) provides for a general limitation clause, the CJEU did not have to employ the artificial

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91 Compare the four criteria of both courts as listed in *infra* s. 1.3.2 and s. 4.

92 Cf Michiel Luchtman, 'The ECJ's recent case law on *ne bis in idem*: implications for law enforcement in a shared legal order', *Common Market Law Review* (2018), 1732.

93 See Explanatory report – ETS 117 – Human Rights (Protocol No. 7), para. 33; Hans-Jürgen Bartsch, 'Council of Europe *ne bis in idem*: the European perspective' (2002-2003), Revue Internationale de droit pénal 2002-3/4 1163, 1164; Luchtman 2011 (n 1) 7; *A and B v Norway*, Dissenting Opinion of Judge Pinto De Albuquerque (n 10), paras 10, 49, 61 and 76. On the category of ECHR rights of an 'apparently absolute' nature, see Steve Peers & Sacha Prechal, 'Article 52 - Scope and Interpretation of Rights and Principles', in Steve Peers, Tamara Hervey, Jeff Kenner & Angela Ward (eds.), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing, 2014), 1462.

reasoning of the ECtHR and could introduce a balancing test at a more logical place, i.e. in assessing the justification of the limitation of a fundamental right. Moreover, one might argue that, with this approach, the CJEU in fact introduced a higher standard than the ECtHR. The CJEU inherently qualifies double punitive proceedings for the same conduct as a limitation of Article 50, which always requires a justification under Article 52 of the Charter. The ECtHR, on the contrary, does not necessarily regard the duplication of punitive proceedings as a limitation of A4P7.[94] However, it remains to be seen whether this difference leads to a higher level of protection under the Charter *inpractice*. After all, both courts lay down largely similar criteria when deciding on the lawfulness of a duplication of administrative and criminal proceedings with respect to the same conduct.

A second difference relates to the order in which the punitive proceedings take place. In *A and B v Norway*, the ECtHR explicitly held that 'the order in which the proceedings are conducted cannot be decisive of whether dual or multiple processing is permissible under Article 4 of Protocol No. 7.'[95] The CJEU appears to disagree in *Garlsson* and *Di Puma*. While the Luxembourg Court allows administrative proceedings to take place prior to criminal proceedings,[96] proceedings cannot take place in reverse order, at least in cases of market manipulation. Bringing administrative proceedings after a criminal procedure has finished – irrespective of whether this procedure led to an acquittal or an effective, proportionate and dissuasive sanction – does not constitute a necessary limitation of Article 50 of the Charter. In this regard, the Charter provides more protection, as according to the ECtHR there is no problem in principle with subsequent administrative proceedings, provided that they are sufficiently connected to previous criminal proceedings. The CJEU's approach, in which regard must be had to the sequence of the proceedings, makes sense. Under the national laws of the EU Member States, the effect of a conviction or acquittal in criminal proceedings on subsequent administrative proceedings may differ from the impact of a final administrative decision on criminal proceedings.[97] Moreover, double-track enforcement systems mainly aim at ensuring a quick and fixed administrative response, possibly followed by criminal proceedings in serious cases. Allowing for administrative proceedings after the completion of criminal proceedings would undermine an important rationale of dual-track law enforcement.[98] This being said, it should be noted that the exact meaning

94 Luchtman 2018 (n 92), 1748.
95 *A and B v Norway* (n 9), para. 128, *infra* s. 1.3.2.
96 *Garlsson* (n 7), para. 47 and *Menci* (n 6), para. 45.
97 *A and B v Norway*, Dissenting Opinion of Judge Pinto De Albuquerque (n 10), para. 39.
98 Cf Floris Tan, *HvJ EU, C-524/15, C-537/16, C-596/16 & C-597/16*, [2018] European Human Rights Cases 2018/123 (case note), pt. 5.

of the judgments in *Garlsson* and *Di Puma* is still unclear and it remains to be seen whether the CJEU imposes an absolute bar to administrative proceedings after criminal proceedings are completed.[99]

In one important respect, the protection afforded by the CJEU may fall below the standards set by Strasbourg. Although the ECtHR emphasizes that dual proceedings have to be sufficiently connected in both substance *and time*,[100] the CJEU does not impose such a 'temporality requirement'. While this can be applauded in terms of legal certainty as the requirement is arbitrary,[101] necessitating a temporal connection does provide for additional protection against a duplication of administrative and criminal proceedings. This appears, for instance, from the judgment in *Jóhannesson v Iceland*.[102] In that case, the ECtHR concluded that, if the overall length of dual proceedings is nine years and the overlap between them only one year, there is no sufficient connection in time.[103] In the CJEU's defence, it can be argued that its insistence on the need for coordination between both procedures implies that the proceedings must also be connected in time. However, the fact that the CJEU did not regard the lack of overlap between the administrative and criminal proceedings in *Menci* problematic runs counter to this argument. The absence of a temporality requirement can lead to a situation in which the protection afforded by the Charter falls below the minimum standard set by the ECtHR.

In *A and B v Norway*, the ECtHR held that the individual proceedings must address 'different aspects of the social misconduct involved.'[104] In applying this criterion to the facts of the case, the ECtHR deems it important that the administrative fines were imposed without regard to guilt (strict liability), whereas the criminal conviction concerned an additional *mens rea* element.[105] The sub-

99 Luchtman 2018 (n 92), 1736, for instance, wonders what the exact rationale of this position is and whether the CJEU's bar on subsequent administrative proceedings will also apply if the criminal procedure takes the shape of e.g. an out-of-court settlement. In addition, one might doubt whether the reasoning in *Garlsson* and *Di Puma* also applies outside the area of market abuse, what happens if an earlier criminal sentence is not regarded as effective, proportionate and dissuasive sanction and what if an acquittal in an earlier criminal case is based on points of law, rather than fact.

100 *A and B v Norway* (n 9), paras 130 and 134.

101 *A and B v Norway*, Dissenting Opinion of Judge Pinto De Albuquerque (n 10), para. 46 and *Menci*, Opinion AG, para. 56 who speaks of 'the almost insurmountable obstacles which national courts must address in order to ascertain a priori (n 18) when that temporal connection exists.'

102 ECtHR 18 May, *Jóhannesson v Iceland*, Appl. No. 22007/11, ECLI:CE:ECHR:2017:0518JUD002200711.

103 *Ibid*, paras 54-55.

104 *A and B v Norway* (n 9), paras 112 and 132.

105 That of 'culpable fraud'. *Ibid*, para. 144.

jective element thus is a distinct aspect of the social misconduct involved.[106] The CJEU seems less concerned with whether the procedures focus on the exact same conduct. The different proceedings can relate to different aspects of the conduct 'as the case may be', which is for the referring court to decide.[107] Moreover, the 'different aspects' requirement is missing from the list of requirements laid down in the CJEU's final answer to the preliminary questions.[108] In light of the importance attached by the CJEU to combatting VAT-fraud and market abuse, it can be explained why the exact same conduct, without regard to guilt or intent, can become subject of two proceedings and be punished twice.[109] Be that as it may, the ECtHR's 'different aspects' requirement raises an additional stumbling block for the state in doubling the exercise of its *ius puniendi*. As the CJEU does not clearly and convincingly lay down this additional criterion, the ECHR provides more protection in this respect.

These distinctions are of special relevance for litigants in Member States which have ratified Protocol 7 to the ECHR. When subjected to double punitive proceedings in intrastate situations within the scope of Union law, they can rely either on the ECHR or the Charter depending on the circumstances of the case at hand. The Charter provides more protection in cases where criminal proceedings are followed by administrative proceedings, whereas in other cases – for instance when there is a clear disconnection in time between the two proceedings – the ECHR contains the higher standard. The latter situation, as such, runs counter to Article 52(3) of the Charter.[110] Consequently, if new preliminary questions on the duplication of punitive proceedings are referred to the CJEU, the differences that might lead to a lower level of protection under Article 50 of the Charter require clarification.

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106 This reasoning was criticized by Judge De Pinto Albuquerque. The Dissenting Judge regards this as an inherently substantive issue, dealing with the definition of *idem*, rather than relating to the *bis* element. According to De Pinto the majority in *A and B v Norway* introduces elements of an *idem crimen* test through the backdoor of the *bis*-element. See *A and B v Norway*, Dissenting Opinion of Judge Pinto De Albuquerque (n 10), para. 56 and Fanny de Graaf, *Meervoudige aansprakelijkstelling. Een analyse van rechtsfiguren die aansprakelijkstelling voor meer dan één strafbaar feit normeren* (Boom Juridisch, 2018), 275-276.

107 *Menci* (n 6), para. 44. See also *Menci* (n 6) para. 45 and *Garlsson* (n 7), para. 47 ('whether intentional or not').

108 *Menci* (n 6), para. 63.

109 The importance of the effectiveness of Union law in these areas is emphasised in *Menci* (n 6), paras 18-20 and 44 and *Garlsson* (n 7), para. 22.

110 See the Explanations relating to the Charter of Fundamental Rights, *OJ* 2007/C/303/33, Art. 52: 'In any event, the level of protection afforded by the Charter may never be lower than that guaranteed by the ECHR'; Peers & Prechal 2014 (n 93), 1496.

### 5.1.3. Evaluating the substantial alignment between both European Courts

The situation sketched above is one of predominant convergence, despite the observed differences. Both the CJEU and ECtHR do not impose absolute restrictions on the duplication of punitive proceedings for the same conduct, and the criteria established by both courts in this regard are largely similar. This raises the question of how the *ne bis in idem* principle in the EU legal order in its present state, i.e. after the CJEU's recent judgments in the Italian cases, is to be evaluated. In this regard, an important preliminary point needs to be made. The recent CJEU and ECtHR case law does not affect the possibility for states to organise their law enforcement in a way that provides 'maximum' *ne bis in idem* protection, that is, by responding to prohibited conduct only once in a single-track procedure which bars further proceedings. As recognised by the ECtHR, this is the surest manner of complying with the principle.[111] The discussion below focuses on the permissive attitude of both European courts towards states with systems in which this high level of protection is not pursued.

For a long time, the development of the *ne bis in idem* principle by the two European courts moved in an upward spiral.[112] *A and B v Norway* broke that spiral,[113] and the CJEU followed suit. The *ne bis in idem* principle no longer primarily serves to prevent the duplication of proceedings, but instead merely mitigates the disadvantages resulting from that duplication.[114] *A and B v Norway* and *Menci* signal the move towards a less protective version of the principle based on the *Anrechnungsprinzip*. From these cases, it follows that the same person can be disturbed twice for the same conduct, essentially because this disturbance occurs in two proceedings of a different nature. This indeed maximises the 'possible repressive effect' in response to the same factual conduct.[115] In addition, there are some other points of criticism that can be raised. A 'credit system' does not protect the interest of the *res judicata* of final judgments because it does not uphold the finality of a first conviction and creates a risk of diverging verdicts concerning the same facts. Moreover, a system based on the *Anrechnungsprinzip* 'to a much lesser degree serves the interest of legal certainty.'[116] This clearly applies to the criteria laid down in *A and B v Norway*. By

111 *A and B v Norway* (n 9), para. 130; *infra* note 124 below.
112 *Infra* s. 1.3.1.
113 *Infra* s. 1.3.2.
114 Jan Crijns & Michiel van Emmerik, 'Samenloop tussen strafrecht en punitief bestuursrecht: Zoeken naar evenredige bestraffing', *Nederlands Juristenblad* 1094 (2018), 1103.
115 *A and B v Norway*, Dissenting Opinion of Judge Pinto De Albuquerque (n 10), para. 79.
116 Van Bockel 2010 (n 2), 36-37.

incorporating these criteria into EU law in *Menci*, the CJEU ignored a firm warning by its Advocate General, who stated that alignment with the ECtHR would 'add significant uncertainty and complexity to the right of individuals not to be tried or punished twice for the same acts.'[117] For instance, it remains unclear what the requirement of foreseeability entails and whether it provides additional protection,[118] how courts are to decide on the issue of the proportionality of sanctions (and what is to be done when in the proceeding finishing first no sanction is imposed)[119] and how much weight both courts attach to each of the criteria in their multi-pronged *ne bis in idem* assessment.[120] In *Garlsson* and *Di Puma*, the CJEU appears to put a hold on the move towards a less protective *ne bis in idem* principle where criminal proceedings precede administrative proceedings. After all, in those cases, the CJEU has held – in essence – that administrative proceedings may no longer be brought once a final judgment in criminal proceedings has been reached. In those cases, *ne bis in idem* entails a prohibition on a second administrative 'prosecution' (*ne bis vexari*). While this is to be applauded in light of the arguments expressed above,[121] the exact meaning of these judgments is yet unclear, and it is most certainly possible that the CJEU still allows for criminal punishment followed by administrative fines in particular circumstances.[122] In addition, little seems to be gained by lowering the level of protection afforded by the *ne bis in idem* principle; a high level of coordination between law enforcement authorities will be required

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117 *Menci*, Opinion AG (n 18), paras 69-73 (*infra* note 69) and Fabio Giuffrida, 'Taricco principles beyond Taricco: Some thoughts on three pending cases (Scialdone, Kolev & Menci)', *New Journal of European Criminal Law* 31 (2018), 35-37.

118 Art. 7 ECHR already requires a certain degree of foreseeability and in *A and B v Norway* the ECtHR does not seem to adhere to a strict assessment of this requirement. See *A and B v Norway*, Dissenting Opinion of Judge Pinto De Albuquerque (n 10), para. 57. Nor does the CJEU. In *Menci* (n 6), paras 49-51 and *Garlsson* (n 7), paras 52-53 the Court merely states that Italian law provides for the conditions in accordance with which a duplication of proceedings can take place and leaves verification of this point to the national court. However, a limitation of a Charter right must also be 'provided for by law' and the 'law' concerned must have a certain quality, which includes a guarantee of foreseeability. See Peers & Prechal 2014 (n 93), 1473. One might therefore wonder whether the foreseeability requirement – as introduced by both the ECtHR and CJEU - has any additional value.

119 See *A and B v Norway*, Dissenting Opinion of Judge Pinto De Albuquerque (n 10), para. 65 on clearer alternatives for the abstract proportionality requirement and paras 68 and 72 on problems with an offsetting mechanism if there is nothing to offset.

120 For instance, while the requirement on coordination between the relevant authorities was considered an *obiter dictum* by Judge De Pinto Albuquerque in his Dissenting Opinion (n 10), para. 61, this criterion turned out to be decisive in the case of *Jóhannesson v Iceland* (n 102), paras 53-55. The CJEU, to the contrary, does not scrutinise this requirement strictly, as the mere existence of rules ensuring coordination appears to suffice. See *Menci* (n 6), para. 53 and Luchtman 2018 (n 92), 1732-1733.

121 Respectively the arguments against a credit system in this section and the criticism of *A and B v Norway* in *infra* s. 1.3.2.

122 *Infra* note 99.

under the case law of both European courts.[123] One might wonder why the ECtHR and CJEU do not require this coordination to entail that a single-track procedure is provided for (*ab initio*).[124] The level of protection afforded by the *ne bis in idem* principle has thus been lowered, leading to a large degree of legal uncertainty whilst still putting a significant strain on how law enforcement authorities go about combining punitive procedures.

On a positive note, the decisions in *Menci*, *Garlsson* and *Di Puma* highlight that the CJEU again engaged in a *ne bis in idem* dialogue with the ECtHR, thereby preventing conflicting approaches.[125] This convergence does not come as a surprise. The CJEU is not solely a fundamental rights court,[126] but positions itself as the 'Supreme Court of the Union' with tasks extending beyond the protection of fundamental rights.[127] One of those tasks is to safeguard the effectiveness of Union law, the importance of which has been repeatedly emphasised.[128] Since the *ne bis in idem* principle limits the duplication of proceedings and the imposition of sanctions, it hampers the effective enforcement of Union law.[129] At the same time, the CJEU is keen on avoiding open conflict with the ECtHR.[130] By following the ECtHR's approach in *A and B v Norway*, the CJEU achieved those two objectives; it avoided divergence and, at the same time, preserved the effectiveness of Union law.[131] Moreover, while criticism can be

123 Cf Luchtman 2018 (n 92), 1728 with regard to the position of the ECtHR in *A and B v Norway* (n 9) and *Jóhannesson v Iceland* (n 102). Although the CJEU appears to take a less strict stance (*infra* note 120), Art. 52(3) might require the Court to raise its standards in this regard, as the level of protection afforded by the Charter may not be lower than that of the ECHR.

124 Especially in light of the fact that, as noted above (*infra* note 111), the ECtHR itself recognizes that 'the surest manner of ensuring compliance with Art. 4 of Protocol No. 7 is the provision, at some appropriate stage, of a single-track procedure enabling the parallel strands of legal regulation of the activity concerned to be brought together, so that the different needs of society in responding to the offence can be addressed within the framework of a single process'. See *A and B v Norway* (n 9), para. 130. See also *Menci*, Opinion AG (n 18), para. 70.

125 On the positive effects of convergence through dialogue, see Rob Widdershoven, 'The art of dialogue', *Review of European Administrative Law* 1 (2017), 2.

126 See e.g. Steven Greer, Janneke Gerards & Rose Slowe, *Human Rights in the Council of Europe and the European Union. Achievements, Trends and Challenges* (CUP, 2018), 294-295.

127 A statement made by the President of the CJEU, as referred to by Leonard Besselink, 'Acceding to the ECHR notwithstanding the Court of Justice Opinion 2/13' (*VerfBlog*, 23 December 2014), https://verfassungsblog.de/acceding-echr-notwithstanding-court-justice-opinion-213-2/, (last accessed 10 September 2018).

128 See C-399/11, *Melloni*, ECLI:EU:C:2013:107, para. 60 and, with regard to the effectiveness of the rules on VAT and market abuse in the cases under discussion, *infra* note 109.

129 See Gulliksson 2015 (n 48), 157-158.

130 Avoiding divergence with the ECtHR is one of the main reasons for the examination and citation of ECtHR case law by the CJEU. See Jasper Krommendijk, 'The use of ECtHR case law by the Court of Justice after Lisbon. The view of Luxembourg Insiders', *Maastricht Journal of European and Comparative Law* 812 (2015), 820.

131 In this respect the decisions differ from e.g. C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru*, ECLI:EU:C:2016:198 paras 86-90 (discussed below in *infra* s. 5.2), as in that case the preservation of peace between both courts had possible detrimental effects on the effectiveness of EU law.

voiced against the current state of *ne bis in idem* in the EU, the CJEU is able to move forward on a case by case basis. The criteria developed under Article 52(1) of the Charter allow the CJEU to weigh effectiveness-based considerations against the importance of protecting Article 50 of the Charter, depending on the circumstances of the case at hand, and possibly fostering higher standards of protection under the Charter. In this regard, *Garlsson* and *Di Puma* are cases in point. With its judgments in *Menci*, *Garlsson* and *Di Puma*, the CJEU found a way to balance the interests of effectiveness, fundamental rights protection and an amicable relationship with the Strasbourg Court.

### 5.2. The cases framed in the broader judicial dialogue between the CJEU and ECtHR

Given its multiple sources in the European legal order and the dynamic context of law enforcement in which it operates, the interpretation of the *ne bis in idem* principle by the ECtHR and CJEU can serve as a 'litmus test' shining a light on wider developments in EU fundamental rights protection.[132] Against this background – and primarily from the perspective of the CJEU – this section positions the recent steps in the *ne bis in idem* dialogue in the broader dialogue between the CJEU and ECtHR, that is, the dialogue between both courts on other subjects than the *ne bis in idem* principle.

The so-called 'homogeneity clause'[133] enshrined in Article 52(3) of the Charter provides the interpretative bridge between the CJEU and ECtHR.[134] Under this article, the meaning and scope of Charter rights with an equivalent in the ECHR shall be the same as the rights contained in the latter document, although the Charter might provide for more protection. It might thus be expected that the CJEU has a keen interest in citing the case law of the Strasbourg Court. Indeed, for a long time, the cross-fertilisation and mutual influence between the courts was a hallmark of the relationship between the two courts.[135] However, this

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132 Bas van Bockel, 'Introduction and Set-up of the Study' in Bas van Bockel (ed.), *Ne Bis in Idem in EU Law* (CUP, 2016), 1.

133 A term introduced by Advocate General Kokott in her Opinion in Case C-109/10 P, *Solvay v Commission*, ECLI:EU:C:2011:686, paras 252 and 257.

134 See Dean Spielmann, 'The Judicial Dialogue between the European Court of Justice and the European Court of Human Rights. Or how to remain good neighbours after the Opinion 2/13' (Brussels, 27 March 2017 FRAME conference) providing a succinct overview of the development of the relations between the CJEU and ECtHR. See also, specifically with regard to the *ne bis in idem* principle, Xavier and Groussot 2016 (n 28).

135 Krommendijk, 'The CJEU's reliance on the case law of by the ECtHR since 2015. Opinion 2/13 as a game changer?' in Emmanuelle Bribosia & Isabelle Rorive (eds.), *A Global And Multilayered Approach Of Human Rights. Promises and Challenges* (Intersentia, 2018), 2, http://repository.ubn.ru.nl/bitstream/handle/2066/177477/177477.pdf?sequence=1 (last accessed 10 September 2018).

cordial relationship has come under strain,[136] especially since the CJEU handed down Opinion 2/13 through which it put a hold on the EU's accession to the ECHR by declaring the agreement on the accession to the ECHR to be incompatible with the autonomy of EU law.[137]

Following Opinion 2/13, roughly two strands of cases can be discerned with regard to the CJEU's treatment of ECtHR case law.[138] The first branch concerns cases of 'Charter centrism' in which the ECHR is not referred to at all or only cited as 'afterthought'. For instance, in *J.N.* and *K.*, the CJEU held that the ECHR is not a formal legal instrument of Union law and that the secondary EU law concerned 'must' be reviewed 'solely' in light of the Charter. In the final paragraphs of the latter two judgments, the CJEU merely checks whether the outcome it arrived at on the basis of the Charter is compatible with the ECHR.[139] The second line consists of cases in which a constructive dialogue has taken place. In those cases, the CJEU relies extensively on ECtHR case law to prevent divergence between the two courts. *Aranyosi* is a case in point. Article 3 ECHR and the case law of the ECtHR play a prominent role in this judgment, in which the CJEU eventually concludes that the execution of a European Arrest Warrant must be postponed if a real risk of inhuman or degrading treatment exists because of the detention conditions in the issuing Member State.[140]

The question remains how *Menci*, *Garlsson* and *Di Puma* fit in this bifurcated picture of judicial dialogue. It is important to note that there are differences between the judgments in terms of their explicit references to the ECHR. In *Menci* and *Garlsson*, the CJEU, citing *Åkerberg Fransson,* emphasises that the Charter is not a formal instrument of Union law and, referring to *J.N.* and *K.*, adds that Article 52(3) intends to ensure consistency between the Charter and the ECHR without thereby adversely affecting the autonomy of EU law.[141] Therefore, in line with the judgment in *Orsi & Baldetti,* the Charter, and in

136 Greer, Gerards & Slowe 2018 (n 126), 325-326.
137 *Opinion* 2/13, ECLI:EU:C:2014:2454.
138 For the broader typology on which this distinction is based, see Krommendijk 2018 (n 135), Lize Glas & Jasper Krommendijk, 'From Opinion 2/13 to Avotiņš. Recent Developments in the Relationship between the Luxembourg and Strasbourg Court' [2017] Human Rights Law Review 567, 572-576. This is not to say that these lines of cases first emerged after the Opinion. For a post-Charter, but pre-Opinion 2/13 overview, see Sionaidh Douglass-Scott, 'The relationship between the EU and the ECHR Five Years On From the Treaty of Lisbon' Legal Research Paper Series, January 2015, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2533207 (last accessed 10 September 2018).
139 *J.N.* (n 74), paras 45-46 and 77-81; K. (n 75), paras 32 and 50-52.
140 *Aranyosi* (n 131), paras 86-90.
141 *Infra* note 76; *Garlsson* (n 7), para. 24.

particular Article 50 thereof, is the standard of review.[142] These considerations are absent in *Di Puma*, which can be explained by the fact that the prime yardstick in that case is the principle of *res judicata* and, in the reasoning of the CJEU, Article 50 of the Charter only confirms the outcome reached based on that self-standing principle.[143] Only in *Menci* does the CJEU explicitly refer to *A and B v Norway*, albeit summarily. This seminal ECtHR judgment functions merely as an afterthought, as the CJEU assures that the level of protection afforded by Article 50 of the Charter as interpreted in *Menci* does not fall below that of the ECHR.[144] The reason for the absence of this assurance in *Garlsson* and *Di Puma* might be that the CJEU only allowed for the duplication of punitive proceedings in *Menci*. In *Garlsson* and *Di Puma*, the CJEU provides more protection as it bars the bringing of administrative proceedings after a criminal trial has finished. *Menci* is thus the only case in which the Charter might provide less protection than the ECHR.[145] When looking at the explicit references to the ECHR in the Italian cases, it appears that the CJEU 'flies solo' by emphasising the central role of the Charter and referring to *A and B v Norway* as an afterthought, or not at all.[146] However, as discussed above, *A and B v Norway* permeates the substantive reasoning of the CJEU.[147] This also follows from an interesting procedural fact concerning the case of *Menci*. After the ECtHR issued the judgment in *A and B v Norway*, the CJEU reassigned *Menci* to the Grand Chamber and reopened the oral procedure in that case, which signifies that the CJEU was willing to take into account the case law of the ECtHR on this matter.[148] A more in-depth look at the cases thus leads to the conclusion that a constructive dialogue does take place, leading to convergence. *Menci*, *Garlsson* and *Di Puma* appear to combine the strands of cases identified above, by formally preserving the autonomy of the Charter while achieving convergence at a substantive level.[149] This contributes to the CJEU's 'mixed bag' of dialogue judgments. Although fitting the CJEU's increasingly formal Charter centrism,[150] this discrepancy is peculiar. By pretending to arrive at its conclusions

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142 However, the CJEU uses a slightly different wording than it does in *Orsi and Baldetti* (n 33), para. 15: Art. 50 is mentioned in particular, and in the phrase 'the examination of the question referred must be undertaken in light of the Charter', the word 'solely' is omitted; *Garlsson* (n 7), para. 26.

143 *Infra* note 89 and *Di Puma* (n 8), para. 37.

144 *Infra* note 85.

145 Cf Tan 2018 (n 98), pt. 6 and the discussion of the absence of the temporality-requirement under the Charter in *infra* s. 5.1.2. In this respect the brief 'Strasbourg-check' in *Menci* is unconvincing as in some respects the Charter does provide less protection.

146 There are many possible reasons for this 'Charter centrist' reasoning. Krommendijk 2015 (n 130), 823-835 for qualitative research into this matter.

147 *Infra* s. 5.1.1.

148 Order of the Court (Grand Chamber) of 25 January 2017, ECLI:EU:C:2017:64.

149 In this regard the judgments resemble *Åkerberg Fransson* (n 11).

150 Glas & Krommendijk 2017 (n 138), 586 and Krommendijk 2018 (n 135), 20.

independently, the CJEU seems to overstate its autonomous position *vis-à-vis* the ECtHR.[151]

Nevertheless, the substantive convergence reached through the judgments expresses a continuing insistence on dialogue and reliance on ECtHR case law. This is in line with landmark judgments of the Strasbourg Court signalling considerable respect and comity towards the CJEU.[152] A CJEU-friendly approach can also be found in more recent *ne bis in idem* case law. In *Krombach v France*, exactly one month before the CJEU issued its judgments in the Italian cases, the ECtHR was confronted with an application concerning the transnational effect of A4P7.[153] Consistent with the text of the article and its own case law, the ECtHR denied this extension of the territorial scope of A4P7 ECHR. Importantly, the Court further considers that the fact that Article 54 CISA and Article 50 of the Charter do apply to transnational situations does not affect the scope of A4P7. The Court also explicitly states that it has no jurisdiction to apply EU law or assess alleged violations of it, except in cases where these violations might infringe the ECHR.[154] In deciding the case this way, the Court behaves itself 'in the most diplomatic and respectful way possible' towards the Luxembourg Court.[155]

### 5.3. The future of the *ne bis in idem* dialogue between the CJEU and ECtHR

Regarding the future of the *ne bis in idem* dialogue in Europe, a distinction must be made between 'internal' (intra-state) and cross-border (transnational) applications of the principle.[156] The cases that are the object of this analysis all concerned *ne bis in idem* situations within one Member State. As made clear once again by the ECtHR in *Krombach*, A4P7 ECHR is limited to those internal situations. Article 50 of the Charter, however, also extends to

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151 Cf the criticism directed at *Åkerberg Fransson* by Groussot & Xavier (n 28), 86 and Bas van Bockel, 'Conclusions. The Changing Geometry of Fundamental Rights Protection in the EU' in Bas van Bockel (ed.), *Ne Bis in Idem in EU Law* (CUP, 2016), 239.

152 ECtHR 30 June 2005, *Bosphorus v Ireland*, Appl. No. 45036/98, ECLI:CE:ECHR:2005:0630JUD004503698 and ECtHR 23 May, *Avotiņš v Latvia*, Appl. No. 17502/07, ECLI:CE:ECHR:2016:0523JUD001750207.

153 ECtHR 20 February 2018, *Krombach v France*, ECLI:CE:ECHR:2018:0220DEC006752114.

154 *Ibid*, paras 35-36 and 39.

155 Bas van Bockel, 'Krombach returns to Strasbourg' (*ECHR Blog*, 16 May 2018), http://echrb-log.blogspot.com/2018/05/guest-blog-commentary-on-ne-bis-in-idem.html (last accessed 10 September 2018).

156 *Ne bis in idem* situations can also have other territorial dimensions. For an overview see Wattel 2016 (n 24), 167-171.

transnational cases, that is cases of double proceedings in multiple Member States.[157]

In the absence of yet another *revirement*, the future of the dialogue between both courts in intra-state cases will focus on clarifying the criteria developed by the CJEU and ECtHR. Due to their yet unclear meaning, some of these conditions need further interpretation,[158] as do the elements that lead to diverging levels of protection under the Charter and ECHR, especially where the Charter appears to provide less protection.[159] The intricate scheme developed by the courts to decide on questions of *ne bis in idem* in relation to dual administrative and criminal proceedings will require both courts to keep a particularly close eye on each other's interpretations of the separate requirements. Besides a dialogue through case law, interaction between the courts at informal meetings on this issue can be helpful in determining the future direction of the principle in a proactive way.[160] Mutual influence and cross-fertilisation between the CJEU and ECtHR are necessary in this regard as they may lead to increasing uniformity and coherence in the approach of both courts. This will provide useful guidance to domestic courts when dealing with issues of *ne bis in idem*, which is particularly necessary in intra-state cases within the scope of Union law since these cases fall within the territorial scope of both A4P7 ECHR and the Charter.[161] In any case, based on *Menci, Garlsson* and *Di Puma*, more substantive convergence is to be expected.

As A4P7 ECHR is limited to situations within one state, the ECtHR does not have jurisdiction over a transnational *ne bis in idem* principle. The homogeneity clause of Article 52(3) only applies in as far as the rights in the ECHR and Charter correspond, and Article 50 of the Charter and A4P7 ECHR only correspond in intra-state situations. Therefore, the *ne bis in idem* dialogue between the CJEU and the ECtHR will not extend explicitly to transnational cases.

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157 The transnational effect of Art. 50 of the Charter appears from its text and is confirmed in the Explanations relating to the Charter of Fundamental Rights, *OJ* 2007, 2007/C 303/31, Art. 50.

158 *Infra* notes 118-120.

159 *Infra* s. 5.1.2.

160 On this latter type of 'informal' dialogue (*infra* s. 1.2), see press release no. 75 issued by the Registrar of the ECtHR on 27 January 2011, 'Joint Communication from Presidents Costa and Skouris', https://www.echr.coe.int/Documents/UE_Communication_Costa_Skouris_ENG.pdf (last accessed 10 September 2018); Press release by Court of Justice of the European Union of 7 March 2016, 'A delegation from the European Court of Human Rights visits the Court of Justice of the European Union', Luxembourg 7 March 2016', https://curia.europa.eu/jcms/upload/docs/application/pdf/2016-03/cp160025en.pdf (last accessed 10 September 2018); see also e.g. F.G. Jacobs, 'Judicial dialogue and the Cross-Fertilization of Legal Systems: The European Court of Justice', *Texas International Law Journal* (2003), 552; Spielmann 2017 (n 134) and Glas and Krommendijk 2018 (n 138), 570.

161 Provided, of course, that the Member State concerned has ratified A4P7 ECHR.

Through *A and B v Norway*, however, the ECtHR might have a lasting influence on the development of the principle in cross-border situations. In *Menci, Garlsson* and *Di Puma*, the CJEU tied its interpretation of Article 50 of the Charter to the ECtHR's interpretation of A4P7 ECHR. It is unlikely that the CJEU will adhere to a fundamentally different approach in transnational cases. As noted by Luchtman, the CJEU seeks to develop a common European standard.[162] Differentiating between transnational and intra-state situations is hard to reconcile with this ambition.[163] It remains to be seen how the ECtHR's 'solution' developed in *A and B v Norway*, as incorporated into EU law in *Menci, Garlsson* and *Di Puma*, works out in cross-border situations. Several questions can be raised in this regard. How, for instance, can foreseeability of the duplication of proceedings be guaranteed if administrative and criminal proceedings can be commenced in multiple Member States? How is the duplication of the collection and assessment of evidence to be avoided if several law enforcement authorities in various Member States open investigations? And how are courts to take into account previous penalties by foreign authorities, bearing in mind the large number of different sanction systems in the Member States?[164] In brief, criteria that are already troublesome when applied within one Member State acquire an additional dimension of practical and legal arduousness when applied in a transnational situation. The foregoing highlights that if the CJEU remains keen to prevent divergence with the ECtHR in intra-state cases *and* will not adopt a different standard in transnational cases, the ongoing dialogue with the ECtHR in the former type of cases will influence the application of Article 50 of the Charter in the latter type of cases. This would extend the ECtHR's influence to cases beyond the territorial scope of its own *ne bis in idem* principle as laid down in A4P7 ECHR.

## 6. Conclusion

The past of the *ne bis in idem* dialogue between the CJEU and ECtHR is characterised by a high level of protection and significant convergence. The ECtHR's judgment in *A and B v Norway*, in which the Strasbourg Court adopted a lenient position towards the combination of punitive administrative and criminal proceedings, constituted a possible turning point in the dialogue. The judgment lowered the level of protection under the ECHR and led to signi-

162 Luchtman 2018 (n 92), 1744.

163 Van Kempen & Bemelmans 2018 (n 19), 261 note that '[it] is hard to imagine that the ECJ would create a level of protection for transnational situations that differs from the level for national situations.'

164 Crijns & Van Emmerik 2018 (n 114), 1101-1102 point out that ensuring the proportionality of multiple sanctions might already be hard to realise within a single Member State.

ficant legal uncertainty. In *Menci, Garlsson* and *Di Puma* the CJEU largely followed the course of the ECtHR. Despite the differences between the current approaches of the CJEU and ECtHR, the present of the *ne bis in idem* dialogue is again dominated by the alignment between the two European courts. The European *ne bis in idem* principle still serves as an example of convergence. Assuring continuing convergence will not be an easy task, given the intricacies surrounding the *bis*-criteria developed in *A and B v Norway* as adopted by the CJEU in *Menci, Garlsson* and *Di Puma* under the flag of Article 52(1) of the Charter. An ongoing *ne bis in idem* dialogue will be necessary, both to avoid conflict in future cases and to further the development of the European *ne bis in idem* principle.