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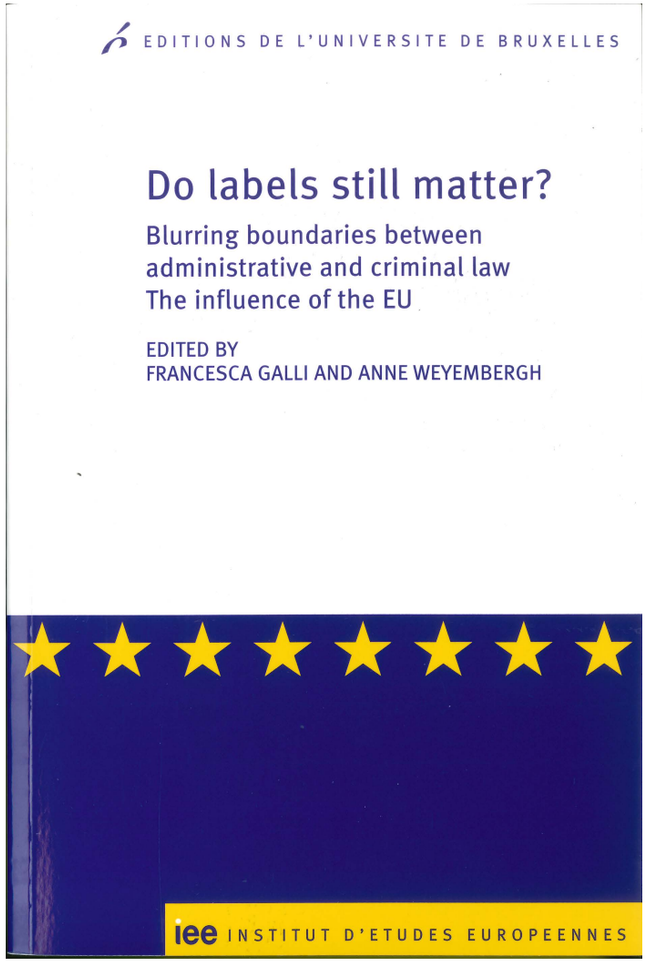

Criminal sanctions and administrative penalties: the *quid* of the *ne bis in idem* principle and some original sins

Christoffer WONG

1. Introduction

It is quite clear that both criminal sanctions and equivalent administrative penalties are subject to protection against *ne bis in idem*. This protection is available in national legal systems, through different international human rights instruments as well as under EU law. The content of this protection differs, however, depending on which instrument is being considered. In this paper, the *ne bis in idem* principle as expressed in different sources is examined, but mainly when this principle is applied in the context of criminal proceedings. The paper begins, however, with a reminder of the concept of *res judicata* and its relationship with the principle of *ne bis in idem*. The discussion then moves on to the development of the principle in the case law of the European Court of Human Rights. In this context, a considerable amount of space is given to the early development of this case law, including the adoption of the so-called *Engel* criteria for the purpose of *ne bis in idem*. The reason for dwelling on this early development of case law is that the positions taken at this early stage actually set the path for the subsequent development of the case law, and the present author argues that the Court has not given sufficient reasons for taking some of these positions. After examining the jurisprudence of the Strasbourg Court, a brief account is given on the development of the same principle under various provisions of EU law. This account is not meant to be comprehensive; it aims rather to highlight the approach of the Court of Justice of the European Union based on the special consideration of EU law. Before the conclusion of this paper with some comments on the coherence of the European legal order, the application of the *ne bis in idem* in areas outside the context of criminal proceedings is touched upon briefly.

2. *Ne bis in idem* as a consequence of a final judgment

When all legal remedies against a judgment [1] have been exhausted – typically when it is no longer possible to take the case before an appellate instance – the judgment acquires final force (finality) and is described as having the status of *res judicata* [2]. This judgment, as has been described rather succinctly, "disposes once and for all of the fundamental matters decided, so that (...) they cannot be re-litigated between persons bound by the judgment" [3]. The epithet "bound by the judgment" articulates two important aspects of *res judicata*: (1) it is now the judgment – a judicial fact – that is to hold between the litigating parties, whether this is a correct reflection – or not – of reality [4], but (2) the judgment has *res judicata* effect only insofar as a person is bound by it [5]. These aspects can be said to constitute the "positive" element of *res judicata*.

As a corollary to the "positive" element, *res judicata* can also be said to have the "negative" effect of *barring* re-litigation. In criminal proceedings, this preclusive effect of a final judgment is often referred to under the heading "*ne bis in idem*"; in civil proceedings, a final judgment in a case is said, in English law, to constitute "etsoppel of *res judicata*" [6]. As mentioned above, the negative force of a final judgment affects only those bound by the judgment. Thus, a final judgment in a criminal case under public prosecution – *i.e.* a case between on the one side the accused, and on the other side the State, the prosecutor or some other competent public authority – will not, in many if not most legal systems, preclude a civil law suit, *e.g.* for restitution, compensation or damages in tort. This is not only the case when the final judgment

[1] See the joined cases referred to in note 99 below for examples of other decisions, whether judicial or otherwise, having equivalent effects as court judgments.

[2] *Cf.* the following description of "final force" in the Explanatory Report to Council of Europe's Convention (ETS no. 70, 1970) on the International Validity of Criminal Judgments: "A decision is final if, according to the traditional expression, it has acquired the force of *res judicata.* This is the case when it is irrevocable, that is to say when no further ordinary remedies are available or when the parties have exhausted such remedies or have permitted the time-limit to expire without availing themselves of them" (Commentary on Article 1).

[3] K.R. HANDLEY and G.S. BOWER, *Res Judicata*, 4th ed., London, LexisNexis, 2009, p. 1. Although stated in a treatise on (primarily) English law, this description is clearly applicable to other legal systems, including the continental civil law systems. There is no need either *ab initio* to distinguish, in this context, between different subject matters (civil, administrative, criminal law etc.) when discussing the question of *res judicata*.

[4] A party is entitled to act on this judicial fact, *e.g.* by seeking enforcement of the judgment in a civil case. In a criminal case, the judgment convicting the defendant of a crime is the basis for enforcement measures such as the imposition of a fine or imprisonment. The judicial fact that substitutes the state of affair previously in dispute is a "positive" aspect of *res judicata*.

[5] Generally speaking, a civil judgment *in personam* binds only the parties while a judgment *in rem* is binding on all who has to do with the object (the *res*) of the litigation – see HANDLEY & SPENCER BOWER (note 3 above), chapters 9 and 10. It is more difficult to characterise the binding effects of a criminal judgment. Whereas it is (with few exceptions) only the convicted who is "bound" to undergo the punishment imposed, a criminal sentence may also entail obligations to act by parties not involved in the criminal proceeding; in this sense, third parties may also be said to be "bound" by the judgment.

[6] See K.R. HANDLEY and G.S. BOWER, *op. cit.*

results in a conviction – in which case, the judicial fact established through a criminal sentence may be used as the ground for the plaintiff's civil cause – but also when the accused is acquitted of the criminal charge. In the latter case, a civil proceeding can still meaningfully be brought against the defendant since a civil wrong may exist even though the conduct in question does not amount to a crime. Moreover, the standard of proof in civil proceedings is often lower than that for criminal proceedings. However, it is another matter if civil remedies – *e.g.* recovery of loss of public revenue – are sought by a public authority, *e.g.* the tax authority. An argument can be made for the claim that actors belonging to different branches of government are nonetheless part of the machinery of State, which would entail that all State actors are to be bound by a final judgment in a criminal proceeding and are thus precluded from re-litigating the matter. From the point of view of the law of *res judicata*, it is crucial to examine both part of the final judgment: *viz.* the *res* and what is considered *judicata*. Different approaches to this problem exist in national legal systems and this area of law belongs to one of the classical problems of the study of procedural law. Although procedural law *per se* does not fall within the EU's field of competence [7], EU law does affect the application of the law of *res judicata* in its Member States; but this topic cannot be pursued in the present paper [8].

The preclusive effect of a final judgment in a criminal proceeding – or force of *ne bis in idem* – has however been separated from the complex of issues concerning *res judicata*, and treated as an independent principle of law. Thus, the *ne bis in idem* principle is said to have an ancient basis and has been described as

> a fundamental norm which exists in order to protect identical legal rights in respect of the same unlawful conduct and prevents a person from being subject to more than one penalising procedure and, possibly, being punished repeatedly, in so far as that duplication of procedures and penalties involves unacceptable repetition of the exercise of the *ius puniendi* [9].

[7] With the exception of matters now falling under the umbrella of the area of freedom, security and justice.

[8] See, however, X. GROUSSOT and T. MINSSEN, "Res judicata in the Court of Justice Case-Law: Balancing Legal Certainty with Legality?", *European Constitutional Law Review*, 2007, 3, p. 385-417.

[9] W. SCHOMBURG, "Criminal matters: transnational *ne bis in idem* in Europe – conflict of jurisdictions – transfer of proceedings", *ERA Forum*, 2012, 13, p. 311-324, at p. 312. A study of the principle including a detailed presentation of the principle's historic origins can be found in M. MANSDÖRFER, *Das Prinzip des ne bis in idem im europäischen Strafrecht*, Berlin, Duncker & Humblot, 2004. The rationale behind the *ne bis in idem* principle has been described in J.A.E. VERVAELE, "*Ne Bis In Idem*: Towards a Transnational Constitutional Principle in the EU?", *Utrecht Law Review*, 2013, 9, p. 211-229. On the current status of the principle of *ne bis in idem*, see also E. SHARPSTON and J.M. FERNÁNDEZ-MARTÍN, "Some Reflections on Schengen Free Movement Rights and the Principle of *Ne Bis In Idem*", *Cambridge Yearbook of European Legal Studies*, 2007-2008, 13, p. 413-448, at p. 416-417 and A. WEYEMBERGH, "La jurisprudence de la CJ relative au principe *ne bis in idem* : une contribution essentielle à la reconnaissance mutuelle en matière pénale", *in* A. ROSAS, E. LEVITS and Y. BOTS (eds.), *La Cour de Justice et la Construction de l'Europe : Analyses et Perspectives de Soixante ans de Jurisprudence*, The Hague, T.M.C. Asser Press, 2013, p. 539-559, at p. 540 with accompanying notes.

In this light, the normative justification behind the principle of *ne bis in idem* is based on the need of protection against the State's abuse of its *ius puniendi*; reasons relating to the integrity of the system of procedural law may have a role to play, but they are not the primary justifying ground for *ne bis in idem*. A principle based on the protection of individual rights will also entail that a second proceeding that, for one reason or another, is to the advantage of the accused/sentenced person need not be ruled out. The present paper will subscribe to the protective view on the normative background of the *ne bis in idem* principle.

Before moving on to the discussion of *ne bis in idem* in criminal and non-criminal proceedings, it should be noted that the principle applies only to the ordinary course of justice; it does not preclude measures that involve the setting-aside – on grounds of exceptional circumstances such as new evidence in extraordinary cases or grave judicial errors – of judgments that have attained final force.

3. Application of the principle of *ne bis in idem* in criminal proceedings

A. National and international rules on ne bis in idem

In this section, an overview is given of the *ne bis in idem* principle applicable to criminal proceedings. This is, in its original form, a national principle in the sense that it relates to the preclusive effect of a final criminal judgment within a given legal system. There may or may not be written provisions on this in the criminal or procedural law legislation of the legal system, but there is general consensus that *ne bis in idem* is applicable in any case as a general principle of law [10]. The importance of this national principle has been reflected in the inclusion of the principle in different international instruments. In this paper, the principle as it appears in Protocol no. 7 to the European Convention on the Protection of Human Rights and Fundamental Freedoms (hereafter "ECHR") is discussed as the primary example of an international rule on the *ne bis in idem* principle. After the examination of Protocol no. 7 ECHR, this section turns to the application of the principle in an entirely different context, *viz.* when a final criminal judgment in one State is given preclusive effect in another State. As there is no rule of public international law that compels a State to recognise a judgment passed by the court of another State [11], the preclusive effect of a foreign criminal judgment is derived from an agreement between States. The rules on *ne bis in idem* in the Convention Implementing the Schengen Agreement are discussed as an example of international *ne bis in idem*. Finally, the provision on *ne bis in idem* in the Charter of Fundamental Rights of the European Union will also be discussed. The Charter provision is similar to a "national" rule if one treats the European Union as one single legal order, but it also has an "international" character in the sense that the provision is applicable to criminal proceedings in different Member States of the EU. In addition to the provisions dealing with the prosecution and punishment of crimes, the principle of *ne bis in idem* also features in a number of instruments on mutual assistance in criminal matters, in which the principle is used as a ground for non-cooperation [12], but this latter type of instrument will not be examined in this paper.

[10] See the literature referred to in note 9 above.

[11] Naturally, this does not prevent a State from unilaterally, or voluntarily, recognising the effect of foreign judgments under conditions that it sees fit.

B. In principio erat angelus

Before taking a look at some of the international rules on *ne bis in idem* it is necessary to make a detour and examine the interpretation given by the ECtHR of the concept "criminal" for the purpose of an individual's fair-trial rights, as it turns out that this interpretation would have a crucial role to play in the development of the law on *ne bis in idem*.

The right to a fair trial according to Article 6 ECHR – of all the articles of the Convention – has generated the highest number of individual complaints and numerous textbooks, commentaries as well as scholarly articles and monographs have dealt with, at length and in detail, the established position of law that, for the assessment whether the right of an individual faced with a criminal charge to have a fair trial has been violated, the ECtHR applies an "autonomous" conception of what is considered "criminal charge' [13] in the context of the ECHR [14]. The concept is "autonomous" in the sense that the same standard applies for the purpose of the Convention, independent of the definition or classification of offences and procedures in the legal systems of the State Parties to the ECHR [15]. This standard is captured by the so-called "*Engel* criteria", established by the ECtHR in a judgment [16] with respect to a series of complaints against the Netherlands lodged in 1971. The ECtHR ruled on a number of issues concerning, *inter alia*, various aspects of Articles 5 and 6 ECHR; but for the purpose of the present paper, only the discussion concerning the meaning of the term "criminal" in Article 6 ECHR needs to be taken up.

[12] See, *e.g.*, J.A.E. VERVAELE, *op. cit.* and A. WEYEMBERGH, *op. cit.*, at p. 541.

[13] The term "criminal charge" appears in Article 6(1) ECHR whereas "charged with a criminal offence" appears in Articles 6(2) and (3) ECHR. The word "criminal" must have the same meaning in both of these terms on linguistic grounds. Logically speaking, a "criminal charge" presupposes a "criminal offence"; an offence is something abstract and relates to a general norm whereas a charge is a contestation in an actual case. The term "criminal proceeding" – not used in the Convention text itself – is the proceeding whereby the criminal charge is determined. In the remainder of this paper, it is taken for granted that the terms "criminal offence", "criminal charge" and "criminal proceedings" all revolve around the same concept of what is "criminal" according to the Convention.

[14] It may be added that although the following discussion deals only with Article 6 ECHR, the argument will apply equally to Article 7 ECHR (the principle of *nullum crimen/nulla poena sine lege*). The ECtHR has stressed the necessity of an autonomous interpretation of the concept "criminal" in both Article 6 and Article 7 ECHR, because, the Courts argued, if States were able "at their discretion to classify an offence" as criminal or otherwise, "the operation of the fundamental clauses of Articles 6 and 7 (...) would be subordinated to their sovereign will. A latitude extending thus far might lead to results incompatible with the purpose and object of the Convention" (ECtHR, 8 June 1976, *Engel and others v. The Netherlands*, Series A, no. 22, para. 81).

[15] Incidentally, a separate line of case law has developed concerning the autonomous concept of "civil rights and obligation" in Article 6(1) ECHR.

[16] *Engel.*

The applicants were members of the Dutch armed forces and had all been subject to disciplinary sanctions and undergone proceedings pursuant to the Regulations on Military Discipline and/or the Military Penal Code of the Netherlands. They complained that their rights to a fair trial – *e.g.* that there was no public hearing[17], that some of the applicants had been "proved guilty according to the law"[18] and that they had not had adequate time and facilities for the preparation of the defence[19] – had been breached. The right to a fair trial – *i.e.* that the trial proceeding has the *quality* of being fair – presupposes that there exists a right to *a trial at all* under Article 6 ECHR. For such a right to exist with respect to an individual, the case must concern "the determination of his civil rights and obligations or of any criminal charge against him"[20]. The applicability – in this case – of Article 6 ECHR depended crucially, then, on whether the disciplinary sanctions and proceedings could be seen as "criminal charges" in the sense of the Article[21].

It was at this point that the ECtHR took a step beyond its previous jurisprudence and laid down, in a more general manner, its "*Engel* criteria", consisting of three separate elements.

In the first place and as "no more than a starting point", the ECtHR would examine "whether the provision(s) defining the offence charged belong, according to the legal system of the respondent State, to criminal law (…)"[22]. Thus, if the offence is classified as criminal according to the national legal system, it will also be considered a criminal one for the purpose of Article 6 ECHR, even though the State could have classified it as a disciplinary or administrative offence. This is what the ECtHR meant, when it said that "autonomy" of the concept of "criminal" operated "one way only'[23].

In the second place, "the very nature of the offence" is to be considered as "a factor of greater import"[24]. In *Engel*, the ECtHR did not expound on the meaning of "the nature of a criminal offence", but it did refer to the "aim of repressing through penalties", which was "an objective analogous to the general goal of the criminal law"[25].

In the third place, the ECtHR will take into consideration "the degree of severity of the penalty that the person concerned risks incurring"[26]. In this respect, the ECtHR provided in *Engel* some slightly more detailed guidelines for the determination of "severity" than what it had said concerning the "nature" of a criminal offence:

> In a society subscribing to the rule of law, there belong to the "criminal" sphere deprivations of liberty liable to be imposed as a punishment, except those which by their nature, duration or manner of execution cannot be appreciably detrimental. The seriousness of what is at stake, the traditions of the Contracting States and the importance attached by the Convention to respect for the physical liberty of the person all require that this should be so (…)[27].

[17] *Engel*, para. 89.
[18] *Engel*, para. 90.
[19] *Engel*, para. 91.
[20] The subordinate clause in the first sentence of Article 6(1) ECHR.
[21] In fact, some of the applicants also based their allegations on the determination of their civil rights, but the Court did not examine these allegations separately. See *Engel*, paras. 86-87.
[22] *Engel*, para. 82.
[23] *Engel*, para. 81.
[24] *Engel*, para. 82.
[25] *Engel*, para. 79.
[26] *Engel*, para. 82.

These three criteria remain to be applicable to this day. This is not the place to discuss – or even to describe – the subsequent jurisprudence of the ECtHR, which seeks to refine the criteria first established in *Engel*[28]. It suffices to note that these criteria are intended to be used to ascertain whether a person is "the subject of a "criminal charge" within the meaning of Article 6 para. 1"[29]. However, as will be discussed presently (3.C below), the *Engel* criteria have been applied in situations even beyond the context of an individual's right to a fair trial.

A. The principle of ne bis in idem *according to Article 4 of Protocol no. 7 to the ECHR*

1) General Remarks

Article 4 of Protocol no. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms[30] (hereafter "Article 4 – P7") prohibits multiple trials and punishment of a person for the same criminal offence. For the present paper, the focus is put on paragraph 1 of that Article, which provides the following:

> 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.

This prohibition is applicable – as the above wording shows – only to criminal proceedings and is restricted to prosecution and punishment in one and the same State. Much of the discussion on this provision has centred on the interpretation of the term "offence" and the ECtHR jurisprudence has been inconsistent on this point. The present paper will ignore, however, the debate concerning this particular interpretation as the Grand Chamber of the ECtHR is said to have settled the question in its judgment from 2009 in *Zolotukhin*[31]. What this paper will examine, instead, is the seemingly less controversial question of what is to count as a criminal offence/charge/proceeding. It is the purpose of sub-section 3.C.2 below to show that the

[27] *Ibid.*
[28] Readers are referred to standard commentaries to the ECHR such as D. HARRIS *et al.*, *Harris, O'Boyle & Warbrick. Law of the European Convention on Human Rights*, 2nd ed., Oxford, Oxford University Press, 2009; J. MEYER-LADEWIG, *Europäische Menschenrechtskonvention – Handkommentar*, 3. Aufl., Baden-Baden, Nomos, 2011; P. VAN DIJK *et al.* (eds.), *Theory and Practice of the European Convention on Human Rights*, 4th ed., Antwerpen – Oxford, Intersentia, 2006 and R.C.A. WHITE and C. OVEY, *Jacobs, White & Ovey. The European Convention on Human Rights*, 5th ed., Oxford, Oxford University Press, 2010.
[29] *Engel*, para. 83. See, however, note 14 above concerning the equal applicability of criteria to Article 7 ECHR.
[30] Strasbourg, 22 November 1984, CETS no. 117.
[31] ECtHR, 10 February 2009, *Zolotukhin v. Russia*, App. no. 14939/03.

ECtHR has simply transposed the notion of "criminal" from its case law related to the interpretation of Article 6 ECHR to the quite different context of Article 4 – P7. Criticisms are raised against the ECtHR for the absence of argument for treating the notions of "criminal" in these different provisions as the same. It is conceded, however, that the case law in this area is so entrenched that one simply has to live with this fault. Sub-section 3.C.3 will then provide a *de lege lata* account of the law after the ruling of the Grand Chamber in *Zolotukhin*. In this regard, it is just as interesting to examine the methodology of the ECtHR as to describe the actual findings of the Court. Some of the themes touched upon in the discussion of *Zolotukhin* will resurface in the final concluding section (5 below).

2) The development up to Zolotukhin

Gradinger[32] is one of the first cases decided by the ECtHR directly addressing issues arising from Article 4 – P7. In this case, the complainant alleged violation of both Article 6 ECHR and Article 4 – P7. The first question that the Court had to decide was whether the complainant – with respect to a "sentence order" (*Straferkenntnis*) issued by an administrative authority for "driving under the influence of alcohol", subsequent to a criminal proceeding for "causing death by negligence" (*fahrlässige Tötung*) – had had access to a "tribunal" in the sense required by Article 6(1) ECHR. The question was to be answered in a context where the "sentence order" was treated as a "criminal charge" for the purpose of the applicability of Article 6 ECHR. In this case, there was no dispute that the "sentence order" was indeed a criminal charge and the Court simply reiterated the *Engel* criteria for its classification although no explicit mention was made to *Engel* itself[33]. After reviewing the character of the various bodies that had dealt with the complainant's case in Austria, the ECtHR found that examination of the "sentence order" by these bodies did not fulfil the requirement of a fair hearing before a "tribunal" in the sense required by the ECHR. Hence, there was a violation of Article 6(1) ECHR. The next question for the Court to decide was whether there was also a violation of Article 4 – P7. After dismissing some preliminary issues concerning Austria's reservation in respect of Article 4 – P7 and the applicability *ratione temporis* of the Article, the ECtHR proceeded immediately to the question of compliance with Article 4 – P7. In this connection, the Court arrived, without much detailed discussion, at the conclusion that there was a breach of Article 4 – P7 as "both impugned decisions [*viz.* the criminal conviction and the "sentence order"] were based on the same conduct"[34]. The point that I want to make here does not concern, however, the merit of the Court's conclusion regarding the same conduct; what I wish to point out is, rather, the fact that the Court did not re-examine the classification of the "sentence order" as a "criminal charge". For Article 4 – P7 to be applicable at all, the "sentence order" had to be qualified as a second criminal proceeding, but the conclusion to this effect was simply carried over – without argument – from the context of Article

[32] ECtHR, *Gradinger v. Austria*, 23 October 1995, App. no. 15963/90.

[33] See *Gradinger*, para. 30. The Court referred, instead, to ECtHR, 21 February 1984, *Öztürk v. Germany*, App. no. 8544/79 ; ECtHR, 27 August 1991, *Demicoli v. Malta*, App. no. 13057/87.

[34] *Gradinger*, para. 55.

6 ECHR to that of Article 4 – P7. There was thus an implicit assumption, rightly or wrongly[35], that the same concept of "criminal charge" was applicable to Article 6 ECHR and to Article 4 – P7. Given the fact that the issue whether a "sentence order" was a "criminal charge" was not under dispute, the implicit assumption of the ECtHR could be said to be excusable.

In *Oliveira*[36], a case decided a little less than three years after *Gradinger*, the ECtHR adopted another approach and found that there was no violation of Article 4 – P7 as this provision, in the opinion of the Court, only prohibited "people [from] being tried twice for the same offence whereas in cases concerning a single act constituting various offences (*concours idéal d'infractions*) one criminal act constitute[d] two separate offences". But again, I shall not discuss the merit of this conclusion. I merely wish to note that, in this case, dealing solely with Article 4 – P7, there was no need to examine whether the second proceeding constituted a "criminal charge" in the sense of the Protocol, as the "penal order" (*Strafbefehl*) in the second proceeding – issued by the Public Prosecutor's office for negligently causing physical injury contrary to the Swiss Penal Code – was clearly concerned with a "criminal charge'[37]. This case is therefore silent on the question whether the concept of "criminal charge" is the same in Article 6 ECHR and in Article 4 – P7.

An opportunity for the ECtHR to address the issue of "criminal charge" arose in *Ponsetti and Chesnel*[38]. This case was concerned with criminal proceedings brought for tax evasion subsequent to the imposition by the tax authorities of tax surcharges after a failure to file income tax returns. France, the respondent State, argued specifically, that the tax surcharges were not "criminal charges'. It maintained that, where two decisions were made based on the same conduct,

> the first of those decisions had to have been delivered by a criminal court applying rules of procedure classified as penal under the domestic law (there was nothing to suggest that the provision in issue was applicable *ipso facto* to all offences coming within the scope of "criminal proceedings" for the purposes of Article 6 of the Convention)[39].

The respondent State maintained, furthermore, that

> In any event, the decision taken (…) in the tax proceedings could not be equated with a criminal decision: surcharges for delay under Article 1728 of the General Tax Code were not so much intended to punish negligent taxpayers as to compensate for

[35] I should emphasise that I am only questioning the correctness of the *assumption* and not the actual determination, in *Gradinger*, that the "sentence order" is a "criminal charge" in the sense of Article 4 – P7. There are, on the contrary, very good arguments for the ECtHR conclusion in the case in question, had the Court chosen to make these arguments.

[36] ECtHR, 30 July 1998, *Oliveira v. Switzerland*, App. no. 25711/94.

[37] It may be added that the first proceeding was concerned with an offence under the Swiss Road Traffic Act for a failure to adapt the driving to the road condition (*Nichtbeherrschen des Fahrzeuges infolge Nichtanpassens der Geschwindigkeit an die Strassenverhältnisse*) and a fine issued by the Police Magistrate – see *Oliveira*, para. 10.

[38] ECtHR, 14 September 1999, *Ponsetti and Chesnel v. France*, App. no. 36855/96 and 41731/98.

[39] *Ponsetti and Chesnel v. France*, para. 3.

> the loss sustained by the Treasury – indeed, the tax authorities would have no right to seek damages on that account before the criminal courts – and the penalties imposed (...) had been relatively modest[40].

However, this argument regarding the nature of tax surcharges in the context of Article 4 – P7 was ignored completely by the ECtHR. The Court chose instead to focus on what it regarded as an essential difference between the constitutive elements of the fiscal offence and the criminal offence, and on this ground alone, the application was found to be manifestly ill-founded and was rejected pursuant to Article 35 ECHR[41].

It may be questioned whether the "silent treatment" of the ECtHR with regard to the respondent State's argument can be taken as an implicit rejection of the claim that the concept of "criminal proceedings" developed under Article 6 ECHR should not automatically be applied in the context of Article 4 – P7. As it turned out, subsequent case law of the ECtHR would show that the absence of an argument for a uniform interpretation of the notions "criminal charge", "criminal proceeding" etc. had not adversely affected the Court's adoption of this approach. However, it should be noted that *Ponsetti and Chesnel* is a decision on admissibility and not on the merit of the case; the Court is entitled to reject an application on any ground that would make the application inadmissible. Against this background, it is submitted that it is ill-advised – to say the least – to base an important conclusion about a fundamental matter on what the Court has not said in the admissibility decision.

After *Ponsetti and Chesnel*, the issue of the applicability to Article 4 – P7 of the concept of "criminal proceedings" developed from the case law of Article 6 ECHR did not come to the fore as the Court was preoccupied for some time with a series of Austrian traffic-offence cases following the pattern of *Gradinger* and *Oliveira*. The ECtHR was again faced with a tax case in *J.B.*[42]. Arguments similar to those put forward by France in *Ponsetti and Chesnel* were made in *J.B.*, but once again the ECtHR avoided the question when it stated that the issue did not need to be resolved since the complaint was in any event inadmissible on other grounds. In *Franz Fischer*[43], the ECtHR did refer to *Ponsetti and Chesnel* on the interpretation of what was meant by the *same* offence[44] but the issue of the characterisation as a "criminal charge" did not arise in that case.

The otherwise unremarkable case of *Luksch*[45] (concerning the characterisation of disciplinary proceedings under the Austrian Accountants Act) is interesting in the present context since the ECtHR made a specific reference to the "criteria established by the Court's case-law"[46] when determining whether there was a "criminal charge" in the context of a complaint based on Article 4 – P7. By such criteria, the ECtHR was referring to the criteria developed through the case law associated with Article 6

[40] *Ibid.*

[41] *Ponsetti and Chesnel v. France*, para. 5.

[42] ECtHR, 6 April 2000, *J.B. v. Switzerland*, App. no. 31827/96.

[43] ECtHR, 29 May 2001, *Franz Fischer v. Austria*, App. no. 37950/97.

[44] *Franz Fischer*, para. 22.

[45] ECtHR, 21 November 2000, *Luksch v. Austria*, App. no. 37075/97.

[46] *Luksch*, para. 3.

ECHR[47]. In *Luksch*, the ECtHR found that the first proceeding was indeed merely disciplinary in nature since the offence at issue merely concerned the infringement of the accountancy profession's reputation and the penalties were not so severe as to render the prosecution of this offence a "criminal charge". In the context of the present discussion, it is not important which outcome the Court actually arrived at. The points to note here are rather: (i) that the Court did apply the criteria established through Article 6 ECHR, (ii) that explicit reference was made to these criteria and (iii) that the ECtHR offered no reason why the Article 6 ECHR criteria were applicable.

In *Göktan*[48], the complainant alleged violation of Article 4 – P7 arising from a French court's order of "imprisonment in default" for failure to pay the customs fines (*la contrainte par corps, en exécution du paiement des amendes douanières*) originally imposed in a criminal proceeding, in which the sentence for drug trafficking was a hybrid penalty consisting of both a customs fine and imprisonment. Before answering the question as to whether there had been *double* punishment, the Court had to determine whether "imprisonment in default" as such was a "penal sanction" as opposed to merely a *means of execution* of a penal sanction. In this connection, the Court referred to *Jamil*[49] in which the ECtHR found that "imprisonment in default" was a "penalty" within the meaning of Article 7 ECHR. The Court stated that "[t]he notion of what constitutes a "penalty" cannot vary from one Convention provision to another", and for this reason it concluded that "imprisonment in default" was a "criminal sanction" also for the purpose of Article 4 – P7. To recapture the point, the ECtHR has, in *Göktan*, made use of the concept of "penalty" developed in the Court's jurisprudence on Article 7 ECHR – as opposed to Article 6 ECHR in the cases discussed earlier – for the interpretation of the concept of "criminal sanction" under Article 4 – P7; the reason offered being that the notion of what constitutes a penalty cannot vary between the different provisions in the ECHR and its protocols. The ECtHR did not explain, however, why there should not be a variation in meaning between the different provisions.

An appeal to the uniform interpretation of notions featured in the ECHR and its protocols was made in the ECtHR's decision in *Rosenquist*[50]. In a series of other Swedish (pre-*Rosenquist*) cases[51], the ECtHR had already established that the "tax surcharge" applied under Swedish law constituted a "criminal sanction" for the purpose of Article 6 ECHR. What remained to be decided, in the Court's own words, was "whether the proceedings relating to the (...) tax surcharge could be viewed as

[47] For some reason the ECtHR referred to ECtHR, 23 March 1994, *Ravnsborg* v. *Sweden*, App. no. 14220/88 rather than the more well-known cases associated with the criteria in question.

[48] ECtHR, 2 July 2002, *Göktan v. France*, App. no. 33402/96.

[49] ECtHR, 8 June 1995, *Jamil v. France*, App. no. 15917/89.

[50] ECtHR, 14 September 2004, *Rosenquist v. Sweden*, App. no. 60619/00.

[51] See ECtHR, 23 July 2002, *Janosevic v. Sweden*, App. no. 34619/97 on violation of Article 6(1) ECHR; ECtHR, 23 July 2002, *Västberga Taxi Aktiebolag and Vulic v. Sweden*, App. no. 36985/97 on violation of Article 6(1) ECHR; and ECtHR, 8 April 2003, *Manasson v. Sweden*, App. no. 41265/98 on the admissibility of the claim based on Article 6(1) ECHR and the inadmissibility of the claim based on Article 4 – P7.

"criminal" *for purposes of Article 4 of Protocol no. 7*" (my emphasis)[52]. However, having made this statement, the Court then went on – as the Court itself had put it – to "reiterate" the ECtHR's previous finding in Article 6 ECHR cases that "the proceedings (…) were "criminal" although the surcharges cannot be said to belong to criminal law under the Swedish legal system"[53]. After this reiteration, however, the Court also mentioned, "in its judgment in the case *Göktan v. France* (…) concerning Article 7 of the Convention and Article 4 of Protocol no. 7, the Court held that the notion of penalty should not have different meanings under different provisions of the Convention"[54]. Thus, *Göktan* was adduced as support for the proposition that notions used in the Convention and its protocols should always have the same meaning.

After the 2004 decision in *Rosenquist*, the uniformity issue concerning the interpretation of concepts used in the ECHR and its protocols had arisen in few cases decided by the ECtHR on Article 4 – P7. *Storbråten*[55], decided in 2007, can be noted as an expression of the status quo in the ECtHR jurisprudence: the notion "criminal" has been given an "autonomous meaning" under Article 4 – P7 and this notion "must be interpreted in the light of the general principles concerning the corresponding words "criminal charge" and "penalty" respectively in Articles 6 and 7 of the Convention"[56].

The ECtHR did, however, suggest in *Haarvig*[57], an admissibility decision, that the interpretation of what is "criminal" in the context of Article 4 – P7 might be different from that related to other provisions of the ECHR. The "second proceeding" in *Haarvig* concerns the suspension of the licence to practise medicine following the conviction of the complainant in a criminal proceeding. To determine whether this second proceeding was criminal in nature, the ECtHR stated the following:

> This notion must be interpreted in the light of the general principles concerning the corresponding words "criminal charge" and "penalty" respectively in Articles 6 and 7 of the Convention [references to case law omitted]. Hence, the Court will have regard to such factors as the legal classification of the *offence* under national law; the nature of the offence; the national legal characterisation of the measure; its purpose, nature and degree of severity; whether the measure was imposed following conviction for a criminal offence and the procedures involved in the making and implementation of the measure [references to case law omitted]. *This is a wider range of criteria than the so-called "*Engel *criteria" formulated with reference to Article 6 of the Convention* [my italics in this sentence][58].

[52] *Rosenquist*, p. 9 of the pdf-version of the decision available at HUDOC.

[53] *Ibid.*

[54] *Rosenquist*, p. 10 of the pdf-version of the decision available at HUDOC.

[55] ECtHR, 1 February 2007, *Storbråten v. Norway*, App. no. 12277/04. See also ECtHR, 1 February 2007, *Mjelde v. Norway*, App. no. 11143/04; ECtHR, 11 December 2007, *Haarvig v. Norway*, App. no. 11187/05 and ECtHR, 17 June 2008, *Synnelius and Edsbergs Taxi AB v. Sweden*, App. no. 44298/02.

[56] *Storbråten*, p. 17 of the pdf-version of the decision available at HUDOC.

[57] *Haarvig*.

[58] *Haarvig*, p. 11 of the pdf-version of the decision available at HUDOC. Although the ECtHR elaborated this wider range of criteria, in light of which the Court came to the conclusion that the suspension of the licence was not equivalent to a criminal sanction, the Court could, arguably, have arrived at the same result simply using the *Engel* criteria.

Using this wider range of criteria, it is thus possible to arrive at a result where on the balance a set of proceedings is considered not to be criminal in nature while the use of the more limited *Engel* criteria would suggest the contrary. If this is the case, then logically, there will be situations where a "second proceeding" is not *per se* objectionable according to the principle of *ne bis in idem*, while what is at stake at this "second proceeding" is nonetheless seen as being serious enough – equivalent to a "criminal charge" – as to deserve a proceeding conducted in accordance with the fair-trial standards provided by Article 6 ECHR. This, in my view, is not an unreasonable position. After all, the rationale for the right to a fair trial (which is equally applicable to civil proceedings) is quite different from that for the rights stemming from the principle of *ne bis in idem* (which is applicable only to criminal proceedings or their equivalence). Without endorsing the "wider range" formulated in *Haarvig*, my contention is that the criteria for "criminal" according to Article 4 – P7 need not be exactly the same as the *Engel* criteria, even though there may be overlaps, or even substantial overlaps[59]. The burden of argumentation for an autonomous and uniform conception of what is "criminal" throughout the ECHR and all its protocols lies on the proponent of such a view. However, no such argument – as opposed to statement or proclamation – can be found in the case law of the ECtHR.

No use of the "wider criteria" formulated in *Haarvig* has been made in the subsequent case law of the ECtHR. The Grand Chamber did cite *Haarvig* in its judgment in *Zolotukhin* (see below 3.C.3), but there *Haarvig* was only one in a series of many cases following the *Engel* criteria. Thus, by the time of *Zolotukhin*, the *Engel* criteria have been firmly established as *the* criteria to apply for the determination of the notion "criminal" for the purpose of Article 4 – P7. It really is a moot point whether the ECtHR has offered any convincing argument for this – I may say – dogma. Thus, it is not difficult for the present author to share the sentiment expressed by van Bockel when he wrote:

> Although this [the extension of the *Engel* criteria to Article 4 – P7] may attract criticism it must be said that the Engel-line of jurisprudence itself is by now well-established, and it is difficult to see how the Court could have any other approach in the context of Article 4 of Protocol no. 7 to the European Convention on Human Rights[60].

3) *The Grand Chamber's judgment in* Zolotukhin v. Russia

In the above section (3.C.2), I have focused on the interpretation of the term "criminal" for the application of Article 4 – P7. The present section will examine the merits of complaints about the violation of the principle of *ne bis in idem*. The *Zolotukhin* judgment is ground-breaking with regard to the "*idem*" element of the

[59] See B. VAN BOCKEL, *The* Ne Bis In Idem *Principle in EU Law*, Alphen ann den Rijn, Kluwer Law International, 2010, p. 181-182 for a discussion of *Haarvig*. This case deals however with proceedings in Norway even though the author refers to Swedish authorities and courts in his presentation.

[60] B. VAN BOCKEL, "The *ne bis in idem* principle in the European Union legal order: between scope and substance", *ERA Forum*, 2012, 13, p. 325-347, at p. 341.

ne bis in idem principle, but for completeness's sake the "*bis*" element will also be dealt with in this section. The discussion may begin, however, with a recapture of the *Engel* criteria as formulated by the Grand Chamber as the *ne bis in idem* principle is actualised only if the proceedings involved are criminal in character. These criteria, as expressed in *Zolotukhin*, are:

> The first criterion is the legal classification of the offence under national law, the second is the very nature of the offence and the third is the degree of severity of the penalty that the person concerned risks incurring. The second and third criteria are alternative and not necessarily cumulative. This, however, does not exclude a cumulative approach where separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a criminal charge [61].

In the present case, the first set of proceedings was concerned with "minor disorderly acts". Subsequent *criminal* proceedings would be barred for the same offence if the first proceedings were "criminal" in character. Applying the *Engel* criteria, the ECtHR had no difficulty in finding that "the nature of the offence of "minor disorderly acts", together with the severity of the penalty, were such as to bring the applicant's conviction … within the ambit of "penal procedure" for the purposes of Article 4 of Protocol no. 7" [62].

Having established that Article 4 – P7 was applicable, the next question for the Court to address was whether the "minor disorderly acts", which are already subject to administrative proceedings, constituted the same offence (*idem*) as those for which the applicant was being prosecuted in accordance with the Criminal Code.

At this point, the ECtHR admitted that the existence of a variety of approaches to the question of *idem* [63] "engenders legal uncertainty incompatible with (…) the right not to be prosecuted twice for the same offence" [64]. It was for this reason that the Court would set out to "provide a harmonised interpretation of the notion of the "same offence" – the *idem* element of the *ne bis in idem* principle – for the purposes of Article 4 of Protocol no. 7" [65]. The Court did not explain what it meant by a "harmonised interpretation", but its reasoning demonstrated that such an interpretation was certainly not restricted to a harmonisation of the different lines of reasoning given by the various sections and chambers of the ECtHR in its own jurisprudence. In its reasoning, the ECtHR made references to the following international instruments [66]:

[61] *Zolotukhin*, para. 53. It is remarkable how closely the first sentence resembles the criteria as originally stated in *Engel*. The second and third sentence can be said to reflect the result of the application of the criteria in the Court's case law since *Engel*.

[62] *Zolotukhin*, para. 57.

[63] These approaches are not presented here as they have already been competently discussed and analysed in an abundance of work on this topic, some of which have already been mentioned above, *e.g.*: B. VAN BOCKEL, *The* Ne Bis In Idem *Principle in EU Law*, p. 190-201; W. SCHOMBURG, *op. cit.* ; M. MANSDÖRFER, *op. cit.*; E. SHARPSTON and J.M. FERNÁNDEZ-MARTÍN, *op. cit.*; and A. WEYEMBERGH, *op. cit.*

[64] *Zolotukhin*, para. 78.

[65] *Ibid.*

[66] *Zolotukhin*, para. 79. In addition to international instruments the ECtHR also made reference to the jurisprudence of the Supreme Court of the United States under the heading

- Protocol no. 7 to the ECHR,
- United Nations Covenant on Civil and Political Rights,
- Charter of Fundamental Rights of the European Union,
- American Convention on Human Rights,
- Convention Implementing the Schengen Agreement (hereafter "CISA"),
- Statute of the International Criminal Court.

The ECtHR seemed to favour the approach of the Court of Justice of the European Union (hereafter "CJ", previously Court of Justice of the European Communities, or "CJ") and the Inter-American Court of Human Rights (IACtHR), which "based strictly on the identity of the material acts and reject[ed] the legal classification of such acts as irrelevant" [67]. Furthermore, the ECtHR preferred these other courts" approach as it found that "both tribunals emphasised that such an approach would favour the perpetrator, who would know that, once he had been found guilty and served his sentence or had been acquitted, he need not fear further prosecution for the same act" [68].

There is, however, a fundamental difference between the ECtHR and the CJ [69]. Whereas the former court deals with cases concerning the American Convention on Human Rights, according to which a person shall not be subjected to a new trial for the same cause within the same State Party to the Convention, the latter court, when interpreting Article 54 CISA, is concerned with the *ne bis in idem* effect of a final judgment in one Member State on a subsequent proceeding in another Member State. I shall shortly return to the significance of this difference, but first, a presentation should be given of the ECtHR's reasoning and conclusion with regard to this "material act" approach.

For a State, which wishes to exercise a more extensive *ius puniendi*, the preference will be to interpret the *idem* element as restrictively as possible. A narrowly-defined *idem* entails a lower risk of violation of the *ne bis in idem* principle. A pure "material act" approach defines *idem*, on the contrary, very widely indeed, as the legal classification or any other factors such as the protected interest or intention of the offender are absolutely irrelevant as limiting factors.

It was the ECtHR's view that "the use of the word "offence" in the text of Article 4 of Protocol no. 7 cannot justify adhering to a more restrictive approach" [70]. As support for this view, the Court reiterated that "the Convention must be interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory" [71]. The Court then came up with a tautology when it "noted" that "the approach which emphasises the legal characterisation of the two offences is too restrictive on the rights of the individual, for if the Court limits itself to finding

"relevant and comparative international law" (paras. 41-44) and recognised that the *ne bis in idem* principle was, according to EU case law, a fundamental principle of EU law (paras. 35-36).

[67] *Ibid.*

[68] *Ibid.*

[69] As to the case law of the CJ, the ECtHR focused primarily on the jurisprudence related to Article 54 CISA.

[70] *Zolotukhin*, para. 80.

[71] *Ibid.*

that the person was prosecuted for offences having a different legal classification it risks undermining the guarantee enshrined in Article 4 of Protocol no. 7 rather than rendering it practical and effective as required by the Convention"[72].

The result of the Court's "reasoning" is that Article 4 – P7 would prohibit "the prosecution or trial of a second "offence" in so far as it arises from identical facts or facts which are substantially the same"[73]. For the determination of whether facts are identical or substantially the same, the Court has given certain guidelines:

> [the] 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, the existence of which must be demonstrated in order to secure a conviction or institute criminal proceedings[74].

The opinion of the ECtHR was clearly inspired[75] by the jurisprudence of the CJ in matters related to the interpretation of Article 54 CISA. The ECtHR was also more thorough in its analysis of the CJ's case law than it was with other international instruments[76]. It is submitted that there are unfortunate drawbacks when CJ jurisprudence in this area is transposed to the context of Article 4 – P7.

To state the most obvious criticism first, it is extremely naïve to assume unreflectively that what makes sense in an international – or rather a transnational context – will make sense in the context of a single national legal system. It should be recalled that while the *ne bis in idem* principle according to Article CISA is to apply between Member States, Article 4 – P7 is applicable to proceedings conducted in the same Party State to the Protocol.

Less obvious, but may be for that reason more pernicious, is the implicit import of certain ideology from CJ jurisprudence to the framework of protection of human rights, which is the task of the ECHR and its protocols. Article 54 CISA will be discussed presently (3.D below), so it suffices here to say that the determination of "*idem*" in the CJ case law is very much influenced by the ideology of an internal market, the freedom of movement of persons as well as the supremacy of EU law. None of these is part of the human rights regime that the ECHR represents.

I shall return to these issues concerning the link between the ECHR and CISA (and EU law in general) in a concluding analysis (5 below). To complete the discussion of *Zolotukhin*, some words will be said about the "*bis*" element of the *ne bis in idem* principle, even though the Court only reiterated what had already been established – or "entrenched"[77] as the Court put it – according to its own case law. In this regard, the

[72] *Zolotukhin*, para. 81. It is submitted that besides stating a tautology, the Court committed the fallacy of *tertium non datur* in that it ignored the possibility where the legal characterisation of an offence could be taken into consideration although not emphasised.

[73] *Zolotukhin*, para. 82.

[74] *Zolotukhin*, para. 84. Note the similarity between the EctHR's wordings and the CJ's judgments in, *e.g.*, CJ, 9 March 2006, *Van Esbroeck*, C-436/04, *ECR*, p. I-2333; and CJ, 18 July 2007, *Kretzinger*, C-288/05, *ECR*, p. I-6470, para. 34.

[75] Some may even say "fully inspired"; see J.A.E. VERVAELE, *op. cit.*, at p. 222.

[76] *Zolotukhin*, paras. 37-38.

[77] *Ibid.*, para. 107.

Court only took up three questions. Firstly, it restated that the application of the *ne bis in idem* principle was dependent on the existence of a *final* decision, and that a decision was "final" "when it is irrevocable, that is to say when no further ordinary remedies are available or when the parties have exhausted such remedies or have permitted the time limit to expire without availing themselves of them"[78]. Secondly, the Court restated the fact that a person was *acquitted* – hence not punished – and the second set of proceedings was irrelevant, thus confirming the established interpretation that Article 4 – P7 not only prohibited double punishment but also double prosecution[79]. And thirdly, the Court ruled that the *acquittal* of the applicant did not deprive him of his status as a victim of the alleged violation of Article 4 – P7[80]. The three questions that the ECtHR took up did not, however, really address the core of the issue of the "*bis*" element.

The key question on the "*bis*" element can be re-formulated as follows: whether two (or more) proceedings concerning the same facts can be seen as different parts of one and the same proceeding, or whether two (or more) different sanctions based on the same facts can be seen as different components of one and the same punishment. However, to illuminate this question it is necessary to go beyond *Zolotukhin*, so the remainder of this sub-section will be an excursus.

The jurisprudence of the ECtHR is scarce on the "*bis*" element of the *ne bis in idem* principle. In an admissibility decision, the Court found that the imposition by different authorities of a suspended prison sentence, a fine and the withdrawal of driving licence did not mean that criminal proceedings were repeated against the applicant[81]. It is however difficult to read from that decision what the reasons were behind this finding of the Court. Moreover, in this case the criminal sanction was imposed before the decision to withdrawal the driving licence became final and Article 4 – P7 might therefore be inapplicable on this ground. In *Nilsson*[82], another admissibility decision, the Court found that the withdrawal of the applicant's driving licence following his conviction for a traffic offence did not amount to new criminal proceedings against him. This time, the Court actually provided a more detailed justification, stating:

> [while] the different sanctions [*viz.* the criminal sanction and the withdrawal of driving licence] were imposed by two different authorities in different proceedings, there was nevertheless a sufficiently close connection between them, in substance and in time, to consider the withdrawal to be part of the sanctions (...) for the offences of aggravated drunken driving and unlawful driving"[83].

[78] *Ibid.* The ECtHR referred in particular to ECtHR, 20 July 2004, *Nikitin v. Russia*, App. no. 50178/99. *Cf.* note 2 above on the meaning of "final force".

[79] *Zolotukhin*, para. 110. This interpretation has also been given in *Nikitin*, which the Court cited.

[80] *Zolotukhin*, paras. 112-115. This point – based on the reasoning in *Zigarella* (ECtHR, 2 October 2002, *Zigarella v. Italy*, App. no. 48154/99) – was really a non-argument, but the Court needed to address it since it had been raised by the respondent State.

[81] ECtHR, 30 May 2000, *R.T. v. Switzerland*, App. no. 31982/96.

[82] ECtHR, 13 December 2005, *Nilsson v. Sweden*, App. no. 43661/01.

[83] *Nilsson*, p. 11-12 of the pdf-version of the decision available at HUDOC.

In *Maszni*[84], where the factual circumstances were similar to *Nilsson*, the ECtHR did decide on the merit and stated:

> *Or, en l'espèce, force est de constater que l'annulation du permis était la conséquence directe et prévisible de la condamnation pénale du requérant. En effet, la Cour relève que, bien que l'annulation litigieuse ait été décidée par une autorité administrative, elle n'est intervenue qu'en raison de la condamnation définitive prononcée par le juge pénal et sans l'ouverture d'une nouvelle procédure*[85].

Thus, it appears that different "consequences" of an offence may be treated as being components of one and the same punishment if these consequences are direct and foreseeable as a result of the criminal conviction. Furthermore, if the second proceeding is based on the definitive findings of the first proceeding, this second proceeding may not amount to a new proceeding based on the same facts.

B. Article 54, Convention Implementing the Schengen Agreement

Title III of the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (hereafter CISA)[86] deals with various issues concerning police and judicial cooperation in criminal matters. A special chapter is dedicated to the application of the *ne bis in idem* principle. The main provision under this chapter is given in Article 54:

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

One difference between Article 4 – P7 and Article 54 CISA that one will note immediately is that whereas the Protocol deals with domestic *ne bis in idem*, the provision in CISA is applicable when more than one State Party is involved. There are also some other differences such as the use of the word "offence" in Article 4 – P7 to identify the *idem* element, and "same acts" in Article 54 CISA. The present discussion will focus on this last-mentioned difference.

In the first case before the CJ where the *idem* element was a crucial question – *van Esbroeck*[87] – the Court recognized that Article 54 CISA was different from other international agreements concerning the same principle; it stated:

> Unlike Article 54 of the CISA, Article 14(7) of the International Covenant on Civil and Political Rights and Article 4 of Protocol no. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms use the term "offence", which implies that the criterion of the legal classification of the acts is relevant as a prerequisite for the applicability of the *ne bis in idem* principle which is enshrined in those treaties[88].

[84] ECtHR, 21 September 2006, *Maszni v. Romania*, App. no. 59892/00 (the judgment is available only in French and in Romanian).

[85] *Maszni*, para. 68.

[86] Done at Schengen, 19 June 1990, reprinted in *OJ*, no. L 239, 22 September 2000, p. 19.

[87] *Van Esbroeck*.

This, the CJ contrasted with the wording "the same acts" in Article 54 CISA, which the Court understood as referring "only to the nature of the acts in dispute and not to their legal classification"[89].

As part of the Court's reasoning, a reminder was made of the fact that CISA did not presuppose the harmonisation of criminal law in the Member States[90], and it was a necessary implication of the *ne bis in idem* principle that "the Contracting States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Contracting States even when the outcome would be different if its own national law were applied".[91] Under these premises, the CJ was able to arrive at the following conclusions: (1) "the possibility of divergent legal classifications of the same acts in two different Contracting States is no obstacle to the application of Article 54 of the CISA"[92] and (2) "the criterion of the identity of the protected legal interest cannot be applicable since that criterion is likely to vary from one Contracting State to another"[93].

These conclusions were rationalised – or "reinforced" as the CJ put it – by reference to the context of freedom of movement within the Schengen area. The CJ emphasised, in particular, that

> [b]ecause there is no harmonisation of national criminal laws, a criterion based on the legal classification of the acts or on the protected legal interest might create as many barriers to freedom of movement within the Schengen territory as there are penal systems in the Contracting States[94].

And it was for this reason that the Court concluded that

> the only relevant criterion for the application of Article 54 of the CISA is identity of the material acts, understood in the sense of the existence of a set of concrete circumstances which are inextricably linked together[95].

It is submitted that, in principle, this conclusion is perfectly logical. Criminal offences are defined in the Member States independently of each other and the exact formulation of offence definitions will invariably differ from one Member State to another in a way that reflects how the penal code is structured or what legal interests are being protected by a particular provision. A notion of *idem* based on the legal

[88] *Ibid.*, para. 28.

[89] *Ibid.*, para. 27.

[90] *Ibid.*, para. 29.

[91] *Ibid.*, para. 30.

[92] *Ibid.*, para. 31.

[93] *Ibid.*, para. 32. *Cf.* the argument in E. SHARPSTON and J.M. FERNÁNDEZ-MARTÍN, *op. cit.*, p. 429-430 based on the fact that *ne bis in idem* in the Schengen context, when contrasted with EU competition law, is *not* about "one *single* legal order governed by one *uniform* set of rule".

[94] *Van Esbroeck*, para. 35.

[95] *Ibid.*

classification of conducts will inevitably frustrate the purpose of the principle and will be absolutely unworkable.

That having said, there is nothing illogical if *some* consideration based on the legal classification and/or the legally protected interest is taken into account when resolving the *idem* question. Thus, it is submitted that the CJ's conclusion that identity of the material acts is "the *only* relevant criterion" (my emphasis) for the application of Article 54 CISA is too categorical. However, in its subsequent case law[96], the CJ has in fact treated the identity of material acts as the only criterion and in *Kretzinger*, this approach is stated clearly and explicitly; the Court went beyond saying that factual identity was the only relevant criterion to providing guidelines on what the national courts had to confine themselves to and what considerations were irrelevant:

> The competent national courts which are called upon to determine whether there is identity of the material acts must confine themselves to examining whether those acts constitute a set of facts which are inextricably linked together in time, in space and by their subject-matter (…), and considerations based on the legal interest protected are not to be deemed relevant[97].

The notion of *idem* as expressed in the *Kretzinger* judgment can be said to represent the CJ's understanding of *idem* in current law, and it is to this notion that the ECtHR has aligned its approach in *Zolotukhin*[98].

The CJ has been asked to deliver preliminary rulings in a number of cases – besides those already mentioned – on the interpretation of Article 54 CISA dealing with issues not directly relevant for the purpose of this paper and there is no need to take up these cases. Nonetheless, the principle established in *Gözütok and Brügge*[99] must at least be mentioned because this principle considerably expands the scope of application of Article 54. According to this Article, the prohibition of subsequent prosecution is applicable to a person "whose trial has been finally disposed of". It is by no means obvious, from the wording alone, that an out-of-court settlement would qualify as a trial that has finally been disposed of. In the joined cases in question, public prosecution was discontinued after the accused had paid a fine imposed by the prosecution authority without the involvement of a court. According to domestic law, discontinuance of prosecution on these grounds would bar further prosecution in that State. The CJ ruled that "following such a procedure, further prosecution is definitively barred", therefore "the person concerned must be regarded as someone whose case has been "finally disposed of" for the purposes of Article of the CISA in relation to the acts he is alleged to have committed"[100]. Furthermore, the CJ stated explicitly that "[the] fact that no court is involved in such a procedure and that the decision in which

[96] See CJ, 28 September 2006, *Van Straaten*, C-150/05, *ECR*, p. I-9327; CJ, 28 September 2006, *Gasparini*, C-467/04, *ECR*, p. I-9199; CJ, 18 July 2007, *Kraaijenbrink*, C-367/05, *ECR*, p. I-6619.

[97] *Kretzinger*, para. 34.

[98] *Zolotukhin*, para. 84.

[99] CJ, 11 February 2003, *Gözütok and Brügge*, C-187/01 and C-385/01, *ECR*, p. I-1345.

[100] *Ibid.*, para. 30.

the procedure culminates does not take the form of a judicial decision does not cast doubt on that interpretation"[101].

Finally, it must be pointed out that Schengen *ne bis in idem* has not been rendered obsolete by the provision on *ne bis in idem* in the EU's Charter of Fundamental Rights (to be discussed presently). Whereas the Charter is applicable to the Member States "only when they are implementing Union law"[102], Schengen *ne bis in idem* is applicable to criminal proceedings involving all sorts of crimes in the Member States. To give just one simple example, the question whether Member State B may prosecute a person for "homicide through gross negligence" after that person has already been acquitted for the offence of "murder" in Member State A must be answered by reference to Schengen *ne bis in idem* since the crime does not contain an EU element that would trigger the application of the Charter of Fundamental Rights.

C. *Article 50, Charter of Fundamental Rights of the European Union*

According to Article 6 TEU, the Charter of Fundamental Rights of the European Union (hereafter CFR)[103] shall have the same legal value as the Treaties. Under Title VI of the Charter entitled "Justice", the *ne bis in idem* principle is articulated in its own provision:

> **Article 50 – Right not to be tried or punished twice in criminal proceedings for the same criminal offence**
>
> No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has been finally acquitted or convicted within the Union in accordance with the law.

According to its wording, it is abundantly clear that this provision is applicable only to criminal proceedings. The area of application of Article 50 CFR differs from that of Article 4 – P7 and of Article 54 CISA in that the scope of Article 50 encompasses the whole EU, or, more precisely, all[104] final criminal judgments delivered "within the Union". Thus, this prohibition has effect in relation to both judgments delivered within one and the same Member State, and judgments delivered in different Member

[101] *Ibid.*, para. 31.

[102] Article 51(1) CFR provides the following: "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".

[103] Proclaimed by the European Parliament, the Commission and the Council on 7 December 2000, and adapted on 12 December 2007 at Strasbourg. The consolidated text of the Charter is available at EUT C 326, 26 October 2012, 391-407.

[104] This is, according to the only case law on the matter, subject to the requirement of a link with the implementation of EU law – see Article 51(1) CFR and CJ, 26 February 2013, *Åkerberg Fransson*, C-617/10, nyr, paras. 17-22. *Cf.* the discussion on the continued relevance of Schengen *ne bis in idem* in section 3.D *in fine*.

States [105]. *Åkerberg Fransson* [106] is at the moment of writing the first and only case in which the CJ has expressed its view on Article 50 CFR. This case is concerned with criminal proceedings brought by the Swedish prosecution authority for tax fraud subsequent to the imposition by an administrative authority of a "tax surcharge" for the failure to account for the value added tax (VAT) payable. It is the VAT element that renders the dispute within the ambit of EU law and thereby also under the jurisdiction of the CJ [107]. On the substantive question of the interpretation of Article 50 CFR, the CJ's approach differed somewhat from that of the ECtHR's in relation to Article 4 – P7 [108]. First of all, the CJ "noted" that

> (...) Article 50 of the Charter does not preclude a Member State from imposing, for the same acts of non-compliance with declaration obligations in the field of VAT, a combination of tax penalties and criminal penalties [109].

Taken at face value, this is a mere platitude stating that there is nothing in the text of the Article to prevent the imposition of a combination of different sanctions. At a deeper level, this may be understood as a more general statement on the "*bis*" elements in the *ne bis in idem* principle and points to a discrepancy between the CJ and ECtHR case law [110].

The first proper step towards answering the questions of the referring national court was to determine whether the tax surcharges in this case were "criminal', and the CJ stated:

[105] Article 50 CFR can thus be said to give expression for the principle of European territoriality, or a single European judicial space, or one single European area of freedom, security and justice.

[106] *Åkerberg Fransson*. Many commentators have remarked on the wider implications of this case – together with *Melloni* (CJ, 26 February 2013, *Melloni*, C-399/11, nyr) decided on the same day – on the interplay between different sources of fundamental protection. The remarks here are limited simply to the narrow question of the *ne bis in idem* principle. See however section 5 below on the multiplicity of sources and coherence of the *ne bis in idem* principle. On 27 May 2014, the CJ (Grand Chamber) delivered its judgment in case C-129/14 PPU, *Spasic*, a case which dealt very much with Article 50 CFR. Account can however not be taken of this case as the judgment was delivered at the final proofing stage of this volume.

[107] *Åkerberg Fransson*, paras. 16-31. The CJ has thereby ruled that the application in this case of the Swedish legislation on tax fraud charges and tax surcharges constitutes an implementation of EU law, which is a prerequisite for the applicability of Article 50 CFR to Member States, even though said legislation was enacted independently of any EU provisions and at a time when Sweden was not even a Member State of the EU. See Article 51(1) CFR, which states: "[t]he provisions of this Charter are addressed to Member States only when they are implementing Union law".

[108] This, however, may be the consequence of the questions posed by the referring court rather than a reflection of the CJ's logic in this matter.

[109] *Åkerberg Fransson*, para. 34.

[110] On this last point see, *e.g.*, J.A.E. VERVAELE, "The Application of the EU Charter of Fundamental Rights (CFR) and its *Ne bis in idem* Principle in the Member States of the EU", *Review of European Administrative Law*, 2013, 6, p. 113-134, at p. 116.

> It is only if the tax penalty is criminal in nature for the purposes of Article 50 of the Charter and has become final that that provision precludes criminal proceedings in respect of the same acts from being brought against the same person [111].

The criteria adopted by the CJ in determining whether a penalty is criminal in nature were exactly the same as the *Engel* criteria used by the ECtHR, which the CJ formulated in the following way:

> The first criterion is the legal classification of the offence under national law, the second is the very nature of the offence, and the third is the nature and degree of severity of the penalty that the person concerned is liable to incur [112].

But having identified the applicable criteria, the CJ then eschewed the question whether the tax surcharges in this case were of a criminal nature by stating that

> [i]t is for the referring court to determine (...) whether the combining of tax penalties and criminal penalties that is provided for by national law should be examined in relation to the national standards (...), which could lead it, as the case may be, to regard their combination as contrary to those standards, as long as the remaining penalties are effective, proportionate and dissuasive [113].

This formulation by the CJ differs somewhat from the case law of the ECtHR in that in *Åkerberg Fransson*, the CJ speaks of the combination of penalties whereas the ECtHR jurisprudence has consistently examined the character of each of the penalties on its own [114]. It is unclear how the combination effect should relate to the (*Engel*) criteria that the Court has just reiterated. Furthermore, the phrase "effective, proportionate and dissuasive" appears odd in the present context. The requirement that a sanction shall be effective, proportionate and dissuasive stipulates that Member States must give effect to EU law and as such can be seen as being based on the protection of the EU's – *i.e.* not the Members States' or the individuals' – interests. Does it mean that when looking at the (*Engel*) criteria and the combination effect of different penalties, regard shall also be had to the interests – not least the financial interests – of the Union? It is unfortunate that the CJ has left these questions to the referring court to answer [115].

[111] *Ibid.*

[112] *Åkerberg Fransson*, para. 35. Interestingly, the CJ only referred to its own decision in *Bonda* (CJ, 5 June 2012, C-489/10, *Bonda*, nyr) and did not mention the ECtHR case law.

[113] *Åkerberg Fransson*, para. 36.

[114] Thus, it may not be a coincidence that the CJ prefaced the substantive argument by its statement in para. 34 (*cf.* note 110 above). These remarks of the CJ may open up the discussion again on the applicability of the *Anrechnungsprinzip* and *Erledigungsprinzip*, a discussion of which cannot be pursued here – but see B. VAN BOCKEL, *op. cit.*, p. 32-36, for an explanation of these principles.

[115] It has been surmised by some that "the judgment seems to suggest that the Court did not consider that the *ne bis in idem* principle as protected by Article 50 of the Charter was violated in Mr Åkerberg Fransson's case" (B. VAN BOCKEL and 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, 38, p. 866-883, at p. 871–872); although these authors find this "surprising" (*ibid.*).

This is really all the CJ has to say on the principle of *ne bis in idem* in the version given in Article 50 CFR since the Court declared one of the two remaining questions in *Åkerberg Fransson* as inadmissible for being hypothetical [116] and the other question that the Court did answer concerns the more general questions of the position of the ECHR in EU law and the supremacy of EU law on fundamental rights *vis-à-vis* a national judicial practice that requires "clear support" in EU or ECHR law for the "disapplication" of national law that might be in breach of human rights standards [117].

Åkerberg Fransson is thus completely silent on the substantive issues that have occupied the ECtHR in its jurisprudence on the *idem* element of the *ne bis in idem* principle. It follows, then, that *Åkerberg Fransson* is silent too on the question whether the ECtHR's judgment in *Zolotukhin* has any effect on the interpretation by the CJ of the *idem* element in Article 54 CISA. For the purpose of this paper, then, *Åkerberg Fransson* does not provide the illumination of Article 50 CFR that one may expect.

4. Application of the principle of *ne bis in idem* in non-criminal proceedings

The focus of this paper is on criminal proceedings. Yet, final judgments of non-criminal proceedings – such as civil suits and administrative cases – also have preclusive effect. This is the "negative" aspect [118] of *res judicata*. It is not uncommon that, in a legal system where different codes of procedure exist for civil and criminal cases, the issue of *res judicata* is dealt with differently, often by separate lines of case law. In particular, the notion of the *res* that has been finally adjudged may well differ between a civil and criminal case [119]. This paper will not discuss the concept of *res judicata* in criminal or non-criminal cases any further. However, when the term *ne bis in idem* is used, one has usually in mind criminal proceedings only. As mentioned in section 2 above, the normative import of *ne bis in idem* is the protection of an individual who has undergone a criminal proceeding, an instance of the exercise of public power. The jurisprudence of the ECtHR shows very clearly that the protective *ne bis in idem* principle is applicable when the level of public interference in the individual is equivalent to the interference of a criminal proceeding. Within the system of the ECHR, the *ne bis in idem* principle is found to be applicable in cases qualified as non-criminal according to national law by virtue of the proceeding's intrusive effect on the individual; the ECtHR does not appear to have given any special consideration to the precise type of non-criminal proceedings in question – although administrative proceedings concerning traffic fines and revenue law proceedings concerning tax surcharges feature rather frequently in the case law.

Within the EU, but in an area outside the field of application of the Schengen *acquis*, the protective *ne bis in idem* principle is applicable when EU measures have

[116] *Åkerberg Fransson*, paras. 38-42.

[117] *Ibid.*, paras. 43-49.

[118] See the discussion of *res judicata* in section 2 above.

[119] Under Swedish law, for instance, the extent of the preclusive effect of *res judicata* is different for civil and criminal judgments even though there is a common code of judicial procedure for both civil and criminal proceedings. This difference may partly be explained by the different rules concerning the adjustment of claims/charges in the different categories of proceedings.

or have had an effect on an individual that is equivalent to a criminal proceeding. Article 50 CFR, discussed in section 3.E above, will – despite its wording referring specifically to criminal proceedings – certainly be applicable to any proceedings that are "criminal" in nature in the sense developed through ECtHR case law. In *Bonda* [120], the CJ referred explicitly to the ECtHR's *Engel* and *Zolotukhin* jurisprudence in relation to the application of the *ne bis in idem* principle in a case concerning "irregularities" concerning declaration of the agricultural area eligible for the single area payment, even though the Court found no infringement of the *ne bis in idem* principle in this particular case since the penalties imposed under the agricultural regulation was deemed not to be "criminal" in character [121].

But long before the CFR's acquisition of a status on par with the treaties, *ne bis in idem* has been applied as a general principle of EU law. Although the application of this principle can be traced back to the CJ's early staff cases [122], it is in the field of competition law that the principle has received the most attention. It is in the so-called *Cement Cases* [123] that the CJ formulated its threefold test in this field:

> As regards observance of the principle *ne bis in idem*, the application of that principle is subject to the threefold condition of identity of the facts, unity of offender and unity of the legal interest protected. Under that principle, therefore, the same person cannot be sanctioned more than once for a single unlawful course of conduct designed to protect the same legal asset [124].

This threefold test to identify the *idem* in competion law matters is clearly distinct from the *idem*-test specified in the ECtHR's *Zolotukhin* jurisprudence. This state of affairs has been much criticised and it has even been argued that "[t]o interpret and apply the *ne bis in idem* principle so differently depending on the area of law concerned is detrimental to the unity of the EU legal order" [125]. There was hope that the CJ would alter its course and harmonise its case law in competition law area with the ECtHR's *Zolotukhin* jurisprudence. In *Toshiba* [126], the CJ had an opportunity to take note of the ECtHR's recent case law and it was also the Advocate General's conclusion that the *Zolotukhin* criteria be adopted even in EU competition law cases [127]. The CJ (Grand Chamber), however, simply reiterated the threefold test of the *Cement Cases* and did not engage in a dialogue, so to speak, with the ECtHR on the application of the *ne bis in idem* principle in the area of competition law [128]. There is much criticism of *Toshiba*

[120] *Bonda*.

[121] *Ibid.*, paras. 36-37 and 42.

[122] CJ, 5 May 1966, *Gutmann*, 18 and 35/65, *ECR*, p. 149.

[123] CJ, 7 January 2004, *Aalborg Portland v. Commission*, C-204, 205, 211, 213, 217 and 219/90 P, *ECR*, p. I-123.

[124] *Aalborg Portland v. Commission*, para. 338.

[125] Opinion of Advocate General Kokott, delivered on 8 September 2011, in *Toshiba* (CJ, 14 February 2012, *Toshiba*, C-17/10, nyr).

[126] *Toshiba*.

[127] Opinion of Advocate General Kokott in *Toshiba*, para. 124.

[128] *Toshiba*, para. 97. In the case in question, the outcome would have been the same even if the *Zolotukhin* criteria for *idem* were applied since the Court had come to the conclusion that there was no identity of fact (para. 98).

in the literature but this not the place to engage in this debate; suffice it to say that the main lines of criticism have been directed at the lack of coherence within the EU legal order caused by the differentiated approach of the CJ to a general principle of EU law and the uncertainty that the current state of affairs has created [129].

To recapture the main points raised in this section, it may be recalled that, for the ECtHR, the classification of the proceeding within a legal system is a *non sequitur* for the purpose of the application of the *ne bis in idem* principle; the case law of the ECtHR shows that the Court would make the necessary "reclassification" in order to trigger the *ne bis in idem* principle using the *Engel* criteria whenever the impact of the proceeding on the individual is equivalent to that of a criminal proceeding. The situation with respect to the EU legal order is less clear. The case law based on Schengen *ne bis in idem* has hitherto only dealt with criminal cases. It is an open question whether the CJ will follow the *Engel* criteria if such a case should arise in the future [130], and if the *Engel* criteria are used, thus expanding the scope of application of Schengen *ne bis in idem*, whether the CJ would find some ways to limit the widened scope by modifying other elements of the principle. For the application of Article 50 of the Charter of Fundamental Rights, it appears that the notion of "criminal proceeding" is to be interpreted in accordance with the *Engel* criteria or perhaps the *Bonda* criteria since the CJ has, in its recent jurisprudence, made reference only to its own case law without mentioning the provenance of these criteria from the ECtHR's *Engel* jurisprudence [131]. The scope of Article 50 CFR is, however, limited, as there is a requirement of a link to EU law. *Toshiba* shows that the *ne bis in idem* principle in the field of competition law has its own special set of criteria including the element of "unity of the legal interest protected'. It is still unclear whether Article 50 CFR is directly applicable in competition law cases, thus by-passing the case law developed based on the understanding that *ne bis in idem* is a general principle of EU law.

5. Concluding Remarks: Coherence of the *ne bis in idem* principle in the European legal order

This paper started with a look at *res judicata*, which is a central concept in procedural law having both positive and negative aspects; *positive* in the sense that a final judgment is recognised on the basis of which different legal consequences may ensue and *negative* in the sense that a final judgment precludes further litigation concerning the same matter (*res*), a sense expressed in maxims such as *contra rem iudicatem non audietur*. Both these aspects are important for the maintenance of the integrity or coherence of the legal system, not only at an abstract or theoretical level but

[129] In addition to the numerous commentaries on *Toshiba*, the generality of general principles of law is discussed in W. Devroe, "How General Should General Principles Be? *Ne Bis in Idem* in EU Competition Law", *in* U. Bernitz, X. Groussot and F. Schulyok (eds.), *General Principles of EU Law and European Private Law*, Alphen ann den Rijn, Wolters Kluwer, 2013, p. 401-442.

[130] An example of such a case is where criminal charges are brought in Member State B against an undertaking, based on the same conduct that has led to a fine by the competition authority of Member State A or by the Commission.

[131] See *Åkerberg Fransson*, para. 35.

also at the very practical level of managing litigations that a legal system may handle. The negative aspects of *res judicata* have however been given special consideration when it comes to criminal proceedings as one of the parties to such proceedings is the State exercising public power. In the context of criminal proceedings, the negative aspects of *res judicata* are usually discussed under the heading of *ne bis in idem*. With the consecration of the *ne bis in idem* principle in a number of human rights instruments, the principle has been seen – mainly, if not exclusively – as a protective principle for the benefit of individuals against the exercise of State power. The link to the central functions of *res judicata* in a legal system has more or less been severed in the continued development of the principle of *ne bis in idem*. In the case law of the international courts – the ECtHR and CJ – the protective element of *ne bis in idem* is the sole aspect that has underlined the development of the principle.

This paper has pointed out that there are certain gaps in the reasoning of the ECtHR as the case law develops – gaps [132] that eventually lead to a denouement in the understanding of Article 4 – P7, which is unsatisfactory in the opinion of the present author. One of these gaps consists of the lack of reasoning offered by the ECtHR for applying the concepts of crimes, criminal sanctions and criminal proceedings developed through its fair trial jurisprudence to the context of Article 4 – P7. As fair trial rights and the protective purpose of *ne bis in idem* are quite different rights, there is a burden of argumentation on the ECtHR if it considers that good reasons exist for treating the concepts of criminal proceedings etc. as the same in both contexts. Another gap is the lack of explanation offered by the ECtHR when it adopts the conclusions of the CJ's case law on the interpretation of the provision on *ne bis in idem* according to CISA. Two main criticisms can be raised against the ECtHR's approach. To begin with, the ECtHR has failed adequately to take into account the fact that while CISA deals with international *ne bis in idem*, Article 4 – P7 is clearly confined to legal proceedings in the same legal system. As has been discussed in subsection 3.D above, one of the more compelling reasons for endorsing the CJ's approach is the fact that criminal law and criminal procedure in the Member States are not harmonised and an interpretation of *idem* based on legal classification or protected interests will be unworkable. This is hardly the case when a single legal system is concerned. The substantive and procedural provisions in different areas of law should form a coherent system. In particular, legal classifications and procedural provisions can be "harmonised" within one legal system so that the *effect* of *ne bis in idem* be avoided when different parts of the legal system interact coherently and in harmony: it may be the case that, if the *idem* element in a legal system is understood in a certain way, the *bis* element must be interpreted in a manner that will lead to an overall result that respects the principle of *ne bis in idem*. The other criticism that can be raised against the ECtHR is its failure to acknowledge that the CISA case law is based on a convention that has totally different purposes by comparison with the ECHR. It is clear that the CJ case law is motivated by the overriding goal of CISA to ensure free movement with the Schengen area. The Contracting State' mutual trust in each

[132] This is what I mean by an "original sin" alluded to in the title of this paper. It can be likened to a character flaw of a tragic hero that will inevitably lead to his downfall.

other's criminal justice systems has also been given as a reason for focusing on the factual circumstances rather than legal classifications etc. when interpreting the *idem* element. This kind of consideration is completely alien to the system of human rights protection offered by the ECHR and its additional protocols. In the opinion of the present author, the ECtHR – through "harmonising" its case law on *ne bis in idem* with that of the CJ – has ironically disturbed the coherence of the European legal order by the import of conclusions based on a consideration of elements that are alien to the system of human rights protection according to the ECHR.

Looking more closely at the European Union only, a separate issue of coherence has been raised. As mentioned earlier, the CJ has maintained a separate interpretation of the *idem* element in the area of competition law[133], while there is a clear trend towards convergence in the areas of CISA rights, the European arrest warrants and administrative sanctions (outside the field of competition law). This is seen by some critics as being highly unsatisfactory. If there is no good reason for treating competition law differently, the current state of affairs can certainly be described as being incoherent. However, this matter has not been discussed sufficiently in this paper to suggest a conclusion. Suffice it to say that part of the debate on this issue must address the question of who has the burden of argumentation that the same *ne bis in idem* principle – or more narrowly, the same concept of *idem* – must apply uniformly in all fields of EU law.

[133] See section 4 above in connection with the discussion of *Toshiba*.