The principle of *ne bis in idem* and the application of criminal sanctions: of scope and restrictions

ECJ 20 March 2018, Case C-524/15, *Luca Menci*
ECJ 20 March 2018, Case C-537/16, *Garlsson Real Estate SA and Others* v *Commissione Nazionale per le Società e la Borsa (Consob)*
ECJ 20 March 2018, Joined Cases C-596/16 and C-597/16, *Enzo Di Puma* v *Consob* and *Consob* v *Antonio Zecca*

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Introduction

The principle of *ne bis in idem* has played a key role in the protection of human rights in the EU and has been recognised as a general principle of European Union (hereinafter 'EU') law.[1] This principle has been recognised in the EU Charter of Fundamental Rights (hereinafter the 'Charter') in Article 50 and has acquired an important role in challenges raised at the national level and submitted for preliminary rulings to the Court of Justice of the European Union in the last few years.[2] The *ne bis in idem* has also been subject to extensive case law of the European Court of Human Right Court in cases regarding the application of Article 4 of Protocol VII to the European Convention on Human Rights.[3]

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[1] *See* generally on the principle of *ne bis in idem* in EU law, B. Van Bockel (ed.), *The Principle of ne bis in idem* (Cambridge University Press 2016); B. Van Bockel, *The ne bis in idem* (Kluwer 2010) and J. Tomkin, 'Article 50, Right not to be tried or punished twice in criminal proceedings for the same criminal offence', in S. Peers et al., *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014) p. 1373.

[2] For a reconstruction of the Luxembourg Court case law on the *ne bis in idem see* D. Sarmiento, '*Ne bis in idem* in the Case Law of the European Court of Justice', in Van Bockel (2016), *supra* n. 1, p. 103 ff.

[3] On the protection of the *ne bis in idem* under the Convention see B. Van Bockel, 'The "European" *ne bis in idem* Principle Substance, Sources, and Scope', in Van Bockel (2016), *supra* n. 1, p. 16-19.

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In light of the Luxembourg Court judicial recognition of the principle of *ne bis in idem* and the existing Strasbourg Court case law, three important cases have been recently decided by the Luxembourg Court (Grand Chamber): *Menci*,[4] *Garlsson Real Estate*[5] and *Di Puma*.[6] Not surprisingly, they have all been decided on the same day, 20 March 2018, and they deal with similar questions, namely the application of the principle of *ne bis in idem* to parallel administrative/criminal proceedings and penalties in Italy.

The Court of Justice confirms that the *ne bis in idem* is a fundamental principle protected in the Charter. It reconciles the treatment of possible infringements of the *ne bis in idem* in three different areas by providing a general framework to recognise when two (criminal) proceedings or penalties may raise challenges to the *ne bis in idem*. At the same time, the Court of Justice has also the opportunity to assess the possible justifications to limit this principle in light of the general clause provided in Article 52 of the Charter. This also follows (indirectly) the new approach adopted by the Strasbourg Court in the recent *A and B* v *Norway*.[7]

This case note intends to examine the judgments and to analyse the issues raised on the application of the *ne bis in idem* principle established in the EU legal framework and recognised by the Charter. To a certain extent, the Court of Justice approach is a welcome development in the *ne bis in idem* case law, mainly due to a 'balanced' interpretation of the limitation to a Charter fundamental right.

After having briefly summarised the three cases, this contribution examines the role of *ne bis in idem* in the EU legal order and its recognition in recent years by the Court of Justice. Subsequently, it discusses the relationship between the Luxembourg Court and the Strasbourg case law, in particular by drawing a comparison with *A and B* v *Norway*. Furthermore, the note assesses and comments on the criteria to determine when and under what circumstances the *ne bis in idem* may be restricted. Before concluding, the paper looks also at the relationship between the principle of *ne bis in idem* and *res judicata*.

The three cases

This section briefly outlines the facts of the three cases and summarises the three judgments. The three cases substantially assess four consecutive aspects in analysing the *ne bis in idem* principle: (a) whether the subject matter comes under the scope of EU law; (b) whether the two proceedings and penalties are criminal in nature; (c) whether the same offence exists in the cases at issue; and (d) finally, whether two proceedings and sanctions on the same matter may be justified under the Charter regime.

[4] ECJ 20 March 2018, Case 524/15, *Menci*, ECLI:EU:C:2018:197.
[5] ECJ 20 March 2018, Case 537/16, *Garlsson Real Estate and Others*, ECLI:EU:C:2018:193.
[6] ECJ 20 March 2018, Case 596/16, *Di Puma*, ECLI:EU:C:2018:192.
[7] ECtHR 15 November 2016, Case Nos. 24130/11 and 29758/11, *A and B* v *Norway*.

Menci

Case 524/15 *Menci* deals with a preliminary ruling raised in national proceedings against Mr Menci for offences concerning value added tax (VAT). Mr Menci was declared liable to pay a certain amount by the Italian tax authorities. The decision became final and he decided to pay the amount in instalments. The referring judgment decided to ask to the Court of Justice the question of whether the existence of two proceedings, one administrative and one criminal, complies with Article 50 of the Charter, the Convention and the Strasbourg Court case law. The Advocate General's Opinion[8] reconstructs at length the case law of the Luxembourg Court and the approach of the Strasbourg Court to the *ne bis in idem* application to the joint imposition of criminal and administrative penalties in tax matters. A certain emphasis in the Advocate General's reconstruction is posed on the question whether to apply the recent Strasbourg Court *A and B* v *Norway* case law where it accepted the non-infringement of the *ne bis in idem* in two proceedings that are closely connected in time and substance.[9] Having determined the identity of the two penalties on the same facts, the Advocate General concludes that there is no scope for the application of restrictions to Article 52 of the Charter as well as for references to the Strasbourg Court justification applied in *A and B* v *Norway*.[10]

After determining that the subject matter comes within the scope of EU law, the Court of Justice states that Member States may set up systems of applicable penalties for VAT collection that may be also a combination of administrative and criminal penalties.[11] According to the Court, there is a duplication of proceedings penalties that limits the fundamental right guaranteed in Article 50 of the Charter.[12] The Court of Justice then looks at the possible justifications to limit the right guaranteed under Article 50 of the Charter and recognises that there may be restrictions to the rights and freedoms if they comply with the principle of proportionality and if they are necessary and they genuinely meet objectives of general interests recognised by the Union.[13] When looking at the reasons for the justifications to restrictions of Article 50 of the Charter, the Court comes to the conclusion that the duplication of the proceedings and penalties in the case is not excessive in relation to the seriousness of the offence committed.[14]

[8] A.G. Opinion, Case 524/15, *Menci*, ECLI:EU:C:2017:667.
[9] *Ibid.*, paras. 57-62.
[10] *Ibid.*, para. 94
[11] *Menci* judgment, *supra* n. 4, paras. 18-20.
[12] *Ibid.*, para. 39.
[13] *Ibid.*, paras. 41-46.
[14] *Ibid.*, paras. 62-63.

Garlsson Real Estate

Garlsson Real Estate deals with the interpretation of Article 50 of the Charter on administrative fines set out following breaches of the legislation on market manipulation. In 2007 the Italian market conduct authority (Consob) issued an administrative fine to Mr Ricucci and two legal persons. The conduct of Mr Ricucci was also subject to criminal proceedings, leading to a final judgment that extinguished the conviction as a result of a pardon. The referring court asked mainly whether Article 50 of the Charter and the Strasbourg Court preclude the conduct of administrative proceedings for which the same person has been convicted by a decision that has the force of *res judicata*. The Advocate General's Opinion[15] in *Garlsson* follows closely the Advocate General's Opinion of *Menci*. Even though the Advocate General's Opinion analyses at length the restriction clause of Article 52 of the Charter, it comes to the conclusion that a system of dual criminal and administrative penalties does not respect the *ne bis in idem* principle and cannot be justified under Article 52 of the Charter.[16]

The Court of Justice firstly ascertains whether the national provisions come within the scope of EU law, and concludes that Italian law on market manipulation implements Directive 2003/6 on market abuse.[17] Further, the Court finds that the administrative penalty at issue is considered to have punitive purposes, especially because it can be 10 times greater than the proceeds or profits which occurred, and therefore is criminal in nature. It then holds that duplication of proceedings and penalties can be allowed under certain circumstances.[18] However, according to the Court, the correlation between the Italian public prosecution service and Consob questions whether a conviction by a court and the parallel proceedings leading to administrative fines are proportionate to pursue the objectives of the EU legislation on market manipulation.[19] The Court of Justice considers that the final criminal conviction is already sufficient to punish the offence, while the interaction between the criminal and administrative penalties and the possibility to recover part of the administrative penalty after a criminal conviction are not justified under Article 52 of the Charter.[20]

Di Puma

This case concerns the interpretation of Article 50 of the Charter in relation to criminal sanctions for market abuse. Administrative penalties were imposed by

[15] A.G.'s Opinion, *Garlsson Real Estate*, ECLI:EU:C:2017:668.
[16] *Ibid.*, para. 77.
[17] *Garlsson Real Estate* judgment, *supra* n. 5, paras. 22-23.
[18] *Ibid.*, para. 43.
[19] *Ibid.*, paras. 48-49.
[20] *Ibid.*, paras. 53-57.

Consob on Mr Di Puma and Mr Zecca for insider dealing. In the context of the cases brought before the national court against Consob, Mr Di Puma and Mr Zecca relied on a judgment of criminal acquittal for Mr Di Puma. The referring court asked whether a judgment of acquittal precludes the initiation or prosecution of further proceedings based on the same facts. The Advocate General's Opinion[21] follows closely the analysis in *Menci* and *Garlsson Real Estate*. The Advocate General considers that the duplication of proceedings on the same facts leads to a violation of the *ne bis in idem* principle that cannot be justified.[22]

The Court of Justice analyses the case by looking at the fact that there had been a final criminal judgment having *res judicata* effect. It makes clear that *res judicata* precludes double findings of violations on insider dealing and their punishment. This principle is not absolute, rather – also in light of the Strasbourg Court case law – criminal proceedings may be reopened.[23] However, the bringing of double proceedings shall respect the principle of proportionality. In the case at issue, the Court of Justice concludes that the existence of a previous judgment of acquittal before the conclusion of judicial proceedings on administrative penalties is sufficient to exclude limitations to Article 50 of the Charter.[24]

Ne bis in idem in the EU legal order: rationalisation at stake?

The principle of *ne bis in idem* is the main object of the three judgments and has been applied to recognise to what extent two proceedings on the same fact (*idem*) cannot lead to two penalties of a criminal nature (*bis*) on the same person, when one decision on the matter is definitive. The development of the *ne bis in idem* has a long standing in the EU legal framework.[25] Before its recognition in the EU Charter, it was protected in some instruments outside or within EU law[26] as well as being considered a general principle of EU law.[27]

The primary recognition of the *ne bis in idem* in the EU legal order is in the EU Charter, where Article 50 provides that '[n]o one shall be liable to be tried or

[21] A.G.'s Opinion, Case 596/16, *Di Puma*, ECLI:EU:C:2017:669.

[22] *Ibid*. para. 75.

[23] *Di Puma* judgment, *supra* n. 6, para. 35.

[24] *Ibid*., para. 45.

[25] For a first reference to *ne bis in idem* in the Luxembourg case law see ECJ 15 March 1967, Joined Cases 18/65 and 35/65, *Gutmann* v *Commission*, EU:C:1967:6, paras. 79, 81 and 82.

[26] E.g. Art. 54 of the Convention Implementing the Schengen Agreement. *See* B. Van Bockel, 'The "European" Ne Bis in Idem Principle. Substance, Sources, and Scope', in Van Bockel (2016), *supra* n. 1, p. 21-22.

[27] ECJ 15 October 2002, Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, *Limburgse Vinyl Maatschappij and Others* v *Commission*, EU:C:2002:582, para. 59. *See* Sarmiento, *supra* n. 2, p. 109-110.

punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law'. Against this background, the three judgments raise reflections on the following aspects: the scope of application of the *ne bis in idem* under the Charter; the determination of the 'criminal' nature of administrative penalties; and the identity of facts.

The scope of application of the ne bis in idem *under the Charter*

In the past the Court of Justice has examined the *ne bis in idem* in various fields of application of EU law, such as competition, taxation or the Area of Freedom Security and Justice.[28] The approach followed by the Court of Justice has not always been satisfactory. This is mainly because the Court has adopted a differential treatment to the *ne bis in idem* depending on the field of its application.[29] While it could be argued that a different interpretation may be justified under certain circumstances, this seems unacceptable in the context of the application of a principle protected in the Charter. This is because a uniform application of Charter standards as well as consistency in the protection of fundamental rights require a consistent treatment of the *ne bis in idem*.

Furthermore, only after the entry into force of the Treaty of Lisbon has the Court of Justice analysed national law implementing EU law in light of Article 51 of the Charter on the scope of application of the Charter. In fact, one essential condition for the application of the Charter in Member States is that it applies 'when they are implementing Union law'.[30] This condition has been subject to wide scrutiny in literature, and the main reading[31] is correctly that the term 'implementing Union law' is sufficiently broad to include not only cases where Member States act within the scope of EU law, but also when they derogate from EU law.

The three cases under scrutiny refer to three fields of EU law: taxation, market abuse and market manipulation. These raise one main issue: what approach the Court of Justice follows to determine the scope of application of Article 50 of the Charter?

The situation of the *Menci* judgment follows the case law on the application of the *ne bis in idem* in the taxation field and refers to the seminal *Åkerberg Fransson* judgment[32] (hereinafter '*Fransson*') to justify the application of the Charter to

[28] *See* Van Bockel (2016), *supra* n. 1, p. 13 ff.

[29] *See* 'The identity of the offences' below.

[30] On Art. 51 of the Charter *see* K. Lenaerts, 'Exploring the limits of the EU Charter of Fundamental Rights', 8 *EUConst* (2012) p. 388.

[31] *Ibid.*, p. 377-388.

[32] ECJ 26 February 2013, Case C-617/10, *Åklagaren* v *Hans Åkerberg Fransson*, ECLI:EU:C:2013:105.

VAT infringements. In *Menci* the question of whether the applicable tax law under scrutiny implements EU law is succinctly, but correctly, assessed by the Court. This is for two reasons. Firstly, the Court of Justice does not want to put at risk its *Fransson* case law and the broad interpretation of what constitutes implementation of EU law according to the Charter. Secondly, and more importantly, the Court wants to give an *effet utile* interpretation of the secondary EU law provisions on VAT collection and ensure that EU law enforcement is guaranteed throughout the Union while respecting the fundamental rights of the Charter.[33] Consequently, the Court of Justice does not put into question whether the imposition of criminal and administrative sanctions in this field implements EU law. Rather, in *Menci* the Court has correctly taken stock of the *Fransson* experience and takes for granted that VAT infringements come within a broad scope of implementation of EU law. Furthermore, differently from *Fransson*, the Court in *Menci* analyses in detail the imposition of the administrative penalty of a criminal nature in light of the *ne bis in idem* instead of referring back the questions to the national court. This is an improvement compared to *Fransson* for two reasons. First, it provides a judicial framework for the assessment of dual penalties imposed in the taxation field. The *Fransson* case had been disappointing in this, as it left it to the national court. This left the interpreter with the unanswered question of knowing how the Court would have assessed the administrative proceedings/penalties. Secondly, the Court of Justice provides a sound understanding of when there may be an infringement of the *ne bis in idem* differently from the *Fransson* judgment where the Court had not really replied to that question.

Differently, *Di Puma* and *Garlsson Real Estate* relate to financial market offences that are, for the first time on this matter, brought before the Court of Justice. The court has no difficulty, though, in determining that the proceedings and sanctions under national law come within the scope of the Charter. This is because the penalties at issues relate broadly to a clear implementation of EU law and were 'easier' to assess than in the *Fransson*/*Menci* cases. In this regard, three points are highlighted. Firstly, it is interesting to note that the Court of Justice makes use of the same framework to assess taxation and financial markets matters when it comes to determining the scope of application of the Charter. These subject matters come within the Charter scrutiny because they protect interests recognised by EU law. Secondly, the Court has no difficulty in giving a broad interpretation of what constitutes implementation of EU law. It takes for granted that Member States, which are given an option of imposing criminal sanctions under national law, do so within the scope of EU law. This is correct in light of the progressive harmonisation of financial market abuses in the EU. Thirdly, while

[33] *See*, in this sense, B. Van Bockel and P. Wattel, 'New wine into old wineskins: the scope of the Charter of Fundamental Rights of the EU after *Åkerberg Fransson*', 38 *ELRev* (2013) p. 880-881.

obviously not mentioned in the Court of Justice judgments, the Directive on market abuse under scrutiny has been replaced by a new Regulation[34] and a new EU Directive.[35] These instruments set a higher level of EU harmonisation of market abuses in Europe. In particular, this legislative package sets EU directly applicable rules on market manipulation and market abuses and ensures a certain level of coordination between criminal and administrative penalties that may be imposed in Member States. Interestingly, Recital 23 of the Directive indicates that when Member States impose both administrative and criminal sanctions the principle of *ne bis in idem* should be respected. Moreover, Recital 72 and Article 25(1) of the Regulation indicate that national law may impose administrative and criminal sanctions for the same offence, but shall ensure an appropriate level of coordination between the two. This legislative development clearly indicates that laws on market abuses and manipulation come within the scope of EU law.

Overall, it is argued that the Court of Justice in the three judgments adopts a sound and comprehensive approach to the scope of application of EU law when it comes to issues related to the protection of fundamental rights under the Charter.

The 'criminal' nature of administrative sanctions

The determination of the criminal nature of administrative sanctions is the second point of interest in the three judgments. In fact, in order to apply the *ne bis in idem* principle there shall be two 'criminal' proceedings and penalties. The previous Court of Justice case law on the *ne bis in idem* already looked at whether two parallel proceedings led to 'criminal' penalties. While criminal proceedings are by their very nature 'criminal', the Court has considered also that administrative proceedings may result in imposing an administrative penalty that is 'criminal' in nature. This is an established issue in the Luxembourg Court case law, but the three judgments give some new indications.

The determination of a criminal sanction by the Luxembourg Court is originally based on a three-criteria assessment already developed in the Strasbourg Court case law. These have been already developed in the *Engel* Strasbourg Court case[36] and have 'migrated' in the EU legal order in the *Bonda*[37] and *Fransson*

[34] Regulation (EU) No. 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC, OJ L 173, 12.6.2014.

[35] Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (market abuse directive), OJ L 173, 12.6.2014.

[36] ECtHR 8 June 1976, Case Nos. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, *Engel e. a.* v *The Netherlands*, para. 82.

[37] ECJ 5 June 2012, Case C-489/10, *Bonda*, ECLI:EU:C:2012:319.

judgments where the Luxembourg Court assessed them under the Charter. This approach is justified by the need to develop case law on the *ne bis in idem* as protected in the Charter. Even if they are not always referred with the same wording, the three cumulative criteria are: whether the penalty is defined as criminal in national law; whether the proceedings and the sanction imposed are of general application; and whether their impact is sufficiently serious to justify the criminal nature of a penalty. In *Bonda* the Court of Justice was asked to assess the possibility of accumulation of administrative penalties and criminal prosecution of a Polish farmer who contravened EU agricultural provisions concerning direct payments and was excluded from receiving additional aid. The Court did not find a breach of the principle of *ne bis in idem* because it did not consider that the administrative penalty (a reimbursement of additional aid) under scrutiny was of a criminal nature.[38] This was sufficient to exclude the application of the *ne bis in idem*. Differently, in *Fransson* the Court of Justice was called to assess the combination of Swedish criminal and administrative penalties in the tax field.[39] While it recognised *Bonda* as a point of reference to assess whether administrative penalties are criminal in nature, the Court regrettably considered that it was for the referring court to determine whether the Swedish administrative penalty was criminal in nature.[40] This was perhaps because the Court of Justice did not itself feel ready to determine the 'criminal' nature of the administrative penalty.

The three cases under scrutiny go beyond the *Bonda* case law and conclude that the administrative penalties are criminal in nature. This is an important point that distances the three cases from *Bonda* and *Fransson*. In the three judgments under scrutiny the Court of Justice seems to concentrate carefully on determining the criminal nature of the penalties, in particular on the severity of the measures. The approach of the Court is based on a substantive rather than formal assessment of the criminal nature of the penalty. This means that the non-qualification of proceedings and sanctions as criminal under national law is unlikely to exclude them from being criminal in substance. Rather, the Court of Justice goes in the direction of recognising the *ne bis in idem* by focusing essentially on the severity of the penalty in the administrative proceedings to determine whether the latter have a criminal nature. This seems to be the most appropriate criterion to determine the criminal nature of an administrative penalty. In the three judgments the severity leading to the criminal nature of the administrative penalty was considered as follows: the additional payment of a fine of 30% of the VAT due in *Menci*; a fine

[38] *Ibid.*, para. 44.

[39] *See Fransson* judgment, *supra* n. 32, para. 36.

[40] *See* J. 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', 6 *REALaw* (2013) p. 132-133.

of up to 10 times more than the profit or proceed obtained from the market manipulation in *Garlsson Real Estate*; a fine of an amount 10 times greater than the proceeds or profit derived from the offence in *Di Puma*. The Court suggests that the criminal nature of proceedings and sanctions is determined mainly by whether there is a severe impact on the person subject to the sanctions. This is sensible because this criterion is sufficiently broad to ensure that the Court of Justice can determine the impact of the measure on the natural or legal person. A penalty consisting of the payment of a fine that considerably impacts the finances of a person is considered 'criminal'. Differently, repayment of undue financial advantages is not considered 'criminal'. This means that financial penalties of a financial amount going beyond repayment may be considered 'criminal' in nature. However, the questions that remain unanswered are what the (quantitative) threshold for severity is and how the Court determines an administrative penalty sufficiently 'severe' and therefore 'criminal' in nature. The three judgments do not provide common criteria or examples that suggest when administrative penalties are severe enough to be considered 'criminal' in nature. Furthermore, it is unclear whether non-pecuniary administrative enforcement measures such as cease-or-decease orders, suspensions of activities or withdrawal of licenses or authorisations would qualify as 'criminal' penalties.

The identity of the offences

The identity of the offences (*bis*) is an essential condition for the application of the *ne bis in idem* as it requires that the penalties imposed relate to the same offence. This element seems to have been settled in the recent Court of Justice case law, with the exception of competition law. This is because it is a rather straightforward element requiring, essentially, an assessment of the identity of facts of the case.

The three cases under scrutiny analyse this aspect succinctly, as the Court has no doubts that the same conducts have been subject to two proceedings. Its approach is straightforward: it requires that there shall be identity of person and material conduct to determine whether there has been an infringement of the *ne bis in idem*. This follows a substantive assessment of the facts rather than the legal qualification of these facts in the law. The Court of Justice also discarded the argument that, differently from administrative proceedings, criminal proceedings need to prove the subjective element in order to impose the penalty. The Court is correct in having this material understanding on the identity of offences. Otherwise, Article 50 of the Charter would not apply, simply because of the different criteria to impose criminal and administrative measures in the applicable law.

At the same time, the Court of Justice does not resolve the contentious issue of the differential treatment of the identity of the offences that still exists in

competition law.[41] It could be argued that the specific area of competition law requires a specific scrutiny of the *ne bis in idem*. However, this is not acceptable under a consistent application of a right enshrined in the Charter and protected in the EU legal order.[42] In the past, one of the main sources of concern is the different treatment of similar cases on *ne bis in idem* in competition matters. The *Walt Wilhelm* case excluded a violation of the *ne bis in idem* in competition matters as the Court has accepted that two parallel proceedings leading to two sanctions may be conducted.[43] In the *Toshiba* case the Luxembourg Court highlighted that the application of the *ne bis in idem* requires identity of facts, the same offender and the same legal interest prosecuted in two parallel procedures.[44] This gives the impression that there are additional requirements in competition law that make the application of the *ne bis in idem* different when compared with the level of protection in the Charter. The Advocate General's Opinion in *Menci* submitted that there should be a reconciliation of the case law in competition law with the general approach on *ne bis in idem*.[45] Unfortunately, the Court does not supersede its case law on *ne bis in idem* in competition law. This is a missed opportunity, which shows that the Court of Justice is still not comfortable in solving this matter. One may argue, though, that the Court was not asked to deal with the question of the *ne bis in idem* violation in competition matters. Nevertheless, it remains controversial that the Luxembourg Court accepts parallel proceedings in competition law based on the same offences, while in general it will scrutinise other proceedings in light of Articles 50 and 52 of the Charter.[46]

The relationship between the court and the Strasbourg Court case law on *NE BIS IN IDEM*: further 'autonomisation'?

The three judgments raise reflections also on the standard of application of the *ne bis in idem* in light of the Strasbourg Court case law. This section examines the Strasbourg case law and then looks at the approach followed by the Luxembourg Court in the three cases. This serves to assess to what extent the Court of Justice and its case law interacts with the Strasbourg Court.

[41] *See* R. Nazzini, 'Parallel Proceedings in EU Competition Law. *Ne bis in idem* as a Limiting Principle', in Van Bockel, *supra* n. 1, p. 131.

[42] *See* 'The scope of application of the *ne bis in idem* under the Charter', below.

[43] ECJ 13 February 1969, Case 14/68, *Walt Wilhelm* v *Bundeskartellamt*, ECLI:EU:C:1969:4, paras. 3 and 11.

[44] ECJ 14 February 2012, Case C-17/10, *Toshiba*, ECLI:EU:C:2012:72, para. 85.

[45] A.G.'s Opinion, *Menci*, *supra* n. 8, para. 103.

[46] *See* further on the justification 'Limitations to the *ne bis in idem* principle: the scope for restrictions', below.

It is well know that Article 4 of Protocol VII of the Convention sets out the principle of the *ne bis in idem* in the Strasbourg Convention system.[47] This article states that the *ne bis in idem* shall be protected in the signatory states of the protocol. Differently from the Charter, the Protocol has not been signed and ratified by all EU Member States.[48] This raises challenges of a differential application of the Protocol as compared to the Charter in the EU legal order. In particular, there are doubts about the effective application of the Strasbourg Convention principle as it is contained in a Protocol that is not applicable in all EU Member States.

The Strasbourg Court has analysed the *ne bis in idem* in various cases and has developed extensive case law on its application and scope. Notwithstanding its limit as to the non-application in all Member States, the Strasbourg case law on Article 4 of Protocol VII is long established and has been considered as a point of reference for the Luxembourg Court, even after the entry into force of the Charter.[49] This is because of the 'homogeneity clause' provided in Article 52(3) of the Charter, which requires that the 'scope of the rights [of the Charter] shall be the same of those laid down by the [Strasbourg Convention]'. Further, the Explanations of the Charter recognise that Article 50 has its corresponding reference to Article 4 of Protocol VII of the Convention.[50] However, the Charter may provide more extensive protection to the rights than the Convention, as provided in Article 52(3) of the Charter.[51]

The Strasbourg Court case law is analysed at length in the Advocate General Opinions in the three cases.[52] In fact, the Strasbourg Court has developed extensive case law, in particular to determine when the acts being judged are the same (*idem*) and when there are two sets of proceedings in which a penalty is imposed (*bis*). Interestingly, the Strasbourg Court has recently relaxed its orthodoxy on the application of the *ne bis in idem* principle in *A and B* v *Norway*.[53] This case excluded the violation of Article 4 to Protocol VII when there are parallel and sufficiently interconnected stages of proceedings to the wrongdoing by different authorities and for different purposes that lead to the imposition of a criminal penalty and an administrative penalty having a criminal

[47] *See* Van Bockel (2016), *supra* n. 1, p. 16 ff.

[48] Germany and the Netherlands have not ratified the Protocol, while the UK has not signed it. Austria, France, Portugal and Italy have ratified the Protocol, but they have added reservations to it.

[49] *See* Sarmiento, *supra* n. 2, p. 113-114.

[50] Explanations relating to the Charter of Fundamental Rights (2007/C 303/02), OJ 2007, C 303/17.

[51] *See* S. Peers and S. Prechal, 'Article 52: Scope and Interpretation of Rights and Principles', in Peers et al., *supra* n. 1, p. 1459 ff.

[52] *See* A.G.'s Opinion, *Menci*, *supra* n. 8, para. 38 ff.

[53] *A and B* v *Norway*, *supra* n. 7, paras. 132-134 and 147.

nature. This exception to the application of the *ne bis in idem* has also been confirmed in *Johannesson and Others* v *Iceland*,[54] where the Strasbourg Court determined that the *ne bis in idem* was violated in the case at issue, but held that this was because the two proceedings were not sufficiently interlinked with each other. This was especially because there was a time-lapse of several years between the two proceedings.

In general terms, it has been submitted that the Luxembourg Court references to the Strasbourg Court on the *ne bis in idem* protection have shown that the Luxembourg Court has used a dual approach: on the one side it (strictly) adhered to the Strasbourg Court case law; on the other side it has departed from it.[55] It has been also observed that where Article 4 of Protocol VII comes into play the Court of Justice refers somehow to the criteria developed by the Strasbourg Court, although there may some reasons to depart from this case law in specific cases.[56] The first approach has been followed in *Bonda* and to a certain extent in *Fransson*, while the second approach has been used in sectorial cases, such as *Toshiba*. This is arguably because the Court of Justice prefers to have a specific say in specific matters and does not want to blindly follow the Strasbourg Court case law.

Now, in the three cases under scrutiny it is submitted that the Luxembourg Court follows a novel three-step approach on the relationship with the Strasbourg Court: (a) firm recognition of the Luxembourg Court autonomy under the Charter; (b) references to the Strasbourg Court through Luxembourg Court case law that relies on the Strasbourg Court case law; (c) use of a 'Convention-supported' approach through direct or indirect references to the Strasbourg Court case law when the Luxembourg Court develops new case law.

Firstly, the Luxembourg Court stresses vigorously the autonomy of the Charter and the Luxembourg Court case law from the Strasbourg Court. In *Menci* and *Garlsson Real Estate* the Court of Justice emphasises the autonomy of the Charter and the Luxembourg Court when the latter takes a decision on matters that may fall under the Convention. This is an important point, showing that the Luxembourg Court now distances itself from the approach followed in *Bonda* and *Fransson* where it relied heavily on the Strasbourg Court and its case law to determine whether the conditions on the *ne bis in idem* could be found.[57] It also shows the Court of Justice's maturity gained after the *Fransson* and *Bonda* judgments. Differently, the Advocate General Opinions referred to the traditional Strasbourg Court case law and held that the Luxembourg Court should not follow the new Strasbourg Court case law in *A and B* v *Norway*. It is submitted that this

[54] ECtHR 18 May 2017, Case No. 22007/11, *Johannesson and Others* v *Iceland*.
[55] Sarmiento, *supra* n. 2, p. 114.
[56] *Ibid*., p. 116.
[57] *See* '*Ne bis in idem* in the EU legal order: rationalisation at stake?', above.

Court of Justice approach is positive, as it develops an autonomous understanding of the degree of protection of fundamental rights. This is justified by the autonomous nature of the EU legal order and the current non-accession to the Convention.

Secondly, the Luxembourg Court applies the *Engel* criteria developed by the Strasbourg Court case law, but recognises them only through references to its case law, i.e. *Fransson* and *Bonda*. This is the point where the Strasbourg case law comes indirectly to use for the Luxembourg Court as the determination of the criminal nature of administrative proceedings is a long-established aspect of the Strasbourg Court case law. However, the Luxembourg Court stresses its preference on the severity of the penalty and does not completely follow the Strasbourg Court case law on the matters where the nature of the penalty is considered an equally important factor.

Thirdly – and most importantly – the Court of Justice departs from the Strasbourg Court case law when it assesses the scope for restrictions to the *ne bis in idem*. The Luxembourg Court traces the framework for the assessment of the possible restrictions to Article 52 of the Charter, based on the principle of proportionality. At the same time, it makes reference to *A and B* v *Norway*, but does not (essentially) follow the rationale for the restriction to the *ne bis in idem* traced therein, i.e. the level of connection between the two proceedings. This suggests that the Luxembourg Court intentionally uses an autonomous approach to balance Article 50 with Article 52 of the Charter. This is based on the perception of a duplication of proceedings by the sanctioned person and on an assessment of proportionality regarding the objective of the two proceedings and penalties. However, the limitations are not justified only on the degree of connection between the two proceedings, but require some other substantial criteria, i.e. a test of proportionality. This seems to be a ground where the Court of Justice makes use of the clause in the Charter on a 'more extensive protection' that can be provided by the Charter as compared to the Convention.[58] However, the Luxembourg Court still does not want to depart from the Strasbourg Court case law as a point of reference to support its new case law positions, as it can serve to support innovative judicial stances. This can be seen in the reliance in *Menci* on *A and B* v *Norway*, where the Court of Justice is supported by the Strasbourg Court case law. In fact, the Luxembourg Court mentions the Strasbourg case law only when it justifies the application of the restriction to the *ne bis in idem* in *Menci*.[59] *Garlsson* and *Di Puma* do not mention *A and B* v *Norway*. Reliance on the Strasbourg case law is also explicitly mentioned when it comes to the relationship between the *ne bis in idem* and the possible reopening of cases when there has been

[58] Art. 52(3) last indent of the Charter.
[59] *Menci* judgment, *supra* n. 4, para. 61.

a final judgment (*res judicata*).[60] This is because the Charter does not expressly contain an equivalent provision to Article 4 third subparagraph to Protocol VII of the Convention. The latter recognises the possibility of re-opening final judgments under specific circumstances.

In a nutshell, the three cases indicate that the Luxembourg Court rightly intends to follow an autonomous approach from the Strasbourg Court in applying the *ne bis in idem* and its restrictions. This is a sensible approach that is justified in light of the different scope of Protocol VII of the Convention and the progressive development of the Court of Justice case law in the matter. At the same time, reference to the Strasbourg Court case law is still made when the Luxembourg Court intends to support a new position that is not yet solidly grounded in its case law – i.e. restrictions under Article 50 of the Charter – or when it adds some argumentations not strictly traceable in the Charter – i.e. limits of *res judicata*. This suggests that the Court of Justice is still careful when it comes to develop new stances on human rights protection, but it was arguably so in these cases as the Advocate General Opinions followed a different approach.

Limitations to the *NE BIS IN IDEM* principle: the scope for restrictions

The scope of limitations to the *ne bis in idem* is the main novel aspect arising from the three judgments. This is because the Court of Justice develops a framework for justifications to limitations to the *ne bis in idem* under the Charter. This is also where it departs from the Advocate General Opinions and offers a structured assessment on the relationship between fundamental rights and restrictions to them.[61] This approach seems justified by the Strasbourg Court new case law in *A and B* v *Norway* and by the intention to clarify the Charter restrictions to rights under certain circumstances.

Article 52 of the Charter contains the 'restriction clause' that allows, under certain conditions, restriction of the fundamental rights protected in the Charter.[62] The framework for the assessment of limitations to Charter's rights is based on two preliminary requirements and, subsequently, on two consecutive steps, as also held by the Court of Justice in the three cases under scrutiny. Firstly, the preliminary requirements provide that the duplication of proceedings and penalties is foreseen in the law and that it respects in substance the *ne bis in idem* principle. Secondly, limitations shall follow two consecutive steps: (a) the justifications shall meet objectives of general interest recognised by the EU or by

[60] *See* 'Limitations to the *ne bis in idem* and the principle of *res judicata*: friends or foes?', below.
[61] *See Menci* judgment, *supra* n. 4, paras. 40-41.
[62] *See* Lenaerts, *supra* n. 39, p. 392.

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the need to protect the rights and freedoms of others; (b) they shall comply with the principle of proportionality.

The Court of Justice assessment of possible restrictions to the *ne bis in idem* is not new, but has already been applied in the Area of Freedom Security and Justice in the *Spasic* judgment.[63] There, it was held that the *ne bis in idem* may be restricted when the first penalty 'has been enforced' or is 'actually in the process of being enforced'. In that case, though, the applicable framework is based on a specific *ne bis in idem* provision that foresees a limitation to the *ne bis in idem* when the first penalty is contained in the CISA Agreement on Schengen.[64] Conversely, in the three judgments under scrutiny the Luxembourg Court interprets the 'restriction clause' contained in Article 52(1) of the Charter by looking at the national laws implementing EU law and gets to the conclusion that under certain circumstances there can be parallel administrative and criminal proceedings and penalties. This development of the Court of Justice case law is welcome for a number of reasons.

Firstly, the Luxembourg Court makes sound use of the restriction clause in Article 52 of the Charter and gives it a functional meaning that will serve the Court case law in future to assess possible limitations to Charter principles. When it comes to judgments where a limitation to a Charter principle is envisaged, the Court will probably follow a similar approach in order to assess possible limitations.

Secondly, it is submitted that the Court of Justice exercises a detailed assessment of the proportionality of the measures and comes to a 'weighting exercise' on the punitive nature of a combination of criminal and administrative penalties. In *Menci* the Court considers that the combination of penalties is proportionate for the material offence, while in *Garlsson Real Estate* it is not convinced of the possible duplication of penalties. It seems that the Court requires a balanced weighting of interests when there is a combination of penalties and when the duplication is necessary to ensure the *effet utile* of EU law interests.[65]

Thirdly and consequently, it is argued that the three judgments indicate that there may be good grounds to justify proportionate limitations to the *ne bis in idem*, but the national legislators and authorities need to be careful on how to draft and/or implement them. The Court of Justice accepts that there may be dual proceedings and penalties on the same offence if there are certain guarantees respecting the principle of proportionality. This is so in particular when national laws contain cooperation clauses both in the context of the proceedings *and* in the determination of the sanctions. This approach follows to a certain extent the *A and*

[63] ECJ 27 May 2014, Case C-129/14 PPU, *Spasic*, EU:C:2014:586, paras. 55 and 56.

[64] *See* J. Vervaele, 'Schengen and Charter-related *ne bis in idem* protection in the Area of Freedom, Security and Justice: M and Zoran Spasic', 50 *CMLRev* (2013) p. 1349.

[65] *See*, differently, Van Bockel and Wattel, *supra* n. 42, p. 880.

B v *Norway* Strasbourg Court case law, but it frames it on the principle of proportionality and does not rely simply on the 'connection criterion' developed by the Strasbourg Court. This sophisticated approach of the Luxembourg Court is certainly positive, but requires that national legislators and authorities weigh carefully the scope of duplication of proceedings and penalties in the law. In a key paragraph of the *Garlsson Real Estate* judgment the Court of Justice requires that a proportionate duplication takes into account not only a possible 'pecuniary penalties (…) [but also the] administrative fine of a criminal nature and a term of imprisonment'.[66]

Fourthly, the Court of Justice accepts a broad understanding of the protection of the EU law interest as part of the first limb of the steps to justify a Charter right limitation. This means that any interest that is broadly protected in the EU legal order could give grounds to apply a restriction to a fundamental right, regardless of the degree of harmonisation at EU level. The *Di Puma* and *Garlsson Real Estate* judgments deal with financial market abuses that according to an EU Directive (now also an EU regulation) shall be subject to a dissuasive, effective and proportionate system of administrative penalties. These are sufficient grounds to justify a *prima facie* restriction to the principle of the *ne bis in idem*.

Fifthly, the Court of Justice takes stock of the existence of binary proceedings in which national law may provide for administrative and criminal penalties for the same offence. The Court accepts that national law may set up dual proceedings for the same offence and prefers not interfere with that decision taken at the national level and recognised by the EU legislators. In fact, there may be good reasons to pursue binary proceedings, such as the different objectives that administrative proceedings have in comparison to criminal proceedings. For instance, there may be not only a general deterrent effect to punish a conduct because of criminal offences, but also reasons of good administration or administrative enforcement by supervisory authorities to pursue administrative penalties.

At the same time, some questions on the use of the 'restriction clause' remain unanswered or are even problematic.

Firstly, it is not completely clear what is the relationship between administrative and criminal proceedings/sanctions, when it comes to assessing a restriction to the *ne bis in idem*. In *Garlsson* the Luxembourg Court makes an extensive analysis of the national legislation, comes to the conclusion that the imposition of administrative sanctions on top of criminal sanctions is excessive, but does not explain in detail why.[67] This is perhaps because the Court prefers to leave the individual case assessment to the national court and does not want to

[66] *Garlsson Real Estate* judgment, *supra* n. 5, para. 60.
[67] *Ibid.*, para. 59.

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enter into a detailed assessment of the national legislation. The rejection of the restriction remains, though not completely justified. In *Di Puma* the situation is reversed to that in *Fransson*, as the criminal judgment of acquittal in the former case came before the imposition of the administrative penalty. In the former case, the Court does not accept a limitation to the principle of *ne bis in idem* when there is a criminal judgment of acquittal having the force of *res judicata*. This is excessively strict and the Court of Justice should have not excluded limitations of this principle. Rather, it refers to the exceptional grounds to re-open definitive judgments having *res judicata*, but this cannot exclude that there may be other reasons justifying the imposition of administrative penalties. This is also confirmed by Regulation 596/2014 on financial market abuses, where the EU legislators have accepted that the same offence may be subject to criminal and administrative penalties.[68] The Court of Justice decided not to 'upset' national constitutional orders and the *res judicata* principle. This is in contrast with the abovementioned EU legislative development. The new EU rules on market abuses suggest that a limitation to the *ne bis in idem* on market abuses is accepted in the EU legal order. In principle, this stands in contrast with the strict Court reading of the disproportionate duplication of proceedings and penalties in *Garlsson*.

Secondly, the Court of Justice limitation to the *ne bis in idem* allows in principle that certain offences that are subject to criminal proceedings are not barred from being subject to administrative penalties and vice versa. It can, though, well be the case that the first judicial proceeding is terminated with a judgment of acquittal due to procedural issues such as time bar or procedural irregularities. A strict application of the *ne bis in idem* would exclude the enforcement of offences *in concreto* if the first procedure concludes on procedural reasons. This is unacceptable, as it frustrates the *effet utile* of imposing penalties against severe offences.

Finally, the Court of Justice could have also addressed under the justification to the limitation of the *ne bis in idem* its inconsistent approach in competition law.[69] The Court fails to do so and this remains an open question.

Overall, the examination of the Court of Justice approach to the limitations on the *ne bis in idem* shows that there may be good grounds to have a duplication of penalties of a criminal nature. This is also recognised in the new market abuse EU legislation adopted in 2014.[70] While there are some limitations on such approach, this is a welcome development to balance the different interests that come into play when a *ne bis in idem* challenge is raised. However, Member States and competent authorities need to be careful on such duplication of proceedings/penalties.

[68] *See* Regulation 596/2014, Art. 30(1).
[69] See *'Ne bis in idem* in the EU legal order: rationalisation at stake?', above.
[70] Directive 2014/57/EU, Recital 23.

Limitations to the *ne bis in idem* and the principle of *res judicata*: friends or foes?

The *Di Puma* judgment raises some problems on the relationship between the *ne bis in idem* and *res judicata* principles. The latter is a general principle recognised and respected in the EU legal order.[71] It consists of barring a matter in a subsequent litigation once it has been decided by a final judgment against which no appeal is possible.

In *Di Puma* the Court of Justice refers to *res judicata* to exclude that there may be limitations to the *ne bis in idem*. Differently from the other two cases under scrutiny, and from *Fransson,* the criminal proceedings in *Di Puma* led to a definite acquittal judgment. It refers to the previous *Impresa Pizzarotti* case where the principle of *res judicata* was analysed and where the Court concluded that the principle of *res judicata* could be limited.[72] The Luxembourg Court is satisfied with a definitive judgment of acquittal in order to exclude a limitation to the *ne bis in idem*. With this said, a strict application of the *res judicata* principle remains problematic. The Court allows the reopening of national proceedings under special circumstances.[73] However, it adopts an excessively restrictive approach and its reasoning, respectfully, is not convincing. The Court fails to consider what happens in cases of acquittal judgments for offences due to procedural defects in the proceedings that lead to the non-conviction of the persons under criminal charges or transnational proceedings that may lead to conflicting judgments. In these cases, the *res judicata* force of a judgment of acquittal does not correspond to appropriate forms of enforcement to be pursued with administrative or criminal penalties. This suggests that a careful coordination between criminal and administrative proceedings, as well as between judiciary and administrative authorities, are necessary steps to avoid infringing the *ne bis in idem* principle.

At the same time, it remains clear that the preference of the Court of Justice is not to frustrate the *res judicata* principle, unless there are very good reasons for it. As held earlier, the justification for this approach is that the Court of Justice does not want to challenge national constitutional systems on the legal force of definite acquittal criminal judgments. However, this solution does not reflect the fact that there may be situations where a first judgment of acquittal does not represent an effective way to conclude proceedings against serious offences.

In conclusion, the principle of *res judicata* is an essential guarantee to give certainty to judicial proceedings. However, in *Di Puma* the Luxembourg Court gives an excessively restrictive application to limitations to the *ne bis in idem* when

[71] *See generally* A. Kornezov, '*Res judicata* of national judgments incompatible with EU law: Time for a major rethink?', 51 *CMLRev* (2014) p. 809.

[72] ECJ 10 July 2014, Case 213/13, *Impresa Pizzarotti*, ECLI:EU:C:2014:2067, para. 62.

[73] *Di Puma* judgment, *supra* n. 6, para. 35.

confronted with the *res judicata*. There may be good policy reasons to prosecute the offence with administrative penalties having a criminal nature.

Conclusion

In general, it can be said that the Luxembourg Court in the three cases adds some interesting elements to its case law on the protection of the *ne bis in idem* principle under the Charter. Three main conclusions can be made.

Firstly, the three judgments clarify the scope of application of the *ne bis in idem* in EU law and consider positively grounds for the limitations of this constitutional principle in the EU legal order. The Court allows that – under certain conditions – limitations to the *ne bis in idem* may take place, if well justified. In practice the judgments suggest that Member States may pursue a duplication process of criminal and administrative proceedings/sanctions that will not lead to a violation of the *ne bis in idem* under certain conditions, but Member States need to be careful how they draft such laws, and competent authorities need to exercise well their enforcement powers.

Secondly, the Luxembourg Court seems to distance itself explicitly from a strict application of the Strasbourg Court case law, but relies on it implicitly. The Strasbourg Court case law remains indeed a point of reference, also in light of the 'homogeneity clause', but the Luxembourg Court intends to give its autonomous say on it. This is clear in the structured analysis on the limitations to the principle of *ne bis in idem* under Article 52(1) of the Charter. The autonomous path followed by the Luxembourg Court is a welcome step in ensuring its role to protect (and limit) fundamental rights under the Charter, given also the current difficulties of the EU accession to the Convention.

Thirdly and finally, the Court of Justice develops a sound approach on the balancing of the violation of the *ne bis in idem* with the possible justifications for restrictions of this principle. This is a correct exercise serving the scope of marking a balanced assessment of the *ne bis in idem*, while having an individual scrutiny in each case. The assessment is not without problems, especially when confronted with the *res judicata* principle, but it is an important development to ensure the *effet utile* of EU law.