ARTICLES

THE *NE BIS IN IDEM* PRINCIPLE IN THE AGE OF BALANCING

GIORGIO ARDIZZONE*

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ABSTRACT: This *Article* analyses the issue of the compatibility with the *ne bis in idem* principle of the double-track sanctioning systems present in various European legal orders in the light of the case-law of the European Court of Human Rights and the Court of Justice of the European Union. In particular, after a reconstruction of the most significant case-law after the famous ruling *A and B v. Norway*, three main critical points are brought into focus: the divergences between the national and European case-law on the interpretation of the notion of *idem factum*, the difficult practical application of the close connection test between proceedings developed by the European Court of Human Rights, which can be seen as the precipitate of an unsatisfactory balancing act of opposing interests, and the possible extension of the *ne bis in idem* principle also to cases of *lis pendens*.

KEYWORDS: *ne bis in idem* – double-track enforcement systems – proportionality – tax – market abuse – *lis pendens*.

I. DUAL-TRACK PROCEEDINGS AND THE CURRENT SCOPE OF PROTECTION

In the legal systems of several European States, what are often referred to as "dual track" or "double-track" enforcement systems are still quite common. The combining of administrative and criminal sanctions for the same act is often used in national law as a device to strongly tackle business crimes deemed as particularly harmful, so as to ensure the immediate effectiveness of protection against the offences involved. Often by means of administrative sanctions, which are generally imposed more quickly than criminal ones[1] and without forgoing

* Phd Candidate in Criminal Law, IUSS Pavia-Unitelma Sapienza, giorgio.ardizzone@iusspavia.it.

[1] For an overview of the use of administrative enforcement for business crime, see in the Italian literature CE Paliero, "La sanzione amministrativa come moderno strumento di lotta alla criminalità economica" (1993)

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the severity and stigma associated with criminal law. Indeed, such dual-track mechanisms are conceived as integrated sanctioning systems, further to which the State coordinates the two branches of enforcement with the precise intention of creating a unitary mechanism to eradicate the offences involved.[2] Currently such systems exist, for the most part, in tax matters[3] and in the field of market abuse,[4] both of which, incidentally, are areas of particular concern

Rivista trimestrale di diritto penale dell'economia 1021 and, within the European legal framework, M Luchtman, J Vervaele, 'Enforcing the Market Abuse Regime: Towards an Integrated Model of Criminal and Administrative Law Enforcement in the European Union?' (2014) New Journal of European Criminal Law 192.

[2] With regards to the Italian situation, for a complete overview of existing dual-track systems, see AF Tripodi, Ne bis in idem *europeo e doppi binari punitive: Profili di sostenibilità del cumulo sanzionatorio nel quadro dell'ordinamento multilivello* (Giappichelli 2023) 59 ff. More specifically, the author distinguishes between "cumulative" or "alternative" double-track systems depending on whether or not the persons against whom dual proceedings have been brought have a double penalty imposed on them, referring back to his earlier work: AF Tripodi, 'Cumuli punitivi, *Ne bis in idem* e proporzionalità' (2017) Rivista italiana di diritto e procedura penale 1055 ff. The distinction has recently been echoed by JI Escobar Veas, Ne bis in idem *and Multiple Sanctioning Systems* (Springer 2023) 162 ff., who talks about a "subsidiary" and "complementary" model. On this issue, see also A Weyembergh and N Joncheray, 'Punitive Administrative Sanctions and Procedural Safeguards: A Blurred Picture That Needs to Be Addressed' (2016) New Journal of European Criminal Law 190; H Satzger, 'Application Problems Relating to *ne bis in idem* as Guaranteed under art. 50 CFR/54 CISA and art. 4 Prot. no. 7 ECHR' (2020) Eucrim 213 ff.; M Kärner, 'Interplay between European Union Criminal Law and Administrative Sanctions: Constituent Elements of Transposing Punitive Administrative Sanctions into National Law' (2022) New Journal of European Criminal Law 42.

[3] In Italy, the main tax offences are sanctioned both administratively and criminally, and although the law provides for coordination mechanisms between the two branches of enforcement that should in theory ensure that procedural duplication does not lead to the imposition of a double penalty, in practice these are essentially disapplied by national courts. Cf. Supreme Court (Combined Criminal Divisions) judgments of 28 March 2013 n. 37424 and 37425. For a critique on this issue, cf. A Vallini, 'Il principio di specialità' in A Giovannini, A Di Martino and E Marzaduri (eds), *Trattato di diritto sanzionatorio tributario* (Giuffrè 2016) 291 ff. and, if I may be permitted, G Ardizzone, 'Il "volto attuale" del *ne bis in idem* nel sistema penal-tributario' (2022) Diritto penale contemporaneo – Rivista trimestrale, 213 ff. In France, on the contrary, the taxation system has adopted a double-track approach right from its very inception and has recently been deemed constitutional by the Conseil constitutionel – as opposed to that in financial matters – according to the "*réserve d'interprétation*" technique. In short, the mechanism does not contravene the French Constitution as long as one of the two authorities does not exclude on the merits the existence of the fact, the combination of penalties is applied only in cases of greater seriousness and, above all, the principle of proportionality of penalties is observed in the case of a joint sanctioning response. Compare with arts 1729 and 1741 *Code Général des Impôts* and Conseil constitutionnel Decision of 24 June 2016 n. 2016-545 QPC *M. Alec W. and others*. For a comment, see C Mascala, 'Cumul de poursuites et cumul de sanctions en matières boursière et fiscale: deux poids, deux mesures pour le Conseil constitutionnel' (2016) Recueil Dalloz 1839 ff.; V Peltier, 'Fraude fiscal: Non-cumul de sanctions' (2016) Les Nouveaux Cahiers du Conseil Constitutionel 132 ff.; F Stasiak, 'Cumul de poursuites: le Conseil constitutionel n'aurait pas dû statuer deux fois sur les mêmes faits' (2016) Revue de science criminelle et de droit pénal comparé 293 ff. Likewise, similar sanctioning systems in tax matters exist in many Nordic countries, like Iceland, Norway and Finland. For other considerations regarding this issue in the tax field, see also PJ Wattel, '*Ne bis in idem* and Tax Offences in EU Law and ECHR Law' in B Van Bockel (ed.), Ne bis in idem *in EU Law* (Cambridge University Press 2016) 167 ff.

[4] Compare with arts 184 ff. TUF (Legislative Decree 58/1998) and F D'Alessandro, *Regolatori del mercato*, enforcement *e sistema penale* (Giappichelli 2014) 101 ff. and, for the most recent amendments, F Mucciarelli, 'Gli abusi di mercato riformati e le persistenti criticità di una tormentata disciplina' (2018) Diritto

to the European Union, which has always taken great care to ensure high standards of protection of its financial interests, unquestionably affected by the wrongdoing in question. Indeed, it is certainly no coincidence that although art. 50 of the Charter of Fundamental Rights of the European Union (CFREU) codifies the *ne bis in idem* principle (which is also of intra-EU application), Directive 2003/6/EC allowed a double-track system regarding market abuse offences in order to better protect the stability of the European internal market. While the regulatory framework evolved for both market abuse and VAT fraud, the attention paid by the European Court of Justice (CJEU) to the effective protection of the interests safeguarded by dual-track systems is discernible right from the first decision in the matter in which it held that art. 50 CFREU was infringed by the combining of criminal and administrative sanctions when the latter are of a substantially criminal nature in the light of the Engel criteria but only where the penalties in the first set of proceedings are in and of themselves already effective, proportionate and dissuasive.[5]

It must be borne in mind that at the root of the doubts as to the lawfulness of such a system of penalties is the well-known concept of "criminal matter" developed by the European Court of Human Rights (ECtHR) starting with the famous leading case of *Engel v Netherlands*,[6] based on the equally famous three criteria – which are alternative and not cumulative[7] – aimed at verifying whether an offence is criminal in nature within the meaning of the European Convention on Human Rights (ECHR): *i)* the legal classification of the offence under national law, which is not decisive but constitutes, by the Court's own admission, a

penale contemporaneo 1 ff. As is well known, Italy was found to have breached the ECHR on that basis: cf. ECtHR *Grande Stevens v Italy* App n. 18640/10 [4 March 2014], more about which see more in detail section I. In France, a dual-track system similar to the Italian one remained in force for a long time but was declared unconstitutional by the *Conseil Constitutionel* and recently reformed so that today the administrative authority and the public prosecutor coordinate by choosing which one of them will alone prosecute the offence. Compare with Conseil Constitutionel Decision of 18 March 2015 n. 2014-453/454 QPC and 2015-462 QPC, *M John L. et a.* and art. 465(3)(6) of Code Monétaire et Financier (CMF). Moreover, on the basis of previous legislation, France was also found to have breached the ECHR for violation of the *ne bis in idem* principle with regard to the punishment of breaches of financial laws: cf. ECtHR *Nodet v France* App n. 47342/14 [6 June 2019], more about which see, more in detail, section III.

[5] Case C-617/10 *Åkerberg Fransson* ECLI:EU:C:2013:105 para. 36. As for the legislative acts mentioned above, cf. Directive 1371/2017/EU of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law (whose recital 28 actually admonished Member States to respect fundamental rights, among which the *ne bis in idem* principle, in protecting European financial interests). For market abuse, Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse and Regulation EU 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. See also J Tomkin, 'Sub art. 50' in S Peers and others (eds), *The EU Charter of Fundamental Rights: A Commentary* (Bloomsbury Publishing 2021).

[6] ECtHR *Engel v Netherlands* App n. 5100/71 [8 June 1976].

[7] See *Grande Stevens v Italy* cit. para. 94 ff.

starting point;[8] *ii)* the intrinsic nature of the offence;[9] *iii)* the nature and degree of severity of the penalty.[10] In fact, once administrative offences are classified as substantially criminal on the basis of those factors, it is necessary to extend to them the guarantees enshrined in the ECHR, including *ne bis in idem*.

Alongside these integrated sanctioning systems, conceived from the very beginning at national level as a complementary response, it is possible that in some jurisdictions the same conduct is incidentally punished both under criminal and administrative law. This is the case, for example, for drink-driving resulting in a traffic accident[11] or of fighting in a public place for which a fine is envisioned for disturbing the peace, except that the persons involved are also liable to criminal prosecution for the injuries caused on the same occasion.[12] Unlike true dual-track mechanisms, in such cases the double prosecution originates from a mere contingency and is not the result of a criminal policy preordained to establish dual proceedings.

Nevertheless, in both cases, for the same material fact, the alleged offender is tried twice, thus generating particular tensions with the *ne bis in idem* principle. Indeed, it is well known how the extensive effect of the broad notion of "criminal matter"[13] and an

[8] *Engel v Netherlands* cit. para. 82.

[9] This second criterion takes into account numerous factors, such as how worthy of formal criminal protection the legal interest covered by the offence is, the general scope of the rule and the nature of the authority responsible for establishing the offence. With different emphases, cf. ECtHR *Bendenoun v France* App n. 12547/1986 [24 February 1994] para. 47; ECtHR, *Benham v United Kingdom* App n. 19380/92 [10 June 1996] para. 56; ECtHR *Jussila v Finland* App n. 73053/01 [23 November 2006] para. 38.

[10] This is the most relevant criterion used to date: for the relevant bibliography, see F Mazzacuva, *Le pene nascoste. Topografia delle sanzioni punitive e modulaizone dello statuto garantitico* (Giappichelli 2017) 26 ff.

[11] Such a situation is currently possible in various European countries like Italy, Austria and Croatia.

[12] Such an enforcement system exists, among others, in Croatia and, before the 2017 amendments, in Bulgaria: cf. art. 129(1) of the Criminal Code and art. 22(2) of the Administrative Offences and Penalties Act of 1969. The Bulgarian legislation was actually changed after a case brought before the ECtHR: cf. ECtHR *Tsonyo Tsonev v Bulgaria (No. 2)* App n. 2376/03 [14 January 2010] and, again, ECtHR, *Tsonyo Tsonev v Bulgaria (No. 4)* App n. 35623/11 [6 April 2021]. For a comment, see G Zaharova, 'The Influence of the Judgment of the European Court of Human Rights in the Case of Tsonyo Tsonev v Bulgaria' (2020) Eucrim 344.

[13] See *Engel v Netherlands* cit. To date, at least since *Öztürk v Germany*, it seems however that the purpose of the sanction is the decisive criterion: if it has a punitive aim exceeding what is necessary to merely make good the damage, the offence falls within the notion of criminal matter and the guarantees enshrined in the ECHR are applicable to the defendant. See ECtHR *Öztürk v Germany* App n. 8544/79 [21 February 1984] para. 53 ff. By way of example, in *Nykänen v Finland*, a tax surcharge of only EUR 1,700 was recognised as criminal in nature despite the small amount of the penalty due to its predominant punitive purpose. See ECtHR *Nykänen v Finland* App n. 11828/11 [20 May 2014] para. 40 ff. For the scope of the notion, cf. M Delmas-Marty (ed.), 'La "matière pénale" au sens de la Convention Européenne des droit de l'homme, flou du droit penal' (1987) Revue de sciences criminelle et de droit pénal comparé 819 ff.; F Mazzacuva, *Le pene nascoste* cit. 26 ff. Authors who agree about the expansive effect of the notion are, recently, Z Buric, '*Ne bis in idem* in European criminal law: moving in circles' (2019) European and Comparative Law Issues and Challenges 508; M Gómez, "*Non bis in idem* en los casos de dualidad de procedimientos penal y administrativo. Especial consideración de la jurisprudencia del TEDH' (2020) Revista para el Análisis del Derecho 429; JI Escobar Veas, Ne bis in idem *and Multiple Sanctioning Systems* cit. 3 ff.

approach to assessing the *idem factum*[14] based on the material fact have led to a gradual erosion of the lawfulness of such enforcement systems, culminating in the *Grande Stevens v Italy*[15] judgment, in which the ECtHR found art. 4 of Protocol No 7 ECHR to be violated by the double prosecution that the applicant had faced for a market abuse offence. It is no secret that for quite some time now both the ECtHR and the CJEU have downgraded the scope of the principle with reference to its application to double-track proceedings. Since the case of *A and B v Norway*,[16] the ECtHR has recognised a violation of *ne bis in idem* only if the two proceedings cannot be regarded as complementary. This complementary relationship would mean, in other words, that there is no "duplication" in a strict sense, but rather a single integrated set of proceedings.

To this end, the Court has developed a close connection test, which consists of a two-fold assessment, namely, a verification of the connection in time between the two proceedings and an analysis of the connection in substance between them on the basis of four factors: *i)* the foreseeability of the duality of proceedings; *ii)* the complementary nature of the purposes pursued by the two proceedings so that it is possible to consider that each of them is aimed at sanctioning different aspects of the social misconduct involved; *iii)* the coordination between the two proceedings aimed at avoiding, as far as possible, duplication in the gathering and assessment of evidence; *iv)* "above all", the overall proportionality of the integrated sanction, which should be ensured by means of an offsetting mechanism enabling the court in the second set of proceedings to take into account the sanction imposed at the end of the first ones.[17]

[14] As will be discussed in more detail below, the supranational courts have adopted a defendant-friendly approach in assessing the *idem* element that looks only at the concrete events without any regard for the legal classification of the act. Compare with C-436/04 *Van Esbroek* ECLI:EU:C:2006:165 para. 33 ff. for the CJEU and ECtHR *Zoluthukin v Russia* App n. 14939/03 [10 February 2009] para. 82 ff.

[15] *Grande Stevens v Italy* cit. commented on by AF Tripodi, 'Uno più uno (a Strasburgo) fa due: L'Italia condannata per violazione del ne bis in idem in tema di manipolazione di mercato' (9 March 2014) Diritto Penale Contemporaneo archiviodpc.dirittopenaleuomo.org.

[16] ECtHR *A and B v Norway* App n. 24130/11 and n. 29758/11 [15 November 2016] para. 132 ff. commented, among others, by F Viganò, 'La Grande Camera della Corte di Strasburgo su ne bis in idem e doppio binario sanzionatorio' (18 November 2016) Diritto Penale Contemporaneo archiviodpc.dirittopenaleuomo.org.

[17] *A and B v Norway* cit. para. 132. To be precise, the close connection test originated with reference to certain road traffic cases in which revocation of the driving licence was envisaged as an automatic sanction following particularly serious traffic offences. Cf. ECtHR *R.T. v Switzerland* App n. 31982/96 [30 May 2000]; ECtHR *Nilsson v Sweden* App n. 73661/01 [13 December 2005]. Subsequently, the test also came to be applied in certain cases in tax matters, where however a breach of *ne bis in idem* was always found with the exception of two situations relating to the automatic nature of the administrative penalty (ECtHR *Boman v Finland* App. n. 41604/11 [17 February 2015] para. 43) and the failure to appeal against the decision establishing the violation (ECtHR *Häkkä v Finland* App n. 758/11 [20 May 2014] para. 50 ff.). Compare with *Nykänen v Finland* cit.; ECtHR *Glantz v Finland* App n. 37394/11 [20 May 2014]; *Häkkä v Finland* cit.; ECtHR *Lucky Dev v Sweden* App n. 7356/10 [27 November 2014]; ECtHR *Rinas v Finland* App n. 17039/13 [27 January 2015]; ECtHR *Österlund v Finland* App n. 53197/13 [10 February 2015]; ECtHR *Kiiveri v Finland* App n. 53573/2012 [10 February 2015]; *Boman v Finland* cit. For a complete overview of the origin and affirmation of the close connection test, see *A and B v Norway* cit. para. 112 ff. and, among scholars, L Bin, 'Anatomia del *ne bis in idem*: da principio unitario a trasformatore

Leaving aside the issues posed by each individual parameter,[18] the factors "contaminate", so to speak, the *ne bis in idem* principle with various elements that are have nothing to do with the purely procedural logic of the principle[19] – such as compliance with the chronological factor and the overall proportionality of the penalty – and are difficult to apply in practice from the perspective of the predictability of decisions.[20] Nevertheless, the "sufficiently closely connected in substance and time" test now represents the standard of protection in ECtHR case-law,[21] and for its part the CJEU has also adopted a substantially homogeneous approach in ascertaining breach of the principle.[22] Indeed, the

neutro di principi in regole' (2020) Diritto Penale Contemporaneo 104 ff.; JI Escobar Veas, Ne bis in idem *and Multiple Sanctioning Systems* cit. 102 ff.

[18] For a general critique, see the dissenting opinion of Judge Pinto de Albuquerque in *A and B v Norway* cit. para. 40 ff. and, in the Italian literature, AF Tripodi, 'Cumuli punitivi, *ne bis in idem* e proporzionalità' cit. 1064 ff. and 1073; F Mazzacuva, '*Ne bis in idem* e diritto penale dell'economia: profili sostanziali e processuali' (2020) Discrimen 23; N Madia, Ne bis in idem *europeo e giustizia penale* (Cedam 2020) 174 ff.; F Consulich, 'Il prisma del *ne bis in idem* nelle mani del giudice eurounitario' (2018) Diritto penale e processo 955 ff. Furthermore, various criticism were voiced by AG Campos Sánchez-Bordona in his Opinion in the *Menci* case; see C-524/15 *Menci* ECLI:EU:C:2017:667, opinion of AG Sánchez-Bordona, para. 53 ff.

[19] It is well known that the same *nomen iuris* is used to indicate two guarantees: that of not being punished twice for the same act, including within the same trial (substantive *ne bis in idem*) and that of not being tried twice for the same offence, even if both proceedings end with an acquittal (procedural *ne bis in idem*). The guarantee codified internationally refers only to the procedural aspect of the principle: in that vein, for the ECHR, see Council of Europe, Guide on Article 4 of Protocol no. 7 to the European Convention on Human Rights, 31 August 2022, www.echr.coe.int and Council of Europe, Explanatory Report to the Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, 22 November 1984, rm.coe.int in which it is stated: "the aim of Article 4 of Protocol No. 7 is to prohibit the repetition of criminal proceedings"; as for the CFREU, see case C-617/17 *Powszechny Zakład Ubezpieczeń na Życie* ECLI:EU:C:2019:283 in which the CJEU denied that art. 50 CFREU could be invoked in the case of double penalties for the same act imposed in a single set of proceedings. It is clear then that posing the proportionality of the sanction as a condition to be compliant with *ne bis in idem* confuses the two aspects of the guarantee. In the same vein, JI Escobar Veas, Ne bis in idem *and Multiple Sanctioning Systems* cit. 135 and, for the distinction between the two, 171 ff. In the Italian literature, see C Silva, *Sistema punitivo e concorso apparente di illeciti* (Giappichelli 2018) 94 ff.; G Ranaldi and F Gaito, 'Introduzione allo studio dei rapporti tra ne bis in idem sostanziale e processuale' (2017) Archivio penale 1.

[20] Compare with the dissenting opinion of Judge Pinto de Albuquerque in *A and B v Norway* cit. paras 46 and 73 and see also section IV.

[21] It has been applied in every decision since *A and B v Norway* except for the ECtHR's judgment in *Šimkus v Lithuania* App n. 41788/11 [13 June 2017]. For an overview of the subsequent case-law about the close connection test, see section III.

[22] Compare with case C-524/15 *Menci* ECLI:EU:2018:197; case C-537/16 *Garlsson Real Estate and Others* ECLI:EU:2018:193; joined cases C-596/16 and C-597/16 *Di Puma and Zecca* ECLI:EU:2018:192 commented on by A Galluccio, 'La Grande Sezione della Corte di Giustizia si pronuncia sulle attese questioni pregiudiziali in materia di bis in idem' (2018) Diritto penale contemporaneo 286 ff.; A Turmo, '*Ne bis in idem* in European Law: A Difficult Exercise in Constitutional Pluralism' (2020) European Papers www.europeanpapers.eu 1341 ff.; M Vetzo, 'The Past, Present and Future of the ne bis in idem Dialogue between the Court of Justice of European Union and the European Court of Human Rights: The Cases of Menci, Garlsson and Di Puma' (2018) Review of European Administrative Law 76 ff.; JI Escobar Veas, Ne bis in idem *and Multiple Sanctioning Systems* cit. 125 ff.

CJEU's approach, while not perfectly overlapping with that of the ECtHR, is nevertheless compatible with the teachings of the latter. It is true that in the CJEU's decisions the temporal factor is not taken into consideration and the various elements of the test are emphasised by means of the well-known horizontal clause in art. 52 CFREU in order to hold that the compression of the fundamental right is legitimate. Nevertheless, the different arguments employed in the reasoning adopted, although moving along parallel tracks, come to the same conclusions and complement each other, thus making it difficult to maintain that they are incompatible.

In this way, in contrast to a defendant-friendly interpretation of the *idem* criterion, which has proved capable of overstretching the scope of the principle, national courts have been able to restore the repressive effectiveness of double-track systems by leveraging the *bis* assessment, often considering lawful some multiple sanctioning systems that by contrast the ECtHR has been particularly strict in evaluating.[23]

The purpose of this *Article* is to propose solutions to the current interpretive conundrums that complicate the European case-law in the field, caused both by integrated sanctioning systems and other forms of combinations of sanctions that, although not designed by the legislature as complementary parts of a single enforcement mechanism, *de facto* give rise to double proceedings against the alleged offender. The *Article* will then deal with three main issues: *i)* the notion of *idem factum*, which is still the subject matter of discrepancies between supranational and national jurisprudence; *ii)* the superseding of the criterion of close connection in substance and time which, as will be seen, currently encompasses different yardsticks of assessment depending on the court that is performing the test; *iii) lis pendens* as a situation capable of triggering the preclusion of *ne bis in idem*.

In order to do so, for each of the issues mentioned above, the relevant case-law of the supranational courts will be analysed first, so as to offer a state-of-the-art overview regarding these topics. Subsequently, having thus shed light on the major problems of interpretation, recommendations will be formulated in order to fill the gaps and provide a modern version of *ne bis in idem* capable of offering adequate protection to citizens without leaving particularly important legal interests unprotected. Of course, in doing so,

[23] In Iceland, see Supreme Court of Ireland of 21 September 2017, *Bragi Gudmundur Kristjánsson*. In Italy, regarding only recent tax proceedings, compare with Supreme Court (Criminal Division III) judgment of 14 January 2021 n. 4439, commented by L Troyer, '*Ne bis in idem* e reati tributari: la Corte di Cassazione valuta concretamente legittimo il doppio binario sanzionatorio in tema di dichiarazione infedele' (2021) Rivista dei dottori commercialisti 272 ff., and Supreme Court (Criminal Division III) judgment of 20 January 2021 n. 2245. Even the Consitutional Court recognises such an approach: judgment of 24 October 2019 n. 222, commented on by M Scoletta, 'Legittimità in astratto e illegittimità in concreto del doppio binario punitivo in materia tributaria al cospetto del *ne bis in idem* europeo' (2019) Giurisprudenza commerciale 2649C ff. Also in competition law, the CJEU makes up for the effectiveness lost thanks to a defendant-friendly interpretation of the *idem* element through such an interpretation of the bis criterion: see case C-117/20 *Bpost* ECLI:EU:2022:202 and case C-151/20 *Nordzucker* ECLI:EU:2022:203 with comment by P Van Cleynenbreugel, '*Bpost* and *Nordzucker*: searching for the essence of *Ne bis in idem* in European Union Law' (2022) EuConst 357.

the pros and cons of the proposed solutions will also be analysed. Regarding issue *ii)*, in view of its particular relevance and the fact that it constitutes today the real "heart" of the balancing-of-rights test, it will first be necessary to analyse the different conclusions reached by the courts using the close connection test, also in order to highlight the contradictions. For this reason, the third and fourth section will both explore the issue and its possible solution.

On a final note, it is well known that the *ne bis in idem* principle is codified at supranational level by both art. 4 of Protocol No 7 ECHR and art. 50 CFREU. However, if the ECtHR looks only at the national dimension of the principle, the CFREU has a wider scope of application, encompassing also its transnational application between Member States.[24] This *Article* will not deal with the issues posed by the cross-border dimension of the principle, if not to briefly highlight the differences in its application within the borders of the same country, but instead will focus only on the challenges posed by double-track systems within the same jurisdiction. Consequently, the references to art. 50 CFREU and CJEU case-law must be read in this light.

II. The need for a clear notion of "*idem*"

It is common ground that the guarantee enshrined in art. 4 of Protocol No 7 ECHR can be triggered only if the two proceedings concern the same fact.[25] European case-law has long adopted an extensive approach in the definition of *idem factum*. More precisely, at least since the *Zoluthukin v Russia* judgment,[26] in order to assess the *idem* element the ECtHR verifies whether "the facts are the same or substantially the same" or "inextricably linked in time and space".[27] As does the CJEU, which has also recently extended that same

[24] J Tomkin, 'Sub art. 50' in S Peers and others (eds), *The EU Charter of Fundamental Rights* cit. 1404.

[25] Of the view that the idem element is the most difficult aspect to assess, see B Van Bockel, 'The European *ne bis in idem* Principle: Substance, Sources and Scope' in B Van Bockel (ed.), Ne bis in idem *in EU Law* (Cambridge University Press 2016) 47; art. 4 of Protocol No 7 ECHR and art. 50 CFREU both use the expression "offence". As will be seen, both the ECtHR and the CJEU focus today on the facts themselves despite the term actually used by the Convention and the Charter. Actually, among the supranational sources of law, only art. 20 of the Statute of the International Criminal Court (ICC) uses the word "conduct" to describe the *idem* element, for more about which see RS Aitala, *Diritto internazionale penale* (Mondadori 2021) 218 ff.

[26] *Zoluthukin v Russia* cit. para. 82 ff. For a comment on the notion of idem used ever since by the ECtHR, see P Whelan, *The criminalization of European Cartel Enforcement: Theoretical, Legal and Practical Challenges* (Oxford University Press 2014) 161; MÓ Floinn, 'The Concept of *idem* in the European Courts: Extricating the Inextricable Link in European Double Jeopardy Law' (2017) Columbian Journal of European Law 76 ff.; JI Escobar Veas, Ne bis in idem *and Multiple Sanctioning Systems* cit. 99 ff.

[27] Quotation from *Zoluthukin v Russia* cit. paras 82 and 84. Actually, before this decision, the Court's case-law was mixed: in some road traffic decisions, it had used the idem crimen approach or a hybrid criterion, examining whether the two proceedings concerned facts that had the same essential elements in common; cf. respectively, ECtHR *Oliveira v Switzerland* App n. 25711/9430 [30 July 1998] and ECtHR *Franz Fischer v Austria* App n. 37950/97 [29 May 2001]. See also L Bin, 'Anatomia del ne bis in idem' cit. 101 ff.; JI Escobar Veas, Ne bis

notion focusing on the material facts to competition law, where identity of the legal interests protected by the law imposing the sanctions has long been required.[28]

The wording used by the courts, however, has a congenital defect: it is too broad and abstract, and does not by itself make it possible to arrive at a notion of *idem factum* based on the material facts that can be applied homogeneously by national States.[29] Indeed, this lack of clarity is not without its repercussions. One can infer from the case-law of the ECtHR that the assessment of the identity of the facts must regard only the conduct of the agent[30] but, as will be seen, this is not the solution consistently adopted also by the national courts.

Nonetheless, the choice of focusing solely on the conduct of the agent is also the option that guarantees the maximum protection afforded by the *ne bis in idem* principle: citizen know that, once a judgement has been delivered on their action or omission, they cannot be called to answer again for the same behaviour even if classified differently from a legal point of view or if it has caused new natural events after a certain time.

Thus, by way of example, in the case of injuries caused by a person prosecuted for breach of the peace, the act has always been found to be the same even if the bodily harm caused to others was not considered in the first proceedings.[31] Again, the identity

in idem *and Multiple Sanctioning Systems* cit. 98 ff.; S Allegrezza, 'sub art. 4 Prot. 7' in R Bartoli, G Conforti and V Zagrebelsky (eds), *Commentario breve alla Convenzione europea dei diritti dell'uomo* (Cedam 2012) 894 ff.; A Procaccino, *I* bis in idem *tra diritti individuali e discrezionalità dell'apparato* (Cedam 2022) 38 ff.

[28] For the first decision in that sense, see *Van Esbroek* cit. para. 33 ff. For a general overview of the *idem* element in CJEU case-law, see JI Escobar Veas, Ne bis in idem *and Multiple Sanctioning Systems* cit. 122 ff. As for competition law, cf. *Bpost* cit. para. 31 ff.; *Nordzucker* cit. para. 36 ff. with comment by P Van Cleynenbreugel, '*Bpost* and *Nordzucker*' cit. 357 ff. Before those rulings, the CJEU actually required the identity of protected legal interests in competition law, thus giving rise to unequal treatment in the assessment of that criterion, which, solely with reference to anti-competitive conduct, was not concerned only with the concrete event: cf. case C-204/00 *Aalborg Portland A/S and Others v Commission* ECLI:EU:C:2004:6; case C-205/00 *Irish Cement v Commission* ECLI:EU:C:2002:333 para. 338 ff.; case C-17/10 *Toshiba Corporation* ECLI:EU:C:2012:72 para. 97. For a more complete examination of the development of the *idem factum* criterion in competition matters, see G Lasagni, 'La Corte di Giustizia e la definizione di *idem* nel diritto della concorrenza: verso la creazione di una nozione uniforme?' (2020) Giurisprudenza commerciale 11 ff.; S Schiavone, 'La nozione di "*idem*" nel dialogo tra le Corti: un unico criterio per una tutela effettiva, anche in materia di concorrenza' (2022) Cassazione penale 2826.

[29] For a general critique of the formula, see N Neagu, 'The *ne bis in idem* principle in the Interpretation of European Courts: Towards Uniform Interpretation' (2012) LJIL 955 and 971; MÓ Floinn, 'The Concept of *idem* in the European Courts' cit. 93 ff.

[30] Although the provision refers to the same "offence", the expression found in the case-law of the Court is that of "same conduct" or "même comportament": by way of example, see *Tsonyo Tsonev v Bulgaria (No. 2)* cit. para. 56; *A and B v Norway* cit. para. 145; ECtHR *Goulandris and Vardinogiannis v Greece* App n. 1735/13 [16 June 2022] para. 80; ECtHR *Milenković v Serbia* App n. 50124/13 [1 March 2016] para. 48; ECtHR *Muslija v Bosnia-Erzegovina* App n. 32042/11 [14 January 2014] para. 34; ECtHR *Butnaru and Bejan-Piser v Romania* App n. 8516/07 [23 June 2015] para. 36; *contra*, AF Tripodi, Ne bis in idem *europeo e doppi binari punitivi* cit. 127 who does not consider it to be a definite stance.

[31] Cf. ECtHR *Maresti v Croazia* App n. 55759/07 [25 June 2009] para. 62 ff.; *Tsonyo Tsonev v Bulgaria (No. 2)* cit. para. 51 ff.; *Milenković v Serbia* cit. para. 38 ff.; ECtHR *Igor Tarasov v Ukraine* App n. 44396/05 [16 June 206] para. 26 ff.; *Muslija v Bosnia-Erzegovina* cit. para. 32 ff.

of the fact has been found to exist in the case of two persons convicted of battery on foot of a final judgment and then re-tried for robbery, even though it is clear that the *actus reus* of each of the two offences does not overlap perfectly.[32] The same can be said, in tax matters, for the conduct of filing an incorrect tax return and altering bookkeeping entries, in which the ECtHR found again the facts to be the same.[33] Lastly, in a case of drink-driving followed by vehicular homicide, the ECtHR held that the first administrative proceedings, while not taking into account in any way the event of death caused by the offender, covered the same facts as the criminal proceedings.[34]

Yet, this approach, enshrined in the elastic formula used by the ECtHR, has not been able to penetrate fully into the minds of national courts. The situation in Italy is emblematic of the difficulty of circumscribing the notion of *idem* to conduct alone: the Constitutional Court, called upon in 2016 to rule on the issue as a result of a prevailing interpretation still rooted to the criterion of *idem crimen*,[35] concluded that the fact would be identical only whenever the "classification of the offence, considered with reference to all of its constituent elements (conduct, event, causal link) and with regard to the circumstances pertaining to the time, place and individual involved" fully coincide.[36] Moreover, the Court took the

[32] *Butnaru and Bejan-Piser v Romania* cit. para. 36.

[33] *Lucky Dev v Sweden* cit. para. 52 ff.

[34] See ECtHR *Bajcic v Croatiae* App n. 67334/13 [8 October 2020] in which the Court actually found no breach of the principle in consideration of the bis assessment: see infra. It is true that in some cases the ECtHR relies on pre-Zoluthukin case-law to legitimise an approach based on the *idem crimen* criterion, but this is rather infrequent: see ECtHR *Pirttmäki v Finland* App n. 35232/11 [20 May 2014] para. 51; an assessment of the idem element based not only on the conduct was also used by the ECtHR in *Trebalsi v Belgium* App n. 140/10 [4 September 2014] paras 31 and 37. However, that case regarded the transnational dimension of the principle which not only does not fall within the scope of the ECHR but also enjoys a lower standard of protection even within the European Union. The same happened with the *Kossowski* case: cf. C-486/14 *Kossowski* ECLI:EU:C:2016:483, which concerned a Member State wishing to prosecute an individual for aggravated battery committed with the intention of glorifying Nazism even if another State had already convicted the same individual for battery but without taking into consideration the hatred motives. It is clear that in the two above-mentioned cases the notion of *idem* is more restricted because the *ne bis in idem* principle has a very different scope depending on whether it has to be applied within the same jurisdiction or not. See also MÓ Floinn, "The Concept of *idem* in the European Courts' cit. 92.

[35] Before the 2016 ruling of the Constitutional Court, Italian case-law firmly adhered to the *idem crimen* criterion: cf. Supreme Court (Criminal Division II) judgment of 21 March 2013 n. 18376 and judgment of 28 November 2016 n. 51127, Supreme Court (Criminal Division I) judgment of 29 January 2014 n. 12943 and Supreme Court (Criminal Division V) judgment of 20 January 2016 n. 11918. For critiques on such an approach see, amongst many, A Pagliaro, voce "Fatto", *Enciclopedia del diritto, vol. XVI* (Giuffrè 1967) 954; C Bellora, '*Ne bis in idem* e reato progressivo: un pericoloso orientamento giurisprudenziale' (1990) Rivista italiana di diritto e procedura penale 1641 ff.; F Cordero, *Procedura penale* (Giuffrè 2012) 1206; D Pulitanò, 'La Corte costituzionale sul ne bis in idem' (2017) Cassazione penale 73 ff.; N Galantini, 'Il fatto nella prospettiva del divieto di doppio giudizio' (2015) Rivista italiana di diritto e procedura penale 1205 ff.; E Scaroina, 'Ancora sul caso Eternit: la "giustizia" e il sacrificio dei diritti' (2015) Archivio penale 897 ff.; *contra*, see P Rivello, 'La nozione di "fatto" ai sensi dell'art. 649 c.p.p. e le perduranti incertezze interpretative ricollegabili al principio del *ne bis in idem*' (2014) Rivista italiana di diritto e procedura penale 1422 ff.

[36] Constitutional Court judgment of 31 May 2016 n. 200 para. 8.

Zoluthukin judgment as a reference, and stated that no argument in favour of reducing the fact to conduct alone could be inferred from the elastic formula used.

The fallout of such an approach has led to numerous instances in which the ECtHR would certainly have deemed the *idem* element to be satisfied, while the Italian Supreme Court has invariably denied that the two proceedings involved concerned the same fact, with results that are not always satisfying in terms of protection of fundamental rights. For instance, in the case of a person who on foot of a final judgment had already been convicted of theft for having illegally connected to the electricity grid, a second trial was not held to be precluded for the burning down of the building caused by the same conduct, even though that event could have been attributed to the defendant at the first trial.[37] Likewise, it was not considered unlawful to hold a new trial for illegally altering land against two persons who had built two sections of a dirt road in the absence of authorisations and who, on foot of a final judgment, had already been judged for certain town planning and environmental offences.[38] Lastly, it was not considered that the material fact was identical either in the case of an anaesthetist already tried for grave personal injuries and then prosecuted again for manslaughter caused by the same act following the death of the patient[39] or in the case of a person already convicted on foot of a final judgment for bodily harm and then tried again for third degree murder for the same conduct.[40]

This is, on closer analysis, an excessive dilatation of the concept of *idem factum* which has not merely marginal repercussions on the subjection of individuals to the punitive power of the State. In the cases in question, the core is the same and is rooted in the offender's conduct: putting a citizen on trial for a second time for the same action or omission excessively reduces the scope of the guarantee enshrined in art. 4 of Protocol No 7 ECHR and art. 50 CFREU. It is also undoubtedly contrary to the principles of law expressed by supranational case-law. However, lacking a clear indication in that sense, national courts cling to the elastic formula used by ECtHR and CJEU to legitimise such overkill, so to speak. It would therefore be advisable for the ECtHR, guardian of the "minimum standard" of protection of fundamental rights, to better delimit this notion, circumscribing it to conduct alone.[41]

It is true that, in so doing, at least two problems would remain. From the point of view of harmonisation with the CJEU, the interpretative solution could generate friction on the aspect of the transnational application of *ne bis in idem*: the CJEU is concerned with the European dimension of the principle, which, as is well known, tends to have a lesser scope of protection.[42] For example, in the *Nordzucker* case, the CJEU clarified that the notion of

[37] Supreme Court (Criminal Division IV) judgment of 24 October 2017 n. 54986.
[38] Supreme Court (Criminal Division II) judgment of 31 October 2018 n. 52606.
[39] Supreme Court (Criminal Division IV) judgment of 2 March 2021 n. 10152.
[40] Supreme Court (Criminal Division V) judgment of 25 October 2021 n. 1363.
[41] Contra, see for all MÓ Floinn, "The Concept of *idem* in the European Courts' cit. 99 ff.
[42] As for the *idem* element, see *Kossowski* cit.

idem does not extend to the effects of the agent's conduct when they consist in distorting the interplay of competition in a market of a Member State other than the one in which the alleged offender was tried, thus not focusing only on the agent's conduct but also on its effects.[43] Essentially, the preclusion of double proceedings would not operate, due to the lack of identity of the facts, if a second Member State were to judge again the same conduct with reference to the effects produced within its own market that were not covered in the first set of proceedings. Nonetheless, if such a limitation can be justified on the basis that the same conduct is addressed in different jurisdictions, at least with regard to national *ne bis in idem* it would appear preferable to arrive at a solution that examines only the agent's act or omission.

Naturally the transnational scope of the guarantee is inevitably less extensive than the national one, affected as it is by the trust between the different States that would like to exercise jurisdiction. Limitations in this sense of the principle are numerous: suffice it to think of the *Kossowski* and *Trebalsi* cases[44] or the case-law of the CJEU on art. 54 of the Convention implementing the Schengen Agreement (CISA),[45] not to mention its application outside the EU.[46] Therefore, it does not seem that such an interpretative stance of the supranational courts can affect the domestic scope of *ne bis in idem*, which, on the other hand, must be further extended when it comes to guaranteeing the protection of citizens from repeated prosecution by the same State.

[43] *Nordzucker* cit. para. 41.

[44] For both, see *Kossowski* cit. and *Trebalsi v Belgium* cit. paras 31 and 37.

[45] Art. 54 CISA requires the execution of the sentence in case of conviction, thus having a narrower scope of protection than art. 50 CFREU. Nonetheless, such a limitation has always been held to be lawful by the CJEU: cf. case C-129/14 *Spasic* ECLI:EU:C:2014:586 para. 51 ff. On the transnational scope of the principle with regard to EU Law, see: J Vervaele, 'The Transnational *ne bis in idem* Principle in the EU: Mutual Recognition and Equivalent Protection of Human Rights' (2005) Utrecht Law Review 100; J Vervaele, '*Ne bis in idem:* Towards a Transnational Constitutional Principle in EU Law?' (2013) Utrecht Law Review 211; N Recchia, 'Il principio europeo del *ne bis in idem* tra dimensione interna e internazionale' (2015) Diritto penale contemporaneo 71; J Vervaele, 'Schengen and Charter-related *ne bis in idem* Protection in the Area of Freedom, Security and Justice: *M and Zoran Spasic*' (2015) CMLRev 1339; L Bin, 'Anatomia del ne bis in idem' cit. 108; H Satzger, 'Application Problems Relating to ne bis in idem as Guaranteed under art. 50 CFR/54 CISA and art. 4 Prot. no. 7 ECHR' cit. 213 ff.

[46] On an international level, other than the already mentioned art. 20 ICC Statute that regards conflicts of jurisdiction between the ICC and the national criminal courts, the ne bis in idem principle is recognised also in art. 14(7) of the International Covenant on Civil and Political Rights (ICCPR) but it does not actually bind another State to respect the outcomes of criminal proceedings in another country: in this vein, A Colangelo, 'Double Jeopardy and Multiple Sovereigns: A Jurisdictional Theory' (2009) Washington University Law Review 806 ff.; MÓ Floinn, 'The concept of *idem* in the European Courts' cit. 79. For more considerations on the transnational scope of the principle, cf. J Lelieur, '"Transnationalising" *Ne Bis In Idem*: How the Rule of *Ne Bis In Idem* Reveals the Principle of Personal Legal Certainty' (2013) Utrecht Law Review 198; N Galantini, 'Il *ne bis in idem* internazionale e i limiti alla sua applicazione' (2020) Processo penale e giustizia 537; V Mongillo, 'The Jurisdictional Reach of Corporate Criminal Offences in a Globalised Economy: Effectiveness and Guarantees "Taken Seriously"' in MÓ Floinn and others (eds), *Trasformations in Criminal Jurisdiction: Extraterritoriality and Enforcement* (Hart 2023) 85.

In this regard, the second problem that might arise concerns the excessive dilation of the principle that might result from the approach focused solely on the conduct, especially with reference to its infra-systemic application. For instance, criminal proceedings for vehicular homicide considered precluded by the imposition of an administrative penalty for drink-driving.[47] The challenge that the European courts are called upon to address concerns precisely such problems: how to provide adequate protection to situations that deserve to be brought under the application of the guarantee, such as the cases of injury-murder referred to above, without however neutralising criminal protection where necessary to protect legal interests of primary importance.

On this issue, a choice must be made: either the fact is identified with the conduct alone and an attempt is made to avoid the application of *ne bis in idem* in such cases by using the *bis* criterion or, as was actually done before *Zolothukin v Russia*,[48] different criteria are adopted such as *idem crimen* or a wider notion of material fact – including also the event and thus permitting the alleged offender to stand trial twice for the same conduct – but then seeking to ensure a sanctioning response proportionate to the offence. The first solution, I believe, is of greater merit: it would avoid the injustice of being subjected indefinitely to a web of criminal proceedings, without neutralising the necessary protection for legal interests such as life and physical integrity that the State has an obligation to protect. Unpersuasive on the other hand is the proposal, albeit put forward by authoritative scholars,[49] to circumscribe the notion of identity of the fact to just its legal classification: in order to evade the application of *ne bis in idem*, it would suffice that the law has legally classified the same act in different ways thereby legitimising *a priori* double-track repressive systems which, on the contrary, often find no justification but merely the useless duplication of costs borne by the individual when a single trial alone is capable of satisfying the system's need for retribution. In any case, it is necessary for the supranational courts to further clarify the notion of *idem* so as to avoid giving rise to divergences with national case-law that would be difficult to remedy.

[47] On this issue, MÓ Floinn, 'The Concept of *idem* in the European Courts' cit. 100, talks about "overprotection", criticising the ECtHR's judgment in *Franz Fischer v Austria* cit. The same need is felt overseas: cf. US Supreme Court, 1990, 495 U.S. 508, Grady v. Corbyn where the *idem crimen* approach was adopted. See AR Amar, 'Double Jeopardy Law made simple' (1997) Yale Law Review 1807. As for the current approach of the U.S. Supreme Court on this matter, see R Delfino, 'Prohibition on Successive Prosecutions for the Same Offence – In Search of the "Goldilocks Zone": The California Approach to a National Conundrum' (2017) American Criminal Law Review 423 ff.; JI Escobar Veas, Ne bis in idem *and Multiple Sanctioning Systems* cit. 11 ff.

[48] See *Oliveira v Switzerland* cit.

[49] See MÓ Floinn, 'The Concept of *idem* in the European Courts' cit. 101 ff., who suggests using an idem crimen approach and then utilising art. 6 ECHR to balance the narrowness of protection. See also B Van Bockel, *The ne bis in idem Principle in EU Law* (Kluwer Law International 2010) 231, who proposes a hybrid approach: while the criterion based on the material facts cannot be said to be overall incorrect, the legal classification of the act remains of paramount importance to shape the idem notion.

III. The "sufficiently close connection in substance and time": ECtHR case-law post *A and B v Norway*

It has been mentioned, after all, that the test of how closely connected the dual proceedings are has become the definitive standard of protection in ECtHR case-law precisely in order to contain the overwhelming effect that the extensive interpretation of the concept of *idem factum* has had.[50] In order not to systematically bring down all the double-track systems in force in the Council of Europe Member States, the ECtHR has resorted to a legal fiction, maintaining that it can assess whether or not there has been a double trial. In other words, the close connection in substance and time analysed above would allow the two proceedings to be classified as one, thus ruling out any violation of the guarantee. The same solution, but from a different perspective, has also been reached by the CJEU,[51] which however has conceded that in such cases there is a duplication of proceedings but has held that it is a legitimate limitation of the right enshrined in art. 50 CFREU on the basis of the well-known limitation of rights clause in art. 52 of that same Charter.[52]

Having thus defined the current scope of the guarantee, which cannot disregard the close connection test,[53] it is however interesting to note that, despite the various criticisms levelled at the new interpretative approach inaugurated with the judgment in *A and B v Norway*,[54] the ECtHR has shown itself to be particularly strict in verifying compliance with each element of the test, finding a breach of *ne bis in idem* within the various dual-

[50] It is no coincidence that in the *A and B v Norway* ruling several Member States of the Council of Europe intervened: see *A and B v Norway* cit. para. 87 ff.

[51] Cf. with *Menci* cit.; *Garlsson Real Estate and others* cit.; *Di Puma and Zecca* cit.

[52] Art. 52(1) CFREU reads as follows: "Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others". For the use of this clause referring to the ne bis in idem principle and dual-track proceedings, see T Lock, 'Articles 48-50' in M Kellerbauer, M Klamert and J Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: A commentary* (Oxford University Press 2019) 2239 ff.; JI Escobar Veas, Ne bis in idem *and Multiple Sanctioning Systems* cit. 125 ff. In particular, it was highlighted that, at the very least, while the ECtHR relies on a legal fiction considering two distinct sets of proceedings to be one, the CJEU actually recognises the limitation of the principle: see M Luchtman, 'The ECJ's Recent Case-Law on *ne bis in idem*: Implications for Law Enforcement in a Shared Legal Order' (2018) CMLRev 1748; G Lo Schiavo, 'The Principle of *ne bis in idem* and the Application of Criminal Sanctions: of Scope and Restrictions' (2018) EuConst 663; M Scoletta, 'Il principio del *ne bis in idem* e i modelli punitivi "a doppio binario"' (2021) Diritto penale contemporaneo 188.

[53] See Supreme Court of Iceland of 21 September 2017, Bragi Gudmundur Kristjánsson, cit.; Italian Supreme Court (Criminal Division III) judgment of 14 January 2021 n. 4439, cit.

[54] As alluded to above, the ruling was seen as putting the brakes on an evolutionary approach to *ne bis in idem*: cf. F Viganò, 'La Grande Camera della Corte di Strasburgo su *ne bis in idem* e doppio binario sanzionatorio' cit. para. 12; G Gaeta, 'Dove non arriva il principio: il *ne bis in idem* tra sanzioni tributarie e politica giudiziaria delle Corti superiori' (2018) Archivio penale 17; P Paulesu, '*Ne bis in idem* and Conflicts of Jurisdiction' in RE Kostoris (ed.), *Handbook of European Criminal Procedure* (Springer 2018) 401; JI Escobar Veas, Ne bis in idem *and Multiple Sanctioning Systems* cit. 94; Judge Pinto de Albuquerque was of the same view in his dissenting opinion, see the dissenting opinion of Judge Pinto de Albuquerque in A and B v Norway cit. para. 79 ff.

track systems in numerous cases brought to its attention.[55] More specifically, it is precisely with reference to the Member States' actual integrated sanctioning systems in the areas of taxation and market abuse that the close connection test has proved to be a merely *apparent* limitation of the guarantee since the ECtHR has never failed to find that art. 4 of Protocol No 7 ECHR has been violated in such instances.

In *Jóhannesson v Iceland*,[56] the first tax case after the close connection test had been established, the test was failed – despite the fact that the criminal court had taken the previous administrative sanction into account when determining the penalty – due to the insufficient coordination in collecting and assessing evidence and the excessive length of the second set of proceedings. More specifically, the fact that the criminal police carried out investigations autonomously and did not rely solely on the investigation carried out by the administrative authority was considered sufficient on its own to give rise to a lack of connection in substance.[57] In addition, the criminal proceedings were concluded approximately five years after the administrative ones after having proceeded in parallel for a little over a year, thus also breaking the close connection in time.[58]

The same outcome can be seen in *Ragnar Thorisson v Iceland*[59] and in *Bjarni Ármannsson v Iceland*:[60] the independence of the two prosecuting authorities in the collection and assessment of evidence and the fact that the two proceedings had not been conducted in parallel – in the first case – or had only overlapped for a few months – in the second – were evaluated as elements in themselves capable of arriving at a finding that combination was unlawful due to the lack of a close connection.[61] Even in these cases, however, the overall penalty could be said to be proportionate: the criminal court, taking into account the administrative sanction already imposed, had sentenced the applicants, respectively, to three and six months' imprisonment with suspended sentences and to the payment of a fine.

[55] Cf. amongst many, ECtHR *Johannesson and others v Iceland* App n. 11828/11 [18 May 2017] commented on by F Viganò, 'Una nuova sentenza di Strasburgo su *ne bis in idem* e reati tributari' (2017) Diritto penale contemporaneo 392 ff.; *Nodet v France* cit., commented on by M Scoletta, 'Il *ne bis in idem* "preso sul serio": la Corte Edu sulla illegittimità del doppio binario francese in materia di abusi di mercato' (17 June 2019) Diritto Penale Contemporaneo air.unimi.it; ECtHR *Velkov v Bulgaria* App n. 34503/10 [21 July 2020] with comment by G Caneschi, '*Ne bis in idem*: una garanzia ancora in cerca di identità' (2020) Rivista italiana di diritto e procedura penale 2107 ff. See *infra* for more cases in which the close connection test was failed. Cf. also JI Escobar Veas, Ne bis in idem *and Multiple Sanctioning Systems* cit. 108 ff. for a brief overview of the case-law of ECtHR after *A and B v Norway* cit.

[56] *Johannesson and others v Iceland* cit.

[57] *Ibid*. para. 53.

[58] *Ibid*. para. 54.

[59] ECtHR *Ragnar Thorisson v Iceland* App n. 52623/14 [12 February 2019].

[60] ECtHR *Bjarni Ármannsson v Iceland* App n. 72098/14 [16 April 2019] commented on by G De Marzo, '*Ne bis in idem* e contestualità dei procedimenti paralleli' (2019) Cassazione penale 3087 ff.

[61] *Ragnar Thorisson v Iceland* cit. para. 48 ff.; *Bjarni Ármannsson v Iceland* cit. para. 55 ff.

In *Nodet v France*,[62] the only judgment on double-track systems in financial matters after *A and B v Norway*, the ECtHR held that there had been a violation of the *ne bis in idem* guarantee since it found that the two proceedings did not pursue different purposes but were aimed at protecting the same legal interest and were not adequately coordinated in terms of evidence nor sufficiently closely connected in time, even though once again the criminal court had taken into account the administrative penalty imposed for the same act.[63]

Of relevant interest is the latest ruling on tax matters in *Bragi Gudmundur Kristjánsson v Iceland.*[64] Applying the principles developed in ECtHR case-law, the Icelandic Supreme Court had carried out its own connection test, ascertaining the sufficiently close connection between the criminal proceedings against the applicant and the administrative ones already concluded for the same facts. In particular, assessing both the foreseeability of the duality and the complementarity of purpose as existing, the Supreme Court, with reference to the connection as to substance, held that there was an overlap in the collection and assessment of evidence in the two proceedings only where unavoidable, and that the trial court had adequately taken into account the administrative sanction when imposing the penalty. With reference to the connection in time, the two proceedings were considered sufficiently linked, even though they were conducted in parallel for only about one year, compared to their total duration of more than six years. In spite of the reasoning of the Icelandic judges, the ECtHR found once again the combination to be unlawful due to insufficient coordination in collecting and assessing evidence, as it was unclear whether and to what extent the prosecutor had access to the evidence gathered in the administrative proceedings, and due to the absence of a sufficiently close connection in time, as the period in which the proceedings ran in parallel was too short in relation to their total duration.[65] That said, it is interesting to note that in a dissenting opinion, some of the ECtHR's judges considered the Icelandic Supreme Court's application of the test to be correct.[66]

On the contrary, the ECtHR held that there was no duplication of proceedings in only three cases that did not concern instances of integrated sanctioning systems, in which the national legislature had not provided for coordination with the precise intention of creating a unitary sanctioning system but rather cumulative punishments concerning road traffic offences or in any case designed to protect life and physical integrity. The ECtHR did so even

[62] *Nodet v France* cit. para. 47 ff. Regarding this decision, see also N Madia, Ne bis in idem *europeo e giustizia penale* cit. 63.

[63] *Nodet v France* cit. para. 48.

[64] ECtHR *Bragi Gudmundur Kristjánsson v Iceland* App n. 12951/18 [31 August 2021].

[65] *Bragi Gudmundur Kristjánsson v Iceland* cit. para. 62 ff.

[66] See the joint dissenting opinion of Judges Lemmens, Dedov and Pavli attached to *Bragi Gudmundur Kristjánsson v Iceland* cit. para. 3 ff., who in autonomously performing the close connection test found the two proceedings sufficiently linked both in time and substance, just as the Icelandic Supreme Court had.

though in such instances there was no framework aimed at ensuring a proportionate sanctioning response or an effective coordination between the authorities involved.

In the above-mentioned *Bajcic v Croatia* case concerning proceedings for speeding and ones for vehicular homicide for the same act,[67] the yardstick used to ascertain the different factors of the connection test appears to be totally different. Indeed, the criminal court did not even mention the previous administrative sanction when determining the penalty, it does not appear that there was any sharing of the probative material except for the use of an unspecified "evidence" in both proceedings and, above all, the criminal trial ended approximately six years after the administrative sanction had been imposed.[68] Nevertheless, the ECtHR considered the two proceedings to be sufficiently connected, expressly holding that the harm suffered by the applicant could not be considered excessive in relation to the offence perpetrated.

Similarly, in *Galović v Croatia*, the lawfulness of combination was recognised in the case of several incidents of domestic violence punished separately administratively and then cumulatively considered in criminal proceedings for domestic abuse. Also in this case, several connection factors exhibited significant problems, such as the complementarity of purposes and the timeline.[69] Nevertheless, considering the circumstances of the specific case, the connection test was once again passed.

It is also worth mentioning a recent decision of the ECtHR concerning a case of an physical attack motivated by hatred where the national authorities had decided not to open criminal proceedings against the attacker following the imposition of an administrative sanction for the same facts, justifying this decision on the basis of the need to respect *ne bis in idem*.[70] In that case, the ECtHR, with which the victim of the attack had lodged an application, held that there had been a violation of art. 3 ECHR, which places a positive obligation on the Member States of the Council of Europe to protect the life and physical integrity of their citizens.[71] In particular, the fact that the grounds of hatred had not been taken into account in the administrative proceedings was found to amount to a "fundamental defect" in the proceedings which, according to art. 4(2) of Protocol No 7 ECHR, would allow the proceedings to be reopened.[72] That said, the ECtHR went on to

[67] *Bajcic v Croatia* cit.

[68] Cf. *Bajcic v Croatia* cit. para. 43 ff.

[69] See ECtHR *Galović v Croatia* App n. 45512/11 [31 August 2021] paras 122, 118 and 120 concerning, respectively, the close connection in time, the complementary purposes of the two proceedings and the coordination in collecting and assessing evidence.

[70] ECtHR *Sabalić v Croatia* App n. 50231/13 [14 January 2021] with comment by V Di Nuzzo, 'Ne bis in idem" e tutela della vittima del reato: la Corte di Strasburgo riconosce la cedevolezza del principio di fronte a gravi violazioni dei diritti delle persone LGBTQ+' (2021) Il Foro Italiano 465 ff.

[71] The point is absolutely undisputed in the case-law of the ECtHR: see for all ECtHR *Opuz v Turkey* App n. 33401/02 [9 June 2009].

[72] Cf. art. 4(2) of Protocol No 7 ECHR and Council of Europe, Guide on Article 4 of Protocol No 7, cit., para. 65 ff. This limitation – that many countries have only if the reopening benefits the individual – is used

clarify that the State should guarantee the person subjected to the double trial *de eadem re* adequate remedies, such as, for example, the revocation of the administrative penalty previously imposed.[73]

IV. The "sufficiently close connection in substance and time": the unspoken balancing act engaged in by the ECtHR and an alternative criterion to assess whether there was a duplication of proceedings

A brief review of the ECtHR's case-law, considering the extreme elasticity of the close connection test, depicts a picture in which it is difficult to orient oneself in terms of the predictability of decisions.[74] In fact, it has been seen how the breach of the guarantee is often found in cases of substantially connected combined sanctions, also in consideration of the non-formally criminal nature of administrative proceedings in the field of taxation and market abuse (which according to the teaching of the ECtHR should also provide a criterion for assessing the breach of art. 4 of Protocol No 7 ECHR).[75] On the contrary, in cases where the offence certainly falls within the hard core of criminal law – think of *Bajic* and *Galovic* – and the two proceedings are much less connected than in the Nordic tax ones, the Court has never found the guarantee to be violated.

The reason behind this trend in case-law is to be found in the balancing act that the ECtHR implicitly and actually engages in but that would be more appropriate to explicitly bring out in the decision-making: the judgments in which the test is passed do not concern cases in which the two proceedings could actually be considered closely connected but, on the contrary, cases in which it was necessary to bring the second set of proceedings in order to provide adequate protection to an interest particularly worthy of being safeguarded, such as life or physical integrity. For this reason, in cases where the offence is fully remedied and adequately punished at the outcome of the first set of proceedings – as is the case in economic matters – the test is always failed whereas where criminal

by the court to remedy an overprotection that would otherwise be granted to the offender by the formal application of its case-law. It is clear, therefore, that the decision strikes a hidden balance between the right not to be tried twice for the same offence and the right to life and physical integrity: for more on this issue, see section IV.

[73] *Sabalić v Croatia* cit. para. 114.

[74] In the same vein, see RA Ruggiero, *Proscioglimento e* ne bis in idem *nel doppio binario sanzionatorio* (Giappichelli 2023) 111; JI Escobar Veas, Ne bis in idem *and Multiple Sanctioning Systems* cit. 142 ff. and 150, who however blames the unpredictability not only on the vagueness of the close connection factors but also on the notion of criminal matter.

[75] See *A and B v Norway* cit. para. 133 ff., to the effect that the difference between "the hard core of criminal law" and criminal law is a criterion that courts should use to assess whether the duplication of proceedings would entail a disproportionate burden on the defendant. Even if the Court does not explicitly state it, the other aspect of the proportionality assessment can only be the interest pursued by the State in implementing such dual-track proceedings.

protection is needed for interests deserving of greater protection, the standard of judgement is quite different from that used for tax offences or market abuse.

In other words, if the State's interest in collecting taxes or stamping out conduct detrimental to the stability of the financial markets does not justify the burden of a second set of punitive proceedings on the citizen, the same cannot be said in cases relating to vehicular homicide, domestic abuse or hate crimes. All the more so in the light of the fact that, for the former, the administrative sanctions are part of a formidable arsenal of penalties, in themselves capable of fully repairing the damage caused by the offence and adequately punishing it,[76] whereas for the latter the administrative response mentioned above is much weaker and is certainly not capable of tackling the entire anti-social aspects of the fact.[77] If administrative proceedings for drink-driving were to operate to preclude criminal proceedings for vehicular homicide, the right to life offended by the citizen's conduct would remain totally unprotected: a limitation of the right not to be tried twice for the same act is therefore justified, whereas the same could not be said for cases in tax matters that have come to the attention of the ECtHR. Again implicitly, the same principle has been recognised by the ECtHR: not only in the already mentioned *Sabalić* case, but also in *Tsonyo Tsonev v Bulgaria*,[78] another decision concerning a first prosecution for breach of the peace and a second one for injuries caused on the same occasion. In this case, although finding a violation of *ne bis in idem*, the Court ruled out that the State had to remove the criminal sanction imposed on the applicant at the end of the second set of proceedings (which, if the principle recognised as violated by the Court had been applied, should not even have been brought). This was because of the State's legitimate interest in maintaining the criminal sanction in the event of an offence against the physical integrity of the person.

It seems undeniable that the ECtHR actually exploits the test in all cases where it feels the need to provide adequate protection for legal interests that require it and for which administrative sanctions alone cannot suffice: it is so in the case of the life and physical integrity of citizens, in a hidden balancing act between art. 3 ECHR and art. 4 of Protocol No 7 ECHR. Indeed, only where the first set of proceedings – generally the administrative ones – are by themselves inadequate to effectively protect the interests at stake, does the Court invariably find that there has been no violation of the guarantee.

[76] For example, solely the administrative sanction for insider trading in Italy goes from EUR 20,000 to 5 million, plus confiscation and disqualification. Cf. art. 187-bis ff. TUF (Legislative Decree 58/1998). Similar sanctions are provided also for other market abuse and tax offences, to which the criminal penalty is added.

[77] Regarding road traffic offences, the administrative sanction for reckless driving in the *Bajcic* case was EUR 495; in *Tsonyo Tsonev* cit., the sanction for breach of the peace was EUR 25 and, in *Sabalic*, approximately EUR 40. Clearly, those sanctions fail to address properly the harm caused to life and physical integrity that States should by contrast protect appropriately.

[78] ECtHR *Tsonyo Tsonev v Bulgaria (No. 4)* cit. para. 47 ff. For analogous considerations, see G Ardizzone, 'Tsonyo Tsonev v Bulgaria' cit. 11 ff.

The criterion introduced in *A and B v Norway* to assess whether or not there has been a procedural duplication is not only greatly manipulated by the ECtHR according to an assessment that is actually rooted in the prominence of the interest protected by the combination of penalties, but has also been used by national courts precisely to legitimise, on the contrary, the hyper-repression of offences that do not require such a severe punishment, a stance that has always been condemned in ECtHR caselaw. Indeed, the test has been applied to justify procedural duplication not only in the Icelandic double-track system in tax matters[79] but also in numerous rulings of the Italian courts concerning business crime characterised by a sanctioning response informed by the logic of dual proceedings.[80]

In short, the overall results of the close connection test – the factors of which themselves exhibit numerous interpretative uncertainties[81] – are negative. On the one hand, it has been exploited by national courts to justify repressive sanctioning systems by contrast outlawed by the ECtHR and, on the other hand, it has not been able to provide a definite criterion capable of guiding the decisions of the ECtHR which, as we have seen, is instead driven by a need to strike a balance between the interest protected by the double-track system and the burden suffered by the applicant. It is therefore advisable to ultimately go beyond this criterion of assessment, and to explicitly bring out into the daylight the balancing act that is in fact already inherent in the ECtHR's decisions: it would be necessary to assess whether or not the second set of proceedings were strictly necessary to guarantee protection to a legal interest of primary rank that would otherwise have been deprived of it, without prejudice, in any event, to the obligation of the court in the second set of proceedings to ensure the overall proportionality of the punishment imposed.

Such a solution would have three main advantages: *i)* it would be more in line with the constitutional traditions of many Member States, which provide for a judgment of

[79] Cf. *Bragi Gudmundur Kristjánsson v Iceland* cit.

[80] The Italian case-law on this matter is copious. Regarding tax proceedings, among other decisions, the close connection test is used to legitimise double prosecution in Supreme Court (Criminal Division III) judgments of 22 September 2017 n. 6993, judgment of 12 September 2018 n. 5934, judgment of 16 December 2019 n. 33050, judgment of 14 January 2021 n. 4439 and judgment of 20 January 2021 n. 2245 cit. as well as in Supreme Court (Tax Division) judgment of 13 March 2019 n. 7131. Lastly, even the Constitutional Court has held that such an approach is lawful: judgment n. 222/2019 cit. As for market abuse, among others, cf. Supreme Court (Criminal Division V) judgment of 16 July 2018 n. 45829, judgment of 21 September 2018 n. 49869 and judgment of 15 April 2019 n. 39999. For a critique of that stance see L Baron, '*Ne bis in idem* e giudizio di proporzione: la certezza dell'incertezza applicativa' (2020) Giurisprudenza commerciale 743 ff.; E Fusco, G Baggio, 'Recenti pronunce in materia di *market abuse*' (2019) Diritto penale contemporaneo 67 ff.; AF Tripodi, Ne bis in idem *europeo e doppi binari punitivi* cit. 200 ff.

[81] See the dissenting opinion of Judge Pinto de Albuquerque attached to *A and B v Norway* cit. para. 40 ff. and *Menci* cit. opinion of AG Sánchez-Bordona para. 53 ff. In the italian literature, see AF Tripodi, 'Cumuli punitivi, *ne bis in idem* e proporzionalità' cit. 1064 ff.; F Mazzacuva, '*Ne bis in idem* e diritto penale dell'economia: profili sostanziali e processuali' cit., 23; N Madia, Ne bis in idem *europeo e giustizia penale* cit. 174 ff.; F Consulich, 'Il prisma del *ne bis in idem* nelle mani del giudice eurounitario' cit. 955 ff.

necessity as a step in the broader proportionality test in the balancing of rights;[82] *ii)* it would ensure greater predictability of the decisions of the ECtHR, which today, as we have seen, are contradictory at several points regarding the application of the test; *iii)* it would raise the standard of protection where necessary – economic offences in which the damage is entirely remedied by the administrative penalty that has a high punitive coefficient and for which the legislature may well provide for single-track proceedings in which to ascertain the violation and impose the consequent penalty – without however leaving unprotected those paramount interests for which it is unreasonable to consider that criminal proceedings should be precluded following the imposition of an administrative penalty inadequate to protect the life or physical integrity of citizens.

To be precise, therefore, the assessment to be carried out by the ECtHR would no longer concern whether or not there has been a duplication of proceedings using the test as a legal fiction to consider the two branches of enforcement as complementary and consequently part of a single set of proceedings. On the contrary, the Court should accept the existence of combination but check whether, nevertheless, this was essential for the safeguarding of an interest particularly deserving of protection and providing, where appropriate, for adequate corrective measures such as the overall proportionality of the penalty.

V. *Lis Pendens* and *Ne bis in idem*

Finally, it would be appropriate to extend the guarantee also to instances of *lis pendens*, which to date are outside the scope of application of the principle.[83] Indeed, the reason for

[82] In Italy, cf. G Scaccia, *Gli strumenti della ragionevolezza nel giudizio costituzionale* (Giuffrè 2000) 270 ff.; A Morrone, *Il custode della ragionevolezza* (Giuffrè 2001) 202 ff.; G Pino, *Il costituzionalismo dei diritti* (Il Mulino 2018) 141 ff.; and in the case-law of the Constitutional Court, judgment of 9 April 2013 n. 85, judgment of 9 April 2014 n. 162 and judgment of 23 February 2016 n. 63. In Germany, just for the most recent case-law, see *Bundersverfassungsgericht, 1st Senate*, 20 April 2016 – 1 BvR 966/09, 1 BvR 1140/09; *Bundersverfassungsgericht, 1st Senate*, 6 November 2019 – 1 BvR 16/13, 1 BvR 276/17; *Bundersverfassungsgericht*, 26 February 2020 – 2 BvR 2347/15. See also LS Rossi, 'Il "nuovo corso" del *Bundesverfassungsgericht* nei ricorsi diretti di costituzionalità: bilanciamento fra diritti confliggenti e applicazione del diritto dell'Unione' (2020) federalismi.it 4 ff.; A Lang, 'Proportionality Analysis by the German Federal Constitutional Court' in M Kremnitzer, T Steiner and A Lang (eds), *Proportionality in Action: Comparative and Empirical Perspectives on the Judicial Practice* (Cambridge University Press 2020) 43 and 60 ff. Instead, for the balancing test of the ECtHR, see A Tesauro, 'Corte Edu e Corte costituzionale tra operazioni di bilanciamento e precedente vincolante', Parts I, II and III, respectively in (24 June 2019) Diritto penale contemporaneo archiviodpc.dirittopenaleuomo.org; (9 July 2019) Diritto penale contemporaneo archiviodpc.dirittopenaleuomo.org; (2020) Diritto penale contemporaneo; and N Madia, Ne bis in idem *europeo e giustizia penale* cit. 174 ff.

[83] Such an approach derives from the wording of art. 4 of Protocol No 7 ECHR, which requires that a person "has already been finally acquitted or convicted in accordance with the law and the penal procedure of that State". Therefore, the ECtHR has always excluded that the guarantee could apply to a case of lis pendens; see ECtHR *Garaudy v France* App n. 65831/01 [24 June 2003]; ECtHR *Zigarella v Italy* App n. 48154/99 [2 October 2002]; ECtHR *Tomasović v Croatia* App n. 53785/09 [18 October 2011] paras 30 and 32; *Muslija v Bosnia-Erzegovina* cit. para. 37; *Milenković v Serbia* cit. para. 46; *Nykänen v Finland* cit. para. 47 ff.; *Glantz v Finland* para. 57 ff.; ECtHR *Mihalache v Romania* App n. 54012/10 para. 93 ff. See also Council of

such an exclusion is not easy to understand if one considers the rationale of the principle. In fact, the purpose of *ne bis in idem* as codified internationally is to prevent the sword of Damocles of a criminal trial hanging *sine die* over the head of the citizen, precluding the bringing of more than one set of proceedings of a punitive nature for the same fact.[84] In truth, it is clear how continuous subjection to one of the most intrusive forms of private life such as criminal proceedings would have extremely negative effects on the enjoyment of the freedoms and rights that are recognised by the Convention and national constitutions. For this reason, a situation in which, even in the absence of a final decision, several proceedings of a punitive nature are instituted simultaneously for the same act seems to deserve application of the same safeguard of *ne bis in idem*. It is clear that the need for protection here is the same as that which underpins the case in which there has already been a final decision. Even in the absence of a final judgement, multiple proceedings initiated for the same fact multiply the economic, psychological and social costs to the citizen. Furthermore, not being able to halt one of them before another reaches its conclusion also gives rise to unnecessary costs for the State, initiating several proceedings already knowing that it cannot bring them all to a conclusion. After all, the extension of the principle also to cases of *lis pendens*, in the case of formal criminal proceedings, has long occurred in the Italian legal system, including as means to protect the certainty of *res judicata*.[85]

Some authors,[86] on the other hand, deny that the purpose of *ne bis in idem* is to place a limit on the cost of a trial for citizens precisely because the principle is triggered, according to the case-law of the ECtHR, by a final judgment. Such an opinion cannot be supported, and the steadfast view that art. 4 of Protocol No 7 ECHR does not apply to *lis pendens* must be reassessed.

In fact, in order to ensure broader protection for situations that are certainly worthy of it, once a second set of proceedings has been commenced for the same act, the State

Europe, Explanatory Report to the Protocol No. 7, cit., para. 29, and the Council of Europe, 'Guide on Article 4 of Protocol no. 7 to the European Convention on Human Rights' cit. para. 54 ff. However, see the dissenting opinion of Judge Pinto de Albuquerque in *A and B v Norway* para. 41, footnote 112, who states how such situation raises an issue of unfairness. In the Italian literature, see M Bontempelli, 'La litispendenza e il divieto di doppia decisione' (2015) Rivista italiana di diritto e procedura penale 1316 ff.; F Cassibba, '*Ne bis in idem* e procedimenti paralleli' (2017) Rivista italiana di diritto e procedura penale 351 ff.

[84] See the dissenting opinion of Judge Pinto de Albuquerque in *A and B v Norway* para. 35. In the Italian literature, see N Galantini, 'Il divieto di doppio processo come diritto della persona' (1981) Rivista italiana di diritto e procedura penale 97 ff. See also, more recently, RA Ruggiero, *Proscioglimento e* ne bis in idem *nel doppio binario sanzionatorio* cit. 23.

[85] Cf. Supreme Court (Combined Criminal Divisions) judgment of 28 June 2005 n. 34655, a decision that however is limited only to *lis pendens* in formal criminal proceedings.

[86] See JI Escobar Veas, Ne bis in idem *and Multiple Sanctioning Systems* cit. 138. As another argument in to support his view, the author cites the exception enshrined in the above-mentioned second paragraph of art. 4 Protocol n. 7 ECHR. However, this is a balancing act performed by the Convention, guardian of the minimum standard of protection, and certainly not a reason why the rationale would not be to defend the citizen against repeated prosecution.

should be forced to choose which of the two it wishes to pursue,[87] with the twofold benefit of saving the economic cost of a second prosecution and relieving the burden on the citizen. For the ECtHR, moreover, a criminal charge exists when it can be perceived by individuals: either because they have been notified by the competent authority of an allegation that they have committed a criminal offence or because their situation has been substantially affected by an investigative act undertaken against them, such as an interrogation.[88] It is, therefore, an interpretation that considers the burden imposed on the defendant by a trial, without being hostage to overly rigid formal criteria and that fits well with an extension of the guarantee also to instances of *lis pendens*, thus avoiding a situation whereby a citizen twice faces proceedings that are criminal or substantially criminal in nature even in the absence of a final judgment.

Rather, as regards dual-track proceedings, one could argue that failure to appeal against the administrative act imposing the sanction should not preclude criminal proceedings.[89] This for two reasons.

First, because the cost of administrative proceedings to citizens could be minimal: in some cases, they could be the direct addressee of the sanction without being informed that proceedings had been brought against them or, at most, they could be called upon to provide information to the administrative authority.[90] In such a circumstance, even considering the fact that there are no particular legal fees for this kind of enforcement, the burden of the first set of proceedings would not seem to justify preclusion of the criminal proceedings and only the need to ensure the overall proportionality of the penalty would remain. Obviously, there are different situations in which by contrast a citizen is called upon to actively participate in the administrative proceedings that culminate with a sanction, where legal assistance is required due to the extreme technicality of the matter, thus resulting in an actual burden on the individual.

Second, because such an interpretation would offer an undesirable exploitation of the guarantee: letting the administrative sanction become final in order to "escape" the

[87] For example, this is the choice made by French law on market abuse after the reform and it is the current way such offences are prosecuted also in the UK. Cf. art. 465-3-6*Code Monétaire et Financier* (CMF) for the French system and para. 6(2)(1), para. 6 of the *Decision Procedure and Penalties Manual*, the para. 12(3) of the *Enforcement Guide*, available at www.handbook.fca.org.uk, and Annex 2 to the FCA Handbook for the British one.

[88] See, amongst many, ECtHR *Deweer v Belgium* App n. 6903/75 [27 February 1980] para. 42 ff.; ECtHR *Eckle v Germany* App n. 8130/78 [21 June 1983]; ECtHR *McFarlane v Ireland* App n. 31333/06 [10 September 2010] para. 143; ECtHR *Ibrahim and Others v United Kingdom* App n. 50541/08 [13 September 2013] para. 249; ECtHR *Ragnar Thorisson v Iceland* cit. para. 44; *Mihalache v Romania* cit. para. 103.

[89] That is what happened in *Häkkä v Finland* para. 50 ff.

[90] This is generally what happens in Italian tax proceedings: cf. Decrees of the President of the Republic of 1973 and 1972 (DPR) 600/1973 and 633/1972. However, it should be pointed out that the powers of investigation of the tax authorities may result – in some cases – in an actual burden for the defendant, thus generating a need for effective protection from a re-prosecution. Nonetheless, this particular circumstance requires case-by-case assessment.

criminal trial would lead to the substantial neutralisation of the highest form of protection, in consideration of the greater speed that characterises administrative enforcement.[91] This seems to be the greatest danger: a blanket extension of the *ne bis in idem* principle to dual-track administrative and criminal proceedings without any corrective measures or balancing could lead to the sterilisation of criminal protection when in reality in the most serious cases, it should be the administrative ones that should be sacrificed also in the light of the fact that it is the formally criminal proceedings that afford the greatest procedural guarantees. Nonetheless, this is a conundrum that it is up to the legislature to resolve: in the absence of legislation on the point, the fundamental right not to tried twice for the same fact should be protected first and foremost. It will then be up to the law to regulate the aporias stemming from such a choice, which is necessary for the protection of the right at stake.[92] Moreover, the ECtHR itself considers it sufficient for there to be a final decision, meaning any act that cannot be challenged due to exhaustion of the ordinary means of appeal or the lapse of time to exercise them.[93]

VI. Conclusion

As we have seen, there are still numerous interpretative uncertainties relating to the *ne bis in idem* principle that generate a contrast between ECtHR and national case-law. For this reason, it would be advisable for the ECtHR to remedy the lack of clarity inherent in some of the formulas used to determine whether or not there has been a breach of the guarantee and come up with more immediately effective solutions that can be interpreted homogeneously by the Council of Europe Member States.

First, a clear definition of *idem factum* is needed, which in line with ECtHR case-law would circumscribe the fact to the conduct alone. Indeed, the formula used by the ECtHR as aforesaid is particularly elastic and, taken on its own, is certainly not suitable for circumscribing the identity of the fact to the conduct alone: on this basis, the national courts have adopted a divergent interpretation, which lowers the standard of protection of the fundamental right in question. Nevertheless, it has been observed that a different conclusion can be inferred from the judgments of the ECtHR: it would therefore be necessary

[91] In the Italian literature this issue is pointed out, amongst many, by GM Flick, V Napoleoni, 'A un anno di distanza dall'affaire Grande Stevens: dal *bis in idem* all'*e pluribus unum*?' (2015) Rivista AIC 15 ff.; E Scaroina, 'Costi e benefici del dialogo tra Corti in materia penale' (2015) Cassazione penale 2922 and 2931 ff.; M Di Bitonto, 'Una singolare applicazione dell'art. 649 c.p.p.' (2015) Diritto penale e processo 443 and 445 ff.; M Di Bitonto, 'Il *ne bis in idem* nei rapporti tra violazioni finanziarie e reati' (2016) Cassazione penale 1340 ff. *Contra*, see the dissenting opinion of Judge Pinto de Albuquerque, cit. para. 48 ff.; F Viganò, 'Doppio binario sanzionatorio e *ne bis in idem*: verso una diretta applicazione dell'art. 50 della Carta?' (2014) Diritto penale contemporaneo 226 ff.

[92] F Viganò, 'Doppio binario sanzionatorio e *ne bis in idem*' cit. 229.

[93] *Mihalache v Romania* cit. para. 103; *Zoluthukin v Russia* cit. para. 107; ECtHR *Sismanidis and Sitaridis v Greece* App n. 66602/09 and 71879/12 [9 June 2016] para. 42; *Nykänen v Finland* cit. para. 44.

to bring out that interpretation and to establish unequivocally that *idem factum* coincides with the same conduct, leaving it then to the assessment on the *bis* criterion to address the issue of providing adequate safeguard to interests that deserve protection.

Second, the issue that is most difficult to resolve concerns precisely the close connection test developed to establish whether or not there has been a duplication of proceedings. This criterion, in order to achieve greater clarity and predictability of decisions, must necessarily be abandoned. Indeed, the *vexata quaestio* of the applicability of *ne bis in idem* to double-track systems must be brought back to a balancing act that, more or less explicitly, all national and supranational courts actually perform:[94] it has been seen how the ECtHR reaches very different conclusions in cases in which the combining of sanctions serves to achieve a greater (and not always necessary) repression of business crimes and in cases in which it proves to be necessary in order not to leave totally unprotected a legal interest of paramount importance that the State has the obligation to protect through the criminal law, such as life and physical integrity.[95]

From this point of view, the distinction between the hard core of criminal law and criminal law made by the ECtHR in *A and B v Norway* should provide a key not for the yardstick of ascertaining the factors of connection but within a more predictable balancing act between the sacrifice endured by a citizen at the trial level and the interest from time to time protected by the duplication of proceedings. Faced with such a scenario, rather than continuing to hold that the principle enshrined in art. 4 of Protocol No 7 ECHR cannot be balanced,[96] it is in fact preferable to assess, on a case-by-case basis, whether criminal proceedings are strictly necessary to safeguard a legal good not adequately protected by administrative enforcement alone. Such without thereby undermining the applicability of the guarantee to double-track systems in economic matters and legitimising the "Leviathan-like approach"[97] feared in the aftermath of *A and B v Norway*, but at the same time allowing criminal proceedings to be brought where unavoidable.

Finally, given the rationale of the *ne bis in idem* principle, it would also be appropriate to extend the minimum standard of protection to cases of *lis pendens*, which are also a source of unnecessary and avoidable costs for the State and citizens alike. It has been said, in fact, that the purpose of *ne bis in idem* as codified in conventions, charters and constitutions is precisely to prevent citizens from having to bear the burden of two proceedings. This function is also confirmed by the approach of the ECtHR, which considers that proceedings begin as soon as individuals are aware of them, for whatever reason (*e.g.* because they have been served with a notice of completion of an investigation or are called to testify). It is therefore consistent with the rationale of the guarantee to extend the protection of citizens from repeated prosecution also to cases where neither of the

[94] *Supra* sections III and V.
[95] *Supra* section V.
[96] See the dissenting opinion of Judge Pinto de Albuquerque attached to *A and B v Norway* cit. para. 49.
[97] Cit. from the dissenting opinion of Judge Pinto de Albuquerque in *A and B v Norway* para. 79.

two proceedings has yet formally ended. Such an option, besides raising the standard of protection for the individual, is also cost-effective for the State, which would not have to spend money to initiate proceedings that it knows it cannot conclude.

Thus, after analysing the current situation regarding *ne bis in idem*, these solutions to the three major problems of interpretation would advance the right not to be tried twice for the same fact, both making it easier for national courts to apply it consistent with the supranational case-law and raising the standard of protection without prejudice to the safeguarding of legal interests that need to be defended by criminal law.