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DIALÉTICA

Limitation of Administrative Tax Penalties by the European Convention of Human Rights and the EU Charter of Fundamental Rights

Vincoli alle Sanzioni Amministrative Tributarie Imposti dalla Convenzione Europea dei Diritti dell'Uomo e dalla Carta dei Diritti Fondamentali dell'Unione Europea

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Abstract
This article provides a comprehensive overview of the tax issues related to administrative and criminal penalties, particularly focusing on the need of finding a fair balance with taxpayers' rights. This theme, which was the subject of the annual conference of the European Association of Tax Law Professors (EATLP) held in Milan on 28-30 May 2015, has recently become a pan-European issue, due to the ground-breaking role played by the legal principles enshrined both in the European Convention of Human Rights and the Charter of Fundamental Rights of the European Union. Despite considering human rights' principles to be completely at odds with taxation, the recent achievements resulting from the case-law of the European Courts show instead a movement demanding a more effective protection of taxpayers' guarantees and safeguards against administrative and criminal sanctions imposed by national legislations. The paper analyzes two major subject areas where the intervention of the European Courts has been more incisive: (I) the autonomous classification of administrative and criminal penalties made by the EU Courts, which completely disregards how the penalty is considered under domestic tax laws; (II) the extension of the prohibition of double jeopardy, that is the right not be tried or punished twice, as to impede the simultaneous imposition of both administrative and criminal penalties on the same taxpayer for the same conduct. In the final section, the article also discusses possible solutions which should be implemented by domestic tax systems to be in compliance with the recent developments at EU level.
Keywords: European Convention of Human Rights, Charter of Fundamental Rights of the European Union, Administrative surcharges, Criminal penalties, Affliction model, Compensation model, *Engel* criteria, *Ne bis in idem,* Right not to be tried or punished twice, *Akeberg Fransson, Grande Stevens v. Italy, Lucky Dev v. Sweden,* Parallel proceedings, Principle of specialty, "Una Via" solution, Proportionality.

Riassunto
L'articolo si propone di fornire una visione complessiva delle tematiche fiscali connesse alle sanzioni amministrative e penali, con particolare attenzione alla necessità di trovare un bilanciamento corretto con i diritti dei contribuenti. Tale tematica, la quale ha costituito oggetto di dibattito della conferenza annuale dell'Associazione Europea dei Professori di Diritto Tributario (EATLP) tenutasi a Milano il 28-30 maggio 2015, ha assunto, di recente, una dimensione di respiro europeo, in considerazione del ruolo innovatore svolto dai principi giuridici custoditi all'interno della Convenzione Europea dei Diritti dell'Uomo e della Carta dei Diritti Fondamentali dell'Unione Europea. A dispetto di chi ritiene che la materia fiscale risulti completamente estranea alle tematiche concernenti i diritti umani, i recenti sviluppi avutisi a livello di giurisprudenza europea mostrano, al contrario, una richiesta crescente di tutela e di garanzie maggiormente effettive per i contribuenti nei confronti delle sanzioni amministrative e penali imposte dalle legislazioni nazionali. Il lavoro analizza due macro aree entro le quali l'intervento dei giudici europei è risultato maggiormente incisivo: (I) la classificazione autonoma delle sanzioni amministrative e penali sviluppata in seno alle Corti europee, la quale prescinde completamente dalla tassonomia impiegata dagli ordinamenti tributari domestici; (II) l'estensione interpretativa attribuita al divieto di *bis in idem,* ossia del diritto a non essere processato e punito due volte, così da impedire l'imposizione simultanea di misure punitive sia di tipo amministrativo che penale in capo al medesimo contribuente in conseguenza della medesima violazione. Nella sezione finale, l'articolo si propone inoltre di discutere possibili misure da inserire all'interno dei sistemi fiscali nazionali al fine di renderli conformi ai recenti sviluppi avutisi a livello europeo.
Parole chiave: Convenzione Europea dei Diritti dell'Uomo, Carta dei Diritti Fondamentali dell'Unione Europea, Sanzioni amministrative, Sanzioni penali, Modello afflittivo, Modello risarcitorio, Criteri *Engel, Ne bis in idem,* Diritto a non essere processato o punito due volte, *Akeberg Fransson, Grande Stevens contro Italia, Lucky Dev contro Svezia,* Procedimenti paralleli, Principio di specialità, Soluzione "Una Via", Proporzionalità.

1. The Role of the European Court of Human Rights and the Charter of Fundamental Rights of the European Union in protecting the Taxpayer's Rights

1.1. The European Court of Human Rights (hereinafter "ECtHR") has the duty to enforce the fundamental principles of human beings contained in the European Convention of Human Rights (hereinafter "ECHR"). Its jurisdiction over human rights' principles has been established by the European Convention of Human Rights on November 1950, 4th (Art. 1 of ECHR). The ECHR was adopted within the framework of the Council of Europe[1]. At present, the Court is com-

[1] The European movement toward the institution of the Council of Europe dates back to the Congress held in The Hague in May 1948 and chaired by Winston Churchill, who had already advo-

posed of 47 judges, each of the them coming from one of the 47 Member States that are Contracting Parties to the Convention (Art. 20 of ECHR). The ECtHR's judges are elected for a non-renewable nine-year mandate. Applications to the Court are open from any person or non-governmental organization or group of individuals claiming to be victims of a violation of the rights set forth in the Convention by the Contracting States (Art. 34 of ECHR). A single judge is entrusted with a preliminary check of the application. The single judge has the power to declare receivable complaints lodged by individuals, according to the criteria set forth in Art. 35 Paras. 2 and 3 of ECHR. In this regard, the conditions of admissibility are four: 1) all domestic remedies must have been unsuccessfully exhausted, 2) applications shall not be anonymous or incompatible with the provisions of the Convention and its Protocols, 3) the matter dealt with must differ substantially from cases that have already been examined by the Court, and, finally, 4) the prejudice suffered by the applicant shall be "important". After an application has been declared admissible or has not passed under the single judge's check, the case is further examined by the Chambers of the Court. The Chambers may at the same time decide on the admissibility and merits of the application (Art. 29 of ECHR). Any of the Chambers may decide to relinquish its jurisdiction in favor of the Grand Chamber where a case raises a serious question affecting the interpretation of the Convention and its Protocols or where the resolution of a question before the Chamber might have a result inconsistent with a judgment previously released by the Court (Art. 30 of ECHR)[2]. However, the legal protection of the human rights enshrined in the Convention is ensured by both the Chambers and the Grand Chamber of the Court[3].

1.2. The impact of case-law of the European Court of Human Rights on tax law is far-reaching. As a matter of fact, in the last decade, the bulk of judgments relating to tax ruled by the ECtHR has become extremely relevant. And this is not too surprising, since taxation and human rights are linked through protection of the taxpayer's rights. It can be fairly affirmed that "the concept of protection of taxpayers' rights is a function of the broader notion of human rights whose move-

cated for the creation of a 'Council of Europe' in a famous public speech given at the University of Zurich in 1946. In the final remarks of the Hague Congress, enshrined in the 'Message to Europeans', it is expressed the desire for "a Charter of Human Rights guaranteeing liberty of thought, assembly and expression as well as the right to form a political opposition" as well as the necessity of "a Court of Justice with adequate sanctions for the implementation of this Charter". This movement toward a pan-European system has been subsequently completed when the Statute of the Council of Europe (COE) was signed by ten European States (Belgium, Denmark, France, Ireland, Italy, Luxembourg, Netherlands, Norway, Sweden, United Kingdom) in May 1949, 5th, in London. The first commitment taken by the new-established organization was the drafting of the European Convention of Human Rights.

2 For an in-depth inquiry about the history as well as the legal functioning of the European Court of Human Rights see, *ex multis*, G. RAIMONDI, *Il Consiglio d'Europa e la Convenzione Europea dei Diritti dell'Uomo*, Napoli, 2008.

3 An overview of the present composition of the Court as well as of summaries, numbers and statistics about the cases brought before the judges in Strasbourg is outlined by ECtHR, Annual Report 2014, 29 January 2015, available online at http://www.echr.coe.int/Documents/Annual_report_2014_ENG.pdf. Particularly, this Report underlines that "*there is an impressive decline in the number of pending cases*" before the Court.

ment started only after the Second World War". This is mainly due to the fact that "human rights seek to protect individuals especially against the exercise of public power. Taxation, on the other hand, is arguably the most visible, persistent and almost universal interference with ownership. The right to protection, or peaceful enjoyment, of one's possessions is a well-known human right. Furthermore, taxation generally and tax administration in particular provides fertile ground for conflict between the exercise of public power, on the one hand, and the need to respect the rights of individual (including corporate) taxpayers on the other hand."[4]

1.3. As regards the protection of taxpayer's rights in the European Union, it should be noted that human rights' principles have been included only recently among EU primary law, *i.e.* after the adoption of the Charter of Fundamental Rights of the European Union[5]. It is well-known that the Court of Justice of the European Union (hereinafter "CJEU"), even in the field of direct taxation, which is the exclusive competence of the Member States, has often limited the exercise of taxing powers to protect the fundamental European freedoms as well as the functioning of the common European market, thereby applying the principles of non-discrimination and restriction. Consequently, the subject-matter concerning

[4] For citations see C. Brokelind, *The Role of the EU in International Tax Policy and Human Rights. Does the EU Need a Policy on Taxation and Human Rights?*, in *Human Rights and Taxation in Europe and the World*, 2011, Online Book IBFD. In the same vein, in a very early work on this subject, P. BAKER, *Taxation and Human Rights*, in *GITC Review*, November 2001, p. 1: "Some would say that taxation and human rights is an oxymoron. An oxymoron is, of course, the conjunction of two otherwise apparently irreconcilable concepts. I personally do not believe that taxation and human rights are in any way irreconcilable or conflicting; I think human rights are a fundamental aspect of taxation. Human rights limit what governments can do to their citizens - to people affected by their decisions. I think at the moment we are at a very exciting stage, where we are seeing the extension of human rights principles into the tax field, to provide limits to what governments can do to taxpayers. It is part of the balance between the powers of the state and the rights of taxpayers". See also P. BAKER, *Taxation and the European Convention on Human Rights*, in *European Taxation*, 2000, p. 298 et seq.

[5] As regard to the status of the Charter of Fundamental Rights within the primary law of the European Union, Art. 6 of Treaty of European Union (TUE), as amended by the Treaty of Lisbon (entered into force on 1 December 2009), attributed binding force to the Charter, while giving a mandate to the EU Commission to negotiate the Union's accession to the European Convention on Human Rights. However, the accession of the EU to the ECHR is still stuck since, on 2014, December, 18th, the Court of Justice of the European Union has rejected the draft agreement outlined by the Commission. At this regard, Dean Spielmann, President of the European Court of Human Rights, pointed out that "the end of the year was also marked by the delivery on 18 December 2014 of the Court of Justice of the European Union's (CJEU) eagerly awaited opinion on the draft agreement on the accession of the European Union to the European Convention on Human Rights. Bearing in mind that negotiations on European Union accession have been under way for more than thirty years, that accession is an obligation under the Lisbon Treaty and that all the member States along with the European institutions had already stated that they considered the draft agreement compatible with the Treaties on European Union and the Functioning of the European Union, the CJEU's unfavorable opinion is a great disappointment. Let us not forget, however, that the principal victims will be those citizens whom this opinion (no. 2/13) deprives of the right to have acts of the European Union subjected to the same external scrutiny as regards respect for human rights as that which applies to each member State. More than ever, therefore, the onus will be on the Strasbourg Court to do what it can in cases before it to protect citizens from the negative effects of this situation." See Dean Spielmann, ECtHR, Foreword to the Annual Report 2014, 29 January 2015, available online at http://www.echr.coe.int/Documents/Annual_report_2014_ENG.pdf.

the protection of taxpayers' right has practically been addressed, for the most part, solely by the European Court of Human Rights[6]. At this purpose, it must be highlighted that the relevance of ECtHR rulings upon domestic law is not always the same among different jurisdictions. As a matter of fact, although in some cases the ECtHR has been translated into domestic law (*e.g.* the United Kingdom), nevertheless, according to the Italian legal taxonomy, ECHR's principles represent "constitutionally interposed" provisions, *i.e.* the ECHR's principles are not directly accessible to the taxpayer, but he/she is obliged to bring the question before the Italian Constitutional Court. However, since the "ne bis in idem" principle is also included in Art. 50 of the Charter of Fundamental Rights of the European Union, this circumstance is likely to cause potential issues, due to the fact that some areas of taxation (*i.e.* indirect taxes and excise duties) are completely harmonized at EU level and, therefore, their provisions could be directly invoked by the taxpayer during a tax controversy, while the area of direct taxation is not harmonized. Therefore, a disparity in terms of taxpayer's rights might arise where the subject-matter of a controversy involves issues related to direct or indirect taxation[7].

1.4. In the following paragraphs, the most relevant issues concerning the administrative and criminal penalties' impact on a taxpayer's rights are delineated. First of all, it will be explained what purposes may be found behind, respectively, administrative and criminal tax penalties as well as the criteria under which they have been developed under each domestic legislation. Secondly, the "Engel criteria" set forth by the ECtHR and the main consequences of their applications in tax law will be illustrated. Thirdly, the main purpose and significance of the prohibition of double-jeopardy will be clarified, *i.e.* what exactly the "ne bis in idem" principle is for. Furthermore, an overview of the main challenges posed to domestic tax systems by the recent ECtHR case-law achievements concerning the "ne bis in idem" principle is provided, particularly as they seem to emerge in the different national reports. In the final section, the possible scenarios and getaway solutions about this pan-European issue will be outlined.

2. Administrative and Criminal Penalties

2.1. The majority of the tax systems that have been reviewed in the national reports provides two types of penalties, *i.e.* administrative or criminal, depending on whether the violation is classified under domestic tax law, respectively, as an administrative offence or, instead, as a criminal offense.

[6] In fact, the European Court of Justice expressly recognized the validity of the 'Engel criteria' and seemed to rely on them. See SE: CJEU: 26 February 2013, C-617/10, case *Åkerberg Fransson*. For a comment of the judgment, see C. BROKELIND, *Case Note on Akerberg Fransson (Case C-617/10)*, in *European Taxation*, Vol. No. 53, 2013, Online Journal IBFD. See *below* paragraph 7; see also J. VERVAELE, *The Application of the EU Charter of Fundamental Rights and its 'Ne bis in idem' Principle in the Member States of the EU*, in *Review of European Administrative Law* 2013, p. 113 et seq.

[7] For references to the ECHR in the system of Italian law sources see G. MELIS - A. PERSIANI, *Trattato di Lisbona e sistemi fiscali*, in *Diritto e Pratica Tributaria*, 2013, p. 1 et seq. For an overview of the United Kingdom's experience see P. BAKER, *The Application of the European Convention on Human Rights to Tax Matters in the United Kingdom*, available online at http://www.taxbar.com/documents/App_European_Convention_Philip_Baker_QC.pdf.

By and large, administrative penalties bite less serious offences with the general preventive purpose to ensure tax compliance in order to assure a truly lawful and equal tax assessment, *i.e.* they do not fundamentally share an afflictive and a repressive nature.

Among administrative offences, contraventions, infringements such as the failure to pay the amount of tax resulting from a correct self-assessment, late payments of taxes, or violations of the duties concerning bookkeeping activity are usually included. As regards the punitive measure implemented, different kinds of surcharges are usually employed. The most common instrument is constituted by cash penalties, basically consisting in the request of the Tax Authority to the taxpayer to pay an additional sum of money (sometimes higher than the unpaid taxes[8]!). Cash penalties may assume the form of a proportional tax penalty, *i.e.* they are computed on the total amount of the committed tax evasion, or, instead, tax systems may also be willing to establish a flat cash penalty, *i.e.* regardless how much the government's loss due to taxpayer's non-compliance is[9]. Basically, all these measures can be classified as "ancillary tax payments"[10], *i.e.* additional costs borne by the taxpayer because he/she failed to comply with specific tax duties, though non involving a behavior considered "criminal" by domestic laws. Along with cash penalties, sometimes tax regulations may also impose other forms of penalties. A typical example is provided by interdictions, *i.e.* the ban from public offices, the prohibition to enter into contracts with the Public Administration, the suspension from certain professions (*e.g.* company's director, auditor, notary)[11], the prohibition to participate in public auctions, the suspension of licenses, permits or other administrative authorizations. Finally, it should be duly noted that, unlike criminal penalties, administrative tax penalties are imposed by Tax Authorities or, at least, by other administrative bodies, but they shall not, in any event, be imposed by Criminal Courts[12].

2.2. Besides administrative surcharges, national tax codes also contain criminal penalties. They have an afflictive and repressive nature with the private scope to re-educate the offender and with the general deterrent scope to prevent further criminal behaviors. The affliction of the personal freedom which is the

[8] For instance, in the case of Italy, provided certain circumstances are met, cash penalties can be as much high as 240% of the total amount of the unpaid taxes.

[9] For instance, in the Belgian report, it is stated that the Belgian Tax Administration has the option to sanction each violation of the provisions of the Income Tax Code as well as its executive decrees with a fine from EUR 50 up to EUR 1,250. According to the Belgian Tax Administration, the essential purpose of this penalty is to ensure cooperation of taxpayers and third parties within the tax procedures, under the risk of an additional penalty, in case a proportional penalty cannot be asked or would be too low.

[10] The expression is contained in the German national report that defines 'ancillary tax payments' as "monetary sanctions in addition to regular taxes".

[11] Similar negative consequences are included in many legal systems. See *e.g.* the United States and Germany's national reports.

[12] *E.g.* in the Spanish national report is said that the general consequence of administrative penalties is "a fine, but it may be accompanied in certain cases by penalties of different nature, like exclusion from public grants or fiscal benefits, the prohibition of entering into contracts with the Public Administration and suspension of the practice of certain professions, such as public notaries".

base of the criminal penalty implies the need to specify all the pixels of the criminal behavior. The principle of specialty must indeed make the difference between a criminal offence and an administrative offence when the individual freedom is not under discussion.

Generally, penalties classified as "criminal" do intend to punish the most serious misdeeds. As a matter of fact, the most serious violations of tax law are usually considered by lawmakers as criminal offences. They often include misconducts such as tax fraud (with further split-up between aggravated tax fraud or, instead, petty tax fraud), tax evasion, often connected with other major crimes, such as money laundering, forgery of tax documents, along with other tax accounting crimes. In practice, the main tax crimes are related to misrepresentation and failure of taxpayers to comply with accounting duties. Penalties that are labeled as "criminal" in the domestic legislation commonly involve either imprisonment or very high cash penalty[13]. Finally, it is important to point out that criminal penalties can be assessed only by Criminal Courts.

2.3. As far as interests are concerned, reading the different national reports, it seems unequivocal that interests are never qualified as penalties, since they constitute mere financial compensations for unavailable liquidity due to late payments. In this regard, interests from late payments of taxes do not differ in any way from interest arising from ordinary civil obligations. In other words, when a taxpayer fails to pay on time his tax debt, he has to pay interests to compensate the damage due to the delay. In practice, the *rationale* behind the payment of interests is the compensation of the prejudice deriving from late payments[14].

However, it should also be noted that administrative and criminal penalties do not complete any of the possible surcharges connected to a taxpayer's misconducts. As a matter of fact, a taxpayer violating certain obligations often suffers further adverse and negative consequences. Tax literature usually refers to "improper" or "indirect" sanctions. Generally speaking, they can be regarded as negative consequences to which the taxpayer is subject because of his/her failure to comply with certain tax requirements. These punitive measures are indeed difficult to duly classify under a comprehensive umbrella, since various negative consequences may be associated to a taxpayer's certain behavior. Tax Authority, for example, in specific situations involving failure to file tax returns, may be allowed

[13] For example, it is reported that, under French legislation, "a criminal penalty can be, at main, a financial penalty (*amende*) or a deprivation of liberty. It can be also, in addition, a penalty of publication or a prohibition from participating in certain activities (*e.g.* prohibition to be a member of tax administrative committees)".

[14] Particularly, the United States' national report pointed out that "the applicable interest rate is computed by reference to prevailing market rates, compounded daily. The rate paid to taxpayers generally is the same as the rate paid to taxpayers. However, many special rules exist in specific situations in order to reflect administrative realties or to motivate taxpayers and the IRS to perform their duties conscientiously." However, it might be recalled that according to EU well-established case law also penalty interests must comply with the principle of proportionality. In a case concerning VAT, the CJEU held that "although Member States may impose penalties in the event of non-compliance with obligations which seek to ensure that the tax is collected correctly and that evasion is prevented, those penalties must not go further than is necessary to attain the objective pursued". See BG: CJEU, 12 July 2012, C-284/11, case *EMS Bulgaria Transport,* Para. 67.

to use presumptive methods of tax investigation and assessment. In the same vein, failure to provide accounting books and documents specifically requested during a Tax Police's inspection, could make it impossible to produce them in a further administrative stage[15]. Additional surcharges might be triggered as a consequence of coercive collection[16]. Furthermore, some indirect sanctions often involve either disallowances of tax deductions or exclusions from tax exemptions or other tax favorable conditions[17]. In the same vein, it might be considered a penalty the impossibility to deduct VAT[18]. In more general terms, it might also be recalled that tax law can also be used as a powerful and effective tool in order to achieve non tax-related economic goals, *i.e.* promoting or, instead, discouraging certain behaviors carried out by taxpayers. Indeed, that is precisely the case concerning the problem of thin-capitalization of companies. Accordingly, disallowances of interest deductions or, on the contrary, allowances of notional interest rate deductions of capital invested or kept in the corporation might be regarded as forms of "indirect" penalties/incentives[19]. In some ways, it might also be questionable whether targeting a specific business sector with a detrimental tax system can be perhaps viewed as an "indirect" penalty. For instance, in January 2015, the Italian Constitutional Court has declared "unconstitutional" the so-called "Robin Hood Tax", an additional tax imposed on companies operating in the energetic and oil sectors[20], which had caused those companies to bring additional costs to carry out their business. In a broader perspective, if the government publicizes tax indictments and convictions such as described in the United States' national report, all in all, even negative publicity[21] can be at least as damaging as other more "traditional" forms of penalties[22]. It appears that the question here is how

[15] Possible adverse issues affecting a taxpayer's right during tax proceedings have been analyzed in-depth in the Italian national report.

[16] In Spain, for example, coercive collection period surcharges might vary from 5% to 20% depending on the moment the payment took place.

[17] For instance, in the Portuguese tax system "costs regarding receptions, meals, trips and shows offered in Portugal or abroad to clients or suppliers or to any other persons or entities are also subject to autonomous taxation".

[18] In that regard, the case-law of the CJEU should be taken into account. In a recent judgment, the Court of Luxembourg held that "a penalty consisting of a refusal of the right to deduct is not compatible with the Sixth Directive where no evasion or detriment to the budget of the State is ascertained". See IT: CJEU, 17 July 2014, C-272/13, case *Equoland*, Para. 41.

[19] *E.g.*, as it has been signaled in the Belgium's national report, corporate profits that are reinvested (or kept) in the company for a certain period of time, without being redistributed as dividends, are taxed at a lower rate rather than if the income were redistributed as a dividend through by a reduction of capital.

[20] IT: Constitutional Court, 10 February 2015, No. 10. The "Robin Hood Tax" was introduced by Art. 81, Paras. 16-18, of Law Decree No. 112/2008, as subsequently amended by Law Decree No. 69/2013. However, it should be noted that, due to public budget constraints, the judges of the Italian Supreme Court have decided that the declaration of unconstitutionality will only be limited to the future and have specified that this ruling will be effective from the day after its publication in the Official Gazette of the Italian Republic (11 February 2015). Therefore, no refunds of the "Robin Hood Tax" paid in the past can be claimed by taxpayers.

[21] Similarly, in the Austrian national report, it is expressly recognized that even "naming recipients and creditors could constitute a disguised sanction".

[22] For instance, in the United States' National Report, it has been also reported that "some tax convictions can adversely affect immigration status". Similarly, in German Law tax violations might lead to the withdrawal of the passport.

far certain negative consequences can be regarded as penalties, since an overall distinction between measures that are classified as such and measures that are not can be really blurred.

3. Administrative and Criminal Offences: serving Different or Identical Purposes?

3.1. While the administrative penalty is conceptually different from the criminal penalty (cash payments versus deprivation of individual freedom), the distinction between the criminal tax offences and the administrative tax offences is becoming somehow hazy. As a matter of fact, in many tax systems (it is particularly evident in Italy and Spain), administrative tax offences do share the same fundamental characteristics of criminal offences. In other words, considering Italy as an example, administrative tax offences have been modeled by the Italian lawmaker and, consequently, Italian Tax Courts impose them, according to the same legal principles and for the same legal purposes on which criminal offences are conceived. Thus, administrative and criminal tax proceedings are both manifestations of the same *ius puniendi* of the State. Specifically, looking at the Italian experience, the reform of the current administrative tax penalty system, implemented during the years 1996-1998[23], explicitly make reference to the principles contained in the Italian General Administrative Law[24]. As it is evident even at first glance, this Law has been developed having the main principles of criminal law in mind. As a consequence, the Italian Lawmaker has transplanted institutes typical of the criminal system such as the legality principle, mental culpability, the principle of *favor rei,* the exclusion and other provisions into the administrative tax proceedings. Also Spanish administrative and criminal provisions, as it is indicated in the Spanish Report, have been developed with the same goals and founding principles in mind. As a matter of fact, it has been reported that the Spanish Constitutional Court, along with the Spanish Supreme Court, have established many years ago the basic principle that criminal offences and administrative contraventions substantially share the same repressive and preventive purposes.

3.2. That is to say that the Italian and Spanish Legislators have chosen the afflictive model law, based on criminal law's principles, rather than the compensatory model[25], based on civil law's principles. However, it should be underlined that such a legal choice has not been always in force in the past. For example, the original Italian tax criminal system under Law No. 4/1929[26] provided only pecu-

[23] The legal discipline of the Administrative Tax Penalties is contained in the Administrative Tax Penalties Consolidated Act. See IT: Legislative Decree of 18 December 1997, No. 471.

[24] IT: Law, 24 November, No. 689 (so-named 'Decriminalization Law'). In fact, the current Italian administrative tax sanctions have been shaped by the reform of the years 1996-1998 (Legislative Decrees No. 471, 472 and 473 of 1997) that directly calls back the principles previously set out in Law No. 689/1981.

[25] The Italian penalty system before the Reform of 1996-1998 entailed both compensatory and punitive measures, since both tax surcharges and monetary fines were imposed and were determined in accordance with the amount of the evasion.

[26] IT: Law, 7 January 1929, No. 4. The system established by Law No. 4/1929 has been progressively overturned by legislative amendments in the 80s.

niary compensation for tax crimes. This means that, in its essence, tax obligation was regarded as a civil duty, *i.e.* not to be entangled with any criminal issue. As it will be discussed in the following paragraphs, due to the recent ECtHR case-law on the "ne bis in idem" principle, the adoption of an afflictive approach also in administrative proceedings may not be more feasible and, therefore, changes in this regard may be expected[27].

4. Qualification of National Tax Surcharges as Criminal Offences under Art. 6 of ECHR and Related Consequences

4.1. Art. 6 of the ECHR[28] establishes the right of an individual to have a fair trial. Thus, it provides a series of guarantees that must be accomplished by judges, *i.e.* "*a fair and public hearing*", the right to be examined by "an independent and impartial tribunal established by law", the right of cross-examination, the right to be informed promptly about the nature and the cause of the accusation *et cetera*.

In *Ferrazzini*[29] the ECtHR expressly ruled out the applicability of Art. 6 of the ECHR to tax litigations, since the judges of Strasbourg did find that taxes do not fall into the concept of "civil rights and obligations" on the premise that "tax matters still form part of the hard core of public authority prerogatives with the public nature of the relationship between the taxpayer and the community remaining predominant".

[27] In this sense, a key role might be played by the principle of proportionality which does constitute a fundamental parameter employed by EU primary law. Accordingly, an Italian author has recently suggested that the amount of administrative tax penalties should be linked to the amount of evaded taxes, since the misconduct of the taxpayer is merely induced by an economic calculation, *i.e.* solely by the tax savings associated with the taxpayer's misdeed. This directly implies the instauration of a limit to the amount of the administrative tax penalties. Accordingly, Italian administrative tax penalties as much high as 240% of the total amount of the tax irregularity committed by the taxpayer. See G. INGRAO, *Appunti sull'applicazione del principio di proporzionalità per la revisione delle sanzioni amministrative tributarie*, in *Rivista di Diritto Tributario*, 2014, p. 976.

[28] Art. 6 of ECHR reads as follows: "1.In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. 3. Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; (b) to have adequate time and the facilities for the preparation of his defence; (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

[29] IT: ECtHR, *Ferrazzini v. Italy*, 12 July 2001, Appl. No. 44759/98. For a comment, see P. BAKER, *Should Art. 6 ECHR (Civil) Apply to Tax Proceedings?*, in *Intertax*, Vol. 29, Issue 6-7, 2001, p. 205 et seq; R. ATTARD, *The Classification of Tax Disputes, Human Rights Implications*, in *Human Rights and Taxation in Europe and the World* (chap. 22), 2011, Online Book IBFD.

Notwithstanding *Ferrazzini*, the Court ruled that the interpretation of "criminal charge"[30], should follow a substantive rather than also formal criteria. In the light of the above, the judges of Strasbourg considered that administrative sanctions could be regarded as "criminal" in nature. Therefore, they did find that the legal guarantees provided by Art. 6 of the ECHR shall become applicable also to administrative penalties.

As a matter of fact, according to the ECtHR well-established case-law, administrative sanction proceedings can be qualified as "criminal" provided certain requirements are met. In particular, the ECtHR appears to rely on the so-named "Engel criteria", *i.e.* the alternative criteria set out by the Court in the case *Engel v. the Netherlands* in 1976[31]. Basically, the following three aspects are reviewed by the judges sitting in Strasbourg in order to determine whether a sanction resulting from an administrative proceedings may be viewed as "criminal":

1) the classification of the offense in the law of the respondent State;
2) the nature of the offence;
3) the degree of severity of the penalty.

The first criterion is strictly formal, since it solely relies on the legal qualification attributed to penalties by each domestic law. This criterion is the first one to be taken into account, although it is not by itself enough. Indeed, if a merely formal approach had been carried forward by the ECtHR, it would have been difficult to set up a common ground of interpretation of the text of the Convention as well as of the legal principles enshrined in it, since they could have been easily overruled by dissimilar practices implemented by each Contracting State.

The other two alternative criteria, instead, involve a substantial approach. They respectively refer to the nature of the offence and to the degree of the severity of the penalty imposed. As far as the nature of the offence is concerned, it is key to pinpoint the interest involved. Particularly, it must be considered whether there is some degree of similarity with other criminal offences. In respect to the level of the severity of the penalty, it becomes relevant to assess whether the penalty could be regarded as afflictive or not.

If one of the three criteria is met, the penalty at stake is assessed as "criminal" and the guarantees provided by Art. 6 of the European Convention of Human Rights become applicable[32], regardless the preclusion ruled by the Court in *Ferrazzini*.

[30] According to Art. 32 of ECHR, in fact, the definition of concepts enshrined in the Convention shall be autonomous, namely independent from the categories employed by the national legal systems of the Contracting States. The ECtHR itself found that "the Court thus has to ascertain whether there was a 'criminal charge' (…) against Mr. Adolf or whether he was 'charged with a criminal offence' (…). These expressions are to be interpreted as having an 'autonomous' meaning in the context of the Convention and not on the basis of their meaning in domestic law." See AT: ECtHR, *Adolf v. Austria*, 26 March 1982, Appl. No. 8544/79.

[31] NL: ECtHR, *Engel and others v. the Netherlands*, 8 June 1976, Appl. No. 5370/72.

[32] At this purpose, see FI: ECtHR, *Jussila v. Finland*, 23 November, 2006, Appl. No. 73053/01. For a comment see P. BAKER, *The Determination of a Criminal Charge and Tax Matters*, in *European Taxation*, 2007, p. 587 et seq.: "following Jussila, it is likely that virtually all penalties computed as a percentage of the tax under-charged will be regarded as involving the determination of a criminal charge for the purposes of Art. 6 of the ECHR". See also C. MAURO, *The Concept of Criminal*

4.2. Concerning the use of the above-explained "Engel criteria" for the applicability of Art. 6 of ECHR to administrative penalties as being "criminal" in nature, many cases of ECtHR might be recalled. At this purpose, a first case (although not directly involving tax matters) dealt with by the ECtHR concerned a violation of the German Traffic Code[33]. Although in Germany (as well as in other European countries) petty offences, such as road traffic violations, had been "decriminalized" and, therefore, they were not more punishable under the German Criminal Code, nonetheless the Court ruled that "the fact that [road traffic violation] was admittedly a minor offence hardly likely to harm the reputation of the offender does not take it outside the ambit of Art. 6. There is in fact nothing to suggest that the criminal offence referred to in the Convention necessarily implies a certain degree of seriousness. (…) Furthermore, it would be contrary to the object and purpose of Art. 6, which guarantees to everyone charged with a criminal offence the right to a court and to a fair trial, if the State were allowed to remove from the scope of this Art. 6 a whole category of offences merely on the ground of regarding them as petty."[34]

It appears self-evident that the Court disregarded the legal categorization attributed to a penalty by domestic legislations, relying its judgment only on substantial criteria, *i.e.* the degree of offensiveness of the sanctions as well as the prejudice suffered by an individual as a consequence of the imposition of a penalty.

In the aftermath of *Ferrazzini,* the ECtHR delved into the subject-matter of administrative sanctions in two similar cases decided jointly in 2002[35]. Specifically, both the cases involves the question whether tax surcharges could be comprehended as "criminal" according to the scope of Art. 6 of ECHR.

In *Janosevic v. Sweden* (but the relevant facts were similar to the ones in the above-mentioned case *Västberga Taxi Aktiebolag and Vulic v. Sweden*), the Swedish Government argued that tax surcharges did not amount to a criminal charge within the meaning of Art. 6 since the "main purposes of the surcharges was to protect the financial interest of the State and the community as a whole by emphasizing the importance of providing the tax authorities with adequate and correct information as a basis for tax assessment"[36]. In this sense, tax surcharges were merely intended to have a preventive effect, *i.e.* to ensure that the taxpayers complied with their fiscal obligations. In addition to that, the Government argued that no subjective element was evaluated when tax surcharges were imposed.

On the contrary, the taxpayer argued that the tax surcharges imposed on him fell within the meaning of "criminal charge", since they had a deterrent and

Charges in the European Court of Human Rights Case Law, in *Human Rights and Taxation in Europe and the World* (chap. 26), 2011, Online Book IBFD. In general, to have an overview on ECHR's principles in tax law, see L. DEL FEDERICO, *I principi della Convenzione Europea dei Diritti dell'Uomo in materia tributaria,* in *Rivista di diritto finanziario e scienza delle finanze*, 2010, p. 206 et seq.

[33] DE: ECtHR, *Ozturk v. Germany*, 21 February 1984, Appl. No. 8544/79.

[34] DE: ECtHR, *Ozturk v. Germany*, Para. 54.

[35] SE: ECtHR, *Janosevic v. Sweden*, 23 July 2002, Appl. No. 34619/97*;* SE: ECtHR, *Västberga Taxi Aktiebolag and Vulic v. Sweden,* 23 July 2002, Appl. No. 36985/97.

[36] SE: ECtHR, *Janosevic v. Sweden*, Para. 61.

punitive effect. Furthermore, he pointed out that in the Swedish legal system tax surcharges were established to replace earlier criminal-law proceedings as a consequence of a "decriminalization" law.

Relying on its "Engel criteria", the Court ruled in favor of the taxpayer stating that, in order to be considered "criminal", it is sufficient that administrative sanctions, such as tax surcharges, show a deterrent and punitive scope[37], since "the main purposes of the relevant provisions on surcharges is to exert pressure on taxpayers to comply with their legal obligations and to punish breaches of those obligations"[38]. As regards the lack of subjective elements, the Court affirmed that "criminal offences based solely on objective elements may be found in the laws of Contracting States"[39]. In that circumstance, the judges regarded tax surcharges as "criminal" also taking into account the burden of the penalty imposed on the taxpayer, which consisted in a relevant amount of money[40]. Therefore, the Court found that the legal guarantees under Art. 6 of ECHR could be invoked by a taxpayer during tax surcharge impositions.

In the other referred case, *i.e. Västberga Taxi Aktiebolag v. Sweden,* the Court took the view that a 20% tax-geared penalty constituted a criminal charge. Furthermore, the Court considered that even a 10% penalty might possibly constitute a criminal charge.

However, the leading case about where administrative penalties imposed in a tax scenario involve the determination of a criminal charge for the purpose of Art. 6 of the ECHR is *Jussila v. Finland* decided in 2006[41]. In this landmark decision, the majority of the Grand Chamber of the ECtHR considered that the minor nature of the penalty was not decisive in concluding whether or not the events were criminal in nature.

In *Jussila,* the applicant was assessed liable to pay VAT and an additional 10% surcharge. Particularly, the taxpayer claimed the lack of an oral hearing during the proceedings of the imposition of tax surcharges, since the Finnish

[37] SE: ECtHR, *Janosevic v. Sweden*, Para. 69: "In the Court's opinion, the general character of the legal provisions on tax surcharges and the purpose of the penalties, which are both deterrent and punitive, suffice to show that for the purposes of Art. 6 of the Convention the applicant was charged with a criminal offence."

[38] SE: ECtHR, *Janosevic v. Sweden*, Para. 68.

[39] SE: ECtHR, *Janosevic v. Sweden*, Para. 68.

[40] SE: ECtHR, *Janosevic v. Sweden*, Para. 69: "the criminal character of the offence is further evidenced by the severity of the potential and actual penalty. Swedish tax surcharges are imposed in proportion to the amount of the tax avoided by the provision of incorrect or inadequate information. The surcharges, normally fixed at 20% or 40% of the tax avoided, depending on the type of tax involved, have no upper limit and may come to very large amounts. Indeed, in the present case the surcharges imposed by the Tax Authority's decisions were very substantial, totaling SEK 161,261. It is true that surcharges cannot be converted into a prison sentence in the event of non-payment; however, this is not decisive for the classification of an offence as 'criminal' under Art. 6 (see Lauko, cited above, p. 2505, § 58)."

[41] FI: ECtHR, *Jussila v. Finland*, 23 November 2006, Appl. No. 73053/01. For comments of this decision see P. BAKER, *The Determination of a Criminal Charge and Tax Matters*, in *European Taxation*, 2007, p. 587 et seq.; among Italian scholars, see M. GREGGI, *Giusto processo e diritto tributario europeo: la prova testimoniale nell'applicazione della CEDU (il caso Jussila),* in *Rassegna Tributaria*, 2007, p. 228 et seq.; E. DELLA VALLE, *Il giusto processo tributario. La giurisprudenza della CEDU,* in *Rassegna Tributaria*, 2013, p. 435 et seq.

Government retained the imposition of surcharges as falling outside the legal guarantees provided under Art. 6 of ECHR relying on its *dictum* in *Ferrazzini*.

However, the Court of Strasbourg dismissed the arguments of the Finnish Government on the grounds that VAT surcharges did integrate a "criminal charge", as entailed in Art. 6 of the ECHR. Therefore, the Grand Chamber concluded that the tax surcharge applied to all taxpayers and constituted a deterrent measure in order to encourage the taxpayer's compliance. In this sense, according to the judges, no importance should be attached to the circumstance that the penalty was minor, *i.e.* not of a substantial amount[42]. And, in effect, in dismissing the argument concerning the minor nature of a tax surcharge, the Court relied on its previous case-law about minor traffic offences such as the case *Ozturk v. Germany*.

Following the Court's decision in *Jussilia* that considered also small tax surcharges (such as a 10% proportional increase on taxpayer's bill) as involving the determination of a criminal charge for the purposes of Art. 6 of the ECHR, the range of applicability of "Engel criteria" has widened a lot. Thus, it can be assessed that virtually all administrative penalties might fall under the broad interpretation of "criminal charges".

As a matter of fact, as it will be explained in the following paragraphs, the "Engel criteria" as well as the ECtHR case-law on tax surcharges have plenty of relevance in the application of the "ne bis in idem" principle.

5. The Charter of Fundamental Rights of the European Union's Criteria for Criminal Sanctions

5.1. Some provisions contained in the Charter of Fundamental Rights of the European Union of 7 December 2000, employ the expression "criminal penalties". For instance, Art. 49 Para. 1 ("Principles of legality and proportionality of criminal offences and penalties") affirms that "no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed". In equal terms, Art. 50 Para. 1 ("Right not to be tried or punished twice in criminal proceedings for the same criminal offence") provides that "no one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law".

However, no distinction is made in the Charter under Artt. 47 ("Right to an effective remedy and to a fair trial") and 48 ("Presumption of innocence and right of defence") as in Art. 6 Para. 1. of the ECHR between "civil rights and obligations" on the one hand and "criminal charge" on the other. Therefore, under European law, the right to fair hearing is not confined to disputes relating to civil law rights and obligations as it is the case for the protection guaranteed by

[42] FI: ECtHR, *Jussila v. Finland*, Para. 35: "No established or authoritative basis has therefore emerged in the case-law for holding that the minor nature of the penalty, in taxation proceedings or otherwise, may be decisive in removing an offence, otherwise criminal by nature, from the scope of Art. 6."

Art. 6 Para. 1 of the ECHR. Thus, the protection offered under Art. 47 of the Charter is wider in scope. In all other aspects, the guarantees afforded by the European Convention on Human Rights apply in a similar way to the Union[43].

Apparently, in determining whether a sanction may be regarded as criminal for the purposes of the Charter, the Court of Justice of the European Union relies on the same criteria established by ECtHR in *Engel*. As a matter of fact, in its judgments *Bonda*[44] and *Fransson*[45], the CJEU expressly recalled the three-pronged criteria mentioned above (*i.e.* 1) the classification of the offense in the law of the respondent State; 2) the nature of the offence; 3) the degree of severity of the penalty).

5.2. Indeed, the judges of Luxembourg has extensively recalled the concepts enshrined by the ECHR, as long as they may correspond to analogous notions defined in the EU law's sources[46].

Specifically, the CJEU seems to adopt a "substance-over-form" approach in assessing whether a sanction might be deemed as criminal or not for the purposes of the application of the Charter. For example, in *Van Straaten*[47], the Court of Luxembourg stated that "the right to freedom of movement is effectively guaranteed only if the perpetrator of an act knows that, once he has been found guilty and served his sentence, or, where applicable, been acquitted by a final judgment in a Contracting State, he may travel within the Schengen area without fear of prosecution in another Contracting State on the basis that the legal system of that Member State treats the act concerned as a separate offence. Because there is no harmonisation of national criminal law, a criterion based on the legal classification of the acts or on the legal interest protected might create as many barriers to freedom of movement within the Schengen area as there are penal systems in the Contracting States".

Therefore, due to the circumstance that the legal guarantees of the Charter apply to different EU jurisdiction, it is key to adopt a substantial rather formal approach about the definition of EU legal concepts, otherwise the principles of law enshrined in the EU primary law would have been easily overridden by subsequent and contrary domestic provisions.

As regards the extension given to the notion of "criminal" among EU law, the Court has consistently held, for instance, that proceedings concerning the imposition of a fine shall be deemed as "criminal" in nature, despite the fact that EU Regulation 1/2003 expressly provides that fines imposed for infringements of competition law are not of a criminal nature[48].

[43] See, for reference, the explanation under Art. 47 provided by the Commentary of the Charter of the Fundamental Rights of the European Union, June 2006, available online at http://ec.europa.eu/justice/fundamental-rights/files/networkcommentaryfinal_en.pdf.

[44] See PL: CJEU, *Bonda*, 5 June 2012, Case C-489/10, Para. 37.

[45] See SE: CJEU, *Akeberg Fransson*, 26 February 2013, Case C-617/10, Para. 35, *supra* n. 6.

[46] For instance, see FR: CJEU: *Rutili v. Minister for the Interior*, 20 October 1975, C-36/75, Para. 32, where the CJEU directly refers to the concepts enshrined in the ECHR under art. 8, 9 and 10.

[47] NL: CJEU, *Van Straaten*, 28 September 2006, C-150/05, Paras. 46-47. In the same vein, see also B: CJEU, *Van Esbroeck*, 9 March 2006, C-434/04, Paras. 34-35.

[48] See, in the area of competition law, *e.g.* DK: CJEU, *Aalborg Portland*,7 January 2004, C-204/00.

5.3. Moreover, in evaluating the relationship between the definitions contained, respectively, in the Charter and in the ECHR, also the so-named "principle of homogeneity" must be taken into account. In fact, according to Art. 52 Para. 3 ("Scope of guaranteed rights") of the Charter, "in so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection". This basically means that ECHR's rights constitutes the minimum standards for EU institutions as well as Members States in respecting human rights. However, this provision does not bar the European Law from setting up higher standards of protection in securing such rights.

Therefore, on the basis of Art. 52 Para. 3 of the Charter and in the absence of the agreement to the contrary, in the determination of criminal proceedings and an offence, it might be held that the three criteria, as identified in *Engel* by ECtHR, shall apply[49].

6. The *ne Bis in Idem* as a General Principle of International Law

The principle that a person should not be prosecuted more than once for the same criminal conduct, condensed in the maxim "ne bis in idem" and also referred to as the rule against "double jeopardy", is prevalent among the legal systems of the world. The rule is the criminal law application of a broader principle, aimed at protecting the doctrine of "res judicata"[50]. The "bis in idem!" prohibition is expressly set out in many International contexts, notwithstanding the majority of scholars denies that the "ne bis in idem" can be recognized either as a rule of custom or a general principle of international law. For instance, Art. 20 of the Statute of the International Criminal Court (ICC) incorporates the principle with respect to crimes within the jurisdiction of the ICC along with the Statutes of the International Criminal Tribunal for the Former Yugoslavia (ICTY) (in Art. 10) and the International Criminal Tribunal for Rwanda (ICTR) (in Art. 9). In addition to that, the principle has previously been incorporated in the Harvard Draft Convention on Jurisdiction with respect to Crime of 1935 (Art. 13), which provides for the application of the principle in the case of aliens; the Internatio-

[49] In this sense, see the opinion of the Advocate General Kokott, in CZ: CJEU, *Toshiba*, 14 February 2012, C-17/10, Para. 120: "the requirement of homogeneity is therefore applicable. It follows from that requirement that rights contained in the Charter which correspond to rights guaranteed by the ECHR are to have the same meaning and scope as those laid down by the ECHR. In other words, Article 4(1) of Protocol No 7 to the ECHR, as interpreted by the European Court of Human Rights (ECtHR), describes the minimum standard that must be guaranteed in the interpretation and application of the *ne bis in idem* principle in EU law." In the same terms, see also *e.g.* AT: CJEU, *Dereci*, 15 November 2011, C-256/11, Para. 70; IRL: CJEU, *J. McB. v L. E.*, 5 October 2010, Para. 53.

[50] For overall inquiries on the principle of '*ne bis in idem*', see S. TRECHSEL, *The Protection Against Double Jeopardy*, in *Human Rights in Criminal Proceedings*, 2010, Oxford Scholarship; B. VAN BOCKEL, *The Ne Bis in Idem Principle in EU Law*, 2010, Wolter Kluwer; J. A. E. VERVAELE, *Ne Bis in Idem: Towards a Transnational Constitutional Principle in the EU?*, in 9 Utrecht L. Rev. 211 (2013); G. CONWAY, *Ne Bis in Idem in International Law*, 3 Int'l Crim. L. Rev. 217 (2013).

nal Covenant on Civil and Political Rights (ICCPR) has the "ne bis in idem" principle enshrined in Art. 14 Para. 7; finally, the "ne bis in idem" principle is included in Art. 8 Para. 4 of the American Convention on Human Rights, in Art. 54 of the Schengen Accord, in Art. 50 of the Charter of Fundamental Rights of the European Union and in, at least, fifty national constitutions and numerous extradition treaties.

7. The *ne Bis in Idem* Principle in the Charter of Fundamental Rights of the European Union: the *Akeberg Fransson* Case

7.1. As regards the "ne bis in in idem" principle enshrined in Art. 50 of the Charter of Fundamental Rights of the European Union[51], it is worth noting that the wording of the maxim does not differ too much from analogous definitions contained in the above-mentioned International legal instruments. Therefore, it can be fairly assessed that both Art. 50 of the Charter of Fundamental Rights and Art. 4 Protocol No. 7 of European Convention of Human Rights practically endeavor to protect the same right. However, relevant differences between the two might be indicated.

7.2. First of all, although a progressive convergence of intents to the extent of the protection ensured to taxpayer's rights, has been developed by the two legal instruments, especially through the enforcement of the respective Courts (*i.e.*, respectively, the CJEU and the ECtHR), however it should not be forgotten that the framework under which the two systems have been established still differs a lot. Specifically, the promotion of the four economic freedoms, as they represent the key point for the setting-up of a European common market without internal borders and barriers has always been the very goal of the foundation of the European Union (or, more correctly, before the Treaty of Maastricht was enacted, of the European Economic Community). Thus, only recently a movement toward the incorporation of human rights into the EU primary law has been encouraged at the EU level[52]. Conversely, the European Convention of Human Rights, which was drafted in the context of the Council of Europe, has always dealt only with human rights' issues. Therefore, it appears inevitable that the legal instruments developed by the ECtHR in this field are much more shaped than the respective tools elaborated by the CJEU. This aspect is particularly visible in the *Akerberg Fransson* case ruled by the CJEU in 2013[53]. In its judgment, the CJEU appeared to follow the well-established ECtHR case-law about the application of the "ne bis in idem". In particular, regarding the overlap of administrative and criminal penal-

[51] Art. 50 of the Charter of Fundamental Rights of European Union ("Right not to be tried or punished twice in criminal proceedings for the same criminal offence") reads as follows: "no one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law".

[52] It might be sufficient to recall here that the legal status of the Charter of Fundamental Rights of the European Union, proclaimed on 7 December 2000, has been uncertain until the Treaty of Lisbon entered into force on 1 December 2009 which attributed to the Charter the same legal status of the EU fundamental treaties.

[53] It should be noted that the Court of Justice of the European Union relied on the criteria and case-law established by the ECtHR. See SE: CJEU, *Akeberg Fransson*, 26 February 2013, Case C-617/10. See *supra* n. 6.

ties related to the failure to pay VAT obligations, the Court of Luxembourg seemed to rely on the "Engel criteria". Nonetheless, since the respective goals of the Charter and the Convention remain detached and, in any event, the CJEU reliance on the ECtHR case-law is not absolute could not be equated. As a matter of fact, while the CJEU stated that the "Engel criteria" were applicable to the case before it[54], in a subsequent paragraph, the Luxembourg's judges affirmed that "it is to be remembered that whilst, as Article 6(3) TEU confirms, fundamental rights recognized by the ECHR constitute general principles of the European Union's law and whilst Article 52(3) of the Charter requires rights contained in the Charter which correspond to rights guaranteed by the ECHR to be given the same meaning and scope as those laid down by the ECHR, the latter does not constitute, as long as the European Union has not acceded to it, a legal instrument which has been formally incorporated into European Union law"[55].

7.3. Furthermore, it should also be recalled the same Advocate General in his opinion proposed a different view about the linkage between, respectively, the CJEU and the ECtHR case-laws. Specifically, he suggested that Art. 50 of the Charter does not prevent Member States from imposing criminal sanctions in regard to facts that have already been sanctioned by way of an administrative fine, as long as the civil judge is able to take the administrative sanction into consideration for the purpose of reducing the criminal sanction, in accordance with the principle of proportionality[56]. Again, at this purpose, it can be highlighted that, albeit the principles set out by the ECtHR were borrowed also by the CJEU, other criteria typical of European Law can be deemed relevant in this particular issue, such as the respect of the fundamental principle of proportionality as enshrined

[54] See SE: CJEU, *Akeberg Fransson*, Para. 35: "three criteria are relevant for the purpose of assessing whether tax penalties are criminal in nature. The first criterion is the legal classification of the offence under national law, the second is the very nature of the offence, and the third is the nature and degree of severity of the penalty that the person concerned is liable to incur". The Court also referred to its previous judgment given in *Bonda*. See PL: CJEU, *Bonda*, 5 June 2012, Case C-489/10, Para. 37.

[55] SE: CJEU, *Akeberg Fransson*, Para. 44.

[56] SE: CJEU, *Akeberg Fransson*, Opinion of Advocate General Cruz Villalon, 12 June 2012, Paras. 94-96*:* "First of all, there is nothing in the wording of Article 50 of the Charter, as such, which leads to the conclusion that the intention was to prohibit all cases where there is a convergence of the power of the administrative authorities to impose penalties and the power of the criminal courts to do so in respect of the same conduct. In that connection, attention should be drawn to the fact that Article 50 of the Charter uses the adjective 'criminal' ('penal' in the Spanish version), in contrast to the language used in Article 4 of Protocol No 7 to the ECHR. That is the case of the title of each provision and also, in the Spanish versions of each one, of the reference to the 'sentencia firme', which is described as 'penal' in the former provision but not in the latter. That difference could be regarded as significant since the provision of the Charter was drafted years after the provision of Protocol No 7. Secondly, the principle of proportionality and, in any event, the principle of the prohibition of arbitrariness, as derived from the rule of law which results from the common constitutional traditions of the Member States, preclude a criminal court from exercising jurisdiction in a way which completely disregards the fact that the facts before it have already been the subject of an administrative penalty. Accordingly, it is my opinion that Article 50 of the Charter must be interpreted as meaning that it does not preclude the Member States from bringing criminal proceedings relating to facts in respect of which a final penalty has already been imposed in administrative proceedings relating to the same conduct, provided that the criminal court is in a position to take into account the prior existence of an administrative penalty for the purposes of mitigating the punishment to be imposed by it."

in Art. 5 of the Treaty of European Union[57]. However, the relationship between the two Courts will probably be more clear if and when the European Union will become part of the Council of Europe and, consequently, it will have the legal status to adhere to the European Convention of Human Rights as suggested by Art. 6 Para. 2 of the Treaty of European Union[58].

8. The ECtHR Case-law about the *ne Bis in Idem* Principle and the Current Problems in Terms of Taxpayer's Rights

8.1. The "ne bis in idem" principle is also established in Art. 4 Para. 1 of the Annexed Protocol No. 7 of the European Convention on Human Rights. According to Art. 4 Para. 1 of the Annexed Protocol No. 7 of the ECHR ("Right not to be tried or punished twice") "no one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State". Notwithstanding, according to the *littera* of the above-mentioned provision, only "criminal proceedings" apparently fall under that principle, the ECtHR has recently extended such prohibition in a way also to include penalties resulting from administrative proceedings, just as for the purposes of the applicability of the legal guarantees provided under Art. 6 of ECHR to administrative proceedings. According to the ECtHR well-established case-law, the above-mentioned "Engel criteria" may apply also in the "ne bis in idem" issue[59]. As a matter of fact, if administrative sanctions are viewed as "criminal" in accordance with the "Engel criteria", the prohibition enshrined in Art. 4 Para. 1 of the Annexed Protocol No. 7 may become applicable. However, it must be recalled that further circumstances shall be carefully evaluated such as:

1) the nature of the administrative penalty;
2) the identity of the offensive conduct;
3) whether the decision has become final.

As a consequence of the above requirements, the principle found by the Court of Strasbourg[60] is that a final decision rendered in an administrative pro-

[57] The necessity to respect the principle of proportionality seems to be taken into consideration also by national legal systems. *E.g.*, according to the German National Report, because of the principle of proportionality, when determining the criminal punishment and *vice versa*, some allowances for any imposed administrative tax penalties should be considered.

[58] As it has already been pointed out the procedure of accession of the EU to the ECHR is still stuck. See *supra* n. 4.

[59] As it has been explicitly recognized by the Court of Strasbourg in the case *Grande Stevens* (see next note for references), reservations made by the Contracting States in order to exclude administrative proceedings from the application of '*ne bis in idem*' are ineffective and, therefore, shall be disregarded.

[60] In this regard, the leading case has been IT: ECtHR, *Grande Stevens and others v. Italy*, 4 March 2014, Appl. No. 18640/10, 18647/10, 18663/10, 18668/10. For a comment in English, see M. VENTORUZZO, *Do Market Abuse Rules Violate Human Rights? The Grande Stevens v. Italy Case*, Law Working Paper No. 269/2014 October 2014, available online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2517760. Notwithstanding it is considered the leading case in this matter, however it must be remembered that it does not directly tackle fiscal sanctions. Nonetheless, this principle has been extended also to tax matters by subsequent cases. See FI: ECtHR, *Nykänen v. Finland*, 20 May 2014, Appl. No. 11828/11; *Glantz v. Finland*, 20 May 2014, Appl. No. 37394/11; *Häkkä v. Finland*, 20 May 2014, Appl. No. 758/11; *Pirttimäki v. Finland*, 20 May 2014, Appl. No.

cedure infringes the prohibition of double-jeopardy when, as a result of criminal proceedings, also a criminal penalty has been imposed on the same person for the same conduct. Therefore, it shall be deemed that the "res judicata" effect due to a final decision impedes the instigation of subsequent criminal proceedings regarding the same factual circumstances.

8.2. As regards to the first requisite, the determination of the nature of the administrative penalty implies the need to develop an autonomous interpretation of the adjective "criminal", regardless the domestic classification of each Contracting State. In doing so, the ECtHR relies on the "Engels criteria".

In addition to that, the application of the "ne bis in idem" principle also requires that the offensive conduct prosecuted in the two proceedings shall be "the same". However, difficulties may arise in assessing the exact meaning of "idem". There are two opposite and mutually exclusive approaches to the interpretation of the element of "*idem*". The identity of the conduct may be assessed on the basis of the historic conduct (*i.e.* "the act") or on the basis of its legal qualification (*i.e.* "the offence").

Although the earlier case-law of the ECtHR is far from being consistent[61], in the recent case *Zolotukhin v. Russia* the ECthR put an end to the existing confusion and uncertainty when it held that "Art. 4 of Protocol No. 7 must be understood as prohibiting the prosecution or trial of a second offence in so far as it arises from identical facts or facts which are substantially the same."[62]

However, even when the "ne bis in idem" principle is thus applied on the basis of a "strictly-the facts" approach, several categories of problems may still arise out of the interaction between the principle and the legal qualification of offences. One potential problem is that a single naturalistic event may constitute several offences under the law (*i.e.* "councours d'infractions").

Therefore, it must be underlined that the prohibition against double prosecution does not, in principle, stand in the way of the possibility of a conviction on several charges, as long as those charges are brought in the same set of legal proceedings. Accordingly, there is no need for a derogation to the "ne bis in idem" principle in the event of a *councours d'infractions*.

Thus, although the ECtHR has clearly pointed out that, in order to determine the exact meaning of "idem", the "historic" and "naturalistic" characteriza-

35232/11. The '*ne bis in idem*' principle is quickly becoming a consolidated interpretation in even more recent cases. See SE: ECtHR, *Lucky Dev v. Sweden*, 27 November 2014, Appl. No. 7356/10; FI: ECtHR, *Rinas v. Finland*, 27 January 2015, App. No. 17039/13; *Kiiveri v. Finland*, 10 February 2015, App. No. 53753/12; *Osterlund v. Finland*, 10 February 2015, App. No. 53197/13.

61 In the past, the European Court of Human Rights has ruled differently in very similar cases. For an example, please compare the decision taken in AT: ECtHR, *Gradinger v. Austria*, 23 October 1995, Appl. No. 15963/90, with the decision in CH: ECtHR, *Oliveira v. Switzerland*, 30 July 1998, Appl. No. 25771/94. As a matter of fact, the Court of Strasbourg itself admitted that its judgments concerning the concept of '*idem*' were "*somewhat contradictory*". See, for reference, AT: ECtHR, *Franz Fischer v. Austria*, 29 May 2001, Appl. No. 37950/97. In RU: ECtHR, *Zolotukhin v. Russia*, 10 February 2009, Appl. No. 14939/09, the European Court of Human Rights explained in-depth the two above-mentioned approaches.

62 RU: ECtHR, *Zolotukhin v. Russia*.

tion should be adopted, it does not appear completely clarified what the expression "substantially the same" exactly means[63].

As a third requirement, the ECtHR states that the repetition of criminal proceedings shall have been concluded by a decision that has become "final" under the Explanatory Report to Protocol 7[64], which itself refers back to the European Convention on the International Validity of Criminal Judgments. A decision is final "if, according to the traditional expression, it has acquired the force of res judicata. This is the case when it is irrevocable, that is to say when no further ordinary remedies are available or when the parties have exhausted such remedies or have permitted the time-limit to expire without availing themselves of them."

This means that, so far, it is not necessary that criminal proceedings should be discontinued due to the simultaneous pendency of administrative proceedings, since this would entail an expansive interpretation of Art. 4 Para. 1 of the Annexed Protocol No. 7 of the ECHR.

8.3. However, it is questionable that the "ne bis in idem" does not imply the protection of a taxpayer from the simultaneous pendency of both criminal and administrative proceedings. In this regard, it is doubtful whether such an interpretation of "ne bis in idem" is correct, or, instead, if the prohibition against double-jeopardy should be extended also to parallel proceedings, though none of them has become "final". Also, in terms of protecting taxpayer rights, it is much more satisfactory for the taxpayer to face only one set of proceedings, either for an administrative surcharge, or for a criminal liability. At this purpose, it might be helpful to recall that the *littera* of Art. 4 Para. 1 of Protocol No. 7 of the ECHR states that "no one shall be liable to be tried or punished again in criminal proceedings". Therefore, it appears that the prohibition of "double jeopardy" do include also the trial's stage, since the above-mentioned disposition endeavors to detach quite sharply between the moment in which a person is tried ("trial") from the time in which a penalty is imposed upon him/her (punishment). Accordingly, the violation of "ne bis in idem" may occur also when a person is tried again, although a single penalty (either administrative or criminal) is levied.

Guidance on this issue, *i.e.* concerning the extension on the application of the prohibition of "double jeopardy" in tax controversies, has been established in the recent case of *Lucky Dev v. Sweden*[65], where a Swedish taxpayer was assessed by the Swedish Tax Authority to pay surcharges as a result of aggravated tax offence and bookkeeping offence, all arising fundamentally out of the same matrix of facts. Nonetheless, the ECtHR held that the bookkeeping offence and the aggravated tax offence were sufficiently different in their constituent elements as not to

[63] As a matter of fact, this aspect could lead to controversies in the application of the '*ne bis in idem*' in the domestic law of each Contracting State, as we will endeavor to explain in paragraph 7 of the present paper.

[64] See Council of Europe, *Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, available online at http://conventions.coe.int/Treaty/EN/Reports/HTML/117.htm.

[65] SE: ECtHR, *Lucky Dev v. Sweden*, *supra* n. 52. For a comment of this sentence, see P. BAKER, *Some Recent Decision of the European Court of Human Rights on Tax Matters*, in *European Taxation*, Vol. No. 55, 2015.

involve the same offence[66]. With regard to the aggravated tax offence and tax surcharges, however, the conduct at issue was fundamentally the same and the ECtHR found, therefore, a breach of the "ne bis in idem" principle since, despite the acquittal of the aggravated tax offence, the proceedings with regard to the tax surcharge continued after the termination.

It might be highly questionable if in such a case the protection of taxpayer rights has been sufficiently guaranteed by the principle of "ne bis in idem". At this purpose, at least three aspects should be carefully examined. First, it is worth noting that the conduct that led to tax surcharges, *i.e.* the aggravated tax offence and the bookkeeping offence, were fundamentally the same. This fact is challenging in terms of the protection of taxpayer's rights since a taxpayer could be liable both for a criminal penalty related to the bookkeeping offence and an administrative tax penalty.

Secondly, for a period of over three years, the taxpayer had to continue proceedings in respect of substantial tax penalties and, at the same time, facing the risk to be held criminally liable even for the aggravated tax offences. Although the ECtHR found that the mere existence of parallel proceedings did not constitute a breach of Art. 4, however, this situation appears to be a clear example of being tried twice for the same offence. In fact, even if, up to now, the Court of Strasbourg has ring-fenced the prohibition of *bis in idem* only to consecutive proceedings, it is evident that also the existence of concurrent proceedings can be equally disturbing for a taxpayer.

Thirdly, parallel proceedings for a tax surcharge and for a criminal offence are likely to lead even to opposite results. In this particular controversy, for instance, the criminal charge for an aggravated tax offence was acquitted, while the proceedings challenging the tax surcharge continued[67].

[66] SE: ECtHR, *Lucky Dev v. Sweden*, *supra* n. 52. According to the Court of Strasbourg "the obligation of a business person to enter correct figures in the books is an obligation per se, which is not dependent on the use of bookkeeping material for the determination of tax liability. In other words, the applicant, while not having fulfilled the legal bookkeeping requirements, could later have complied with the duty to supply the Tax Agency with sufficient and accurate information by, for instance, correcting the information contained in the books or by submitting other material which could adequately form the basis of a tax assessment. Accordingly, the applicant's submission of the incorrect bookkeeping material to the agency in support of the claims and statements made in her tax return and her failure to provide the agency with other reliable documentation on which it could base its tax assessment constituted important additional facts in the tax proceedings which did not form part of her conviction for a bookkeeping offence. In these circumstances, the two offences in question were sufficiently separate to conclude that the applicant was not punished twice for the same offence. Thus, the applicant's trial and conviction for an aggravated bookkeeping offence do not disclose any failure to comply with the requirements of Art. 4 of Protocol No. 7."

[67] Opposite results as a consequence of uncoordinated proceedings might not be necessarily unfavorable for a taxpayer. At this regard, the author of this paper is willing to mention an episode occurred during the years of the famous 'Clean-Hands' inquiry in 1992-1994. An Italian Tax Authority's officer, accused of bribery, succeeded in defending himself during criminal proceedings, arguing that the money received was the reward for his 'private' activity of tax counseling. At the same time, however, during tax proceeding, he argued successfully that the amount of money earned was not taxable since deriving from an illegal activity (*i.e.* bribery)! To put in another way: same conduct, two proceedings, double gain (for the taxpayer, *ca va sans dire*)!

8.4. Therefore, it is undoubted that the continuation of proceedings in relation to the tax surcharge could constitute a breach of the principle of "double jeopardy". As regards the facts in *Lucky Dev v. Sweden,* the feasible solution would have been to clear away the tax surcharges after the acquittal. On the other hand, if the proceedings to challenge the tax surcharge had come to a final conclusion before the end of the criminal proceedings in relation to the aggravated tax offence, conversely the criminal proceedings should have been terminated. In the end, the outcome seems to be unpredictable as long as they depend upon the speed at which the different proceedings reached their conclusion.

Such a situation, where a taxpayer's conduct could lead both to tax surcharges and to a criminal charge, is likely to trigger relevant dilemmas in Tax Administrations' behavior. As a matter of fact, Tax Authorities may be willing to introduce criminal offences, the constituent elements of which are not the same as the basis upon which tax surcharges can be imposed, so that the principle of "double jeopardy" results simply sidestepped. If, however, the constituent elements of the liability for the surcharge and the criminal liability are fundamentally the same, then the Tax Administration is faced with a further dilemma: it is not in breach of the principle to continue with the two proceedings at the same time; however, whichever proceeding reaches its conclusion first, the other proceedings then have to be dropped. That suggests a fairly careful management of the two sets of proceedings. Alternatively, Tax Administrations face a potentially difficult choice at the outset whether to seek to impose surcharges and abandon any criminal proceedings, or whether to bring criminal proceedings and abandon the fines or tax surcharges.

8.5. Another issue regarding the troublesome application of the principle of "ne bis in idem" might possibly arise as long as a single event can constitute several offences under the law, particularly when several events actions may be forged into an artificial combination. This appears to be the case of money-laundering and self-money laundering crimes (the latter has recently been set up under Italian law). As a matter of fact, insofar as money-laundering and self-money laundering crimes often deal with non-declared sums of money, since the former ones often presuppose tax evasion, if money-laundering crimes and tax evasion's sanctions do target the same person, an overlap of penalties may occur. Therefore, the prohibition of "bis in idem" might apply also to these cases.

9. Possible Solutions in applying the *ne Bis in Idem* Principle under National Tax Laws

9.1. As it has been already recalled in the preceding paragraph, the "ne bis in idem" principle is aimed at impeding the imposition of multiple criminal penalties on the same person for the same conduct. And, as it has been recognized by the ECtHR, also administrative penalties can be regarded as "criminal" for the purposes of the ECHR as long as they fall into the so-named "Engel criteria". Therefore, the guarantees under the European Convention of Human Rights also become applicable to administrative sanctions. As a consequence, it is necessary to examine if the legal mechanisms established in each domestic tax law are

able to provide a unique procedural treatment to a tax litigation in order to avoid the addition of multiple criminal penalties arising from the same facts[68].

9.2. For instance, in order to avoid a duplication of State's punitive reaction[69], Italian tax law employs the principle of specialty, which affirms that only the special provisions shall apply (according to the maxim "lex speciali derogat generali") when the same behavior may be punished by both criminal and administrative tax penalties[70]. Nevertheless, there is not a general principle that defines which shall be identified as the "special" penalty: the judge shall, on a case-by-case basis, check which penalty has some "specializing" elements, though, considering that tax crimes expressly require certain qualifying elements (*e.g.* intentionality, exceeding of certain quantitative thresholds, artificial behavior, *etc.*), the lawmaker seems to have implicitly recognized criminal tax penalties as the special ones. This solution appears to be correct also in the light of the natural subsidiary function of criminal sanctions.

However, the principle of specialty is balanced by the quite-opposite principle of autonomy enshrined in Art. 20 of the Italian Tax Criminal Penalties Consolidated Act. It regulates the autonomy of administrative tax investigations and assessment with respect to criminal proceedings (so-called "double track" principle)[71]. Thus, the guarantee to provide an effective response to disobedience using both administrative and criminal tax penalties collides with the risk to duplicate punishments of the same conduct, not preventing a violation of the "ne bis in idem" principle.

As a sole remedy enacted in order to mitigate the punishment of the same person for the same conduct with two penalties, Art. 21 Para. 2 of the Italian Tax Criminal Penalties Consolidated Act prescribes that administrative penalties must be suspended if criminal sanctions are imposed to the taxpayer for the same conduct. However, the law does not *per se* prevent a taxpayer from a "bis in idem" sanction. In fact, should the Public Prosecutor decides to dismiss the procedure, instead of deferring the case before the criminal courts, the tax penalties are no longer suspended and become again claimable. Therefore, this result potentially

[68] However, the '*ne bis in idem*' does cause the same problematic issue all around Europe. In fact, it should be noted that the situation in the United States appears to be quite different. As it is recalled in the United States' Report, there the principal battleground in terms of tax law was a line of cases considering whether imposing the civil fraud penalty on a taxpayer who already had been convicted of criminal tax fraud violates the Double Jeopardy Clause. A 1938 Supreme Court case found there was no violation, since the Court held that, although there is some punitive aspect, the predominant character and effect of the civil penalty is remedial, *i.e.* to compensate the government for the additional cost involved in detecting and correcting fraudulent tax understatements.

[69] In the past, however, it was admissible to have a duplication of sanctions (*i.e.* fiscal and criminal penalties) arising for the same conduct. See IT: Law Decree, 7 August 1982, n. 516, Art. 10.

[70] IT: Legislative Decree, 10 March 2000, No. 74, Art. 19. The same principle is also included in Art. 9 of Law No. 681/1981. See *supra* n. 23.

[71] According to the so-named 'double-track' principle tax proceedings shall not be suspended as a consequence of the beginning of criminal proceedings. For an in-depth analysis on this issue see the Italian report on "Surcharges and Penalties in Tax Law", drawn up under the supervision of Prof. Del Federico, available online at http://www.eatlp.org/uploads/public/2015/National%20report%20Italy.pdf.

exposes the taxpayer to a double degree of legal proceedings, *i.e.* administrative and criminal, for the same cause of action and, in fact the Italian Supreme Court, in applying the above-mentioned principles, has not excluded the joint application of both penalties[72].

9.3. A solution of the simultaneous application of administrative and criminal sanctions might consist in setting up a mechanism able to ensure that the second kind of sanctions (that could be either criminal or administrative) could be executed only in the part that exceed the amount of the former ones. In this way, at least, the principle of "ne bis idem" will be mitigated but not violated. This solution seems to correspond to the current "state of the art" in France, where the French Constitutional Court has set a limit to the accumulation of administrative and criminal sanctions, since the whole amount of financial penalties cannot exceed the heaviest of the incurred penalties[73]. In a quite similar vein, the Spanish Constitutional Court considers that the principle of "ne bis in idem" is respected if the criminal court allows for the deductions of the administrative penalty previously imposed.

9.4. Comparing other feasible options included in the submitted national reports, it seems interesting to underscore the solution that has been implemented in Finland. In Finnish tax law system the "bis in idem" prohibition, *i.e.* the connection between a tax increase assessed in administrative procedure and sanctions under criminal law, has been resolved in part by legislation and in part by established rules of law. Thus, if a tax increase is assessed to the taxpayer, this corresponds to a sanction under criminal law. As a result, the bringing of charges is restricted. Specifically, in a first decision[74], the Finnish Supreme Court considered that a tax increase only prevents investigation of tax fraud charges based on a procedure caused by the same tax increase if the tax increase decision has been finalized prior to the commencement of proceedings. In a subsequent decision[75], this interpretation was clarified so that, in the said situation, investigation of tax fraud charges are prevented as soon as decision-making power concerning the tax increase has been exercised in the tax procedure, either by assessing or waiving a tax increase. Finally, in another case[76], the Court considered that the preventive effect comes into existence immediately after a decision has been made in a tax increase matter, and the stages of a case in a possible appeal do not affect the existing preventive effect. At the same time, as regards the legislative mea-

[72] See IT: ISC, Third Chamber (Criminal), 15 May 2014, No. 20266. In that case, the Italian Supreme Court has excluded a violation of the '*ne bis in idem*' principle, by stating that the administrative tax penalty cannot be considered a penalty having a nature similar to the criminal tax penalty. Therefore, administrative and criminal tax penalties would not be in a relation of specialty, but they shall be framed in terms "*unlawful progression*" of the offense, with the relevant and problematic consequence that the offender shall be subject to both penalties. As long as both administrative and criminal penalties do intend to punish the same conduct, this appears to be a really unconvincing result. This view has been recently challenged by an Italian First-Instance Tax Court. See IT: First Instance Court of Turin, ordinance 27 October 2014.

[73] FR: Conseil Constitutionnel, 29 April 2011, No. 2011-124 DC, *Catherine Boitel*.

[74] FI: Finnish Supreme Court, KKO 2010:45.

[75] FI: Finnish Supreme Court, KKO 2013:59.

[76] FI: Finnish Supreme Court, KKO 2013:78.

sures, a separate law to specify the authority of the Finnish Tax Administration was passed[77], concerning when tax-related offences should be handled as an administrative or a prosecution matter. In this regard, the Finnish Tax Administration cannot report an offence for an act within the scope of application of the law for which a tax increase has been assessed. Similarly, according to the Criminal Code, a prosecutor cannot generally press charges if a tax increase decision has been made concerning the same matter. Still, the most thorny issue concerns the timing of the preventive effect. Again, the Finnish Tax Administration has issued application instructions addressing this matter[78]. In those guidelines, it is stated that the Finnish Tax Authority shall decide as early as possible whether to process the consequences of taxation related abuse administratively as a tax increase matter or on criminal grounds as a prosecution matter.

10. Conclusions

Following the recent development of the case-law of ECtHR, domestic tax penalty systems it seems inevitable that reforms should be enacted to put national systems in accordance with the principle of "ne bis in idem".

The majority of administrative tax penalty systems has been shaped to resemble criminal penalty proceedings. Therefore, in order to comply with the prohibition of "double jeopardy", it seems inevitable that administrative tax penalty systems should be restructured in a way that only one penalty is imposed to the same person for the same conduct[79]. This implies that if either criminal or, alternatively, administrative penalties are first imposed, the latter one should be discontinued.

Furthermore, a stronger link between administrative and criminal proceedings should be set out. In other words, it must be clearly established where either administrative or criminal proceedings should be terminated due to fact that the other proceeding is pending.

Another emerging key issue is timing. As a matter of fact, the "ne bis in idem" principle should be "foreseeable" and requires that the taxpayer should not be exposed to a double degree of legal actions for the same cause of action. Therefore, Tax Authorities should decide as soon as possible whether to process the consequences of taxation-related abuses administratively as a tax increase matter or on criminal grounds as a prosecution matter.

In conclusion, it might also be recalled that both administrative and criminal penalties shall be structured as to be in compliance with the principle of pro-

[77] FI: Act on Tax Surcharges and Customs Duty Surcharges Imposed by a Separate Decision, 781/2013.

[78] FI: Finnish Tax Administration, Instruction 2 December 2013, *The principle of 'ne bis in idem' and taxation: the same issue cannot be punished twice*.

[79] As it has been suggested in the EU: European Commission, *Proposal for a Directive on the fight against fraud to the Union's financial interests by means of criminal law*", COM/2012/0363, as well as in the EU: *Market Abuse Directive*, 2014/57/UE, it seems to be more feasible that criminal sanctions are imposed only for major tax crimes. In the same vein, Art. 8 of Italian Law No. 23/2014 (Fiscal Reform Law) points out the "possibility to apply administrative tax sanctions rather than criminal penalties for minor tax violations".

portionality enshrined in EU primary law[80]. This basically means that administrative and criminal sanctions shall not exceed what is strictly necessary in order to protect a certain legal right.

Bibliographical References

R. ATTARD, *The Classification of Tax Disputes, Human Rights Implications,* in *Human Rights and Taxation in Europe and the World* (chap. 22), 2011, Online Book IBFD.

P. BAKER, *Should Art. 6 ECHR (Civil) Apply to Tax Proceedings?* in *Intertax*, Vol. 29, Issue 6-7, 2001.

P. BAKER, *Some Recent Decision of the European Court of Human Rights on Tax Matters,* in *European Taxation,* Vol. No. 55, 2015.

P. BAKER, *Taxation and Human Rights,* in *GITC Review,* November 2001.

P. BAKER, *Taxation and the European Convention on Human Rights,* in *European Taxation,* 2000.

P. BAKER, *The Application of the European Convention on Human Rights to Tax Matters in the United Kingdom,* available online at http://www.taxbar.com/documents/App_European_Convention_Philip_Baker_QC.pdf.

P. BAKER, *The Determination of a Criminal Charge and Tax Matters,* in *European Taxation,* 2007.

C. BROKELIND, *Case Note on Akerberg Fransson (Case C-617/10),* in *European Taxation,* Vol. No. 53, 2013, Online Journal IBFD.

C. Brokelind, *The Role of the EU in International Tax Policy and Human Rights. Does the EU Need a Policy on Taxation and Human Rights?* in *Human Rights and Taxation in Europe and the World,* 2011, Online Book IBFD.

G. CONWAY, *Ne Bis in Idem in International Law,* 3 Int'l Crim. L. Rev. 217 (2013).

L. DEL FEDERICO, *Surcharges and Penalties in Tax Law,* National Report EATLP Milan 2015, available online at http://www.eatlp.org/uploads/public/2015/National%20report%20Italy.pdf.

E. DELLA VALLE, *Il giusto processo tributario. La giurisprudenza della CEDU,* in *Rassegna Tributaria,* 2013.

ECtHR, Foreword to the Annual Report 2014, 29 January 2015, available online at http://www.echr.coe.int/Documents/Annual_report_2014_ENG.pdf.

M. GREGGI, *Giusto processo e diritto tributario europeo: la prova testimoniale nell'applicazione della CEDU (il caso Jussila),* in *Rassegna Tributaria,* 2007.

G. INGRAO, *Appunti sull'applicazione del principio di proporzionalità per la revisione delle sanzioni amministrative tributarie,* in *Rivista di Diritto Tributario,* 2014.

G. MELIS - A. PERSIANI, *Trattato di Lisbona e sistemi fiscali,* in *Diritto e Pratica Tributaria,* 2013.

[80] On the proportionality principle see *e.g.* Art. 5 of TUE. Notably, Art. 8 of Italian Law No. 23/2014 (Fiscal Reform Law) directly recalls the principle of proportionality in structuring the administrative and criminal sanctions. Particularly, it seems diriment that both administrative and criminal sanctions will be shaped to be in accordance with the specific right that has been violated. On this issue, see G. INGRAO, *Appunti sull'applicazione del principio di proporzionalità per la revisione delle sanzioni amministrative tributarie*, in *Rivista di Diritto Tributario*, 2014, p. 971 et seq.

G. RAIMONDI, *Il Consiglio d'Europa e la Convenzione Europea dei Diritti dell'Uomo,* Napoli, 2008.
S. TRECHSEL, *The Protection Against Double Jeopardy,* in *Human Rights in Criminal Proceedings,* 2010, Oxford Scholarship.
B. VAN BOCKEL, *The Ne Bis in Idem Principle in EU Law,* 2010, Wolter Kluwer;
M. VENTORUZZO, *Do Market Abuse Rules Violate Human Rights? The Grande Stevens v. Italy Case*, Law Working Paper No. 269/2014 October 2014, available online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2517760.
J. A. E. VERVAELE, *Ne Bis in Idem: Towards a Transnational Constitutional Principle in the EU?* in 9 Utrecht L. Rev. 211 (2013);
J. A. E. VERVAELE, *The Application of the EU Charter of Fundamental Rights and its "Ne bis in idem" Principle in the Member States of the EU,* in *Review of European Administrative Law* 2013.

Case Law (in Chronological Order)

NL: ECtHR, *Engel and others v. the Netherlands,* 8 June 1976, Appl. No. 5370/72;
AT: ECtHR, *Adolf v. Austria,* 26 March 1982, Appl. No. 8544/79;
DE: ECtHR, *Ozturk v. Germany,* 21 February 1984, Appl. No. 8544/79;
AT: ECtHR, *Gradinger v. Austria,* 23 October 1995, Appl. No. 15963/90;
CH: ECtHR, *Oliveira v. Switzerland,* 30 July 1998, Appl. No. 25771/94;
AT: ECtHR, *Franz Fischer v. Austria,* 29 May 2001, Appl. No. 37950/97;
IT: ECtHR, *Ferrazzini v. Italy,* 12 July 2001, Appl. No. 44759/98;
SE: ECtHR, *Janosevic v. Sweden,* 23 July 2002, Appl. No. 34619/97;
SE: ECtHR, *Västberga Taxi Aktiebolag and Vulic v. Sweden,* 23 July 2002, Appl. No. 36985/97;
DK: CJEU, *Aalborg Portland,* 7 January 2004, C-204/00;
B: CJEU, *Van Esbroeck,* 9 March 2006, C-434/04;
NL: CJEU, *Van Straaten,* 28 September 2006, C-150/05;
FI: ECtHR, *Jussila v. Finland,* 23 November, 2006, Appl. No. 73053/01;
RU: ECtHR, *Zolotukhin v. Russia,* 10 February 2009, Appl. No. 14939/09;
IRL: CJEU, *J. McB. v L. E.,* 5 October 2010, C-400/10;
FR: Conseil Constitutionnel, *Catherine Boitel,* 29 April 2011, No. 2011-124 DC;
AT: CJEU, *Dereci,* 15 November 2011, C-256/11;
CZ: CJEU, *Toshiba,* 14 February 2012, C-17/10;
PL: CJEU, *Bonda,* 5 June 2012, Case C-489/10;
BG: CJEU, *EMS Bulgaria Transport,* 12 July 2012, C-284/11;
SE: CJEU, *Akeberg Fransson,* 26 February 2013, Case C-617/10;
IT: ECtHR, *Grande Stevens and others v. Italy,* 4 March 2014, Appl. No. 18640/10, 18647/10, 18663/10, 18668/10;
IT: ISC, Third Chamber (Criminal), 15 May 2014, No. 20266;
FI: ECtHR, *Nykänen v. Finland,* 20 May 2014, Appl. No. 11828/11;
FI: ECtHR, *Glantz v. Finland,* 20 May 2014, Appl. No. 37394/11;
FI: ECtHR, *Häkkä v. Finland,* 20 May 2014, Appl. No. 758/11;
FI: ECtHR, *Pirttimäki v. Finland,* 20 May 2014, Appl. No. 35232/11;
IT: CJEU, *Equoland,* 17 July 2014, C-272/13;
IT: First Instance Court of Turin, ordinance 27 October 2014;

SE: ECtHR, *Lucky Dev v. Sweden,* 27 November 2014, Appl. No. 7356/10;
FI: ECtHR, *Rinas v. Finland,* 27 January 2015, App. No. 17039/13;
FI: ECtHR, *Kiiveri v. Finland,* 10 February 2015, App. No. 53753/12;
FI: ECtHR, *Osterlund v. Finland,* 10 February 2015, App. No. 53197/13;
IT: Constitutional Court, 10 February 2015, No. 10.