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Effectiveness of EU law and protection of fundamental rights – in search of balance in the context of the *ne bis in idem* principle

Abstract
The article undertakes the current and important issue of balancing between the Member States' obligations to ensure effectiveness of EU law and to respect fundamental rights, taking as an example the *ne bis in idem* principle, enshrined in Article 50 of the Charter of the Fundamental Rights of the European Union. The recent case law of the CJEU in *Di Puma*, *Garlsson and others* and *Menci* is analysed. These rulings exemplify the growing importance of the issue of how to balance the two obligations in a situation when the repression undertaken by a Member State in order to ensure the full effect of EU law may infringe a fundamental right provided for in the Charter. The main objective is thus to formulate proposals on how to balance these interests, as well as to define their consequences for national courts.

1. Introduction

The Member States' obligations to ensure the effectiveness of EU law and to respect fundamental rights are (among others) two cornerstones of the European Union edifice, both subject to continual attention and efforts undertaken by EU institutions, in particular, the European Commission and the Court of Justice of the European Union. The effectiveness of EU law (*effet utile*) is the subject of ongoing interest of European and Polish researchers, but it still escapes

unequivocal definitions[1]. For the purpose of the following analysis, effectiveness is understood in the broadest meaning possible as a general obligation of Member States to give full effect to EU law in their domestic legal orders[2]. This includes an obligation – resulting from the principle of loyal cooperation as enshrined in Article 5(3) TEU – to impose sanctions for infringements of EU law by individuals under their jurisdiction (within the implementation of EU law). At the same time, the Member States shall respect the fundamental rights, as enshrined in the Charter of Fundamental Rights of the European Union (hereinafter referred to as the Charter), "when they are implementing Union law" (according to its Article 51 (1)). Thus, when implementing Union law (including imposing sanctions for infringements of EU law) the Member States are, among others, bound by the *ne bis in idem* principle provided for in Article 50 of the Charter. The recent rulings of the CJEU of 20 March 2018 in the *Di Puma*[3], *Garlsson and others*[4] and *Menci*[5] cases, in which the *ne bis in idem* principle has been interpreted, exemplify the difficult choices that have to be made when the repression undertaken by a Member State in order to ensure the full effect of EU law may infringe a fundamental right provided for in the Charter. Those judicial decisions also reflect the growing importance of such questions and envisage the crucial role of national courts in seeking a balance between the effectiveness of EU law and protection of fundamental rights. The following analysis is divided into three parts: two introductory sections relating to the role of sanctions as a tool to ensure effectiveness of EU law and the obligation to respect the *ne bis in idem* principle in the context of criminal repressions. The third part is devoted to analysis of recent case law of the ECtHR and the CJEU, concluded with proposals for solving the conflict described above, as well as their consequences for national courts.

1 In the Polish literature see in particular D. Miąsik, *Zasada efektywności* [in:] A. Wróbel (ed.), *Stosowanie prawa Unii Europejskiej przez sądy*, vol. I, Warszawa 2010, pp. 225–228 and the literature referred to therein.

2 A. Wróbel, *Autonomia proceduralna państw członkowskich. Zasada efektywności i zasada efektywnej ochrony sądowej w prawie Unii Europejskiej*, "Ruch Prawniczy, Ekonomiczny i Społeczny" 2005, no. 1, pp. 38, 46.

3 Judgement of the Court of Justice of 20 March 2018, *Di Puma,* C-596/16 and C-597/16, ECLI:EU:C:2018:192.

4 Judgement of the Court of Justice of 20 March 2018, *Garlsson and others*, C-537/16, ECLI:EU:C:2018:193.

5 Judgement of the Court of Justice of 20 March 2018, *Menci*, C-524/15, ECLI:EU:C:2018:197.

2. Obligation to impose sanctions in order to ensure effectiveness of EU law

The effectiveness of EU law in the broad sense is strictly dependent on the enforcement of EU rules by the Member States' competent bodies. For that reason, the obligation of the Member States to introduce laws, regulations and administrative measures in order to ensure that Union law is effectively applied and complied with in the national legal orders stems from the general principle of loyal cooperation. As the Court of Justice confirmed in case 68/88 *Commission v. Greece*, the principle of loyal cooperation "requires the Member States to take all measures necessary to guarantee the application and effectiveness of Community law". This results in the obligation to ensure in particular "that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive" and that "national authorities must proceed, with respect to infringements of Community law, with the same diligence as that which they bring to bear in implementing corresponding national laws"[6]. Since that time, the Court of Justice has consequently upheld the strict relation between the obligation to ensure effectiveness of EU law and the obligation to introduce sanctions for infringements of it[7]. At present, it is beyond doubt that the Member States have the right not only to introduce and impose civil and administrative sanctions, but also – if the effectiveness of EU law thus requires – criminal sanctions, as long as they are dissuasive, effective and proportionate, and applied in a non-discriminatory manner. At the same time, as long as EU law does not impose such an obligation to introduce criminal sanctions in order to give full effect to EU law[8], the Member States are free to choose what kind of sanctions are the most appropriate in this context, including administrative penalties, criminal penalties or a combination of them[9]. Still, the combination of criminal proceedings leading to the imposition of criminal sanctions and administrative proceedings leading to the imposition of administrative

6 Judgement of the Court of Justice of 21 September 1988, *Commission v. Greece*, 68/88, ECLI:EU:C:1989:339.

7 From the abundant literature on this topic, in the Polish literature M. Szwarc, *Wpływ prawa wspólnotowego na prawo karne państw członkowskich*, Warszawa 2006; J. Łacny, *Sankcje za naruszenie prawa wspólnotowego* [in:] *K. Kowalik-Bańczyk*, M. Szwarc-Kuczer (ed.), *Stosowanie prawa Unii Europejskiej przez sądy*, vol. II. *Zasady-orzecznictwo-piśmiennictwo*, Warszawa 2007, pp. 762–830.

8 At present the EU competence in this field is expressly stated in Article 83(2) TFEU.

9 Judgement of the Court of Justice of 26 February 2013, *Åkerberg Fransson,* C-617/10, ECLI:EU:C:2013:105, paragraph 34.

sanctions may, in particular circumstances, raise doubts as to the compatibility of such dual repression with the *ne bis in idem* principle.

3. Obligation to respect the *ne bis in idem* principle in the context of criminal repression

As has already been established, under Article 51(1) of the Charter the Member States are bound by the obligation to respect its provisions "when they are implementing Union law". The interpretation of this criterion is particularly important in all situations where the link with EU law may seem not as obvious as in the clear-cut cases of implementation of EU directives (or framework decisions[10]) or the application of EU regulations. Nevertheless, the CJEU has already had an occasion to confirm, in particular, that the Member States are bound by the obligation to respect the fundamental rights of individuals in the context of mutual recognition of judgements in criminal matters[11] and – particularly relevant for the analyses that follow – in the context of application of national sanctions for infringements of EU law in order to ensure the full effectiveness of that law[12].

The *ne bis in idem* principle enshrined in Article 50 of the Charter is intended to protect individuals against being "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". Before it was codified in the Charter, this principle was recognised by the Court of Justice as part of the general principles of EU law in the context of EU competition

10 Judgement of the Court of Justice of 16 June 2005, *Pupino,* C-105/03, ECLI:EU:C:2005:386, judgement of the Court of Justice of 3 May 2005, *Advocaten voor de Wereld*, C-303/05, ECLI:EU:C:2007:261, judgement of the Court of Justice of 27 February 2007, *Gestoras pro Amnistia*, C-354/04 P, ECLI:EU:C:2007:115.

11 Judgement of the Court of Justice of 5 April 2016, joined cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru*, ECLI:EU:C:2016:198, paragraphs 84, 100–101; see also T. Ostropolski, *Naruszenie praw podstawowych jako przesłanka wykonania ENA – uwagi do wyroku Trybunału Sprawiedliwości z 5.04.2016 r. w sprawach połączonych C-404/15 Aranyosi i C-659/15 PPU Caldararu*, "Europejski Przegląd Sądowy" 2016, no 11, pp. 20–26 and G. Agnostaras, *Mutual confidence is not blind trust! Fundamental rights protection and the execution of the European arrest warrant: Aranyosi and Căldăraru*, "Common Market Law Review" 2016, no. 53, pp. 1975–1704.

12 Starting with the judgement of 26 February 2013, Fransson, C-617/10, ECLI:EU:2013:105, then continued in the judgement of 8 September 2015, Taricco, C-105/14, ECLI:EU:C:2015:555, for more comprehensive analysis see recently M. Szwarc, Zakres związania państw członkowskich Kartą Praw Podstawowych Unii Europejskiej w kontekście stosowania prawa karnego (uwagi na tle orzecznictwa TSUE), "Studia Prawnicze" 2017, no. 3, pp. 47–79 and the literature referred to therein.

rules[13]. It was also confirmed that Member States were bound by Article 50 of the Charter when applying EU law in the context of the protection of EU financial interests[14], as well as framework decisions in the context of mutual recognition[15] and Article 54 CISA[16]. In recent rulings the CJEU has also confirmed that a Member State is bound by Article 50 of the Charter when introducing administrative sanctions into national law for infringements of an EU Directive[17], and when its competent bodies (i.e. national tax authorities) – in order to ensure the proper collection of VAT and to combat fraud – impose administrative penalties and initiate criminal proceedings in respect of VAT offences, as it constitutes implementation of the respective provisions of an EU Directive and Article 325 TFEU[18].

The principle provided for in Article 50 of the Charter corresponds to the *ne bis in idem* principle as enshrined in Article 4 (1) of Protocol No. 7 to the European Convention on Human Rights, according to which "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". Despite the considerable differences in the scope of application of the principle in the EU and Council of Europe systems[19], when Article 50 of the Charter is applied within the same Member State it must be given the same meaning and scope as the corresponding right in the Protocol and case law of the ECtHR[20]. The Court of Justice had, for a considerable period of time, consistently followed the interpretation of the *ne bis in idem* principle adopted by the ECtHR. In general, the

13 Judgement of the Court of Justice of 14 February 2012, *Toshiba Corporation*, C-17/10, ECLI:EU:C:2012:72, paragraph 94 and the case law referred to therein.

14 Judgement of the Court of Justice of 21 July 2011, *Beneo-rafti*, C-150/10, paragraph 68.

15 Judgement of the Court of Justice of 16.11.2010, *Mantello*, C-261/09, ECLI:EU:C:2010:683.

16 On the *ne bis in idem* principle in Article 54 CISA see, in particular, B. Nita, *O zasadzie ne bis in idem w świetle art. 54 Konwencji wykonawczej z Schengen*, "Europejski Przegląd Sądowy" 2007, no. 7, pp. 4–10; A. Sołtysińska, *Zasada ne bis in idem z art. 54 konwencji wykonawczej z Schengen*, "Europejski Przegląd Sądowy" 2007, no. 7, pp. 35–40.

17 Judgement of the Court of Justice of 20 March 2018, *Garlsson and others*, C-537/16, ECLI:EU:C:2018:193, paragraph 23.

18 Judgement of the Court of Justice of 20 March 2018, *Menci*, C-524/15, ECLI:EU:C:2018:197, paragraph 21.

19 Which are immaterial in the context of this analysis, but the main one is that Article 4(1) of Protocol No. 7 concerns only "intrastate" proceedings, meaning a prosecution in only one state, whereas Article 50 of the Charter concerns "interstate" proceedings, meaning a prosecution between two different states.

20 Explanations to the Charter of Fundamental Rights, Official Journal of the European Union C 303/17 – 14.12.2007.

reasoning necessary to answer the question whether *ne bis in idem* is applicable in a particular case rests (according to the case law of both European courts) on assessment of the following elements: a) whether the proceedings are criminal in nature; b) whether the second proceedings are for the same act ("*idem*"); c) whether the first proceedings ended with a final decision; and d) whether there is a duplication of proceedings against the same person for the same act ("*bis*")[21]. Before moving forward to an examination of "*bis*", which is a central issue for the following analyses, let us briefly return to interpretation of "criminal proceedings" and "same act" in the case law of the ECtHR and the CJEU.

As far as the criminal nature of proceedings is concerned, it should be recalled that when assessing whether there was a "criminal charge" (in a particular case) in the meaning of Article 6 of the Convention, the ECtHR applies three criteria, namely: the legal classification of the offence under national law, the very nature of the offence, and the degree of severity of penalty that the person concerned risks incurring (the so-called Engel criteria)[22]. Then, this three-pronged test was applied by the ECtHR in the *Zolotukhin* case for the purpose of interpreting the term "criminal proceedings" in the meaning of Article 4 of Protocol No. 7[23]. Such an approach was fully adopted by the CJEU in the *Bonda* case when assessing the character of measures provided for in the second and third subparagraphs of Article 138(1) of Regulation No 1973/2004[24]. In this particular case, the Court of Justice concluded that the penalties envisaged in the EU regulation could not be equated to criminal penalties in the meaning of the *Engel* criteria. As a consequence, the dual system of administrative sanctions under the EU regulation and criminal sanctions under the PIF convention, thus a system established by the EU law itself, could not be considered to infringe the *ne bis in idem* principle[25]. Since that time, the Engel/Bonda criteria have been consequently applied by the Court of Justice in assessing compatibility with the *ne*

21 For comprehensive analysis see A. Sakowicz, *Zasada ne bis in idem w prawie karnym*, Białystok 2011, including the EU and Council of Europe rules.

22 Judgement of the ECtHR of 8 June 1976, Engel and Others v. the Netherlands, application No. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, paragraphs 80–82.

23 Judgement of the ECtHR of 10 February 2009, *Zolotukhin v. Russia*, application No. 14939/03, paragraphs 52–53, see also M. Jackowski, *Zasada ne bis in idem w orzecznictwie Europejskiego Trybunału Praw Człowieka*, "Państwo i Prawo" 2012, no. 9, pp. 18–30.

24 Judgment of the Court of Justice of 5 June 2012, *Bonda*, C-489/10, ECLI:EU:C:2012:319, paragraph 37.

25 See also J. Łacny, M. Szwarc, *Legal Nature of European Union Agricultural Penalties*, The European Criminal Law Associations' FORUM 2012 / 4 eucrim; J. Łacny, M. Szwarc, *Sankcje w unijnych przepisach rolnych a zasada a zasada ne bis in idem – uwagi na tle wyroku Trybunału Sprawiedliwości w sprawie C-489/10 postępowanie karne v. Ł. Bonda* [in:] A. Błachnio-Parzych, J. Jakubowska-Hara, J. Kosonoga, H. Kuczyńska (ed.), *Problemy wymiaru sprawiedliwości karnej. Księga Jubileuszowa Profesora Jana Skupińskiego*, Warszawa 2013, pp. 894–921.

bis in idem principle of the dual system of administrative and criminal sanctions adopted by the Member States in order to ensure the effectiveness of EU law in the context of VAT offences[26] and insider dealing offences[27].

In respect of interpretation of the "same act", the ECtHR ruled in *Zolotukhin* that "Article 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"[28]. There is no doubt that this standard of interpretation is also applied by the CJEU, interpreting the concept of "same acts" as "referring only to the nature of the acts, encompassing a set of concrete circumstances which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected"[29]. Thus, in the light of the CJEU case law the criterion of "the identity of the protected legal interest" is immaterial for assessment of the "same act", which is fully aligned with the ECtHR approach.

Therefore, the interpretation of notions crucial for the application of the *ne bis in idem* principle evolved. First, both courts – the ECtHR and the CJEU – departed from the "formal understanding" of "criminal proceedings" or "criminal sanction" (based on the legal classification in national law) towards their "material understanding" based on the repressive character of the sanction. Then, both courts decided to interpret an "offence" or the "same act" without reference to the legal classification in the national order, which also means adopting a "material understanding" instead of "formal understanding" based on the legal classification in national law. This judicial evolution resulted in widening the scope of application of the *ne bis in idem* principle, and thus the scope of protection of individuals against excessive repression. But this may also cause problems for those Member States which base their systems of repression on the dual system of criminal and administrative law. Departing from the formal approach based on the formal division between criminal and administrative law means that the *ne bis in idem* principle may apply also in situations where administrative sanctions are treated as "criminal in nature", and so the

26 Judgement of the Court of Justice of 26 February 2013, *Åkerberg Fransson,* C-617/10, ECLI:EU:C:2013:105, paragraph 35, judgement of the Court of Justice of 20 March 2018, *Menci*, C-524/15, ECLI:EU:C:2018:197, paragraph 26.

27 Judgement of the Court of Justice of 20 March 2018, *Garlsson and others*, C-537/16, ECLI:EU:C:2018:193.

28 Judgement of the ECtHR of 10 February 2009, *Zolotukhin v. Russia*, application No. 14939/03, paragraph 82.

29 In the context of mutual recognition of judgements in criminal matters: judgements of the Court of Justice: of 9 March 2006, C-436/04, *Van Esbroeck*, ECLI:EU:C:2006:165, paragraphs 27, 32 and 36, and of 28 September 2006, *Van Straaten*, C-150/05, paragraphs 41, 47 and 48; in the context of Article 54 CISA – judgement of the Court of Justice of 16 November 2010, *Mantello*, C-261/09, ECLI:EU:C:2010:683, paragraph 40.

duplication of sanctions of a criminal and administrative-criminal nature may infringe the *ne bis in idem* principle.

4. When effectiveness of EU law and protection of fundamental rights collide – different approaches of European courts

This is exactly the junction where the effectiveness of EU law and the obligation to respect the *ne bis in idem* principle may collide. As stated at the beginning of this article, generally a cumulation of administrative and criminal sanctions introduced by the Member States for the same act in order to ensure effectiveness of EU law is not contrary to the *ne bis in idem* principle, but only as long as the administrative sanction is not of a "criminal nature" as understood in *Engel/ Bonda* rulings[30]. In some cases, such as in the context of protection of financial interests of the EU, such a cumulation is even imposed by EU law itself, as was exemplified in *Bonda* case[31]. The same holds true in other cases when – in order to give full effect to EU rules – the Member States introduce a dual system based on administrative and criminal proceedings, for example, to combat fraud in VAT[32] or manipulating the market (insider dealing)[33]. The Court of Justice also consistently affirms the Member States' freedom to choose appropriate sanctions for infringements of EU law (as long as they are effective, dissuasive, proportionate and applied in a non-discriminatory manner). Still, choices made by the Member States may not compromise fundamental rights, in particular the *ne bis in idem* principle. The risk of such an infringement is more probable in these legal systems in which the reaction of the Member State to unlawful acts is based on a combination of criminal and administrative proceedings. On the one hand, giving priority to the protection of an individual against repression (which would be contrary to the *ne bis in idem* principle) might undermine the effectiveness of EU law, as it would prevent application of the dual system

30 Judgement of the Court of Justice of 26 February 2013, *Åkerberg Fransson,* C-617/10, ECLI:EU:C:2013:105, paragraph 37.

31 As a consequence, from the perspective of the *ne bis in idem* principle it was admissible for the Polish authorities to impose the administrative sanction in administrative proceedings for "irregularity" under the EU regulation (loss of entitlement to the single area payment for a certain period of time) and then to initiate criminal proceedings in order to impose criminal sanctions for "subsidy fraud" under the PIF convention (imprisonment and a fine).

32 Judgement of the Court of Justice of 26 February 2013, *Åkerberg Fransson,* C-617/10, ECLI:EU:C:2013:105.

33 Judgement of the Court of Justice of 20 March 2018, *Garlsson and others*, C-537/16, ECLI:EU:C:2018:193.

of administrative (yet criminal in nature) and criminal sanctions. On the other hand, prioritising the effectiveness of EU law would, in turn, compromise a fundamental right which is one of the cornerstones of the EU edifice. Thus, both European courts initially applied a uniform interpretation of "criminal proceedings" and the "same act/offence". However, their case law later began to diverge.

4.1. ECtHR

When confronted with the question of whether the duplication of criminal and administrative (of a criminal nature) sanctions infringed the *ne bis in idem* principle, the ECtHR confirmed in *Grande Stevens v. Italy* the existence of such a violation[34]. The ECtHR based its reasoning on its earlier interpretation of "criminal proceedings" and "offence" and stated firstly that the administrative procedure resulting in fines for manipulating the market (established in the national system) "involved a 'criminal charge' against applicants", and secondly that the new set of criminal proceedings "clearly concerned the same conduct by the same persons on the same date"[35]. As these two elements were present in the case before the ECtHR, the Court itself had no doubts that the principle had been violated. It is important to note in this context that the Italian authorities imposed administrative fines for manipulating the market and then criminal sanctions for the same acts in fulfilment of the obligation to impose sanctions for unlawful conduct stemming from the EU Directive on market abuse. For that reason, the ECtHR referred also to EU law and the recognition of the *ne bis in idem* principle in the context of duplication of proceedings by the CJEU in its *Fransson* ruling as well.

In November 2016, however, the ECtHR adopted a somewhat new approach to the duplication of proceedings, which unfortunately raises more questions rather than offers clear answers. In *A and B v. Norway*, the ECtHR was confronted with the question of whether the imposition of tax penalties for VAT offences and then the initiation of criminal prosecution for the same acts amounts to a violation of the *ne bis in idem* principle (Article 4 of Protocol No. 7). When assessing the condition of whether a duplication of criminal proceedings was present ("*bis*"), the ECtHR stated that "Article 4 of Protocol No. 7 does not exclude the conduct of dual proceedings, even to their term, provided that certain conditions are fulfilled. In particular, for the Court to be satisfied that there is no duplication of trial or punishment (bis) as proscribed by Article 4 of Protocol No. 7, the respondent State must demonstrate convincingly

34 Judgement of ECtHR of 4 March 2014, *Grande Stevens and others v. Italy*, Applications No. 18640/10,18647/10,18663/10,18668/10et18698/10.

35 Ibid., paragraphs 222–229.

that the dual proceedings in question have been 'sufficiently closely connected in substance and in time'"[36]. Thus, according to the ECtHR there may be situations when two proceedings are integrated to such an extent that they form a coherent response of the State to unlawful conduct, which implies, however, that "not only that the purposes pursued and the means used to achieve them should in essence be complementary and linked in time, but also that the possible consequences of organizing the legal treatment of the conduct concerned in such a manner should be proportionate and foreseeable for the persons affected"[37]. Hence, according to the ECtHR, if criminal proceedings resulting in the imposition of criminal sanctions and administrative proceedings resulting in the imposition of an administrative sanction criminal in nature are so linked in time and in substance, than the *ne bis in idem* principle is not infringed because the second consecutive proceedings (immaterial whether criminal or administrative) are not treated as "*bis*". This may raise doubts as to whether the protection against dual prosecution or punishment is still effective, even if the ECtHR has elaborated the catalogue of material factors to determine the existence of "such a sufficient close connection in substance". These factors include: 1) the two proceedings pursue complementary purposes, which enables finding that they address *in abstracto* and *in concreto* different aspects of social misconduct; 2) the duality of proceedings for the same act is foreseeable in law and in practice; 3) the two proceedings are conducted in a manner which enables avoiding "as far as possible any duplication in the collection as well as the assessment of the evidence, notably through adequate interaction between the various competent authorities to bring about that the establishment of facts in one set is also used in the other set"; 4) the sanction which has become final as the first is taken into account in the second proceedings "so as to prevent that the individual concerned is in the end made to bear an excessive burden, this latter risk being least likely to be present where there is in place an offsetting mechanism designed to ensure that the overall amount of any penalties imposed is proportionate"[38]. As will be seen below, even if the CJEU decided to take a different path of reasoning as far as *bis* is concerned, it still adopted the reasoning of the ECtHR concerning the above catalogue.

36 Judgement of the ECtHR of 15 November 2016, *A and B v. Norway*, *Applications nos.*24130/11 *and* 29758/11, paragraph 130.

37 Ibid., paragraph 130.

38 Ibid., paragraphs 130–132.

4.2. CJEU

In the context of the possible duplication of criminal proceedings and administrative proceedings resulting in the imposition of an administrative sanction criminal in nature, the CJEU ruled in *Fransson* that "[t]he ne bis in idem principle laid down in Article 50 of the Charter does not preclude a Member State from imposing successively, for the same acts of non-compliance with declaration obligations in the field of VAT, a tax penalty and a criminal penalty in so far as the first penalty is not criminal in nature, a matter which is for the national court to determine"[39]. At that time, such an approach was consistent with the case law concerning the *ne bis in idem* principle of the ECtHR and of the CJEU itself, as it was based on the material understanding of "criminal sanction" and the "same act". Also, the ECtHR in *Grande Stevens v. Italy* recalled the *Fransson* ruling regarding the conceptualisation of the *ne bis in idem* principle in EU law. Until that moment, a coherent interpretation of the *ne bis in idem* by the two European courts could be observed.

After that, however, the CJEU decided not to follow the reasoning of the ECtHR (in *A and B v. Norway*) and elaborated its own interpretation of "*bis*" in the context of the permissible duplication of repressive proceedings. The catalyst for this departure were the preliminary questions addressed by Italian courts regarding the interpretation of Article 50 in the context of the duplication of criminal and administrative proceedings and sanctions envisaged in national law: for the purpose of combatting VAT evasion (*Menci*) and for the purpose of combatting insider dealing and market manipulation (*Garlsson and others* and *Di Puma*). The point of departure in all those rulings was the statement from *Fransson* that "the *ne bis in idem* principle prohibits a duplication both of proceedings and of penalties of a criminal nature for the purposes of that article for the same acts and against the same person"[40]. Then the CJEU followed its analysis with an assessment of the criminal nature of proceedings and penalties (recalling the Engel/Bonda criteria, but leaving for the referring national court to determine that)[41] and the existence of the same offence (applying the standard from *Kraaijenbrink* and *Mantello* and stating that "pecuniary administrative penalty of a criminal nature and the criminal proceedings at issue in the main proceedings appear therefore to relate to the same

39 Judgement of the Court of Justice of 26 February 2013, *Åkerberg Fransson,* C-617/10, ECLI:EU:C:2013:105, paragraph 37.

40 Judgement of the Court of Justice of 20 March 2018, *Garlsson and others*, [C-537/16], paragraph 27.

41 Ibid., paragraphs 28–35, judgement of the Court of Justice of 20 March 2018, *Menci*, C-524/15, ECLI:EU:C:2018:197, paragraphs 26–33.

offence")[42]. If the Court of Justice had applied the reasoning from *Fransson* case, it would have had to rule consequently that because these two requirements were fulfilled, the *ne bis in idem* principle prevented the application of the second set of sanctions.

It decided instead to treat such a duplication of criminal proceedings and administrative proceedings resulting in the imposition of an administrative penalty of a criminal nature as a limitation of the fundamental right guaranteed by Article 50 of the Charter[43]. This results in the necessity to conduct the analysis from the perspective of Article 52(1) of the Charter, establishing the conditions for permissible limitations of rights.

5. Balancing effectiveness of EU law and protection of a fundamental right – an exercise in proportionality

This takes the discussion of the *ne bis in idem* principle into a different dimension, as it reflects the idea that the right not to be punished or prosecuted twice is not an absolute one, but may be restricted if the premises of Article 52(1) of the Charter are satisfied. Let us recall that for a limitation of a right to be in conformity with the Charter, such a limitation must be provided for by law and respect the essence of that right. In addition, such a limitation is permissible only if it is necessary and genuinely meets the objectives of general interest recognised by the Union or the requirement to protect the rights and freedoms of others, subject to the principle of proportionality. The Court referred to the *Spasic* case, where it had already concluded that "a limitation to the *ne bis in idem* principle guaranteed by Article 50 of the Charter may be justified on the basis of Article 52(1) thereof"[44]. But *Spasic* was decided in a different context, namely that of Article 54 CISA, according to which "A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party".

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42 Judgement of the Court of Justice of 20 March 2018, *Garlsson and others*, C-537/16, ECLI:EU:C:2018:193, paragraphs 36–40, judgement of the Court of Justice of 20 March 2018, *Menci*, C-524/15, ECLI:EU:C:2018:197, paragraphs 34–38.

43 Judgement of the Court of Justice of 20 March 2018, *Garlsson and others*, C-537/16, ECLI:EU:C:2018:193, paragraph 41, judgement of the Court of Justice of 20 March 2018, *Menci*, C-524/15, ECLI:EU:C:2018:197, paragraph 39.

44 Judgment of 27 May 2014, *Spasic* C-129/14 PPU, EU:C:2014:586, paragraphs 55 and 56.

In its reasoning the CJEU expressed doubt as to whether the first condition enshrined in Article 52(1) of the Charter was fulfilled, as the possibility of duplication of criminal proceedings and penalties as well as administrative proceedings and penalties of a criminal nature in cases before the Italian courts were provided for by law[45]. Such a conclusion raises no doubts, as the Directive on insider dealing had been implemented into the national legal system by Italian law (enacted by the parliament), and the provisions concerning combatting VAT fraud had also been contained in the law enacted by the parliament. In general, this condition is easily fulfilled and it will not cause problems, as the administrative proceedings and criminal proceedings are in general envisaged in national laws, which is necessary from the point of view of Member States' constitutional standards.

Further, the Court argued that since the national legislation "allow(ed) such a duplication of proceedings and penalties only under conditions which are exhaustively defined, thereby ensuring that the right guaranteed by Article 50 is not called into question as such", the requirement to respect the essential content of Article 50 of the Charter was satisfied[46]. Such a statement, however, may raise considerable doubts as there is no logic and visible link between the exhaustive definition of conditions of duplication of proceedings and the conclusion that such a duplication respects the essential content of *ne bis in idem*. As has been already observed, it is impossible to limit the *ne bis in idem* principle without violating its essential substance[47]. The right contained in Article 50 of the Charter may only be exercised (the person interested is protected from the second prosecution or conviction for the same act) or not exercised at all. The fact that the conditions of duplication of proceedings were exhaustively defined in law is rather an argument in favour of assessing the first requirement under Article 52(1) of the Charter, namely, that such a limitation is provided for by law. It is not relevant, however, for assessing whether it respects the essence of a right or not.

In the next stage, the Court of Justice admitted that limitation of the *ne bis in idem* principle might be justified by the general interest, when the national legislation aims at combatting VAT offences[48] or protecting the integrity of

45 Confirmed by the Court in paragraph 44 of *Garlsson* judgement and paragraph 42 of *Menci* judgement.

46 Judgement of the Court of Justice of 20 March 2018, *Garlsson and others*, C-537/16, ECLI:EU:C:2018:193, paragraph 46, judgement of the Court of Justice of 20 March 2018, *Menci*, C-524/15, ECLI:EU:C:2018:197, paragraph 43.

47 A. Błachnio-Parzych, *Zasada ne bis in idem a obowiązek ustanowienia sankcji skutecznych, proporcjonalnych i odstraszających. Glosa do wyroku TS z dnia 20 marca 2018 r., C-596/16 i C-597/16*, "Europejski Przegląd Sądowy" 2018, no. 12, p. 42.

48 Judgement of the Court of Justice of 20 March 2018, *Menci*, C-524/15, ECLI:EU:C:2018:197, paragraph 44.

financial markets of the European Union and public confidence in financial instruments[49]. Such legislation is justified when it pursues "complementary aims relating as the case may be, to different aspects of the same unlawful conduct at issue". In *Menci* the Court admitted that "it appears legitimate for a Member State to seek, first, to deter and punish any violation […] of the rules relative to VAT returns and collection by imposing fixed administrative penalties, where appropriate, on a flat-rate basis and secondly, to deter and punish serious violations of those rules, which are particularly damaging for the society and which justify the adoption of more severe criminal penalties"[50]. Similarly, in *Garlsson* it was admitted that "a Member State may wish, first to dissuade and punish any infringement […] of the prohibition of market manipulation by imposing administrative penalties set, as the case may be, on a flat-rate basis and secondly, to dissuade and punish serious infringements of such prohibition, which have particularly negative effects on society and which justify the adoption of the most severe criminal penalties"[51]. The reasoning of the CJEU may be understood to mean that there is general acceptance that the effectiveness of EU law may be achieved by the Member States not only [simply] by the cumulation of criminal and administrative (also administrative in nature) sanctions, but also allows for the duplication of criminal proceedings and administrative proceedings resulting in imposing administrative sanctions criminal in nature. This is a new thread in the reasoning of the Court in comparison with the *Fransson* case. It results in the admission that considerations of general interest, namely the effectiveness of EU law, may be prioritised before the protection of fundamental rights. On the basis of rulings in *Menci*, *Garlsson* and *Di Puma*, the Member States are authorised to maintain existing legislation or even enact new legislation providing for the cumulation of criminal proceedings and sanctions and administrative proceedings resulting in administrative sanctions criminal in nature in at least two fields: combatting VAT offences and combatting manipulation of the market. Still, the catalogue of other possible unlawful conduct subjected to such a duplication remains open. It may not be excluded that the CJEU would accept such a cumulation also in other areas where unlawful conduct is defined in EU law, for example in environmental law. The only limit to such a duplication is, thus, the principle of proportionality, as it stems from Article 52(1) of the Charter.

Thus, the key issue in the application of the *ne bis in idem* principle to the duplication of proceedings is the proper balancing between the effectiveness of

49 Judgement of the Court of Justice of 20 March 2018, *Garlsson and others*, C-537/16, ECLI:EU:C:2018:193, paragraph 46; *Di puma*, paragraph 42.

50 Judgement of the Court of Justice of 20 March 2018, *Menci*, C-524/15, ECLI:EU:C:2018:197, paragraph 45.

51 Judgement of the Court of Justice of 20 March 2018, *Garlsson and others*, C-537/16, ECLI:EU:C:2018:193, paragraph 47.

EU law and protection of individuals in the framework of the proportionality test. According to the CJEU, the duplication of proceedings and penalties provided for by national legislation shall not "exceed what is appropriate and necessary in order to attain the objectives legitimately pursued by that legislation, it being understood that, when there is a choice between several appropriate measures, recourse must be had to the least onerous and the disadvantages caused must not be disproportionate to the aims pursued"[52].

As to the appropriateness of national legislation, the Court of Justice assumed that as long as there are no harmonising measures concerning sanctions at the EU level, "Member States have the right to provide either for a system in which infringements of the prohibition of market manipulation may be subject to proceedings and penalties only once, or for a system allowing duplication of proceedings and penalties", and as a result "the proportionality of national legislation [...] cannot be called into question of the mere fact that the Member State would be deprived of that freedom of choice"[53]. Again, such reasoning raises doubts, because it lacks a sufficient logical link between the fact that Member States are free to do something and the conclusion that whatever they do within this freedom will be appropriate. Such an interpretation of appropriateness in this context makes the requirement illusory, because it leads to the conclusion that any duplication of the proceedings in a Member State is appropriate as long as the EU harmonising measure does not define the sanctions for infringements of EU law. As has been already noted, the most important issue should instead be the analysis of the sanctions envisaged in the national legislation and the assessment of whether they are effective, dissuasive and proportionate[54]. As a result, when the reaction to the same act may consist of criminal sanctions and administrative sanctions criminal in nature, those sanctions which are effective, dissuasive and proportionate should be chosen and maintained in the national legal system[55].

As to the necessity, the Court of Justice requires that the national legislation "provide[s] for clear and precise rules allowing individuals to predict which acts or omissions are liable to be subject to such a duplication of proceedings and

52 Judgement of the Court of Justice of 20 March 2018, *Menci*, C-524/15, ECLI:EU:C:2018:197, paragraph 46.

53 Judgement of the Court of Justice of 20 March 2018, *Garlsson and others*, C-537/16, ECLI:EU:C:2018:193, paragraph 49, judgement of the Court of Justice of 20 March 2018, *Menci*, C-524/15, ECLI:EU:C:2018:197, paragraph 47; in particular in *Garlsson* case the Court emphasized that the Directive on manipulating the market left a margin of choice to the Member States, see to that effect A. Błachnio-Parzych, *Sankcja karna a sankcja administracyjna jako środek przeciwdziałania manipulacji instrumentami finansowymi w wybranych krajach europejskich*, "Studia Prawnicze" 2013, no. 1, pp. 165–187.

54 A. Błachnio-Parzych, *Zasada ne bis in idem...*, p. 40.

55 Ibid., p. 41.

penalties"[56]. Again, the link between the necessity of the national legislation and the clear definition of rules can be hardly seen. The necessary measures are those without which the objective pursued would not [have been] attained. The fact that the rules for the possible duplication of proceedings are clear and precise is rather a question of legal certainty, and thus falls under the first requirement of Article 52(1) of the Charter, namely that the limitation is provided by law. If the necessity of duplication of proceedings is interpreted in the way proposed by the CJEU, then it will be very easy for the Member States to prove such a necessity. What is more, the national court which is asked to assess the necessity of such a duplication will have a rather easy task, because it will "only" have to make sure that the rules for duplication are clear and precise. This will not be difficult to assess as long as such rules stem from the law.

Finally, as far as proportionality *sensu stricto* is concerned, the CJEU formulated two general requirements, namely that the national legislation provides for "rules ensuring coordination which limits to what is strictly necessary the additional disadvantage which results, for the persons concerned, from a duplication of proceedings" and "provides for rules making it possible to ensure that the severity of all of the penalties imposed is limited to what is strictly necessary in relation to the seriousness of the offence concerned"[57]. Such requirements correspond, in fact, to the rules formulated by the ECtHR in *A. and B. v. Norway* for the purpose of assessing "a sufficiently close connection in substance" of the criminal proceedings resulting in criminal sanctions and administrative proceedings resulting in administrative sanctions criminal in nature.

The CJEU has explicitly referred to that case in the *Menci* case[58], and thus opened the door for the national court to assess whether proportionality *sensu stricto* is respected or not. As a consequence, even if both European courts have adopted a different approach towards the interpretation of the *ne bis in idem* principle in the context of the duplication of criminal and administrative proceedings, in the end it will be a matter for the proportionality test. The proportionality of repression is also a requirement stemming from Article 49(3) of the Charter, as emphasized by the CJEU in the *Menci* case. The approach was completely different in *Garlsson,* where the CJEU stated that "in the event of a criminal conviction […] following criminal proceedings, the bringing of the proceedings relating to an administrative fine of a criminal nature exceeds what

56 Judgement of the Court of Justice of 20 March 2018, *Garlsson and others*, C-537/16, ECLI:EU:C:2018:193, paragraph 51, judgement of the Court of Justice of 20 March 2018, *Menci*, C-524/15, ECLI:EU:C:2018:197, paragraph 49.

57 Judgement of the Court of Justice of 20 March 2018, *Garlsson and others*, C-537/16, ECLI:EU:C:2018:193, paragraphs 55–56, judgement of the Court of Justice of 20 March 2018, *Menci*, C-524/15, ECLI:EU:C:2018:197, paragraph 63.

58 Ibid., paragraph 61.

is strictly necessary in order to achieve the objective referred to in paragraph 46 of the present judgment, in so far as that criminal conviction is such as to punish the offence committed in an effective, proportionate and dissuasive manner"[59]. Then it analysed the national legislation, taking into account that the sanctions include a prison sentence and a criminal fine liable to be imposed in the criminal proceedings, [corresponding] to the administrative fine of a criminal nature liable to be imposed in the administrative proceedings. For that reason, the CJEU concluded (subject to the final determination by the referring court) that bringing proceedings for an administrative fine of a criminal nature "exceeds what is strictly necessary in order to achieve the objective referred to in paragraph 46 of the present judgment, in so far as the final criminal conviction is, given the harm caused to the company by the offence committed, such as to punish that offence in an effective, proportionate and dissuasive manner"[60]. Further, the Court considered that the rule of moderation of sanctions applies only to the duplication of pecuniary penalties, and not to the duplication of an administrative fine of a criminal nature and a term of imprisonment, and concluded that such a rule "does not guarantee that the severity of all of the penalties imposed are limited to what is strictly necessary in relation to the seriousness of the offence concerned"[61].

Conclusions

First, in *Menci*, *Garlsson* and *Di Puma* the CJEU decided to interpret the *ne bis in idem* principle autonomously with reference to Article 50(1) of the Charter only, and without taking ECtHR case law into consideration (at least in part, as in the *Garlsson* case). On the one hand, it admitted that Article 52(3) of the Charter required that "the 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 that convention", but at the same time recalled that the Convention was not "a legal instrument which has been formally incorporated into EU law". It also argued that the requirement to interpret the Charter in a manner consistent with the Convention might not adversely affect the autonomy of Union law and of the CJEU[62]. Thus, the argument of preserving the autonomy of EU law served as the basis for the CJEU of shaping its own reasoning in the context of *ne bis in*

59 Judgement of the Court of Justice of 20 March 2018, *Garlsson and others*, C-537/16, ECLI:EU:C:2018:193, paragraph 57.

60 Ibid., paragraph 59.

61 Ibid., paragraph 60.

62 Ibid., paragraphs 23–24, judgement of the Court of Justice of 20 March 2018, *Menci*, C-524/15, ECLI:EU:C:2018:197, paragraphs 22–23.

idem. Having admitted that the *ne bis in idem* principle may be limited, because Article 52(1) of the Charter is applicable, the Court did not take into account the fact that under Protocol No. 7 the only limitation to the *ne bis in idem* principle is enshrined in its Article 4 (2), and refers only to the "reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of a new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which can affect the outcome of the case". As has already been emphasized, under Protocol No. 7 no other limitations are envisaged, and under its Article 4(3) *ne bis in idem* may not be suspended on the basis of Article 15 of the European Convention, which means that the right derived from the *ne bis in idem* principle is a right which may not be subject to derogations, even in exceptional situations[63]. It even concluded that the standard of protection offered by the CJEU is lower than that offered by the ECtHR, which amounts to an infringement of Article 52(3) of the Charter[64].

Secondly, the decisions of both European courts, even if different in reasoning, lead to a gradual erosion of the protection offered by the *ne bis in idem* principle. The ECtHR decided that the duplication of criminal proceedings and administrative proceedings, leading to the imposition of administrative sanctions of a criminal nature, does not constitute a duplication ("*bis*") when the particular requirements of "sufficiently close connection in time and in substance" are met. Thus, the prohibition of prosecution or conviction is not actualised, because the *ne bis in idem* principle does not apply. The CJEU decided that in such a situation the *ne bis in idem* principle applies in general, but at the same time such a duplication was a limitation that could be authorised when the requirements under Article 52(3) of the Charter were met. Again, prohibition of prosecution or conviction is actualised only when it is proved that any requirement from this provision of the Charter is not fulfilled. As has already been remarked above, some of these requirements are interpreted by the CJEU in a manner that raises doubts as to when these requirements would not be met.

Thirdly, as far as the tasks resting upon the national courts are concerned, the analysis – whether the *ne bis in idem* principle prevents prosecution or conviction in the case of duplication of proceedings – necessitates quite elaborate reasoning. It consists of: 1) assessment of whether the administrative proceedings and resulting sanctions are criminal in nature; 2) assessment of whether the second set of proceedings is initiated for the same offences ("*idem*"); 3) assessment of whether the first judicial decision has become final; 4) assessment of whether the second set of proceedings has been initiated ("*bis*"). If all of the above questions are answered affirmatively, the national court – when the case

63 A. Błachnio-Parzych, *Zasada ne bis in idem…*, p. 41.
64 Ibid., p. 41.

involves implementation of EU law in the meaning of Article 51(1) of the Charter – should conduct detailed analyses from the point of view of Article 52(1) of the Charter of: 1) whether the limitation to the *ne bis in idem* is provided by law; 2) whether it respects the essential content of the *ne bis in idem* principle; 3) whether the limitation may be justified by an objective of general interest; 4) whether it is proportionate, namely: a) appropriate; b) necessary; and c) proportionate *sensu stricto*. In general, the discussion is focused on the proportionality test both in the meaning of Article 52(1) of the Charter, and more particularly in the aspect of repression under Article 49(3) of the Charter, which may be a difficult task.

Bibliography

Błachnio-Parzych A., *Sankcja karna a sankcja administracyjna jako środek przeciwdziałania manipulacji instrumentami finansowymi w wybranych krajach europejskich*, „Studia Prawnicze" 2013, no. 1, pp. 165–187.

Błachnio-Parzych A., *Zasada ne bis in idem a obowiązek ustanowienia sankcji skutecznych, proporcjonalnych i odstraszających. Glosa do wyroku TS z dnia 20 marca 2018 r., C-596/16 i C-597/16*, „Europejski Przegląd Sądowy" 2018, no. 12, pp. 37–42.

Jackowski M., *Zasada ne bis in idem w orzecznictwie Europejskiego Trybunału Praw Człowieka*, „Państwo i Prawo" 2012, no. 9. pp. 18–30.

Łacny J., Szwarc M., *Legal Nature of European Union Agricultural Penalties*, "The European Criminal Law Association FORUM" 2012, no. 4.

Łacny J., Szwarc M., *Sankcje w unijnych przepisach rolnych a zasada a zasada ne bis in idem – uwagi na tle wyroku Trybunału Sprawiedliwości w sprawie C-489/10 postępowanie karne v. Ł. Bonda* [in:] A. Błachnio-Parzych, J. Jakubowska-Hara, J. Kosonoga, H. Kuczyńska (ed.), *Problemy wymiaru sprawiedliwości karnej. Księga Jubileuszowa Profesora Jana Skupińskiego*, Warszawa 2013, pp. 894–921.

Łacny J., *Korekty finansowe nakładane przez Komisję Europejską na państwa członkowskie UE za niezgodne z prawem wydatkowanie funduszy UE*, Warszawa 2017.

Łacny J., *Sankcje za naruszenie prawa wspólnotowego* [in:] K. Kowalik-Bańczyk, M. Szwarc-Kuczer, (ed.), *Stosowanie prawa Unii Europejskiej przez sądy*, vol. II, *Zasady, orzecznictwo, piśmiennictwo*, Warszawa 2007, pp. 762–830.

Miąsik D., *Zasada efektywności* [in:] A. Wróbel (ed.), *Stosowanie prawa Unii Europejskiej przez sądy*, vol. I, Warszawa 2010.

Nita B., *O zasadzie ne bis in idem w świetle art. 54 Konwencji wykonawczej z Schengen*, „Europejski Przegląd Sądowy" 2007, no. 7, pp. 4–10.

Ostropolski T., *Naruszenie praw podstawowych jako przesłanka wykonania ENA – uwagi do wyroku Trybunału Sprawiedliwości z 5.04.2016 r. w sprawach połączonych C-404/15 Aranyosi i C-659/15 PPU Caldararu*, „Europejski Przegląd Sądowy" 2016, no. 11, pp. 20–26.

Sakowicz A., *Zasada ne bis in idem w prawie karnym*, Białystok 2011.

Sołtysińska A., *Zasada ne bis in idem z art. 54 konwencji wykonawczej z Schengen*, „Europejski Przegląd Sądowy" 2007, no. 12, pp. 35–40.

Szwarc, M. *Wpływ prawa wspólnotowego na prawo karne państw członkowskich*, Warszawa 2006.

Szwarc M., Zakres związania państw członkowskich Kartą Praw Podstawowych Unii Europejskiej w kontekście stosowania prawa karnego (uwagi na tle orzecznictwa TSUE), [The scope of application of the Charter of Fundamental Rights of the European Union by the Member States in the criminal law context (remarks on the recent CJEU case law)], „Studia Prawnicze" 2017,

no. 3, pp. 47–79, http://czasopisma.inp.pan.pl/index.php/sp/article/view/420 [access: 3.12.2019].

Szwarc M., Łączne zastosowanie sankcji administracyjnych i karnych w świetle zasady ne bis in idem, „Państwo i Prawo" 2017 no. 12 (862), pp. 43–56.

Wróbel A., *Autonomia proceduralna państw członkowskich. Zasada efektywności i zasada efektywnej ochrony sądowej w prawie Unii Europejskiej*, „Ruch Prawniczy, Ekonomiczny i Społeczny" 2005, no. 1, pp. 35–58.

SUMMARY

The Member States' obligations to ensure effectiveness of EU law and to respect fundamental rights are two cornerstones of the EU edifice. For the purpose of the analyses in the article, effectiveness is understood in the broadest meaning possible as the general obligation of the Member States to give full effect to EU law in their domestic legal orders. At the same time, the Member States shall respect the fundamental rights as enshrined in the Charter of Fundamental Rights of the European Union "when they are implementing Union law". This includes Art. 50 of the Charter, where the *ne bis in idem* principle is enshrined.

The recent rulings of the CJEU of 20 March 2018 in the *Di Puma*, *Garlsson and others* and *Menci* cases, in which the *ne bis in idem* principle has been interpreted, exemplify the difficult choices that have to be made in a situation when the repression undertaken by a Member State in order to ensure the full effect of EU law may infringe a fundamental right provided for in the Charter. The analyses undertaken in the article concern: the role of sanctions as a tool to ensure effectiveness of EU law, the obligation to respect the *ne bis in idem* principle in the context of criminal repression, and the recent case law of the European Court of Human Rights and the Court of Justice of the European Union concerning interpretation of the *ne bis in idem* principle in the context of cumulation of criminal and administrative proceedings.

The main conclusion is that the decisions of both European courts (ECtHR and CJEU), even if different in reasoning, lead to a gradual erosion of the protection offered by the *ne bis in idem* principle. It is also concluded that, as far as the tasks resting upon the national courts are concerned, analysis of whether the *ne bis in idem* principle prevents prosecution or conviction in the case of duplication of proceedings necessitates quite elaborated reasoning, in which proportionality is the main issue.

Key words: *ne bis in idem*, effectiveness of EU law, fundamental rights, effectiveness of EU law, fundamental rights