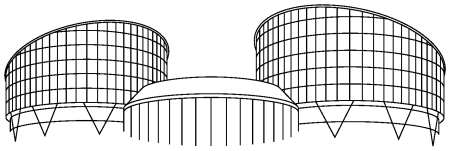

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF A AND B v. NORWAY

(Applications nos. 24130/11 and 29758/11)

JUDGMENT

STRASBOURG

15 November 2016

This judgment is final but it may be subject to editorial revision.

In the case of A and B v. Norway,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Guido Raimondi, *President*,
Işıl Karakaş,
Luis López Guerra,
Mirjana Lazarova Trajkovska,
Angelika Nußberger,
Boštjan M. Zupančič,
Khanlar Hajiyev,
Kristina Pardalos,
Julia Laffranque,
Paulo Pinto de Albuquerque,
Linos-Alexandre Sicilianos,
Paul Lemmens,
Paul Mahoney,
Yonko Grozev,
Armen Harutyunyan,
Gabriele Kucsko-Stadlmayer, *judges*,
Dag Bugge Nordén, ad hoc *judge*,

and Lawrence Early, *Jurisconsult*,

Having deliberated in private on 13 January and 12 September 2016,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in two applications (nos. 24130/11 and 29758/11) against the Kingdom of Norway lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") on 28 March 2011 and 26 April 2011 respectively, by two Norwegian nationals, Mr A and Mr B ("the applicants"). The President of the Grand Chamber acceded to the applicants' request not to have their names disclosed (Rule 47 § 4 of the Rules of Court).

2. The applicants were represented by Mr R. Kjeldahl, a lawyer practising in Oslo. The Norwegian Government ("the Government") were represented successively by Mr M. Emberland, by Mr C. Reusch and again by Mr Emberland, of the Attorney General's Office (Civil Matters), as their Agent.

3. Mr Erik Møse, the judge elected in respect of Norway, was unable to sit in the case (Rule 28). On 20 February 2015 the President of the Chamber

designated Mr Dag Bugge Nordén to sit as an *ad hoc* judge in his place (Article 26 § 4 of the Convention and Rule 29).

4. The applicants alleged, in particular, that, in breach of Article 4 of Protocol No. 7 to the Convention, they had been both prosecuted and punished twice in respect of the same tax offence.

5. On 26 November 2013 the Chamber decided to join the two applications and to give notice of them to the Government.

6. On 7 July 2015 a Chamber of the First Section composed of Isabelle Berro, President, Khanlar Hajiyev, Mirjana Lazarova Trajkovska, Julia Laffranque, Paulo Pinto de Albuquerque, Linos-Alexandre Sicilianos and Ksenija Turković, judges, and Søren Nielsen, Section Registrar, relinquished jurisdiction in favour of the Grand Chamber, neither of the parties having objected to relinquishment (Article 30 of the Convention and Rule 72).

7. The composition of the Grand Chamber was determined according to the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24. András Sajó and Nona Tsotsoria, who were prevented from sitting in the case at the time of the adoption of the judgment, were replaced by Kristina Pardalos and Armen Harutyunyan, first and second substitute judges (Rule 24 § 3).

8. The applicants and the Government each filed observations on the admissibility and merits of the applications.

9. In addition third-party comments were received from the Governments of Bulgaria, the Czech Republic, Greece, France, the Republic of Moldova and Switzerland, which had been granted leave to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 3).

10. A hearing took place in public in the Human Rights Building, Strasbourg, on 13 January 2016 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Mr M. EMBERLAND, Attorney, Attorney-General's Office (Civil Matters) *Agent*,
Ms J. SANDVIG, Attorney, Attorney-General's Office (Civil Matters)
Mr C. REUSCH, Attorney, Attorney-General's Office (Civil Matters) *Counsel*,
Mr A. TVERBERG, Deputy Director General, Legislation Department Royal Norwegian Ministry of Justice and Public Security
Mr L. STOLTENBERG, Senior Public Prosecutor, National Authority for Investigation and Prosecution of Economic and Environmental Crime,
Mr D.E. EILERTSEN, Senior Tax Auditor, Tax Norway East A*dvisers*;

(b) *for the applicants*
Mr R. KJELDAHL, Attorney, *Counsel*.

The Court heard addresses by Mr Kjeldahl and Ms Sandvig and the replies given by them to the questions put by the judges.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

11. The first applicant, Mr A, was born in 1960 and lives in Norway. The second applicant, Mr B, was born in 1965 and lives in Florida, United States of America.

12. The applicants and Mr E.K. owned a Gibraltar-registered company Estora Investment Ltd. ("Estora"). Mr T.F. and Mr G.A. owned the Samoa/Luxembourg-registered company Strategic Investment AS ("Strategic"). In June 2001 Estora acquired 24% of the shares in Wnet AS. Strategic acquired 46% of the shares in Wnet AS. In August 2001 all the shares in Wnet AS were sold to Software Innovation AS, at a substantially higher price. The first applicant's share of the sale price was 3,259,341 Norwegian *kroner* (NOK) (approximately 360,000 euros (EUR)). He transferred this amount to the Gibraltar-registered company Banista Holding Ltd., in which he was the sole shareholder. The second applicant's share of the sale price was NOK 4,651,881 (approximately EUR 500,000). He transferred this amount to Fardan Investment Ltd., in which he was the sole shareholder.

Mr E.K., Mr G.A. and Mr T.F. made gains on similar transactions, while Mr B.L., Mr K.B. and Mr G.N. were involved in other undeclared taxable transactions with Software Innovation AS.

The revenue from these transactions, amounting to approximately NOK 114.5 million (approximately EUR 12.6 million), was not declared to the Norwegian tax authorities, resulting in unpaid taxes totalling some NOK 32.5 million (approximately EUR 3.6 million).

13. In 2005 the tax authorities started a tax audit on Software Innovation AS and looked into the owners behind Wnet AS. On 25 October 2007 they filed a criminal complaint against T.F. with *Økokrim* (the Norwegian National Authority for Investigation and Prosecution of Economic and Environmental Crime) with regard to matters that later led to the indictment of the first applicant, along with the other persons mentioned above and the second applicant, for aggravated tax fraud.

The persons referred to in paragraph 12 above were subsequently prosecuted, convicted and sentenced to terms of imprisonment for tax fraud in criminal proceedings. It may also be noted that:

- the prison term to which Mr E.K. was sentenced at first instance was upheld at second instance, even though the second-instance court found it somewhat mild; in the meantime he had had a 30% tax penalty imposed on him;
- the length of Mr B.L.'s term of imprisonment was fixed in the light of his having previously had a 30% tax penalty imposed on him;
- Mr G.A. was neither sentenced to a fine nor had a tax penalty imposed on him;
- Mr T.F. was in addition sentenced to a fine corresponding to the level of a 30% tax penalty;
- Mr K.B. and Mr G.N. were each sentenced to a fine in accordance with the approach set out in the Supreme Court's ruling in *Rt*. 2011 p. 1509, with reference to *Rt*. 2005 p. 129, summarised at paragraph 50 below.

A summary of the particular circumstances pertaining to the first and second applicants is given below.

A. The first applicant

14. The first applicant was interviewed first as a witness on 6 December 2007; on 14 December 2007 he was arrested and gave evidence as a person charged ("*siktet*"). He admitted the factual circumstances but did not accept criminal liability. He was released after four days.

15. On 14 October 2008 the first applicant was indicted for violations of sections 12-1(1)(a), cf. 12-2, of the Tax Assessment Act 1980 (*ligningsloven*) (see paragraph 43 below for the text of these provisions).

16. On 24 November 2008 the Tax Administration (*skattekontoret*) amended his tax assessment for the years 2002 to 2007, after issuing a warning to that effect on 26 August 2008, with reference *inter alia* to the tax audit, to the criminal investigation, to the evidence given by him, as mentioned in paragraph 13 above, and to documents seized by *Økokrim* in the investigation. For the year 2002 the amendment was made on the ground that the first applicant had omitted to declare a general income of NOK 3,259,341 (approximately EUR 360,000), having instead declared a loss of NOK 65,655. Moreover, with reference to sections 10-2(1) and 10-4(1) of the Tax Assessment Act (see paragraph 42 below for the text of these provisions), the Tax Administration ordered him to pay a tax penalty of 30%, to be calculated on the basis of the tax that he owed in respect of the undeclared amount. The decision had regard *inter alia* to evidence given by the first and second applicants during their interviews in the criminal investigation. The first applicant did not lodge an appeal against that

decision and paid the outstanding tax due, with the penalty, before the expiry of the three-week time-limit for lodging an appeal.

17. On 2 March 2009 the Follo District Court (*tingrett*) convicted the first applicant on charges of aggravated tax fraud and sentenced him to one year's imprisonment on account of his having failed to declare, in his tax return for 2002, the sum of NOK 3,259,341 in earnings obtained abroad. In determining the sentence the District Court had regard to the fact that the first applicant had already been significantly sanctioned by the imposition of the tax penalty.

18. The first applicant appealed, complaining that, in breach of Article 4 of Protocol No. 7 to the European Convention on Human Rights, he had been both prosecuted and punished twice: in respect of the same offence under section 12-1 he had been charged and indicted by the public prosecutor, had then had a tax penalty imposed on him by the tax authorities, which he had paid, and had thereafter been convicted and sentenced.

19. In a judgment of 12 April 2010 the Borgarting High Court (*lagmannsrett*) unanimously rejected his appeal; similar reasoning was subsequently given by the Supreme Court (*Høyesterett*) in a judgment of 27 September 2010 (summarised below).

20. In its judgment of 27 September 2010 the Supreme Court first considered whether the two sets of proceedings in question had concerned the same factual circumstances (*samme forhold*). In this connection it noted the developments in the Convention case-law expounded in the Grand Chamber judgment of *Sergey Zolotukhin v. Russia* ([GC], no. 14939/03, §§ 52, 53, 80-82, 84, ECHR 2009) and the attempt in that judgment to harmonise through the following conclusion:

> "... 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. ... The Court's inquiry should therefore focus on those facts which constitute a set of concrete factual circumstances involving the same defendant and [are] inextricably linked together in time and space ...".

21. In the present instance, the Supreme Court observed, there was no doubt that the factual circumstances underlying the decision to impose tax penalties and the criminal prosecution had sufficient common features to meet these criteria. In both instances, the factual basis was the omission to declare income on the tax return. The requirement that the proceedings relate to the same matter had accordingly been met.

22. The Supreme Court next examined whether both sets of proceedings concerned an "offence" within the meaning of Article 4 of Protocol No. 7. In this regard the Supreme Court reiterated its ruling as reported in *Norsk Retstidende* ("*Rt.*") 2002 p. 509 (see paragraph 45 below) that tax penalties at the ordinary level (30%) were consistent with the notion of "criminal charge" in Article 6 § 1. That earlier assessment had relied on the three

so-called "*Engel* criteria" (the legal classification of the offence under national law; the nature of the offence; and the degree of severity of the penalty that the person concerned risked incurring) as spelled out in the Court's judgment in *Engel and Others v. the Netherlands* (8 June 1976, § 82, Series A no. 22). Of importance for the Supreme Court's assessment was the general preventive purpose of the tax penalty and the fact that, because 30% was a high rate, considerable sums could be involved. The Supreme Court further had regard to its judgment as reported in *Rt*. 2004 p. 645, where it had held in the light of the Strasbourg case-law (to the effect that the notion of "penalty" should not have different meanings under different provisions of the Convention) that a 30% tax penalty was also a criminal matter for the purposes of Article 4 of Protocol No. 7 – a stance adopted without further discussion in *Rt*. 2006 p. 1409.

23. The Supreme Court also noted that both the Directorate of Taxation (*Skattedirektoratet*) and the Director of Public Prosecutions (*Riksadvokaten*) were of the view that it was unlikely that a tax penalty at the ordinary level would not be deemed criminal punishment for the purposes of Article 4 of Protocol No. 7.

24. The Supreme Court further had regard to the Court's more recent case-law (*Mjelde v. Norway* (dec.), no. 11143/04, 1 February 2007; *Storbråten v. Norway* (dec.), no. 12277/04, 1 February 2007; *Haarvig v. Norway* (dec.), no. 11187/05, 11 December 2007, with references to *Malige v. France*, 23 September 1998, § 35, *Reports of Judgments and Decisions* 1998-VII; and *Nilsson v. Sweden* (dec.), no. 73661/01, ECHR 2005-XIII) to the effect that a wider range of criteria than merely the *Engel* criteria applied to the assessment under Article 4 of Protocol No. 7. It found confirmation in *Sergey Zolotukhin* (cited above, §§ 52-57) – later followed in *Ruotsalainen v. Finland* (no. 13079/03, §§ 41-47, 16 June 2009) – that the three *Engel* criteria for establishing the existence of a "criminal charge" for the purposes of Article 6 applied equally to the notion of criminal punishment in Article 4 of Protocol No. 7.

25. Against this background, the Supreme Court found no ground on which to depart from its above-mentioned rulings of 2004 and 2006, holding that tax penalties at the ordinary level were to be regarded as "criminal punishment" (*straff*) for the purposes of Article 4 of Protocol No. 7.

26. It went on to observe that a condition for protection under the above-mentioned provision was that the decision which barred further prosecution – in this case the decision of 24 November 2008 to impose ordinary tax penalties – had to be final. That decision had not been appealed against to the highest administrative body within the three-week time-limit, which had expired on 15 December 2008, and was in this sense final. If, on the other hand, the expiry of the six-month time-limit for lodging a judicial appeal under section 11-1(4) of the Tax Assessment Act were to be

material, the decision had not yet become final when the District Court delivered its judgment of 2 March 2009.

27. The words "finally acquitted or convicted" in Article 4 of Protocol No. 7 had been formulated with a view to situations where the barring decision was a judgment in a criminal case. The Court had established that a decision was final when it was *res judicata*, when no further ordinary remedies were available. In this regard, the time when a decision became *res judicata* according to the rules of national law would be decisive. Neither the wording of the provision, nor its drafting history, nor the case-law provided any guidance for situations where the barring decision was an administrative one. It was pointed out that, in *Rt*. 2002 p. 557, the Supreme Court had expressed an authoritative view to the effect that a tax assessment decision, including a decision on tax penalties, ought to be regarded as final when the taxpayer was precluded from challenging it (p. 570), without specifying, however, whether it was the time-limit for an administrative appeal, or rather for a judicial appeal, which was decisive. In the present case, the Supreme Court observed that the best solution would be to consider that the three-week time-limit for an administrative appeal was decisive in relation to Article 4 of Protocol No. 7. Otherwise, there would be clarity only after six months in cases where the taxpayer did not institute proceedings before the courts and, where he or she did so, only after a legally enforceable judgment – a period that would vary and could be lengthy. The decision of 24 November 2008 was therefore to be considered as final for the purposes of Article 4 of Protocol No. 7.

28. The Supreme Court noted that the first applicant had been charged on 14 December 2007 and that the warning about the amendment of his tax assessment had been sent on 26 August 2008. Thereafter the case concerning the tax penalties and the criminal case had been conducted in parallel until they had been decided respectively by a decision of 24 November 2008 and a judgment of 2 March 2009. A central question in this case was whether there had been successive prosecutions, which would be contrary to Article 4 of Protocol No. 7, or parallel treatment, which was permissible to some extent. In this connection the Supreme Court had regard to two inadmissibility decisions, *R.T. v. Switzerland* (dec.), no. 31982/96, 30 May 2000; and *Nilsson v. Sweden*, cited above, in particular the following passage from the latter:

> "However, the Court is unable to agree with the applicant that the decision to withdraw his driving licence amounted to new criminal proceedings being brought against him. While the different sanctions were imposed by two different authorities in different proceedings, there was nevertheless a sufficiently close connection between them, in substance and in time, to consider the withdrawal to be part of the sanctions under Swedish law for the offences of aggravated drunken driving and unlawful driving (see *R.T. v. Switzerland*, cited above, and, *mutatis mutandis*, *Phillips v. the United Kingdom*, no. 41087/98, § 34, ECHR 2001-VII). In other words, the withdrawal did not imply that the applicant was 'tried or punished again ... for an

offence for which he had already been finally ... convicted', in breach of Article 4 § 1 of Protocol No. 7."

29. In the present case, the Supreme Court held that there could be no doubt that there was a sufficient connection in substance and time. The two cases had their basis in the same factual circumstances – the lack of information on the tax return which had led to a deficient tax assessment. The criminal proceedings and the administrative proceedings had been conducted in parallel. After the first applicant had been charged on 14 December 2007, a warning had followed on 26 August 2008 about an amendment to his tax assessment, then an indictment on 14 October 2008, the tax authorities' decision of 24 November 2008 to amend the assessment, and the District Court's judgment of 2 March 2009. To a great extent the administrative-law and criminal-law processing had been interconnected.

30. The purpose behind Article 4 of Protocol No. 7, to provide protection against the burden of being subjected to a new procedure, had applied to a lesser degree here, in as much as the first applicant had had no legitimate expectation of being subjected to only one procedure. In such a situation the interest in ensuring effective prosecution was preponderant.

B. The second applicant

31. Following the tax audit in 2005 referred to in paragraph 13 above, during the autumn of 2007 the tax authorities reported to *Økokrim* that the second applicant had failed to declare on his tax return for the tax year 2002 income of NOK 4,561,881 (approximately EUR 500,000) earned from his sale of certain shares.

32. On 16 October 2008 the Tax Administration put the second applicant on notice that it was considering amending his tax assessment and imposing a tax penalty, referring *inter alia* to the tax audit, the criminal investigation and the evidence given by him, mentioned in paragraph 13 above, and to documents seized by *Økokrim* in the investigation. On 5 December 2008 the Tax Administration amended his tax assessment to the effect that he owed NOK 1,302,526 (approximately EUR 143,400) in tax in respect of the undeclared income. In addition, with reference to sections 10-2(1) and 10-4(1) of the Tax Assessment Act, it decided to impose a tax penalty of 30%. The decision had regard *inter alia* to evidence given by the first and second applicants during interviews in the criminal investigation. The second applicant paid the tax due, with the penalty, and did not appeal against the decision, which became final on 26 December 2008.

33. In the meantime, on 11 November 2008 the public prosecutor indicted the second applicant for a violation of section 12-1(1)(a), cf. section 12-2, of the Tax Assessment Act on the ground that for the tax year(s) 2001 and/or 2002 he had omitted to declare income of NOK 4,651,881 on his tax return, which represented a tax liability of

NOK 1,302,526. The public prosecutor requested the Oslo City Court (*tingrett*) to pass a summary judgment based on his confession (*tilståelsesdom*). In addition, Mr E.K., Mr B.L. and Mr G.A. pleaded guilty and consented to summary trials on a guilty plea.

34. On 10 February 2009 the second applicant (unlike E.K., B.L. and G.A.) withdrew his confession, as a result of which the public prosecutor issued a revised indictment on 29 May 2009, including the same charges.

35. On 30 September 2009 the City Court, after holding an adversarial hearing, convicted the second applicant on the charges of aggravated tax fraud and sentenced him to one year's imprisonment, account being taken of the fact that he had already had a tax penalty imposed on him.

36. The second applicant appealed against the City Court procedure to the Borgarting High Court, arguing in particular that by reason of the prohibition against double jeopardy in Article 4 of Protocol No. 7, the fact that he had had a tax penalty imposed on him constituted a bar against criminal conviction. Thus he requested that the City Court's judgment be quashed (*opphevet*) and that the prosecution case be dismissed (*avvist*) from the courts.

37. In a judgment of 8 July 2010 the High Court rejected the second applicant's appeal, relying essentially on its reasoning in the case of the first applicant, which was similar to that of the Supreme Court summarised above (see paragraphs 20 to 30 above). Thus, the High Court found that the tax authorities' decision of 5 December 2008 ordering him to pay a tax penalty of 30% did constitute a criminal punishment (*straff*); that the decision had become "final" upon the expiry of the time-limit for lodging an appeal on 26 December 2008; and that the decision on the tax penalty and the subsequent criminal conviction concerned the same matter.

38. Moreover, as in the case of the first applicant, the High Court considered that parallel proceedings – both administrative and criminal – were to some extent permissible under Article 4 of Protocol No. 7, provided that the second proceedings had commenced before the first had become final. Where that minimum requirement had been fulfilled, an assessment had to be made of the state of progress of the second set and, not least, as to whether there was a sufficient connection in substance and in time between the first and second decisions.

39. As to the concrete assessment of the second applicant's case, the High Court observed that the criminal proceedings and the tax proceedings had in fact been conducted in parallel since as far back as the tax authorities' complaint to the police in the autumn of 2007 and until the decision to impose the tax penalty had been taken in December 2008. This state of affairs was similar to the case of the first applicant. The second applicant had been indicted and the case referred to the City Court with a request for a summary judgment on the basis of his confession on 11 November 2008, before the decision on the tax penalty. The criminal

proceedings had thus reached a relatively advanced stage by the time the decision to impose the tax penalty had been taken. The *nine*-month period – from when the tax authorities' decision of 5 December 2008 had become final until the second applicant's conviction of 30 September 2009 by the City Court – had been somewhat longer than the *two-and-a-half*-month period in the case of the first applicant. However, this could be explained by the fact that the second applicant had withdrawn his confession in February 2009, with the consequence that he had had to be indicted anew on 29 May 2009 and an ordinary trial hearing had had to be scheduled. Against this background, the High Court (like the City Court) concluded that there was undoubtedly a sufficient connection in substance and time between the decision on the tax penalties and the subsequent criminal conviction.

40. On 29 October 2010 the Appeals Leave Committee of the Supreme Court refused the second applicant leave to appeal, finding that such leave was warranted neither by the general importance of the case nor by any other reason.

II. RELEVANT DOMESTIC LAW AND PRACTICE

41. By virtue of section 10-2(1) of chapter 10 on Tax Penalties ("*Tilleggsskatt*") of the Tax Assessment Act 1980, taxpayers who have provided the tax authorities with inaccurate or incomplete information which has led to or could have led to a deficiency in their tax assessment may be liable to pay a tax penalty. Under the terms of section 10-4(1), tax penalties will in general be assessed at the level of 30% of the amount of tax which has been or could have been evaded.

42. At the time of the applicants' offences, sections 10-2, 10-3 and 10-4 of the Act provided as follows:

Section 10-2 (Tax penalties)

"1. If the tax authorities find that the taxpayer has given the tax authorities incorrect or incomplete information in a tax return, income statement, appeal or other written or oral statement, which has or could have resulted in a deficiency in the assessment of tax, a tax penalty shall be imposed on the taxpayer as a percentage of the tax that has or could have been evaded.

Social security contributions are also regarded as tax in this connection.

2. If a taxpayer has failed to submit a tax return or income statement as required, the tax penalty shall be calculated based on the tax that is determined in the assessment.

3. A wealth or income supplement that provides grounds for the imposition of a tax penalty is regarded as representing the upper part of the taxpayer's wealth or income. If the taxpayer is to pay a tax penalty based on different rates for the same year, the tax on the basis of which the tax penalty is to be calculated will be distributed proportionately based on the amount of the wealth or income to which the various rates are to apply.

4. The same obligation that applies to the taxpayer pursuant to this section also applies to his or her estate or heirs.

5. Before a tax penalty is assessed, the taxpayer shall be notified and given an appropriate deadline within which to express his or her opinion.

6. Tax penalties may be assessed within the deadlines provided for in section 9-6. They may be assessed at the same time as the assessment of the tax on the basis of which they are to be calculated or in a subsequent special assessment."

Section 10-3 (Exemption from tax penalties)

"Tax penalties shall not be imposed:

(a) as a result of obvious calculation or clerical errors in the taxpayer's statements, or

(b) where the taxpayer's offence must be regarded as excusable owing to illness, old age, inexperience or other cause for which he or she cannot be blamed, or

(c) where the tax penalty is less than NOK 400 in total."

Section 10-4 (Tax penalty rates)

"1. Tax penalties shall in general be assessed at 30 per cent. If an act as mentioned in section 10-2(1) has been committed wilfully or with gross negligence, a tax penalty of up to a maximum of 60 per cent may be assessed. The rate shall be 15 per cent where the incorrect or incomplete information applies to items that are declared without solicitation by an employer or other party pursuant to Chapter 6, or applies to circumstances that are easy to verify by means of information otherwise available to the tax authorities.

2. Tax penalties shall be assessed at half the rates that are specified in subsection 1, first and third sentences, where there are circumstances as mentioned in section 10-3 (b), but these circumstances do not dictate that the tax penalty must be eliminated completely.

3. Tax penalties may be calculated at a lower rate than that specified in subsection 2 or omitted where the taxpayer, or the estate or heirs thereof, voluntarily correct or supplement the information previously provided, so that the correct tax can be calculated. This does not apply if the correction may be regarded as having been brought about by control measures that have been or will be implemented or by information that the tax authorities have obtained or could have obtained from other parties."

43. Chapter 12 on Punishment ("*Straff*") includes the following provisions of relevance to the present case:

Section 12-1 (Tax fraud)

"1. A person shall be punished for tax fraud if he or she, with intent or as a result of gross negligence,

(a) provides the tax authorities with incorrect or incomplete information when he or she is aware or ought to be aware that this could lead to advantages pertaining to taxes or charges, ..."

Section 12-2 (Aggravated tax fraud)

"1. Aggravated tax fraud shall be punished by a fine or up to six years' imprisonment. Aiding and abetting shall be punished likewise.

2. In deciding whether tax fraud is aggravated, particular emphasis shall be placed on whether the act may lead to the evasion of a very significant amount in tax or charges, if the act is carried out in a manner which makes its discovery particularly difficult, if the act has been carried out by abuse of position or a relationship of trust or if there has been aiding and abetting in connection with the performance of professional duties.

3. In application of the criteria stated in subsection 2, several offences may be considered in conjunction.

4. The present section shall also be applicable in the event of ignorance about the factors that render the act aggravated where such ignorance is seriously negligent."

44. According to the Supreme Court's case-law, the imposition of a tax penalty of 60% is to be viewed as a "criminal charge" within the meaning of Article 6 of the Convention (*Rt*. 2000 p. 996). Where criminal charges have been brought thereafter on account of the same conduct, the trial court ought to dismiss the charges; otherwise there would be a breach of Article 4 of Protocol No. 7 (two plenary judgments of 3 May 2002 reported in *Rt*. 2002 p. 557 and *Rt*. 2002 p. 497).

45. The Supreme Court also ruled that liability for a 30% tax penalty constituted a "criminal charge" for the purposes of Article 6 of the Convention (third judgment of 3 May 2002, *Rt*. 2002 p. 509). In subsequent judgments reported in *Rt*. 2004 p. 645 and *Rt*. 2006 p. 1409, it held that a 30% tax penalty was also a criminal matter for the purposes of Article 4 of Protocol No. 7.

46. It should also be pointed out that, with respect to the nature of ordinary penalties of 30% the Supreme Court referred to the drafting history (*Ot.prp.nr 29 (1978-1979*), pp. 44-45). It found that the Ministry attached significant weight to considerations of general prevention. A strong prospect of a sanction in the form of a tax penalty was viewed as more important than having fewer and stricter (criminal) sanctions. The tax penalty was first and foremost to be a reaction to a taxpayer's having provided incorrect or incomplete returns or information to the tax authorities, and to the considerable work and costs incurred by the community in carrying out checks and investigations. It was considered that those costs should to a certain extent be borne by those who had provided the incorrect or incomplete information (*Rt*. 2002 p. 509, at p. 520). The purposes of the rules on ordinary tax penalties were first and foremost characterised by the need to enhance the effectiveness of the taxpayer's duty to provide information and considerations of general prevention (*Rt*. 2006 p. 1409). The taxpayer had an extensive duty to provide such information and material as was relevant for the tax assessment. This duty was fundamental to the entire national tax system and was underpinned by a

system of audits and effective sanctions in the event of a violation. Tax assessment was a mass operation involving millions of citizens. The purpose of tax penalties was to secure the foundations of the national tax system. It was accepted that a properly functioning taxation system was a precondition for a functioning State and thus a functioning society (*Rt*. 2002 p. 509, at p. 525).

47. In a plenary judgment of 14 September 2006, following the Court's inadmissibility decision of 14 September 2004 in the case of *Rosenquist v. Sweden* ((dec.), no. 60619/00, 14 September 2004), the Supreme Court held that the imposition of a tax penalty of 30% and criminal proceedings for tax fraud did not concern the same offence within the meaning of Article 4 of Protocol No, 7 (*Rt*. 2006 p. 1409). In its judgment (of September 2010) in the first applicant's case, the Supreme Court reversed this case-law and found that the administrative proceedings and the criminal proceedings concerned the same offence for the purpose of Article 4 of Protocol No. 7 (see paragraph 20 above).

48. In the meantime, following the Court's judgment of 10 February 2009 in *Sergey Zolotukhin v. Russia* (cited above) the Director of Public Prosecutions (*Riksadvokaten*) issued on 3 April 2009 Guidelines (RA-2009-187) with immediate effect. According to these guidelines, the Supreme Court's judgment of 2006 could no longer be followed. The guidelines stated *inter alia* as follows:

> **"4. The same offence – the notion of 'sameness'**
>
> It has traditionally been assumed that the notion of *idem* in Article 4 of Protocol No. 7 comprised two elements, one concerning the factual circumstances and another relating to the law. According to this interpretation, the second set of proceedings (in practice, the criminal case) would only concern the same offence as the previous set (in practice, the tax penalty) if both cases concerned the same facts – 'the same conduct' – and if the content of the relevant provisions was mainly identical (contained the 'same essential elements').
>
> In its plenary decision in Rt-2006-1409, the Supreme Court found – with particular reference to the European Court's inadmissibility decision of 14 September 2004 in *Rosenquist v. Sweden* (dec.) no. 60619/00 – that a decision to impose ordinary tax penalties did not preclude subsequent criminal proceedings, since the two proceedings concerned different offences within the meaning of Article 4 of Protocol No. 7. The majority (14 justices) found that the provision regarding ordinary tax penalties in section 10-2 of the Tax Assessment Act, cf. Section 10-4(1) first sentence, did not contain the same essential elements as the penal provision in section 12-1 of the Tax Assessment Act. In the view of the Supreme Court, the decisive difference lay in the fact that, while the penal provision could only be applied in cases involving intent or gross negligence, ordinary tax penalties were imposed on a more or less objective basis. Reference was also made to the difference in purpose between these sanctions.
>
> In the Grand Chamber judgment in *Zolotukhin*, the Court carried out an extensive review of the principle of the notion of '*idem*' in Article 4 of the Protocol, which led to the Court deviating from the previously prevailing interpretation. Following *Zolotukhin*, it is clear that the assessment of whether both proceedings concern the

same offence must take place on the basis of the act alone (see in particular paragraphs 82 and 84 of the judgment). The two sets of proceedings will concern the same offence if they both apply to 'identical facts or facts which are substantially the same' (paragraph 82). The assessment should therefore 'focus on those facts which constitute a set of concrete factual circumstances involving the same defendant and inextricably linked together in time and space ...' (paragraph 84).

In the opinion of the Director General of Public Prosecutions, the Supreme Court's view in Rt-2006-1409, which was primarily based on differences in the criterion of guilt, cannot be upheld following the European Court's judgment in *Zolotukhin*. As long as the imposition of tax penalties and the subsequent criminal case are based on the same act or omission, as will normally be the case, it must be assumed that, pursuant to Article 4 of Protocol No. 7, the imposition of ordinary tax penalties will also preclude subsequent criminal proceedings. Following discussions with the Norwegian Directorate of Taxes, the Director General of Public Prosecutions understands that the Directorate shares this opinion.

The new notion of '*idem*' in Article 4 of the Protocol will undoubtedly give rise to new questions about how great the differences in factual circumstances must be before sameness is deemed non-existent. However, these questions must be resolved in practice as the cases arise. It should be noted that the discussion in the *Zolotukhin* judgment indicates that the Court is less inclined to consider a sequence of events as one entity than is Norwegian domestic law in connection with the assessment of whether a continued offence exists.

5. New procedure

As is known, the previous Guidelines (see in particular section 3 of the Director General of Public Prosecutions' letter of 26 March 2007 (RA-2007-120) to the regional offices of the public prosecutors and the chiefs of police) were based on the fact that, for ordinary tax penalties, it was possible to apply the two-track system set out in the Tax Assessment Act. Following the change in the European Court's case-law, it is necessary to apply a 'one-track' system also as regards ordinary tax penalties.

As described above, the Director General of Public Prosecutions and the Norwegian Directorate of Taxes find that it is not justifiable to base a new procedure on the assumption that the courts will no longer find that imposition of ordinary tax penalties constitutes a criminal sanction within the meaning of the Convention. The issue is presumably arguable, but there is too much uncertainty; also bearing in mind the relatively large number of cases involved.

Even if the Court's case law has not changed as regards parallel proceedings, we hold – as previously – that in the event of mass action – which is what we would be facing – it will be too complicated to base a procedure on parallel proceedings, i.e. on the administrative track and in the courts. Another matter is that in individual cases, where circumstances permit, agreements can be entered into with a view to parallel proceedings.

Following discussions, the Director General of Public Prosecutions and the Norwegian Directorate of Taxes agree on the following procedure: ..."

49. The Guidelines went on to set out the modalities of the "new procedures".

(a) As to new cases, namely those in which a decision had not yet been taken by the tax authority, the latter was to consider, on an independent

basis, whether the punishable act was so serious as to warrant being reported to the police. If it decided to report the case, no tax penalty was to be imposed. Where a tax penalty was to be imposed, the case was not to be reported to the police.

As regards cases that had been reported to the police, it was pointed out that the imposition of a fine (through a criminal-law penalty notice or judgment) precluded a subsequent decision to impose a tax penalty. If the prosecuting authority found no basis for prosecution, the case was to be referred back to the tax authority for continued consideration and the person concerned was to be informed accordingly.

In cases where the tax authority had imposed an ordinary tax penalty and had also filed a report with the police, but where a decision to prosecute had yet to be made ("pending reports"), the proceedings ought to be dropped.

(b) Cases where criminal-law penalty notices had been issued but had not been accepted and where the tax authority had imposed tax penalties prior to reporting the case to the police, ought to be withdrawn and dropped. Penalty notices that had been accepted ought to be cancelled by the higher prosecuting authority. On the other hand, with reference to the power of discretion under Article 392(1) of the Code of Criminal Procedure recognised by the plenary Supreme Court in its judgment in Rt-2003-359, it was not necessary to cancel penalty notices accepted before 10 February 2009, the date of delivery of the *Zolotukhin* judgment.

(c) As regards cases brought to trial in the first-instance courts – on the basis of an indictment, a non-accepted penalty notice or a request for a judgment rendered on a guilty plea in summary proceedings – the prosecuting authority was to withdraw the case and drop the charges if the trial hearing had not yet taken place or, if it had, enter a claim for the case to be dismissed. Convictions that were not final and enforceable should be appealed against by the prosecution in favour of the convicted person and regardless of the outcome at first instance the prosecutor ought to enter a claim for annulment of the first-instance judgment and dismissal of the case by the courts.

(d) There was no question of reopening cases where a judgment had become final and enforceable prior to the date of delivery of the *Zolotukhin* judgment, i.e., before 10 February 2009. As for such decisions taken after this date, reopening could be envisaged in exceptional cases, but the person concerned should be informed that the prosecuting authority would not seek a reopening of its own motion.

50. With respect to the imposition of several criminal sanctions for the same conduct, Article 29 of the 2005 Penal Code (*Straffeloven*) provides that the resultant aggregate sanction must have a reasonable relationship to the offence committed. This provision is a clear expression of the general principle of proportionality that also applied in the Norwegian law on criminal sentencing under the former 1902 Penal Code. In the Supreme

Court judgment *Rt*. 2009 p. 14, which concerned criminal proceedings for tax fraud, it was held to follow from the principles of the 1902 Penal Code that regard should be had to the fact that a defendant had already had imposed on him a sanction – an administrative tax penalty – on account of his tax fraud; with the consequence that he should not be treated more severely than if the criminal offence of tax fraud had been adjudicated on together with the conduct sanctioned in the administrative proceedings. In *Rt*. 2011 p. 1509, the Supreme Court confirmed an earlier ruling in *Rt*. 2005 p. 129 that the principle (stated in *Rt*. 2004 p. 645) whereby an amount corresponding to the usual 30% administrative tax penalty could be incorporated into the fine, could not extend to criminal tax fraud cases where imprisonment as well as a fine was to be imposed. It also confirmed, as held in its 2005 ruling, that, in instances where an administrative tax penalty could no longer be imposed, the criminal fine ought to be more severe.

III. CASE OF *HANS ÅKEBERG FRANSSON* (C-617/10) BEFORE THE COURT OF JUSTICE OF THE EUROPEAN UNION

51. In his opinion delivered on 12 June 2012 in the above case before the Court of Justice of the European Union, the Advocate General Cruz Villalón stated as follows:

> **"2. Analysis of the second, third and fourth questions**
>
> 70. The questions referred by the Haparanda tingsrätt [District Court] are particularly complex and are just as difficult as the issue which I dealt with above. On the one hand, the imposition of both administrative and criminal penalties in respect of the same offence is a widespread practice in the Member States, especially in fields such as taxation, environmental policies and public safety. However, the way in which penalties are accumulated varies enormously between legal systems and displays special features which are specific to each Member State. In most cases, those special features are adopted with the aim of moderating the effects of the imposition of two punishments by the public authorities. On the other hand, as we shall see below, the European Court of Human Rights recently gave a ruling on this subject and confirmed that such practices, contrary to how things might initially appear, infringe the fundamental right of ne bis in idem laid down in Article 4 of Protocol No 7 to the ECHR. However, the fact is that not all the Member States have ratified that provision, while others have adopted reservations or interpretative declarations in relation to it. The effect of that situation is that the requirement to interpret the Charter in the light of the ECHR and the case-law of the European Court of Human Rights (Article 52(3) of the Charter) becomes, so to speak, asymmetrical, leading to significant problems when it is applied to this case.
>
> **a) Article 4 of Protocol No 7 to the ECHR and the relevant case-law of the European Court of Human Rights**
>
> **i) Signature and ratification of Article 4 of Protocol No 7 to the ECHR**
>
> 71. The ne bis in idem principle was not an explicit part of the ECHR at the outset. It is common knowledge that the principle was incorporated into the ECHR by means

of Protocol No 7, which was opened for signature on 22 November 1984 and entered into force on 1 November 1988. Among other rights, Article 4 contains the guarantee of the ne bis in idem principle, with the aim, according to the explanations on the protocol drawn up by the Council of Europe, of giving expression to the principle pursuant to which no one may be tried in criminal proceedings for an offence in respect of which he has already been finally convicted or acquitted.

72. Unlike the other rights laid down in the ECHR, the right in Article 4 of Protocol No 7 to the ECHR has not been unanimously accepted by the States signatories to the convention, including a number of Member States of the European Union. As at the date of delivery of this Opinion, Protocol No 7 has still not been ratified by Germany, Belgium, the Netherlands and the United Kingdom. Among the Member States which have ratified the protocol, France lodged a reservation to Article 4, restricting its application solely to criminal offences. ... In addition, at the time of signature, Germany, Austria, Italy and Portugal lodged a number of declarations leading to the same situation: restriction of the scope of Article 4 of Protocol No 7 so that the protection under that provision applies only to double punishment in respect of criminal offences, within the meaning laid down in national law. ...

73. The foregoing demonstrates clearly and expressively the considerable lack of agreement between the Member States of the European Union regarding the problems resulting from the imposition of both administrative and criminal penalties in respect of the same offence. The problematic nature of the situation is reinforced in the light of the negotiations on the future accession of the European Union to the ECHR, in which the Member States and the Union have decided to exclude, for the time being, the protocols to the ECHR, including Protocol No 7. ...

74. That lack of agreement can be traced back to the importance of measures imposing administrative penalties in a large number of Member States, in addition to the special significance also afforded to criminal prosecution and penalties in those Member States. On the one hand, States do not wish to abandon the characteristic effectiveness of administrative penalties, particularly in sectors where the public authorities seek to ensure rigorous compliance with the law, such as fiscal law or public safety law. On the other hand, the exceptional nature of criminal prosecution and the guarantees which protect the accused during proceedings incline States to retain an element of decision-making power as regards actions which warrant a criminal penalty. That twofold interest in maintaining a dual – administrative and criminal – power to punish explains why, at the moment, a significant number of Member States refuse, by one means or another, to be bound by the case-law of the European Court of Human Rights, which, as I shall now go on to examine, has developed in a direction which practically excludes that duality."

52. On 26 February 2013, the Court of Justice of the European Union (Grand Chamber) held, *inter alia*, as follows:

"Consideration of the questions referred

Questions 2, 3 and 4

32. By these questions, to which it is appropriate to give a joint reply, the Haparanda tingsrätt asks the Court, in essence, whether the *ne bis in idem* principle laid down in Article 50 of the Charter should be interpreted as precluding criminal proceedings for tax evasion from being brought against a defendant where a tax penalty has already been imposed upon him for the same acts of providing false information.

33. Application of the *ne bis in idem* principle laid down in Article 50 of the Charter to a prosecution for tax evasion such as that which is the subject of the main proceedings presupposes that the measures which have already been adopted against the defendant by means of a decision that has become final are of a criminal nature.

34. In this connection, it is to be noted first of all that Article 50 of the Charter does not preclude a Member State from imposing, for the same acts of non-compliance with declaration obligations in the field of VAT, a combination of tax penalties and criminal penalties. In order to ensure that all VAT revenue is collected and, in so doing, that the financial interests of the European Union are protected, the Member States have freedom to choose the applicable penalties (see, to this effect, Case 68/88 *Commission v Greece* [1989] ECR 2965, paragraph 24; Case C-213/99 *de Andrade* [2000] ECR I-11083, paragraph 19; and Case C-91/02 *Hannl-Hofstetter* [2003] ECR I-12077, paragraph 17). These penalties may therefore take the form of administrative penalties, criminal penalties or a combination of the two. It is only if the tax penalty is criminal in nature for the purposes of Article 50 of the Charter and has become final that that provision precludes criminal proceedings in respect of the same acts from being brought against the same person.

35. Next, 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 (Case C-489/10 *Bonda* [2012] ECR, paragraph 37).

36. It is for the referring court to determine, in the light of those criteria, whether the combining of tax penalties and criminal penalties that is provided for by national law should be examined in relation to the national standards as referred to in paragraph 29 of the present judgment, which could lead it, as the case may be, to regard their combination as contrary to those standards, as long as the remaining penalties are effective, proportionate and dissuasive (see, to this effect, inter alia *Commission v. Greece*, paragraph 24; Case C-326/88 *Hansen* [1990] ECR I-2911, paragraph 17; Case C-167/01 *Inspire Art* [2003] ECR I-10155, paragraph 62; Case C-230/01 *Penycoed* [2004] ECR I-937, paragraph 36; and Joined Cases C-387/02, C-391/02 and C-403/02 *Berlusconi and Others* [2005] ECR I-3565 paragraph 65).

37. It follows from the foregoing considerations that the answer to the second, third and fourth questions is that the *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."

THE LAW

ALLEGED VIOLATION OF ARTICLE 4 OF PROTOCOL NO. 7 TO THE CONVENTION

53. The applicants submitted that, in breach of Article 4 of Protocol No. 7, they had been both prosecuted and punished twice in respect of the same offence under section 12-1 of chapter 12 of the Tax Assessment Act, in that they had been charged and indicted by the public prosecutor, had then had tax penalties imposed on them by the tax authorities, which they had paid, and had thereafter been convicted and sentenced by the criminal courts. Article 4 of Protocol No. 7 reads:

> "1. 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.
>
> 2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.
>
> 3. No derogation from this Article shall be made under Article 15 of the Convention."

54. The Government contested that argument.

A. Admissibility

55. In the Court's view the applications raise complex issues of fact and Convention law, such that they cannot be rejected on the ground of being manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. Neither are they inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

1. The applicants

56. The applicants argued that, in breach of Article 4 of Protocol No. 7, they had been subjected to double jeopardy on account of the same matter, namely an offence under section 12-1(1) of the Tax Assessment Act, having been first accused and indicted by the prosecution services and having had tax penalties imposed on them by the tax authorities, which they had both accepted and paid, before being criminally convicted. Referring to the chronology of the proceedings complained of, the first applicant added that he had been prosecuted twice over a long period, which had exposed him to

an unreasonably heavy burden, both physically and psychologically, leading to a heart attack and hospitalisation.

(a) Whether the first proceedings were criminal in nature

57. Agreeing with the Supreme Court's analysis on the basis of the *Engel* criteria and other relevant national case-law concerning tax penalties at the ordinary 30% level, the applicants found it obvious that the tax penalty proceedings, not only the tax fraud proceedings, were of a "criminal" nature and that both sets of proceedings were to be regarded as "criminal" for the purpose of Article 4 of Protocol No. 7.

(b) Whether the offences were the same (*idem*)

58. The applicants further shared the view expressed by the Supreme Court that there was no doubt that the factual circumstances underlying the decision to impose tax penalties and the criminal prosecution had sufficient common features to be regarded as the same offence. In both instances, the factual basis was the omission to declare income on the tax return.

(c) Whether and when a final decision had been taken in the tax proceedings

59. In the applicants' submission, the tax authorities' decision to impose the tax penalties had become final with the force of *res judicata* on 15 December 2008 in the case of the first applicant and on 26 December 2008 in the case of the second applicant, that is, before the District Court had convicted them in respect of the same conduct, on 2 March 2009 in the case of the first applicant and on 30 September 2009 in the case of the second applicant. No matter whether these sanctions were to be regarded as so-called parallel proceedings, the tax penalty decisions against the applicants had become final and had gained legal force before the applicants were convicted for exactly the same conduct by the Follo District Court and the Oslo City Court, respectively. Subjecting them to criminal punishment accordingly violated the *ne bis in idem* principle enshrined in Article 4 of Protocol No. 7.

(d) Whether there was duplication of proceedings (*bis*)

60. The applicants argued that they had been victims of duplication of proceedings such as was proscribed by Article 4 of Protocol No. 7. Since the administrative proceedings relating to the tax penalties had indeed been of a criminal nature, the prosecution authorities were obliged under Article 4 of the Protocol to discontinue the criminal proceedings as soon as the outcome of the administrative set had become final. However, they had failed to do so.

61. In the applicants' submission, whilst parallel proceedings were permissible under Norwegian law, the domestic authorities' use of this

avenue had made it possible for them to coordinate their procedures and circumvent the prohibition in Article 4 of Protocol No. 7 and thus make the protection of that provision illusory. In the case of the first applicant, in particular, the use of the parallel proceedings model seemed to have been coordinated as a joint venture organised by prosecutors in cooperation with the tax authorities.

62. In the present case the prosecutors had simply waited until the tax authorities had decided to impose tax penalties before referring the related case for trial. Criminal and administrative proceedings had thus been coordinated, with the aim of trapping the applicants by means of two different sets of criminal provisions so as to impose on them additional tax and tax penalties and have them convicted for the same conduct, in other words double jeopardy. From the point of view of legal security, the possibility of conducting parallel proceedings was problematic. The strong underlying aim of this provision of the Protocol in protecting individuals against being forced to bear an excessive burden suggested that the possibilities for the authorities to pursue parallel proceedings ought to be limited.

63. From a due-process prospective, this option of concerted efforts between the administrative and prosecution authorities to prepare the conduct of parallel proceedings was contrary to the prohibition against double jeopardy in Article 4 of Protocol No. 7 and the Court's recent case-law as well as some national case-law. Consequently, this option allowing for parallel proceedings arranged between different authorities in the present case was questionable and failed to take due account of the strain on the applicants and the main interest behind Article 4 of Protocol No. 7.

64. During their "nightmare" experience in this case, so the applicants claimed, they had experienced great relief when the first applicant was called by the tax officer who stated that he could now "breathe a sigh of relief" because of new written guidelines from the Director of Public Prosecutions, dated 3 April 2009, which banned double prosecution and double jeopardy, as in his case. With reference to *Zolotukhin,* these guidelines provided, *inter alia*, that at an appellate hearing, whether the lower court had decided on conviction or acquittal, the prosecutor should request that the judgment be set aside and the case be dismissed. By virtue of these new guidelines from the Director of Public Prosecutions and the fact that a tax penalty was classified as punishment, and because the decision on the tax penalty had become final and *res judicata* for the applicants, they reasonably expected that the penal proceedings against them would be discontinued on account of the prohibition against double jeopardy in Article 4 of Protocol No. 7. Besides, pursuant to the same new guidelines, other defendants who had been charged with the same offences in the same case-complex had not had tax penalties imposed on them,

because they had already been convicted and sentenced to imprisonment for violation of section 12-2 of the Tax Assessment Act. The applicants, however, unlike the other defendants in the same case-complex, had been convicted and sentenced to imprisonment despite having had additional tax and a tax penalty imposed on them in respect of the same conduct. The Government's argument that an important consideration was the need to ensure equality of treatment with other persons involved in the same tax fraud was thus unconvincing.

65. According to the applicants, they had been psychologically affected even more when, notwithstanding the above guidelines, the prosecutors continued the matter by invoking legal parallel proceedings and denied the applicants' request that their conviction by the District Courts be expunged and the criminal case against them be dismissed by the courts. In this connection the first applicant produced various medical certificates, including from a clinic for heart surgery.

2. The Government

(a) Whether the first proceedings were criminal in nature

66. The Government invited the Grand Chamber to confirm the approach taken in a series of cases predating the *Zolotukhin* judgment, namely that a wider range of factors than the *Engel* criteria (formulated with reference to Article 6) were relevant for the assessment of whether a sanction was "criminal" for the purposes of Article 4 of Protocol No. 7. They contended that regard ought to be had to such factors as the legal classification of the offence under national law; the nature of the offence; the national legal characterisation of the sanction; its purpose, nature and degree of severity; whether the sanction was imposed following conviction for a criminal offence; and the procedures involved in the adoption and implementation of the sanction (they referred to *Malige v. France*, 23 September 1998, § 35, *Reports of Judgments and Decisions* 1998-VII; *Nilsson v. Sweden* (dec.), no. 73661/01, ECHR 2005-XIII; *Haarvig v. Norway* (dec.), no. 11187/05, 11 December 2007; *Storbråten v. Norway* (dec.), no. 12277/04, 1 February 2007; and *Mjelde v. Norway* (dec.), 11143/04, 1 February 2007).

67. The Government maintained, *inter alia*, that the different wording and object of the provisions clearly suggested that the notion of "criminal proceedings" under Article 4 of Protocol No. 7 was narrower than the use of "criminal" under Article 6. It transpired from the Explanatory Report in respect of Protocol No. 7 that the wording of Article 4 had been intended for criminal proceedings *stricto sensu*. In paragraph 28 of that report it was stated that it did not seem necessary to qualify the term offence as "criminal," since the provision "already contain[ed] the terms 'in criminal proceedings' and 'penal procedure' which render[ed] unnecessary any

further specification in the text of the article itself". In paragraph 32 it was stressed that Article 4 of Protocol No. 7 did not prohibit proceedings "of a different character (for example, disciplinary action in the case of an official)". Moreover, Article 6 and Article 4 of Protocol No. 7 safeguarded different, and at times opposite, aims. Article 6 was aimed at promoting procedural safeguards in criminal proceedings.

68. The Government also pointed to a number of further differences in regard to the manner in which the two provisions had been interpreted and applied in the Court's case-law, including the absolute character of Article 4 of Protocol No. 7 (non-derogable under Article 15) as opposed to the differentiated approach which the Court applied under Article 6. They referred to *Jussila v. Finland* ([GC], no. 73053/01, § 43, ECHR 2006-XIV), where the Grand Chamber had stated that there were "clearly 'criminal charges' of differing weight" and that "[t]ax surcharges differ[ed] from the hard core of criminal law" such that "the criminal-head guarantees w[ould] not necessarily apply with their full stringency".

69. Relying on the wider range of criteria, the Government invited the Court to hold that ordinary tax penalties were not "criminal" under Article 4 of Protocol No. 7.

70. However, were the Grand Chamber to follow the other approach, based solely on the *Engel* criteria, and to find that the decision on ordinary tax penalties was "criminal" within the autonomous meaning of Article 4 of Protocol No. 7, they argued as follows.

(b) Whether the offences were the same (*idem*)

71. Agreeing with the reasoning and conclusions of the Supreme Court in the case of the first applicant (see paragraphs 20 to 30 above), which the High Court followed in that of the second applicant (see paragraph 37 above), the Government accepted that the factual circumstances pertaining to the tax penalties and to the tax fraud cases involved the same defendants and were inextricably linked together in time and space.

(c) Whether a final decision had been taken in the tax proceedings

72. The Supreme Court had concluded, out of consideration for effective protection and clear guidelines, that the tax assessment decision became final upon expiry of the three-week time-limit for lodging an administrative appeal (15 and 26 December 2008 for the first and second applicants respectively), even though the six-month time-limit for instituting judicial proceedings pursuant to the Tax Assessment Act, section 11-1(4), had not yet expired. While this was hardly a decisive point in the applicants' cases (the time-limit for legal proceedings also expired before the ongoing criminal proceedings came to an end – on 24 May and 5 June 2009 for the first and second applicants respectively), the Government nonetheless queried whether Article 4 of Protocol No. 7 required an interpretation in this

stricter sense. It seemed well supported by the Court's case-law that "[d]ecisions against which an ordinary appeal [lay] [were] excluded from the scope of the guarantee contained in Article 4 of Protocol No. 7 as long as the time-limit for lodging such an appeal ha[d] not expired" (they referred to *Zolotukhin*, cited above, § 108). Ordinary remedies through legal proceedings were still available to the applicants for a period of six months from the date of the decision.

(d) Whether there was duplication of proceedings (*bis*)

73. On the other hand, the Government, still relying on the Supreme Court's analysis, stressed that Article 4 of Protocol No. 7 under certain circumstances allowed for so-called "parallel proceedings". The wording of this provision clearly indicated that it prohibited the repetition of proceedings after the decision in the first proceedings had acquired legal force ("tried or punished again ... for which he has already been finally acquitted or convicted"). The Explanatory Report in respect of Protocol No. 7 confirmed that the *ne bis in idem* rule was to be construed relatively narrowly. This was reflected in *Zolotukhin* (cited above, § 83), where the Grand Chamber had refined the scope of the provision, limiting it to the following situation:

> "The guarantee enshrined in Article 4 of Protocol No. 7 becomes relevant on commencement of a new prosecution, where a prior acquittal or conviction has already acquired the force of *res judicata*."

74. This implied *a contrario* that parallel proceedings – different sanctions imposed by two different authorities in different proceedings closely connected in substance and in time – fell outside the scope of the provision. Such parallel proceedings would not constitute the commencement of a new prosecution where a prior acquittal or conviction had already acquired the force of *res judicata*. *R.T. v. Switzerland* and *Nilsson v. Sweden* (both cited above) clarified the circumstances in which proceedings might be considered parallel and hence permissible under Article 4 of Protocol No. 7.

75. Nonetheless, on the Government's analysis, the *Zolotukhin* approach had been departed from in a number of more recent judgments, notably in four judgments against Finland delivered on 20 May 2014 (they referred in particular to *Nykänen v. Finland*, no. 11828/11, § 48 and *Glantz v. Finland*, no. 37394/11, § 57), in which paragraph 83 of *Zolotukhin* had merely been taken as a point of departure, with the statement that Article 4 of Protocol No. 7 "clearly prohibits consecutive proceedings if the first set of proceedings has already become final at the moment when the second set of proceedings is initiated (see for example *Sergey Zolotukhin v. Russia* [GC], cited above)".

76. In the Government's view, this expansive interpretation of Article 4 of Protocol No. 7 in *Nykänen* (amongst others), which seemed incompatible

with *Zolotukhin*, appeared to presuppose that Article 4 of Protocol No. 7 called for the discontinuance of criminal proceedings when concurrent administrative proceedings became final, or *vice versa*. It had been based on one admissibility decision (*Zigarella v. Italy* (dec.), no. 48154/99, ECHR 2002-IX (extracts)) and two Chamber judgments (*Tomasovic v. Croatia*, no. 53785/09, 18 October 2011, and *Muslija v. Bosnia and Herzegovina*, no. 32042/11, 14 January 2014). However, neither of these cases provided a sound basis for such a departure.

The first case, *Zigarella*, had concerned subsequent, not parallel, proceedings, contrary to what the Chamber had assumed. The subsequent criminal proceedings, brought without the authorities' knowledge of an existing finalised set of (also criminal) proceedings, had been discontinued when the judge learned of the final acquittal in the first case. In this situation the Court had merely applied the negative material effect of *ne bis in idem* as a *res judicata* rule in relation to two succeeding sets of ordinary criminal proceedings in respect of the same offence.

The two other cases, *Tomasovic* and *Muslija*, had concerned proceedings for offences under "hard-core" criminal law, respectively possession of hard drugs and domestic violence (they referred to *Jussila*, cited above, §43). The cases clearly involved two sets of criminal proceedings concerning one act. Both the first and the second set had been initiated on the basis of the same police report. These situations would at face value not occur under Norwegian criminal law and bore at any rate little resemblance to the well-established and traditional systems of administrative and criminal proceedings relating to tax penalties and tax fraud at stake here.

77. Requiring the discontinuance of another pending parallel set of proceedings from the date on which other proceedings on the same matter had given rise to a final decision amounted to a *de facto lis pendens* procedural hindrance, as there was little sense in initiating parallel proceedings if one set had to be discontinued just because the other set had become final before it.

78. In the Government's submission, against this backdrop of renewed inconsistency in the case-law under Article 4 of Protocol No. 7, it was of particular importance for the Grand Chamber to reassert its approach in *Zolotukhin*, affirming the provision as a *res judicata* rule, and to reject the differing approach in *Nykänen*.

79. The Government failed to see the policy considerations behind *Nykänen*. The underlying idea behind the *ne bis in idem* rule was to be protected against the burden of being exposed to repeated proceedings (they referred to *Zolotukhin*, cited above, §107). An individual should have the certainty that when an acquittal or conviction had acquired the force of *res judicata*, he or she would henceforth be shielded from the institution of new proceedings for the same act. This consideration did not apply in a situation where an individual was subjected to foreseeable criminal and

administrative proceedings in parallel, as prescribed by law, and certainly not where the first sanction (tax penalties) was, in a foreseeable manner, taken into account in the decision on the second sanction (imprisonment).

80. It was further difficult to reconcile the view that, while pending, parallel proceedings were clearly unproblematic under the Protocol, with the view that, as soon as one set had reached a final conclusion, the other set would constitute a violation, regardless of whether the more lenient administrative proceedings or the more severe criminal proceedings had been concluded first and regardless of whether the latter had commenced first or last.

81. *Nykänen* also ran counter to the fundamental principles of foreseeability and equal treatment. In the event that the criminal proceedings acquired the force of *res judicata* before the administrative proceedings, one individual could end up serving time in prison, while another individual, for the same offence, would simply have to pay a moderate administrative penalty. The question of which proceedings terminated first depended on how the taxation authorities, police, prosecuting authorities or courts progressed, and whether the taxpayer availed himself or herself of an administrative complaint and/or legal proceedings. *Nykänen* would thus oblige States to treat persons in equal situations unequally according to mere coincidences. As acknowledged in *Nykänen*, "it might sometimes be coincidental which of the parallel proceedings first becomes final, thereby possibly creating a concern about unequal treatment".

82. The need for efficiency in the handling of cases would often militate in favour of parallel proceedings. On the one hand, it ought to be noted that, owing to their specialised knowledge and capacity, administrative authorities would frequently be able to impose an administrative sanction more swiftly than would the prosecution and courts within the framework of criminal proceedings. Owing to their role of large-scale administration, the administrative authorities would moreover be better placed to ensure that same offences be treated equally. Crime prevention, on the other hand, demanded that the State should not be precluded from prosecuting and punishing crimes within traditional, formal penal procedures where the administrative and criminal proceedings disclosed offences of greater severity and complexity than those which may have led to the administrative process and sanctioning in the first place. According to the Government, the applicants' cases were illustrative examples of such situations.

83. The Government noted that several European States maintained a dual system of sanctions in areas such as tax law and public safety (they referred to the reasons given in the opinion of 12 June 2012 of the Advocate General before the Court of Justice of the European Union in the *Fransson* case, quoted at paragraph 51 above).

84. In Norway, the issue of continued parallel proceedings was not restricted to taxation. If Article 4 of Protocol No. 7 were to be interpreted so as to prohibit the finalisation of ongoing parallel proceedings from the moment either administrative or criminal proceedings were concluded by a final decision, it would entail far-reaching, adverse and unforeseeable effects in a number of administrative-law areas. This called for a cautious approach. Similar questions would arise in a number of European States with well-established parallel administrative and criminal systems in fundamental areas of law, including taxation.

85. The considerations underlying Article 4 of Protocol No. 7 applied to a lesser degree where the proceedings in question were parallel and simultaneous. A defendant who was well aware that he or she was subjected by different authorities to two different sets of proceedings closely connected in substance and in time, would be less inclined to expect that the first sanction imposed would be final and exclusive with regard to the other. Finally, the rationale of the *ne bis in idem* principle applied to a lesser degree to sanctions falling outside the "hard core" of criminal law, such as tax penalties (they referred to the reasoning in *Jussila*, cited above, § 43, with regard to Article 6, which was transposable to Article 4 of Protocol No. 7).

86. As regards the specific circumstances, the Government fully endorsed the reasoning of the Supreme Court in the case of the first applicant (see paragraph 29 above) and that of the High Court in the case of the second applicant (see paragraph 39 above) that there was a sufficiently close connection in substance and time. Neither of the applicants could have legitimately expected to be subjected only to the administrative proceedings and sanction. In order to avoid an outcome that would run counter to the fundamental requirement of equal treatment, so the Government explained, the applicants had, "on an equal footing with" E.K. and B.L. who were defendants in the same case-complex (see paragraphs 12-13 above), each been sentenced to imprisonment in criminal proceedings after having had a 30% administrative tax surcharge imposed.

3. Third-party interveners

87. The third-party interventions were primarily centred on two points; firstly the interpretation of the adjective "criminal" in Article 4 of Protocol No. 7 and the relationship between this provision and both Article 6 (criminal head) and Article 7 of the Convention; and secondly the extent to which parallel proceedings were permissible under the Protocol (dealt with under sub-headings (a) and (b) below).

(a) Whether the first set of proceedings concerned a "criminal" matter

88. The Governments of the Czech Republic and France joined the respondent Government in observing that the *Zolotukhin* judgment did not

explicitly abandon the broader range of criteria for the determination of the character of the proceedings to be assessed under Article 4 of Protocol No. 7 and that the Court had itself considered, *inter alia*, proceedings on tax penalties to fall outside the hard core of criminal law and thus applied less stringent guarantees under Article 6 (they referred to *Jussila*, cited above, § 43 *in fine*). The Czech Government invited the Court to clarify primarily whether and, if so, under what conditions, that is in which types of cases, the broader criteria ought to be applied.

89. The Bulgarian Government, referring to the wording of the provision and its purpose, maintained that only traditional criminal offences fell within the ambit of Article 4 of Protocol No. 7. Whilst extending the scope of Article 6 was paramount for the protection of the right to a fair trial, the purpose of the provision in the Protocol was different. Referring to the ruling of the Supreme Court of the United States of America in *Green v. United States*, 355 US 194 (1957), they stressed that the double-jeopardy clause protected an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offence. The underlying idea was that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offence, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that, even though innocent, he may be found guilty. A second vitally important interest was to preserve the finality of judgments.

90. The French Government made extensive submissions (paragraphs 10 to 26 of their observations) on the interpretation of Articles 6 and 7 of the Convention and of Article 4 of Protocol No. 7. Referring to *Perinçek v. Switzerland* ([GC], no. 27510/08, §146, 15 October 2015), they argued that the terms used in Article 4 of Protocol No. 7, which differed from those in Article 6 § 1 of the Convention, must result in the adoption of narrower criteria serving the principle of *ne bis in idem* protected by Article 4 of Protocol No. 7. Article 7 of the Convention referred to the notions of conviction ("held guilty" in English; "*condamné*" in French), "criminal offence" ("*infraction*" in French) and "penalty" ("*peine*" in French), which were also to be found in Article 4 of Protocol No. 7. Furthermore, the protection afforded by Article 7 of the Convention, like that afforded by Article 4 of Protocol No. 7, concerned essential components of criminal procedure, understood in a strict sense. This was borne out by the fact that no derogation from the obligations concerned was allowed under Article 15, whereas that Article did provide for derogation from Article 6.

91. It followed that, for reasons of consistency, the Court should, in applying Article 4 of Protocol No. 7, rely only on the criteria it had formulated in the framework of Article 7 of the Convention, while

clarifying them in order to assign to the words "in criminal proceedings", as used in Article 4, the strict meaning that was called for. In seeking to determine whether a measure fell within the scope of the latter, the Court ought to consider: the legal classification of the offence in domestic law; the purpose and nature of the measure concerned; whether the measure was imposed following conviction for a criminal offence; the severity of the penalty, it being understood that this was not a decisive element; and the procedures associated with the adoption of the measure (and in particular whether the measure was adopted by a body which could be characterised as a court and which adjudicated on the elements of an offence regarded as criminal within the meaning of Article 6 of the Convention). The last of these criteria was of paramount importance having regard to the actual wording and purpose of Article 4 of Protocol No. 7.

92. In the light of these criteria, one could not regard as falling within the scope of Article 4 of Protocol No. 7 tax penalties which were not classified as criminal in domestic law, which were administrative in nature and intended only as a sanction for a taxpayer's failure to comply with fiscal obligations, which were not imposed following conviction for a criminal offence and which were not imposed by a judicial body.

93. The Swiss Government submitted that the only exception allowed – under Article 4 § 2 of Protocol No. 7 – was the reopening of the case "in accordance with the law and penal procedure of the State concerned". At the time of adoption of the Protocol in 1984, other exceptions, such as those subsequently allowed by the relevant case-law, were not provided for – and did not require such provision in view of the inherently criminal focus of the protection concerned. The narrow conception underlying the guarantee was tellingly confirmed at Article 4 § 3, which ruled out any derogation under Article 15 of the Convention in respect of the protection provided by Article 4 § 1. The *ne bis in idem* guarantee was thus placed on an equal footing with the right to life (Article 2; Article 3, Protocol No. 6; Article 2, Protocol No. 13), the prohibition of torture (Article 3), the prohibition of slavery (Article 4) and the principle of no punishment without law (Article 7). These elements militated in favour of a restrictive interpretation of the protection. The case for such an approach would be still more persuasive if the Grand Chamber were to maintain the practice that any "criminal charge" in the autonomous sense of Article 6 § 1 was likewise such as to attract the application of Article 4 of Protocol No. 7 (see paragraph 100 below).

(b) Duplication of proceedings (*bis*)

94. The Bulgarian Government found no reason to depart from the approach in *R.T. v. Switzerland* and *Nilsson v. Sweden* (both cited above) in the context of road traffic offences and in important areas relating to the functioning of the State such as taxation. Parallel tax proceedings ending in tax penalties and criminal proceedings for investigating tax fraud were

closely related in substance and in time. Also, the Court had recognised that the Contracting States enjoyed a wide margin of appreciation when framing and implementing policies in the area of taxation and that the Court would respect the legislature's assessment of such matters unless it was devoid of any reasonable foundation. A system allowing for parallel proceedings in taxation matters seemed to fall within the State's margin of appreciation and did not appear *per se* to run counter to any of the principles protected in the Convention, including the guarantee against double jeopardy.

95. The Czech Government advanced four arguments for preserving the existence of dual systems of sanctioning: (1) each type of sanction pursued different goals; (2) whilst criminal proceedings *stricto sensu* had to comply with stringent fair trial guarantees, the fulfilment of which was often time-consuming, administrative sanctions needed to comply with demands of speediness, effectiveness and sustainability of the tax system and State budget; (3) the strict application of the *ne bis in idem* principle to parallel tax and criminal proceedings might defeat the handling of large-scale organised crime if the first decision, usually an administrative one, were to impede a criminal investigation leading to the revelation of networks of organised fraud, money laundering, embezzlement and other serious crime; (4) the sequence of the authorities deciding in a particular case. Finally, the Czech Government drew attention to cases of several concurrent administrative proceedings.

96. The French Government were of the view that the reasoning adopted in *R.T. v. Switzerland* and *Nilsson v. Sweden* might be transposed to the field of taxation having regard to the aims pursued by the States in that field, the aims of criminal proceedings and those pursued by the imposition of tax penalties being different (i) and where there was a sufficient connection between the fiscal and the criminal proceedings (ii):

(i) Criminal prosecution for tax evasion must constitute an appropriate and consistent response to reprehensible conduct. Its primary purpose was to punish the most serious forms of misconduct. In its decision in *Rosenquist v. Sweden* ((dec.), no. 60619/00, 14 September 2004), the Court had observed that the purpose of prosecuting the criminal offence of tax evasion differed from that of the imposition of a fiscal penalty, the latter seeking to secure the foundations of the national tax system.

Criminal proceedings for tax evasion also served an exemplary function, especially where new types of fraud came to light, with a view to dissuading potential tax evaders from going down that particular road. Not to bring the most serious cases of tax evasion to trial where a tax penalty had already been imposed would be to deprive the State of the exemplary force of, and publicity provided by, criminal convictions in such cases.

In the event that a judicial investigation in a matter of tax evasion was set in motion prior to an audit by the tax authority, an obligation to discontinue the second action once the outcome of the first had become final would

encourage the taxpayer to let the criminal proceedings reach a swift conclusion, without denying the charge, in such a way that those proceedings would be terminated in advance of the tax audit and the administrative sanctions, which generally represented much larger sums, would thus be avoided.

In such a situation, a taxpayer under investigation would be in a position to opt for whichever procedure offered the most favourable outcome; this would most certainly detract from the dissuasive force of action by the State to punish the most reprehensible conduct in this area. It would be paradoxical indeed for taxpayers who had committed the most serious forms of tax fraud and who were prosecuted for such offence, to receive less severe penalties.

In conclusion, complementary criminal and administrative action was essential in dealing with the most serious tax fraud cases and it would be artificial to consider that, simply because two sets of proceedings and two authorities came into play, the two forms of sanction did not form a coherent whole in response to this type of offence. The two types of proceedings were in reality closely connected and it ought therefore be possible for them both to be pursued.

(ii) In the cases against Finland of 20 May 2014, the main criterion identified by the Court for refusing to allow a second set of proceedings was the total independence of the fiscal procedure on the one hand and the criminal proceedings on the other. However, the fiscal and criminal proceedings ought to be regarded as connected in substance and in time where there was an exchange of information between the two authorities and where the two sets of proceedings were conducted simultaneously. The facts of the case would demonstrate the complementary nature of the proceedings.

By way of illustration, the Government provided a detailed survey of the manner in which, under the French system, criminal and fiscal proceedings were interwoven, how they overlapped in law and in practice, and were conducted simultaneously. The principle of proportionality implied that the overall amount of any penalties imposed should not exceed the highest amount that could be imposed in respect of either of the types of penalty.

In determining whether criminal and fiscal proceedings might be regarded as sufficiently closely connected in time, account ought to be taken only of the phase of assessment by the tax authority and that of the judicial investigation. These two phases ought to proceed simultaneously or be separated by only a very short time interval. It did not, on the other hand, appear relevant, in assessing the closeness of the connection in time between the two sets of proceedings, to consider the duration of the judicial proceedings before the courts called upon to deliver judgment in the criminal case and rule on the validity of the tax penalties. It ought to be borne in mind that the response time of the various courts depended on

external factors, sometimes attributable to the taxpayer concerned. He or she might choose to deliberately prolong the proceedings in one of the courts by introducing large numbers of requests, or by submitting numerous written documents which would then call for an exchange of arguments, or again by lodging appeals.

The States should be afforded a margin of appreciation in defining appropriate penalties for types of conduct which might give rise to distinct forms of harm. While providing for a single response, the State should be able to assign to a number of – judicial and administrative – authorities the task of furnishing an appropriate response.

97. The Greek Government maintained that the existence of separate and consecutive proceedings, in the course of which the same or different measures of a criminal nature were imposed on an applicant, was the decisive and crucial factor for the notion of "repetition" ("*bis*"). The *ne bis in idem* principle was not breached in the event that different measures of a "criminal" nature, though distinct from one another, were imposed by different authorities, criminal and administrative respectively, which considered all the sanctions in their entirety when meting out the punishment (they referred to *R.T. v. Switzerland*, cited above).

98. On the other hand, the Greek Government pointed to *Kapetanios and Others v. Greece* (nos. 3453/12, 42941/12 and 9028/13, §72, 30 April 2015), in which the Court had held that the *ne bis in idem* principle would in principle not be violated where both sanctions, namely the deprivation of liberty and a pecuniary penalty, were imposed in the context of a single judicial procedure. Regardless of this example, it was apparent that the Court attached great importance to the fact that the imposition of criminal and administrative penalties had been the subject of an overall judicial assessment.

99. Nonetheless, they did not disagree with the view held by the Norwegian Supreme Court in the present case that parallel proceedings were at least to some extent permissible under Article 4 of Protocol No. 7. This was strongly supported by the CJEU judgment in the *Fransson* case (they referred to § 34 of the judgment, quoted at paragraph 52 above).

The CJEU had specified that it was for the referring court to determine, in the light of the set criteria, whether the combining of tax penalties and criminal penalties that was provided for by national law should be examined in relation to national standards, namely as being analogous to those applicable to infringements of national law of a similar nature and importance, where the choice of penalties remained within the discretion of the member State; thus it was for the national courts to determine whether the combination of penalties was contrary to those standards, as long as the remaining penalties were effective, proportionate and dissuasive (they referred to § 37 of the judgment, quoted at paragraph 52 above).

The aforementioned ruling of the CJEU appeared relevant to the present case. More specifically, within the framework of such interpretation, it could be inferred *mutatis mutandis* that the national judges had indeed duly ruled, at their sole discretion, as found by the CJEU, that the combination of the sanctions at issue, imposed through so-called "parallel proceedings" upon close interaction between two distinct authorities, had not been in breach of the national standards, despite the fact that national judges had essentially assessed the tax sanctions as being of a "criminal nature". In view of the arguments in paragraph 97 above, it could reasonably be concluded that parallel proceedings, imposing different sanctions through different authorities, clearly distinct in law, were not prohibited by Article 4 of Protocol No. 7 whenever such proceedings satisfied the test of being closely connected in substance and in time. This test answered the critical question whether there had been repetition.

100. The Swiss Government, relying on *Zolotukhin* (cited above, § 83), maintained that the guarantee set forth in Article 4 of Protocol No. 7 became relevant on the institution of a new prosecution, where a prior acquittal or conviction had already acquired the force of *res judicata*. A situation in which criminal proceedings had not been completed at the point in time at which an administrative procedure was initiated was not therefore, in itself, problematic with regard to the *ne bis in idem* principle (they referred, *mutatis mutandis*, to *Kapetanios and Others*, cited above, § 72). It followed that parallel procedures were permissible under Article 4 of Protocol No. 7. The present case afforded the Grand Chamber an opportunity to reaffirm this line of authority.

The justification for a dual system resided primarily in the nature of, and distinct aims pursued by, administrative law (preventive and educative) on the one hand, and criminal law (retributive), on the other.

Whilst the notion of a "criminal charge" in Article 6 had, in the light of the *Engel* criteria, been extended beyond the traditional categories of criminal law *(malum in se*) to cover other areas (*malum quia prohibitum*), there were criminal charges of differing weight. In the case, for example, of tax penalties – which fell outside the hard core of criminal law – the guarantees under the criminal head of Article 6 of the Convention ought not necessarily to apply with their full stringency (they referred to *Jussila*, cited above, § 43). This ought to be taken into account when determining the scope of application of Article 4 of Protocol No. 7.

The foreseeability of the cumulative imposition of administrative and criminal sanctions was another element to be considered in the assessment of the dual system (they referred to *Maszni v. Romania*, no. 59892/00, 21 September 2006, § 68).

In the Swiss Government's view, *Zolotukhin* should not be interpreted or developed in such a way as to embrace the full range of systems providing for both administrative and criminal sanctions for criminal offences, without

regard for the fact that different authorities, possessing different competences and pursuing separate aims, might be called upon to deliver decisions on the same set of facts. At all events, this conclusion was persuasive in instances where there was a sufficiently close connection in substance and in time between the criminal proceedings on the one hand and the administrative procedure on the other, as required by the Court (they referred to the following cases where the Court had been satisfied that this condition had been fulfilled: *Boman v. Finland*, no. 41604/11, § 41, 17 February 2015, with reference to *R.T. v. Switzerland* and *Nilsson v. Sweden*, both cited above, and also *Maszni*, cited above). The Swiss Government invited the Grand Chamber to take the opportunity afforded by the present case to reaffirm this approach, which was not prohibited *per se* in its case-law as it stood.

4. The Court's assessment

101. The Court will first review its existing case-law relevant for the interpretation and application of the *ne bis in idem* rule laid down in Article 4 of Protocol No. 7 (sub-titles "(a)" to "(c)" below). In the light of that review, it will seek to draw such conclusions, derive such principles and add such clarifications as are necessary for considering the present case (sub-title "(d)" below). Finally, it will apply the *ne bis in idem* rule, as so interpreted by it, to the facts complained of by the applicants (sub-title "(e)" below).

(a) General issues of interpretation

102. It is to be noted that in the pleadings of the parties and the third-party interveners there was hardly any disagreement regarding the most significant contribution of the Grand Chamber judgment in *Zolotukhin* (cited above), which was to clarify the criteria relating to the assessment of whether the offence for which an applicant had been tried or punished in the second set of proceedings was the same (*idem*) as that for which a decision had been rendered in the first set (see §§ 70 to 84 of the judgment). Nor was there any substantial disagreement regarding the criteria laid down in that judgment for determining when a "final" decision had been taken.

103. In contrast, differing views were expressed as to the method to be used for determining whether the proceedings relating to the imposition of tax penalties were "criminal" for the purposes of Article 4 of Protocol No. 7 – this being an issue capable of having implications for the applicability of this provision's prohibition of double jeopardy.

104. In addition, there were conflicting approaches (notably between the applicants, on the one hand, and the respondent Government and the intervening Governments, on the other) as regards duplication of proceedings, in particular the extent to which parallel or dual proceedings ought to be permissible under Article 4 of Protocol No. 7.

(b) Relevant criteria for determining whether the first set of proceedings was "criminal": Different approaches in the case-law

105. In *Zolotukhin* (cited above), in order to determine whether the proceedings in question could be regarded as "criminal" in the context of Article 4 of Protocol No. 7, the Court applied the three *Engel* criteria previously developed for the purposes of Article 6 of the Convention: (1) "the legal classification of the offence under national law", (2) "the very nature of the offence" and (3) the degree of severity of the penalty that the person concerned risks incurring – the second and third criteria being alternative, not necessarily cumulative, whilst a cumulative approach was not excluded. The *Zolotukhin* judgment did not, as it could have done, mirror the line of reasoning followed in a string of previous cases (see, for example, *Storbråten*, cited above), involving a non-exhaustive ("such as") and wider range of factors, with no indication of their weight or whether they were alternative or cumulative. The Governments of France and Norway are now inviting the Court to use the opportunity of the present judgment to affirm that it is the latter, broader test which should apply (see paragraphs 66-68 and 90-91).

106. A number of arguments going in the direction of such an interpretive approach do exist, in particular that Article 4 of Protocol No. 7 was apparently intended by its drafters for criminal proceedings in the strict sense and that – unlike Article 6, but like Article 7 – it is a non-derogable right under Article 15. Whilst Article 6 is limited to embodying fair-hearing guarantees for criminal proceedings, the prohibition of double jeopardy in Article 4 of Protocol No. 7 has certain implications – potentially wide ones – for the manner of applying domestic law on criminal and administrative penalties across a vast range of activities. The latter Article involves a more detailed assessment of the substantive criminal law, in that there is a need to establish whether the respective offences concerned the same conduct (*idem*). These differences, the lack of consensus among the domestic systems of the Contracting States and the variable willingness of States to be bound by the Protocol and the wide margin of appreciation to be enjoyed by the States in deciding on their penal systems and policies generally (see *Nykänen*, cited above, § 48; and, *mutatis mutandis*, *Achour v. France* [GC], no. 67335/01, § 44, ECHR 2006-IV) are well capable of justifying a broader range of applicability criteria, in particular with a stronger national-law component, as used for Article 7 and previously used (*before Zolotukhin*), for Article 4 of Protocol No. 7, and hence a narrower scope of application, than is the case under Article 6.

107. However, whilst it is true, as has been pointed out, that the *Zolotukhin* judgment was not explicit on the matter, the Court must be taken to have made a deliberate choice in that judgment to opt for the *Engel* criteria as the model test for determining whether the proceedings concerned were "criminal" for the purposes of Article 4 of Protocol No. 7. It does not

seem justified for the Court to depart from that analysis in the present case, as there are indeed weighty considerations that militate in favour of such a choice. The *ne bis in idem* principle is mainly concerned with due process, which is the object of Article 6, and is less concerned with the substance of the criminal law than Article 7. The Court finds it more appropriate, for the consistency of interpretation of the Convention taken as a whole, for the applicability of the principle to be governed by the same, more precise criteria as in *Engel*. That said, as already acknowledged above, once the *ne bis in idem* principle has been found to be applicable, there is an evident need for a calibrated approach in regard to the manner in which the principle is applied to proceedings combining administrative and criminal penalties.

(c) Convention case-law on dual proceedings

(i) What the Zolotukhin *judgment added*

108. *Zolotukhin* concerned two sets of proceedings, both relating to disorderly conduct *vis-à-vis* a public official and in which the outcome of the administrative proceedings had become final even before the criminal proceedings were instituted (see *Zolotukhin*, cited above, §§ 18-20 and 109). The most significant contribution of the *Zolotukhin* judgment was the holding that the determination as to whether the offences in question were the same (*idem*) was to depend on a facts-based assessment (ibid., § 84), rather than, for example, on the formal assessment consisting of comparing the "essential elements" of the offences. The prohibition concerns prosecution or trial for a second "offence" in so far as the latter arises from identical facts or facts which are substantially the same (ibid., § 82).

109. Furthermore, when recalling that the aim of Article 4 of Protocol No. 7 was to prohibit the repetition of criminal proceedings that had been concluded by a "final" decision ("*res judicata*"), the *Zolotukhin* judgment specified that decisions against which an ordinary appeal lay were excluded from the scope of the guarantee in Protocol No. 7 as long as the time-limit for lodging such an appeal had not expired.

110. The Court also strongly affirmed that Article 4 of Protocol No. 7 was not confined to the right not to be punished twice but that it extended to the right not to be prosecuted or tried twice. Were this not the case, it would not have been necessary to use the word "tried" as well as the word "punished" since this would be mere duplication. The Court thus reiterated that Article 4 of Protocol No. 7 applied even where the individual had merely been prosecuted in proceedings that had not resulted in a conviction. Article 4 of Protocol No. 7 contained three distinct guarantees and provided that, for the same offence, no one should be (i) liable to be tried, (ii) tried, or (iii) punished (ibid., § 110).

111. It should be noted, however, that the *Zolotukhin* judgment offered little guidance for situations where the proceedings have not in reality been duplicated but have rather been combined in an integrated manner so as to form a coherent whole.

(ii) The case-law on dual proceedings before and after Zolotukhin

112. After the *Zolotukhin* judgment, as had been the position previously, the imposition by different authorities of different sanctions concerning the same conduct was accepted by the Court as being to some extent permissible under Article 4 of Protocol No. 7, notwithstanding the existence of a final decision. This conclusion can be understood as having been based on the premise that the combination of sanctions in those cases ought to be considered as a whole, making it artificial to view the matter as one of duplication of proceedings leading the applicant to being "tried or punished again .... for an offence for which he has already been finally ... convicted" in breach of Article 4 of Protocol No. 7. The issue has arisen in four types of situations.

113. At the origin of this interpretative analysis of Article 4, is a *first* category of cases, going back to *R.T. v. Switzerland*, cited above. *R.T.* concerned an applicant whose driving licence had been withdrawn (for four months) in May 1993 by the Road Traffic Office on account of drunken driving. This measure was eventually confirmed by judgments of the Administrative Appeals Commission and the Federal Court (December 1995). In the meantime, in June 1993 the Gossau District Office had imposed a penal order on the applicant which sentenced him to a suspended term of imprisonment and a fine of 1,100 Swiss francs (CHF). This penal order was not appealed against and acquired legal force.

The Court found that the Swiss authorities had merely been determining the three different, cumulable sanctions envisaged by law for such an offence, namely a prison sentence, a fine and the withdrawal of the driving licence. These sanctions had been issued at the same time by two different authorities, namely by a criminal and by an administrative authority. It could not, therefore, be said that criminal proceedings were being repeated contrary to Article 4 of Protocol No. 7 within the meaning of the Court's case-law.

Similarly, while *Nilsson v. Sweden*, cited above, also concerned criminal punishment (50 hours' community service) and withdrawal of a driving licence (for 18 months) on the ground of a road-traffic offence, the complaint was disposed of on more elaborate reasoning, introducing for the first time the test of "*a sufficiently close connection ..., in substance and in time*".

The Court found that the licence withdrawal had been a direct and foreseeable consequence of the applicant's earlier conviction for the same offences of aggravated drunken driving and unlawful driving and that the

withdrawal on the ground of a criminal conviction constituted a "criminal" matter for the purposes of Article 4 of Protocol No. 7. Furthermore, the severity of the measure – suspension of the applicant's driving licence for 18 months – was in itself so significant, regardless of the context of his previous criminal conviction, that it could ordinarily be viewed as a criminal sanction. While the different sanctions were imposed by two different authorities in different proceedings, there was nevertheless a sufficiently close connection between them, in substance and in time, to consider the withdrawal to be part of the sanctions under Swedish law for the offences of aggravated drunken driving and unlawful driving. The licence withdrawal did not imply that the applicant had been "tried or punished again ... for an offence for which he had already been finally ... convicted", in breach of Article 4 § 1 of Protocol No. 7.

Likewise, in *Boman*, cited above, the Court was satisfied that a sufficient substantive and temporal connection existed between, on the one hand, the criminal proceedings in which the applicant had been convicted and sentenced (to 75 day-fines, amounting to EUR 450) and banned from driving (for 4 months and 3 weeks) and, on the other, the subsequent administrative proceedings, leading to the prolongation of the driving ban (for 1 month).

114. In a *second* series of cases, the Court reaffirmed that parallel proceedings were not excluded in relation to the imposition of tax penalties in administrative proceedings and prosecution, conviction and sentencing for tax fraud in criminal proceedings, but concluded that the test of "*a sufficiently close connection ..., in substance and in time*" had not been satisfied in the particular circumstances under consideration. These cases concerned Finland (notably *Glantz*, cited above, § 57 and *Nykänen*, cited above, § 47) and Sweden (*Lucky Dev v. Sweden*, no. 7356/10, § 58, 27 November 2014). In *Nykänen*, which set out the approach followed in the other cases against Finland and Sweden, the Court found on the facts that, under the Finnish system, the criminal and the administrative sanctions had been imposed by different authorities without the proceedings being in any way connected: both sets of proceedings followed their own separate course and became final independently of each other. Moreover, neither of the sanctions had been taken into consideration by the other court or authority in determining the severity of the sanction, nor was there any other interaction between the relevant authorities. More importantly, under the Finnish system the tax penalties had been imposed following an examination of an applicant's conduct and his or her liability under the relevant tax legislation, which was independent from the assessments made in the criminal proceedings. In conclusion, the Court held that there had been a violation of Article 4 of Protocol No. 7 to the Convention since the applicant had been convicted twice for the same matter in two separate sets of proceedings.

Identical (or almost identical) reasoning and conclusions may be found in respect of similar facts in *Rinas v. Finland*, no. 17039/13, 27 January 2015, and *Österlund v. Finland*, no. 53197/13, 10 February 2015.

It is to be noted that, while in some of these judgments (*Nykänen*, *Glantz*, *Lucky Dev*, *Rinas*, *Österlund*) the two sets of proceedings were largely contemporaneous, the temporal connection on its own was evidently deemed insufficient to exclude the application of the *ne bis in idem* prohibition. It would not seem unreasonable to deduce from these judgments in cases against Finland and Sweden that, given that the two sets of proceedings were largely contemporaneous, in the particular circumstances it was the lack of a substantive connection that gave rise to the violation of Article 4 of Protocol No. 7.

115. In a *third* strand of case-law, where proceedings had been conducted in parallel for a certain period of time, the Court found a violation but without referring to the *Nilsson* test of "*a sufficiently close connection ... in substance and in time*".

In *Tomasović* (cited above, §§ 5-10 and 30-32), the applicant had been prosecuted and convicted twice for the same offence of possession of drugs, first as a "minor offence" (held to be "criminal" according to the second and third *Engel* criteria (ibid. §§ 22-25)) and then as a "criminal offence". As the second set of proceedings had not been discontinued on the conclusion of the first, the Court found it evident that there had been duplication of criminal proceedings in breach of Article 4 of Protocol No. 7 (see, similarly, *Muslija*, cited above, §§ 28-32 and 37, in relation to the infliction of grievous bodily harm).

Similarly, in *Grande Stevens and Others v. Italy* (nos. 18640/10, 18647/10, 18663/10, 18668/10 and 18698/10, 4 March 2014), the Court found that there had been dual proceedings in respect of the same fraudulent conduct – namely market manipulation through the dissemination of false information: one set of administrative proceedings (from 9 February 2007 to 23 June 2009), which were considered "criminal" according to the *Engel* criteria, were conducted before the National Companies and Stock Exchange Commission (*Commissione Nazionale per le Societa e la Borsa* – "CONSOB"), followed by appeals to the Court of Appeal and the Court of Cassation and culminating in the imposition of a fine of EUR 3,000,000 (plus a business ban); the other set being criminal proceedings (from 7 November 2008 to 28 February 2013 and beyond, still pending at the time of judgment) conducted before the District Court, the Court of Cassation and the Court of Appeal. Its finding that the new set of proceedings concerned a second "offence" originating in identical acts to those which had been the subject-matter of the first, and final, conviction was sufficient for the Court to conclude that there had been a breach of Article 4 of Protocol No. 7.

116. *Fourthly*, a further and distinct illustration of a lack of substantive connection without specific reference to the above-mentioned *Nilsson* test is provided by *Kapetanios and Others* (cited above), which was confirmed by *Sismanidis and Sitaridis v. Greece*, nos. 66602/09 and 71879/12, 9 June 2016. In these cases the applicants had in the first place been acquitted of customs offences in criminal proceedings. Subsequently, notwithstanding their acquittals, the administrative courts imposed on the applicants heavy administrative fines on account of the self-same conduct. Being satisfied that the latter proceedings were "criminal" for the purposes of the prohibition in Article 4 of Protocol No. 7, the Court concluded that there had been a violation of this provision (*ibid,* respectively, § 73 and 47).

(d) Conclusions and inferences to be drawn from the existing case-law

117. Whilst a particular duty of care to protect the specific interests of the individual sought to be safeguarded by Article 4 of Protocol No. 7 is incumbent on the Contracting States, there is also, as already indicated in paragraphs 106 above, a need to leave the national authorities a choice as to the means used to that end. It should not be overlooked in this context that the right not to be tried or punished twice was not included in the Convention adopted in 1950 but was added in a seventh protocol (adopted in 1984), which entered into force in 1988, almost 40 years later. Four States (Germany, the Netherlands, Turkey and the United Kingdom) have not ratified the Protocol; and one of these (Germany) plus four States which did ratify (Austria, France, Italy and Portugal) have expressed reservations or interpretative declarations to the effect that "criminal" ought to be applied to these States in the way it was understood under their respective national laws. (It should be noted that the reservations made by Austria and Italy have been held to be invalid as they failed to provide a brief statement of the law concerned, as required by Article 57 § 2 of the Convention (see respectively *Gradinger v. Austria*, 23 October 1995, § 51, Series A no. 328-C; and *Grande Stevens*, cited above, §§ 204-211), unlike the reservation made by France (see *Göktan v. France,* no. 33402/96, § 51, ECHR 2002-V).

118. The Court has further taken note of the observation made by the Advocate General before the Court of Justice of the European Union in the *Fransson* case (see paragraph 51 above), namely that the imposition of penalties under both administrative law and criminal law in respect of the same offence is a widespread practice in the EU Member States, especially in fields such as taxation, environmental policies and public safety. The Advocate General also pointed out that the way in which penalties were accumulated varied enormously between legal systems and displayed special features which were specific to each member State; in most cases those special features were adopted with the aim of moderating the effects of the imposition of two punishments by the public authorities.

119. Moreover, no less than six Contracting Parties to Protocol No. 7 have intervened in the present proceedings, mostly expressing views and concerns on questions of interpretation that are largely common to those stated by the respondent Government.

120. Against this backdrop, the preliminary point to be made is that, as recognised in the Court's well-established case-law, it is in the first place for the Contracting States to choose how to organise their legal system, including their criminal-justice procedures (see, for instance, *Taxquet v. Belgium* [GC], no. 926/05, § 83, ECHR 2010). The Convention does not, for example, prohibit the separation of the sentencing process in a given case into different stages or parts, such that different penalties may be imposed, successively or in parallel, for an offence that is to be characterised as "criminal" within the autonomous meaning of that notion under the Convention (see, for instance, *Phillips v. the United Kingdom*, no. 41087/98, § 34, ECHR 2001-VII, concerning Article 6 complaints in regard to confiscation proceedings brought against an individual in respect of proceeds from drugs offences after conviction and sentence of the individual for these offences).

121. In the view of the Court, States should be able legitimately to choose complementary legal responses to socially offensive conduct (such as non-compliance with road-traffic regulations or non-payment/evasion of taxes) through different procedures forming a coherent whole so as to address different aspects of the social problem involved, provided that the accumulated legal responses do not represent an excessive burden for the individual concerned.

122. In cases raising an issue under Article 4 of Protocol No. 7, it is the task of the Court to determine whether the specific national measure complained of entails, in substance or in effect, double jeopardy to the detriment of the individual or whether, in contrast, it is the product of an integrated system enabling different aspects of the wrongdoing to be addressed in a foreseeable and proportionate manner forming a coherent whole, so that the individual concerned is not thereby subjected to injustice.

123. It cannot be the effect of Article 4 of Protocol No. 7 that the Contracting States are prohibited from organising their legal systems so as to provide for the imposition of a standard administrative penalty on wrongfully unpaid tax (albeit a penalty qualifying as "criminal" for the purposes of the Convention's fair-trial guarantees) also in those more serious cases where it may be appropriate to prosecute the offender for an additional element present in the non-payment, such as fraudulent conduct, which is not addressed in the "administrative" tax-recovery procedure. The object of Article 4 of Protocol No. 7 is to prevent the injustice of a person's being prosecuted or punished twice for the same criminalised conduct. It does not, however, outlaw legal systems which take an "integrated" approach to the social wrongdoing in question, and in particular an approach

involving parallel stages of legal response to the wrongdoing by different authorities and for different purposes.

124. The Court is of the view that the above-mentioned case-law on parallel or dual proceedings, originating with the *R.T. v. Switzerland* and *Nilsson v. Sweden* cases and continuing with *Nykänen* and a string of further cases, provides useful guidance for situating the fair balance to be struck between duly safeguarding the interests of the individual protected by the *ne bis in idem* principle, on the one hand, and accommodating the particular interest of the community in being able to take a calibrated regulatory approach in the area concerned, on the other. At the same time, before proceeding to further elaborate the relevant criteria for the striking of the requisite balance, the Court deems it desirable to clarify the conclusions to be drawn from the existing case-law.

125. In the first place, what emerges from the application of the "sufficiently close connection ... in substance and in time" test in recent cases against Finland and Sweden is that this test will not be satisfied if one or other of the two elements – substantive or temporal – is lacking (see paragraph 114 above).

126. Second, in some cases the Court has first undertaken an examination whether and, if so, when there was a "final" decision in one set of proceedings (potentially barring the continuation of the other set), before going on to apply the "sufficiently close connection" test and to reach a negative finding on the question of "*bis*" – that is, a finding of the absence of "*bis*" (see *Boman*, cited above, §§ 36-38). In the Court's opinion, however, the issue as to whether a decision is "final" or not is devoid of relevance when there is no real duplication of proceedings but rather a combination of proceedings considered to constitute an integrated whole.

127. Third, the foregoing observation should also have implications for the concern expressed by some of the Governments taking part in the present proceedings, namely that it should not be a requirement that connected proceedings become "final" at the same time. If that were to be so, it would enable the interested person to exploit the *ne bis in idem* principle as a tool for manipulation and impunity. On this point, the conclusion in paragraph 51 of *Nykänen* (quoted above) and in a number of judgments thereafter that "both sets of proceedings follow their own separate course and become final independently from each other" is to be treated as a finding of fact: in the Finnish system under consideration there was not a sufficient connection in substance between the administrative proceedings and the criminal proceedings, although they were conducted more or less contemporaneously. *Nykänen* is an illustration of the "sufficient connection in substance and in time" test going one way on the facts.

128. Fourth, for similar reasons to those stated above, the order in which the proceedings are conducted cannot be decisive of whether dual or

multiple processing is permissible under Article 4 of Protocol No. 7 (compare and contrast, *R.T. v. Switzerland* – in which the revocation of a licence was effected before the criminal proceedings, and *Nilsson v. Sweden* – where the revocation took place subsequently).

129. Lastly, it is apparent from some of the cases cited above (see *Zolothukin*, *Tomasović*, and *Muslija* – described at paragraphs 108 and 115 above) that, in as much as they concerned the duplication of proceedings which had been pursued without the purposes and means employed being complementary (see paragraph 130 below), the Court was not minded to examine them as involving parallel or dual proceedings capable of being compatible with the *ne bis in idem* principle, as in *R.T. v. Switzerland*, *Nilsson* and *Boman* (see paragraph 113 above).

130. On the basis of the foregoing review of the Court's case-law, it is evident that, in relation to matters subject to repression under both criminal and administrative law, the surest manner of ensuring compliance with Article 4 of Protocol No. 7 is the provision, at some appropriate stage, of a single-track procedure enabling the parallel strands of legal regulation of the activity concerned to be brought together, so that the different needs of society in responding to the offence can be addressed within the framework of a single process. Nonetheless, as explained above (see notably paragraphs 111 and 117-120), 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 that the dual proceedings in question have been "sufficiently closely connected in substance and in time". In other words, it must be shown that they have been combined in an integrated manner so as to form a coherent whole. This implies 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 organising the legal treatment of the conduct concerned in such a manner should be proportionate and foreseeable for the persons affected.

131. As regards the conditions to be satisfied in order for dual criminal and administrative proceedings to be regarded as sufficiently connected in substance and in time and thus compatible with the *bis* criterion in Article 4 of Protocol No. 7, the relevant considerations deriving from the Court's case-law, as discussed above, may be summarised as follows.

132. Material factors for determining whether there is a sufficiently close connection in substance include:

- whether the different proceedings pursue complementary purposes and thus address, not only *in abstracto* but also *in concreto*, different aspects of the social misconduct involved;

- whether the duality of proceedings concerned is a foreseeable consequence, both in law and in practice, of the same impugned conduct (*idem*);

- whether the relevant sets of proceedings are conducted in such a manner as to avoid 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;

- and, above all, whether the sanction imposed in the proceedings which become final first is taken into account in those which become final last, 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.

133. In this regard, it is also instructive to have regard to the manner of application of Article 6 of the Convention in the type of case that is now under consideration (see *Jussila*, cited above, §43):

> "[I]t is self-evident that there are criminal cases which do not carry any significant degree of stigma. There are clearly 'criminal charges' of differing weight. What is more, the autonomous interpretation adopted by the Convention institutions of the notion of a 'criminal charge' by applying the Engel criteria have underpinned a gradual broadening of the criminal head to cases not strictly belonging to the traditional categories of the criminal law, for example administrative penalties ..., prison disciplinary proceedings ..., customs law ..., competition law ..., and penalties imposed by a court with jurisdiction in financial matters .... Tax surcharges differ from the hard core of criminal law; consequently, the criminal-head guarantees will not necessarily apply with their full stringency ...".

The above reasoning reflects considerations of relevance when deciding whether Article 4 of Protocol No. 7 has been complied with in cases concerning dual administrative and criminal proceedings. Moreover, as the Court has held on many occasions, the Convention must be read as a whole, and interpreted in such a way as to promote internal consistency and harmony between its various provisions (see *Klass and Others v. Germany*, 6 September 1978, § 68, Series A no. 28; also *Maaouia v. France* [GC], no. 39652/98, § 36, ECHR 2000-X; *Kudła v. Poland* [GC], no. 30210/96, § 152, ECHR 2000-XI; and *Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, § 48, ECHR 2005-X).

The extent to which the administrative proceedings bear the hallmarks of ordinary criminal proceedings is an important factor. Combined proceedings will more likely meet the criteria of complementarity and coherence if the sanctions to be imposed in the proceedings not formally classified as "criminal" are specific for the conduct in question and thus differ from "the hard core of criminal law" (in the language of *Jussila* cited above). The additional factor that those proceedings do not carry any significant degree of stigma renders it less likely that the combination of proceedings will

entail a disproportionate burden on the accused person. Conversely, the fact that the administrative proceedings have stigmatising features largely resembling those of ordinary criminal proceedings enhances the risk that the social purposes pursued in sanctioning the conduct in different proceedings will be duplicated (*bis*) rather than complementing one another. The outcome of the cases mentioned in paragraph 129 above may be seen as illustrations of such a risk materialising.

134. Moreover, as already intimated above, where the connection in *substance* is sufficiently strong, the requirement of a connection *in time* nonetheless remains and must be satisfied. This does not mean, however, that the two sets of proceedings have to be conducted simultaneously from beginning to end. It should be open to States to opt for conducting the proceedings progressively in instances where doing so is motivated by interests of efficiency and the proper administration of justice, pursued for different social purposes, and has not caused the applicant to suffer disproportionate prejudice. However, as indicated above, the connection in time must always be present. Thus, the connection in time must be sufficiently close to protect the individual from being subjected to uncertainty and delay and from proceedings becoming protracted over time (see, as an example of such shortcoming, *Kapetanios and Others*, cited above, § 67), even where the relevant national system provides for an "integrated" scheme separating administrative and criminal components. The weaker the connection in time the greater the burden on the State to explain and justify any such delay as may be attributable to its conduct of the proceedings.

(e) Whether Article 4 of Protocol No. 7 was complied with in the present case

(i) The first applicant

135. In the case of the first applicant, the Tax Administration had, on 24 November 2008, imposed a 30% tax penalty on him, under sections 10-2(1) and 10-4(1) of the Tax Assessment Act, on the ground that he had omitted to declare in his tax return for 2002 the sum of NOK 3,259,342 in earnings obtained abroad (see paragraph 16 above). Since he did not appeal against that decision it became final at the earliest on the expiry of the three-week time-limit for lodging an appeal (see paragraph 143 below). He was also subjected to criminal proceedings in connection with the same omission in his 2002 tax declaration: on 14 October 2008 he was indicted and on 2 March 2009 the District Court convicted him of aggravated tax fraud and sentenced him to one year's imprisonment for having violated section 12-1(1)(a), cf. section 12-2, of the Tax Assessment Act on account of the above-mentioned failure to declare (see paragraphs 15 and 17 above). The High Court rejected his appeal (see

paragraph 19 above), as did the Supreme Court on 27 November 2010 (see paragraphs 20 to 30 above).

(α) Whether the imposition of tax penalties was criminal in nature

136. In line with its conclusion at paragraph 107 above, the Court will examine whether the proceedings relating to the imposition of the 30% tax penalty could be considered "criminal" for the purposes of Article 4 of Protocol No. 7, on the basis of the *Engel* criteria.

137. In this regard, the Court notes that the Supreme Court has been attentive to the progressive developments of the Convention law in this domain and has endeavoured to integrate the Court's case-law developments into its own rulings on national tax legislation (see paragraphs 44-47 above). Thus, in 2002 the Supreme Court for the first time declared that liability for a 30% tax penalty constituted a "criminal charge" in the sense of Article 6 of the Convention. The Supreme Court also held, contrary to previous rulings, that a 60% tax penalty was a criminal matter for the purposes of Article 4 of Protocol No. 7 and in 2004 and 2006 it went on to hold that the same applied to the 30% tax penalty.

138. In comparable cases concerning Sweden (involving tax penalties at rates of 40% and 20%), the Court has held that the proceedings in question were "criminal", not only for the purposes of Article 6 of the Convention (see *Janosevic v. Sweden*, no. 34619/97, §§ 68-71, ECHR 2002-VII; and *Västberga Taxi Aktiebolag and Vulic v. Sweden*, no. 36985/97, §§ 79-82, 23 July 2002), but also for the purposes of Article 4 of Protocol No. 7 (see *Manasson v. Sweden* (dec.), no. 41265/98, 8 April 2003; *Rosenquist*, cited above; *Synnelius and Edsbergs Taxi AB v. Sweden* (dec.), no. 44298/02, 17 June 2008; *Carlberg v. Sweden* (dec.), no. 9631/04, 27 January 2009; and *Lucky Dev*, cited above, §§ 6 and 51).

139. Against this background, the Court sees no cause for calling into question the finding made by the Supreme Court (see paragraphs 22-25 above) to the effect that the proceedings in which the ordinary tax penalty – at the level of 30% – was imposed on the first applicant concerned a "criminal" matter within the autonomous meaning of Article 4 of Protocol No. 7.

(β) Whether the criminal offences for which the first applicant was prosecuted were the same as those for which the tax penalties were imposed on him (*idem*)

140. As stated above (at paragraph 128), the protection of the *ne bis in idem* principle is not dependent on the order in which the respective proceedings are conducted; it is the relationship between the two offences which is material (see *Franz Fischer v. Austria*, no. 37950/97, § 29, 29 May 2001; and also *Storbråten*; *Mjelde*; *Haarvig*; *Ruotsalainen*; and *Kapetanios and Others*, all cited above).

141. Applying the harmonised approach in *Zolotukhin* (cited above, §§ 82-84) to the facts of the present case, the Supreme Court found that the factual circumstances that constituted the basis for the tax penalty and the criminal conviction – in that both concerned the omission to provide certain information about income on the tax return – were sufficiently similar as to meet the above-mentioned requirement (see paragraph 21 above). This point is not disputed between the parties and, despite the additional factual element of fraud present in the criminal offence, the Court sees no reason to consider finding otherwise.

(γ) Whether there was a final decision

142. As to the issue of whether in the proceedings concerning the tax penalty there had been a "final" decision that could potentially bar criminal proceedings (see *Zolotukhin*, cited above, §§ 107-108), the Court refers to its analysis above. Being satisfied, on the assessment carried out below, that there was a sufficient connection in substance and in time between the tax proceedings and the criminal proceedings for them to be regarded as forming an integrated legal response to the first applicant's conduct, the Court does not find it necessary to go further into the issue of the finality of the tax proceedings considered separately. In its view, the circumstance that the first set became "final" before the second does not affect the assessment given below of the relationship between them (see paragraph 126 above).

143. Thus, the Court sees no need to express any view with regard to the Supreme Court's examination of the question whether the first decision of 24 November 2008 became final after the expiry of the three week time-limit for lodging an administrative appeal or after that of the six month time-limit for lodging a judicial appeal (see paragraph 27 above).

(δ) Whether there was duplication of proceedings (*bis*)

144. The competent national authorities found that the first applicant's reprehensible conduct called for two responses, an administrative penalty under chapter 10 on Tax Penalties of the Tax Assessment Act and a criminal one under chapter 12 on Punishment of the same Act (see paragraphs 15, 16 and 41-43 above), each pursuing different purposes. As the Supreme Court explained in its judgments of May 2002 (see paragraph 46 above), the administrative penalty of a tax surcharge served as a general deterrent, as a reaction to a taxpayer's having provided, perhaps innocently, incorrect or incomplete returns or information, and to compensate for the considerable work and costs incurred by the tax authorities on behalf of the community in carrying out checks and audits in order to identify such defective declarations; it was concerned that those costs should to a certain extent be borne by those who had provided incomplete or incorrect information. Tax assessment was a mass operation involving millions of citizens. For the Supreme Court, the purpose of ordinary tax penalties was first and foremost

to enhance the effectiveness of the taxpayer's duty to provide complete and correct information and to secure the foundations of the national tax system, a precondition for a functioning State and thus a functioning society. Criminal conviction under chapter 12, on the other hand, so the Supreme Court stated, served not only as a deterrent but also had a punitive purpose in respect of the same anti-social omission, involving the additional element of the commission of culpable fraud.

145. Thus, following a tax audit carried out in 2005, the tax authorities filed a criminal complaint against the first applicant along with others in the autumn of 2007 (see paragraph 13 above). In December 2007 he was interviewed as an accused and was held in custody for four days (see paragraph 14 above). With reference, *inter alia*, to the criminal investigation, in August 2008 the tax authorities warned him that they would amend his tax assessment, including in respect of the year 2002, on the ground that he had omitted to declare NOK 3,259,341. That warning was issued against the background of the tax audit conducted by the tax authorities at Software Innovation AS, the ensuing criminal investigation and the evidence given by him in those proceedings (see paragraph 16 above). In October 2008 the *Økokrim* indicted the applicant in respect of the tax offences. On 24 November 2008 the tax authorities amended his tax assessment and ordered him to pay the tax penalty at issue. The decision had regard, *inter alia*, to evidence given by the first and second applicants during interviews in the criminal investigation. A little more than two months later, on 2 March 2009, the District Court convicted him of tax fraud in relation to his failure to declare the said amount on his tax return for 2002. The Court regards it as particularly important that, in sentencing him to one year's imprisonment, the District Court, in accordance with general principles of national law on criminal sentencing (see paragraph 50 above), had regard to the fact that the first applicant had already been significantly sanctioned by the imposition of the tax penalty (see paragraph 17 above; compare and contrast *Kapetanios and Others*, cited above, § 66, where the administrative courts imposing administrative fines failed to take into account the applicants' acquittal in previous criminal proceedings relating to the same conduct; and also *Nykänen*, cited above, where there was found to be no sufficient connection in substance between the two sets of proceedings).

146. In these circumstances, as a first conclusion, the Court has no cause to call into doubt either the reasons why the Norwegian legislature opted to regulate the socially undesirable conduct of non-payment of taxes in an integrated dual (administrative/criminal) process or the reasons why the competent Norwegian authorities chose, in the first applicant's case, to deal separately with the more serious and socially reprehensible aspect of fraud in a criminal procedure rather than in the ordinary administrative procedure.

Secondly, the conduct of dual proceedings, with the possibility of different cumulated penalties, was foreseeable for the applicant who must have known from the outset that criminal prosecution as well as the imposition of tax penalties was possible, or even likely, on the facts of the case (see paragraphs 13 and 16 above).

Thirdly, it seems clear that, as held by the Supreme Court, the criminal proceedings and the administrative proceedings were conducted in parallel and were interconnected (see paragraph 29 above). The establishment of facts made in one set was used in the other set and, as regards the proportionality of the overall punishment inflicted, the sentence imposed in the criminal trial had regard to the tax penalty (see paragraph 17 above).

147. On the facts before it, the Court finds no indication that the first applicant suffered any disproportionate prejudice or injustice as a result of the impugned integrated legal response to his failure to declare income and pay taxes. Consequently, having regard to the considerations set out above (in particular as summarised in paragraphs 132-134), the Court is satisfied that, whilst different sanctions were imposed by two different authorities in different proceedings, there was nevertheless a sufficiently close connection between them, both in substance and in time, to consider them as forming part of an integral scheme of sanctions under Norwegian law for failure to provide information about certain income on a tax return, with the resulting deficiency in the tax assessment (see paragraph 21 above).

(ii) The second applicant

148. In the case of the second applicant, the High Court, relying on the same approach as that followed by the Supreme Court in the first applicant's case, found, firstly, that the tax authorities' decision of 5 December 2008 ordering him to pay a tax penalty of 30% did amount to the imposition of a "criminal" punishment within the meaning of Article 4 of Protocol No. 7; secondly, that the decision had become "final" upon the expiry of the time-limit for lodging an appeal on 26 December 2008; and, thirdly, that the decision on the tax penalty and the subsequent criminal conviction concerned the same matter (see paragraph 37 above). The Court, as in the case of the first applicant, sees no reason to arrive at a different conclusion on the first and the third matter, nor any need to pronounce a view on the second.

149. As to the further question whether there was a duplication of proceedings (*bis*) that was incompatible with the Protocol, the Court notes that the competent authorities, as for the first applicant (see paragraph 144 above), judged that dual proceedings were warranted in the second applicant's case.

150. As to the details of the relevant proceedings, following their tax audit in 2005 the tax authorities filed a criminal complaint with *Økokrim* in the autumn of 2007 also against the second applicant (as they had done

against the first applicant and others) in relation to his failure to declare NOK 4,561,881 (approximately EUR 500,000) in income for the tax year 2002 (see paragraph 31 above). With reference in particular to the tax audit, the criminal evidence given by him in the relevant criminal investigation and documents seized by *Økokrim* in the investigation on 16 October 2008, the Tax Administration warned him that it was considering amending his tax assessment on the ground that he had omitted to declare the said income and imposing a tax penalty (see paragraph 32 above). On 11 November 2008 the public prosecutor indicted the applicant on a charge of tax fraud in relation to his failure to declare the aforementioned amount, which represented a tax liability of NOK 1,302,526, and requested the City Court to pass a summary judgment based on the second applicant's confession (see paragraph 33 above). The criminal proceedings had reached a relatively advanced stage by 5 December 2008 when the Tax Administration amended his tax assessment to the effect that he owed the latter amount in tax and ordered him to pay the tax penalty in question (see paragraph 32 above).

Thus, as can be seen from the foregoing, since as far back as the tax authorities' complaint to the police in the autumn of 2007 and until the decision to impose the tax penalty was taken on 5 December 2008, the criminal proceedings and the tax proceedings had been conducted in parallel and were interconnected. This state of affairs was similar to that which obtained in the first applicant's case.

151. It is true, as noted by the High Court on appeal, that the nine-month period – from when the tax authorities' decision of 5 December 2008 had become final until the second applicant's conviction of 30 September 2009 by the City Court – had been somewhat longer than the two-and-a-half-month period in the case of the first applicant. However, as also explained by the High Court (see paragraph 39 above), this was due to the fact that the second applicant had withdrawn his confession in February 2009, with the consequence that he had had to be indicted anew on 29 May 2009 and an ordinary adversarial trial hearing had had to be scheduled (see paragraphs 34 and 35 above). This circumstance, resulting from a change of stance by the second applicant, cannot of itself suffice to disconnect in time the tax proceedings and the criminal proceedings. In particular, the additional lapse of time before the criminal trial hearing cannot be considered disproportionate or unreasonable, having regard to its cause. And what remains significant is the fact that, as for the first applicant, the tax penalty was indeed taken into account by the City Court in fixing the sentence in the criminal proceedings (see paragraph 35 above).

152. Therefore, also in the second applicant's case, the Court has no cause to call into doubt the reasons why the Norwegian authorities opted to deal with his reprehensible conduct in an integrated dual (administrative/criminal) process. The possibility of different cumulated penalties must have been foreseeable in the circumstances (see paragraphs

13 and 32 above). The criminal proceedings and the administrative proceedings were conducted largely in parallel and were interconnected (see paragraph 39 above). Again the establishment of facts made in one set was relied on in the other set and, as regards the proportionality of the overall punishment, regard was had to the administrative penalty in meting out the criminal sentence (see paragraphs 33 and 35 above).

153. On the facts before the Court, there is no indication that the second applicant suffered any disproportionate prejudice or injustice as a result of the impugned integrated legal treatment of his failure to declare income and pay taxes. Having regard to the considerations set out above (in particular as summarised in paragraphs 132-134), the Court thus considers that there was a sufficiently close connection, both in substance and in time, between the decision on the tax penalties and the subsequent criminal conviction for them to be regarded as forming part of an integral scheme of sanctions under Norwegian law for failure to provide information on a tax return leading to a deficient tax assessment.

(iii) Overall conclusion

154. Against this background, it cannot be said that either of the applicants was "tried or punished again ... for an offence for which he had already been finally ... convicted" in breach of Article 4 of Protocol No. 7. The Court accordingly finds no violation of this provision in the present case in respect of either of the two applicants.

FOR THESE REASONS, THE COURT

1. *Declares*, unanimously, the applications admissible;

2. *Holds*, by sixteen votes to one, that there has been no violation of Article 4 of Protocol No. 7 to the Convention in respect of either of the applicants.

Done in English and French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 15 November 2016.

Lawrence Early
Jurisconsult

Guido Raimondi
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Pinto de Albuquerque is annexed to this judgment.

G.R.
T.L.E.

DISSENTING OPINION OF JUDGE PINTO DE ALBUQUERQUE

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I – Introduction

1. I do not subscribe to either the reasoning or the conclusions of the majority in the present case. Although the present case specifically pertains to the combination of penalties imposed in tax proceedings and in parallel criminal proceedings, the Grand Chamber of the European Court of Human Rights ("the Court") has deliberately extended the scope of the case to the more general legal problem of "dual criminal and administrative proceedings"[1]. The obvious purpose of the Grand Chamber is to establish a principle of European human rights law that is applicable to all cases involving a combination of administrative and criminal proceedings. The problem is that the Grand Chamber's reasoning cuts some corners. The imprecise description of the conditions required for the combination of administrative and criminal penalties and the perfunctory application of these conditions to the Norwegian legal framework and practice leave a lingering impression of lightness of reasoning.

2. In the first part of my opinion, I deal with the forgotten foundations of the *ne bis in idem* principle, namely its historical roots as an individual guarantee and its gradual recognition as a principle of customary international law. Afterwards, I present the contemporary challenges to this principle in the field of administrative offences and especially of tax offences and the Court's hesitant response to them. In the second part of the opinion, I assess the *pro persona* legacy of *Sergey Zolotukhin*[2] and compare the majority's *pro auctoritate* stance in the present case with the recent solutions adopted by the Court and by the Court of Justice of the European Union in the field of tax offences[3], stock-exchange offences[4] and customs offences[5]. Finally, I demonstrate the shortcomings of the majority's solution in the present case on the basis of an in-depth discussion of the aims and the elements of the criminal and administrative offences at stake, the different evidentiary rules applicable in Norwegian administrative and criminal proceedings and the specific features of the alleged offsetting mechanism provided by domestic substantive law and case-law. In the light of the foregoing, I conclude that there has been a violation of Article 4 of Protocol No. 7.

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1. See the crucial paragraph 132 of the judgment.
2. *Sergey Zolotukhin v. Russia* [GC], no. 14939/03, §§ 82 and 84, ECHR 2009.
3. *Hans Åkeberg Fransson* (C-617/10, judgment of the Grand Chamber of the Court of Justice of the European Union, 26 February 2013, and *Lucky Dev v. Sweden*, no. 7356/10, § 58, 27 November 2014.
4. *Grande Stevens and Others v. Italy*, nos. 18640/10, 18647/10, 18663/10, 18668/10 and 18698/10, 4 March 2014.
5. *Kapetanios and Others v. Greece*, nos. 3453/12, 42941/12 and 9028/13, § 72, 30 April 2015, and *Sismanidis and Sitaridis v. Greece*, nos. 66602/09 and 71879/12, 9 June 2016.

First Part

II - Foundations of *ne bis in idem*

A. Brief historical note

a. Roman times

3. The maxim *ne bis in idem* was respected during the Roman Republic and the Principate, although some exceptions were mentioned of new proceedings for the same crime against defendants who had already been acquitted[6]. Initially, during the period of the *legis actiones*, the maxim meant that *bis de eadem res ne sic actio*, that is, the launching of a certain action had the consequence of extinguishing the respective right, which hindered the launching of new *actiones*, even when no decision on the merits had been delivered. To limit the impact of this maxim, the *exceptio rei judicatae* was introduced, which was dependent on a previous decision on the merits. The *exceptio* hindered *bis in eadem*, regardless of the fact that the previous judgment had been upon an acquittal or a conviction. In both cases, the *autoritas rerum judicatarum* consisted in the extinguishing effect of the criminal action. The scope of the maxim was limited by the object of the previous criminal action: *tantum consumptum, quantum judicatum, tantum judicatum, quantum litigatum*. The *eadem quaestio* was defined by the same fact, *idem factum*[7].

4. In Justinian law, the presumption of the truthfulness of the court's decision became the new rationale of the maxim. Ulpiano was the first to formulate the maxim *res iudicata pro veritate accipitur* (D. 50, 17, 207). Together with the emergence of the inquisitorial process and of syllogistic legal reasoning, the rationale of the imperial codification – the court's authority and the infallibility of the court's findings – impacted negatively on the individual dimension of the maxim. In the logic of the new inquisitorial process, the once exceptional cases of reopening of criminal proceedings for the same facts in Roman law became mere examples of the maxim *absolutio pro nunc, rebus sic stantibus*, which in fact acknowledged

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6. For the historical debate see Laurens, *De l'autorité de la chose jugée considerée comme mode d'extinction de l'action publique*, Paris, 1885; Mommsen, *Römisches Strafrecht*, Aalen, 1899; Arturo Rocco, *Trattato della Cosa Giudicata come Causa di Estinzione dell'Azione Penale*, Roma, 1900; Danan, *La régle* non bis in idem *en droit pénal français*, Rennes, 1971; Spinellis, *Die materielle Rechtskraft des Strafurteils*, Munich, 1962; Mansdörfer, *Das Prinzip des ne bis in idem im europäischen Strafrecht*, Berlin, 2004; and Lelieur-Fischer, *La règle ne bis in idem, Du principe de l'autorité de la chose jugée au principe d'unicité d'action répressive, Etude à la lumière des droits français, allemand et européen*, Paris, 2005.

7. See Laurens, cited above, p. 50-51; Arturo Rocco, cited above, p. 76; and Mommsen, cited above, p. 450.

the transitory nature of the criminal judgment in the pursuit of truthfulness. For example, in France, according to the *plus amplement informé* rule, in the absence of positive evidence of the defendant's innocence, the acquittal had a transitory nature, which could be reversed at any moment by new incriminatory evidence. The same occurred in Italy, where the defendant was acquitted from the observation of the court (*At in casu quo reus absoluendus est ab observatione iudici*), with the caveat "while things stand as they are" (*stantibus rebus prout stant*), the proceedings being reopened whenever new evidence appeared (*supervenient nova indicia*).

b. The Enlightenment

5. The Enlightenment brought a revival of the individual dimension of *ne bis in eadem*, which was incorporated into Article 8 of Chapter V of Title II of the 1791 French Constitution ("*tout homme acquité par un jury legal ne peut plus être repris ni accusé à raison du même fait*") and Articles 246 and 360 of the 1808 *Code d'Instruction Criminelle*. The practical consequence of these provisions was the abolition of the infamous *plus amplement informé* rule. On the other side of the Atlantic Ocean, in that same year of 1791, the Fifth Amendment to the United States Constitution introduced a prohibition of double jeopardy in criminal procedure ("*nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb*"), which encompasses the prohibition of subsequent prosecution after acquittal, subsequent prosecution after conviction and multiple punishments for the same offence[8]. The Amendment was designed as much to prevent the offender from being punished twice as from being tried twice for the same offence. When the conviction has been set aside for an error, the punishment already exacted for the offence must be fully "credited" in imposing sentence upon a new conviction for the same offence[9].

B. A principle of customary international law

a. The universal consolidation of the principle

6. As the established and virtually universal practice of States shows, it is a principle of customary international law that the State's claim to prosecute, adjudicate and punish a criminal act is exhausted (*Strafklageverbrauch*) once the accused person has been acquitted or has been found guilty of the imputed offence by a final decision taken in criminal proceedings (the exhaustion-of-procedure principle or

8. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969).
9. Ibid., 718.

Erledigungsprinzip)[10]. This principle is independent of any condition regarding sentencing or enforcement of the sentence. Where this principle does not apply, as in the case of the prohibition of double punishment, without barring a second prosecution and trial, any previous penalty must be taken into account when imposing a subsequent punishment for the same fact (the accounting principle or *Anrechnungprinzip*).

7. The exhaustion-of-procedure principle (*Erledigungsprinzip*) is affirmed by Article 14 § 7 of the 1966 International Covenant on Civil and Political Rights (ICCPR – "tried or punished")[11], Article 8 § 4 of the 1969 American Convention on Human Rights ("new trial"), Article 75 § 4 (h) of the 1977 Additional Protocol I to the 1949 Geneva Conventions ("prosecuted or punished"), Article 10 § 1 of the 1993 Statute of the International Criminal Tribunal for the former Yugoslavia ("tried")[12], Article 9 § 1 of the 1994 Statute of the International Criminal Tribunal for Rwanda ("tried")[13], Article 20 § 2 of the 1998 Statute of the International Criminal Court ("convicted or acquitted"), Article 9 § 1 of the 2002 Statute of the Special Court for Sierra Leone ("tried")[14] and Article 19 § 1 of the 2004 Arab Charter on Human Rights ("tried"). Article 86 of the 1949 Third Geneva Convention ("punished") and Article 117 § 3 of the 1949 Fourth Geneva Convention ("punished") do not go that far, since they only prohibit a new punishment, but make no reference to the accounting principle.

b. The European consolidation of the principle

8. Within the Council of Europe, the principle of *ne bis in idem* initially came into play as a mandatory or optional bar to cooperation in criminal matters between States. Examples of this limited approach are Article 9 of the 1957 European Convention on Extradition[15], Article 9 of the 1962

10. See, for the constitutional practice, Bassiouni, "Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions" (1993), 3 *Duke Journal of Comparative & International Law* 247.

11. See Human Rights Committee General Comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial, 23 August 2007, CCPR/C/GC/32, §§ 54-57.

12. "But in considering the penalty to be imposed on a person convicted of a crime under the present Statute, the International Tribunal shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served."

13. "But in considering the penalty to be imposed on a person convicted of a crime under the present Statute, the International Tribunal for Rwanda shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served."

14. "But in considering the penalty to be imposed on a person convicted of a crime under the present Statute, the Special Court shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served."

15. ETS no. 24.

European Convention on the Punishment of Road Traffic Offences[16], Article 2 of the 1975 Additional Protocol to the European Convention on Extradition[17], Article 8 of the 1983 Convention on the Transfer of Sentenced Persons[18], Article 2 § 4 of the 1995 Agreement on Illicit Traffic by Sea, implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances[19] and Article 28 § 1 (f) of the 2005 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism[20].

9. More recently, the exhaustion-of-procedure principle (*Erledigungsprinzip*) was affirmed by Article 53 of the 1970 European Convention on the International Validity of Criminal Judgments ("neither be prosecuted nor sentenced nor subjected to enforcement of a sanction")[21], Article 35 of the 1972 European Convention on the Transfer of Proceedings in Criminal Matters ("neither be prosecuted nor sentenced nor subjected to enforcement of a sanction")[22] and Article 17 of the 1985 European Convention on Offences relating to Cultural Property ("neither be prosecuted nor sentenced nor subjected to enforcement of a sanction")[23]. In these cases, when *ne bis in idem* does not apply, the accounting principle must be safeguarded as a last-resort guarantee. Article 25 of the 2005 Council of Europe Convention on Action against Trafficking in Human Beings provides solely for the accounting principle[24].

10. The Council of Europe Parliamentary Assembly Recommendation 791 (1976) on the protection of human rights in Europe urged the Committee of Ministers to "endeavour to insert as many as possible of the substantive provisions of the Covenant [on Civil and Political Rights] in the Convention". Article 4 of Protocol No. 7[25] was thus approved in 1984 under the direct influence of Article 17 § 7 of the ICCPR. The major novelty was the non-derogable nature of the European principle.

11. Within the European Union, the exhaustion-of-procedure principle (*Erledigungsprinzip*) was affirmed by Article 1 of the 1987 Convention between the Member States of the European Communities on Double

16. ETS no. 52.
17. ETS no. 86.
18. ETS no. 112.
19. ETS no. 156.
20. CETS no. 198.
21. ETS no. 70. When this principle is not applied, Article 54 provides for the accounting principle for prison sentences.
22. ETS no. 73. When this principle does not apply, Article 36 provides for the accounting principle for prison sentences.
23. ETS no. 119. When this principle is not applied, Article 18 provides for the accounting principle for prison sentences.
24. CETS no. 197.
25. ETS no. 117. The Protocol entered into force on 1 November 1988.

Jeopardy ("not be prosecuted")[26], Article 54 of the 1990 Convention implementing the Schengen Agreement (CISA – "not be prosecuted")[27], Article 7 of the 1995 Convention on the protection of the European Communities' financial interests ("not be prosecuted")[28], Article 10 of the 1997 Convention on the Fight against Corruption involving Officials of the European Communities or Officials of the Member States of the European Union ("not be prosecuted")[29], Article 2 § 1 of the European Central Bank Regulation no. 2157/1999 on the powers of the European Central Bank to impose sanctions ("No more than one infringement procedure shall be initiated"), Article 50 of the 2000 Charter of Fundamental Rights of the European Union ("the Charter" – "tried or punished") and the 2003 Initiative of the Hellenic Republic with a view to adopting the Council Framework Decision concerning the application of the "*ne bis in idem*" principle ("cannot be prosecuted for the same acts")[30].

12. The Charter radically changed the legal obligations of those member States of the European Union to which it is applicable. Since the right not to be tried or punished twice in criminal proceedings for the same offence is set out in Article 54 of the CISA and in Article 50 of the Charter, Article 54 must be interpreted in the light of Article 50[31]. In the light of Article 52 § 3 of the Charter, when implementing Charter rights and freedoms which correspond to rights and freedoms guaranteed by the European Convention on Human Rights ("the Convention") and the Protocols thereto, member States of the European Union are bound by the meaning and scope of those rights and freedoms laid down by the Convention and Protocols, as interpreted by the Court[32], even when they have not ratified these Protocols.

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26. Article 3 provides for the accounting principle for prison sentences as well as penalties not involving deprivation of liberty.

27. Where this principle does not apply, Article 56 provides for the accounting principle for prison sentences as well as penalties not involving deprivation of liberty. Articles 54 to 57 of the Convention implementing the Schengen Agreement were taken from the Convention between the Member States of the European Communities on Double Jeopardy. The Treaty of Amsterdam incorporated *ne bis in idem* in the third pillar. From that moment on, the principle became an objective of the common space of freedom, security and justice. See also the Programme of measures to implement the principle of mutual recognition of decisions in criminal matters (2001/C 12/02) and the Commission Green Paper on Conflicts of Jurisdiction and the Principle of *ne bis in idem* in Criminal Proceedings, COM(2005) 696 final.

28. Council Act of 26 July 1995.

29. Council Act of 26 May 1997. Article 10 provides for the accounting principle for prison sentences as well as penalties not involving deprivation of liberty.

30. Article 3 has rules on *lis pendens*. Article 5 provides for the accounting principle, including for any penalties other than deprivation of freedom which have been imposed and penalties imposed in the framework of administrative procedures.

31. See paragraph 35 of the judgment of 5 June 2014 in *M* (C-398/12).

32. See Note from the Praesidium of the Convention: explanations on the Charter of Fundamental Rights of the European Union (Brussels, 11 October 2000): "The reference to the ECHR covers both the Convention and the Protocols to it. The meaning and the scope

This is also the case for Article 50 of the Charter and consequently Article 54 of the CISA, which evidently must be interpreted and applied in the light of the Court's case-law on Article 4 of Protocol No. 7, even in the case of those European Union member States which have not ratified this Protocol.

13. Furthermore, *ne bis in idem* was inserted as a bar to cooperation in criminal matters between States in various instruments, such as Article 3 § 2 of the 2002 Framework Decision on the European Arrest Warrant[33], Article 7 § 1 (c) of the 2003 Framework Decision on the execution in the European Union of orders freezing property or evidence[34], Article 8 § 2 (b) of the 2006 Framework Decision on the application of the principle of mutual recognition to confiscation orders[35], Article 11 § 1 (c) of the 2008 Framework Decision on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions[36], Article 13 § 1 (a) of the 2008 Framework Decision on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters[37], Article 15 § 1 (c) of the 2009 Framework Decision on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention[38], and Article 1 § 2 (a) of the 2009 Framework Decision on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings[39].

Finally, Article 6 of Regulation no. 2988/95 on the protection of the European Communities' financial interests sets out the principle *le pénal tient l'administratif*, coupled with the accounting principle.

14. In the judicial arena, the Court of Justice of the European Union held, in *Walt Wilhelm and others v. Bundeskartellamt*, that concurrent sanctions could be imposed in two parallel sets of proceedings pursuing different ends. In competition law, the possibility that one set of facts could be submitted to two parallel procedures, one at Community level and the other at national level, followed from the special system of the sharing of jurisdiction between the Community and the Member States with regard to cartels. If, however, the possibility of two procedures being conducted separately were to lead to the imposition of consecutive sanctions, a general

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of the guaranteed rights are determined not only by the text of those instruments, but also by the case law of the European Court of Human Rights and by the Court of Justice of the European Communities."

33. Council Framework Decision 2002/584/JHA of 13 June 2002.
34. Council Framework Decision 2003/577/JHA of 22 July 2003.
35. Council Framework Decision 2006/783/JHA of 6 October 2006.
36. Council Framework Decision 2008/947/JHA of 27 November 2008.
37. Council Framework Decision 2008/978/JHA of 18 December 2008.
38. Council Framework Decision 2009/829/JHA of 23 October 2009.
39. Council Framework Decision 2009/948/JHA of 30 November 2009.

requirement of natural justice would demand that any previous punitive decision must be taken into account in determining any sanction which is to be imposed[40].

Later on, the Court of Justice further developed its case-law within the ambit of the third pillar on *bis* (*Gözütok and Brügge*,[41] *Miraglia*[42], *Van Straaten*[43], *Turanský*[44], *M.*[45], *Kussowski*[46]), on "*idem*" (*Van Esbroeck*[47], *Van Straaten*[48], *Gasparini*[49], *Kretzinger*[50], *Kraaijenbrink*[51] and *Gasparini*[52]) and on the enforcement clause (*Klaus Bourquain*[53], *Kretzinger*[54] *and Spasic*[55]).

In the tax law domain, the landmark judgment was *Hans Åkeberg Fransson*, which reached the following conclusion: "It is only if the tax penalty is criminal in nature for the purposes of Article 50 of the Charter and has become final that that provision precludes criminal proceedings in respect of the same acts from being brought against the same person."[56] By refusing the Advocate General's proposal based on the accounting principle[57], the Luxembourg Court decided, in a remarkable move towards convergence with the Strasbourg Court, that a combination of tax penalties with a criminal nature according to the *Engel* criteria and criminal penalties would constitute an infringement of Article 50 of the Charter[58].

15. In sum, the copious occurrence of the *ne bis in idem* principle in both international and domestic law and case-law testifies to the recognition of a

40. Case 14/68, 13 February 1969, § 11.
41. Case C-187/01 and Case C-385/01, 11 February 2003.
42. Case C-469/03, 10 March 2005.
43. Case C-150/05, 28 September 2006.
44. Case C-491/07, 22 December 2008.
45. Case C‑398/12, 5 June 2014.
46. Case C-486/14, 29 June 2016.
47. Case C-436/04, 9 March 2006.
48. Cited above.
49. Case C-467/04, 28 September 2006.
50. Case C-288/05, 18 July 2007.
51. Case C-367/05, 18 July 2007.
52. Cited above.
53. Case C-297/07, 11 December 2008.
54. Case C-288/05, 18 July 2007.
55. Case C-129/14 PPU, 27 May 2014.
56. *Hans Åkeberg Fransson*, cited above, §§ 34 and 37.
57. In paragraphs 86 and 87 of his opinion, the Advocate General pleaded for a "partially autonomous interpretation" of Article 50 of the Charter, arguing that there was a constitutional tradition common to the member States and at variance with the then prevailing interpretation by the Strasbourg Court of Article 4 of Protocol No. 7 which "clashes with the widespread existence and established nature in the Member States of systems in which both an administrative and a criminal penalty may be imposed in respect of the same offence."
58. This is exactly the reading of the *Fransson* judgment by the Court in *Grande Stevens and Others*, cited above, § 229; *Kapetanios and Others*, cited above, § 73; and *Sismanidis and Sitaridis*, cited above, § 73.

principle of customary international law[59]. The exhaustion-of-procedure principle (*Erledigungsprinzip*) is largely predominant in international law, both at the universal and the European levels, but the accounting principle also finds some recognition, in a narrower form within the Council of Europe (deduction of prison sentences) and a broader form within the European Union (deduction of prison sentences and taking into account of sanctions not entailing deprivation of liberty).

III - Contemporary challenges to *ne bis in idem*

A. Administrative offences and criminal policy *à deux vitesses*

a. The policy trend towards decriminalisation

16. Decriminalisation has been a most welcome trend of criminal law in Europe since the 1960s[60]. Administrative offences are a rational deflative instrument of criminal policy. This trend is frequently characterised by the transfer of criminal offences with a lesser degree of social offensiveness, such as road traffic offences, to the field of administrative law, where the substantive and procedural guarantees are not on a par with those of classic criminal law and criminal procedure. Administrative offences are frequently couched in broad and open-ended terms and administrative fines (*Geldbusse*) are the preferred form of punishment. Imprisonment is not an alternative (*Ersatzfreiheitsstrafe*) to a fine as is the case in criminal law, and no coercive imprisonment (*Erzwingungshaft*) can be ordered unless the person concerned has failed to pay the sum due without having established his or her inability to pay. Administrative penalties are not entered in the national criminal record but solely, in certain circumstances, on administrative registers for specific sectors, such as the register of road traffic offences. Normally, administrative offences are processed by means of a simplified procedure of prosecution and punishment conducted before administrative authorities, save in the event of a subsequent appeal to a

59. See, among many sources of *opinio iuris* in this regard, the conclusions of the International Association of Penal Law (IAPL) at the Fourteenth International Congress of Penal Law in October 1989 ("If an act meets the definition both of a criminal offence and of an administrative penal infraction, the offender should not be punished twice; at a minimum, full credit should be given, in sentencing on a subsequent conviction, for any sanction already imposed in relation to the same act") and the Seventeenth International Congress of Penal Law in September 2004 ("At any rate, double prosecutions and sanctions of a criminal nature have to be avoided"); Principle 9 of the Princeton Principles on Universal Jurisdiction, 2001; and Anke Biehler et al. (eds.), Freiburg Proposal on Concurrent Jurisdictions and the Prohibition of Multiple Prosecutions in the European Union, 2003.

60. IAPL, Fourteenth International Congress, cited above: "The decriminalization of transgressions is in accord with the principle of subsidiarity of penal law and is thus welcomed."

court. In many cases, the prosecution of administrative offences falls within the discretionary power of the competent administrative authorities. General laws on criminal procedure are in principle applicable only by analogy. Shorter limitation periods apply to administrative offences than to criminal offences.

17. The blurring of the dividing line between criminal law and administrative law has its own risks. Forms of conduct with a high degree of social offensiveness have also become the subject of administrative law, especially when they involve mass processing of data, such as tax law, or highly qualified expertise, such as competition law[61] and securities and stock-exchange law[62].

b. *Öztürk* and the "criminalisation" of petty offences

18. It has been the long-standing case-law of the Court that administrative offences also come under its scrutiny, as far as Article 6 guarantees are concerned. On the basis of the *Engel* criteria[63], the Court has time and again reaffirmed that conduct punishable by administrative penalties must benefit from the procedural guarantees of Article 6 regardless of the personal or collective nature of the legal interests protected by the norm that has been breached[64], the relative lack of seriousness of the penalty[65] and the fact that the penalty is hardly likely to harm the reputation of the offender[66]. Otherwise such deprivation of procedural guarantees would contradict the purpose of Article 6[67].

19. In *Öztürk*[68] the Court used three crucial arguments to swim against the tide of decriminalisation and support the position that the administrative offence at stake, a road traffic offence, was "criminal" for the purposes of Article 6: the ordinary meaning of the terms, the punishability of the offending conduct by criminal law in the "vast majority of the Contracting

61. See *A. Menarini Diagnostics S.R.L. v. Italy*, no. 43509/08, 27 September 2011.
62. See *Grande Stevens and Others*, cited above.
63. See *Engel and Others v. the Netherlands*, 8 June 1976, Series A no. 22.
64. See *Öztürk v. Germany*, 21 February 1984, § 53, Series A no. 73: "It matters little whether the legal provision contravened by Mr. Öztürk is aimed at protecting the rights and interests of others or solely at meeting the demands of road traffic."
65. Ibid., § 54. "The relative lack of seriousness of the penalty at stake … cannot divest an offence of its inherently criminal character." See also *Lutz v. Germany*, 25 August 1987, § 55, Series A no. 123, and *Jussila v. Finland* [GC], no. 73053/01, § 31, ECHR 2006-XIII.
66. See *Öztürk*, cited above, § 53: "The fact that it was admittedly a minor offence hardly likely to harm the reputation of the offender does not take it outside the ambit of Article 6. There is in fact nothing to suggest that the criminal offence referred to in the Convention necessarily implies a certain degree of seriousness."
67. Ibid.: "it would be contrary to the object and purpose of Article 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 Article a whole category of offences merely on the ground of regarding them as petty."
68. Ibid.

States" and the general scope of the norm that was breached – a provision of the Road Traffic Act[69]. On closer inspection, none of these arguments is convincing. It is hard to establish the dividing line between administrative and criminal offences on the basis of the "ordinary meaning of terms", whatever this may mean for the Court. Furthermore, while it is true that a European consensus is certainly a decisive criterion for the criminalisation of conduct with a high degree of social offensiveness, it is hard to understand why the Court should argue, on the basis of a European consensus, against the decriminalisation of petty offences, a trend which reflects a concern to benefit not only the individual, who would no longer be answerable in criminal terms for his or her conduct and could even avoid court proceedings, but also to ensure the effective functioning of the courts, which would henceforth be relieved in principle of the task of dealing with the great majority of such offences. Above all, the Court errs in equating criminal offences with norms of general personal scope. Quite surprisingly, it seems to ignore the long-standing European tradition of criminal offences with a limited personal scope, namely norms applicable to certain categories of citizens distinguishable by personal or professional features (*Sonderdelikte* or *Pflichtendelikte*)[70]. Therefore, criminal offences and norms of limited personal scope of applicability are not mutually exclusive.

20. While decriminalisation is not unproblematic in terms of the guarantees in Articles 6 and 7 of the Convention and Article 4 of Protocol No. 7 when it relates to petty administrative penalties that punish conduct with a lesser degree of social offensiveness[71], it undoubtedly raises a serious issue under those Articles when it deals with conduct with a higher degree of social offensiveness that has been downgraded to the sphere of administrative law, for policy purposes. This is all the more so when administrative offences, including those committed negligently, are punishable by astronomical, sometimes even unlimited, financial penalties, fines or surcharges, frequently coupled with the suspension, restriction or even withdrawal of certain rights, such professional rights. Special leniency regimes are available for whistleblowers and others who collaborate with the judicial authorities. Some administrative offences even carry a more severe penalty in the event of recidivism. In addition, administrative proceedings may include such intrusive investigatory measures as

69. Ibid.

70. On this type of criminal offences, see Roxin, *Täterschaft und Tatherrschaft*, Berlin, 9 edition, 2015, and Langer, *Das Sonderverbrechen*, Berlin, 1972. Scholarly literature distinguishes between "true special offences" (*echte Sonderdelikte*), which can only be committed by a person with a certain status or in a certain situation, and "false special offences" (*unechte Sonderdelikte*), which can be committed by any person but carry an aggravated penalty if committed by a person with a certain status or in a certain situation. The Court made no mention of this distinction in *Öztürk*.

71. For the Court, it is clear that decriminalisation is linked to minor offences which have no social stigma (see *Lutz*, cited above, § 57).

interception of communications and house searches, which may restrict the suspect's privacy just as in the most serious criminal proceedings.

21. In fact, this *droit pénal à deux vitesses* hides a net-widening repressive policy, which aims to punish more expediently and more severely, with lesser substantive and procedural safeguards. In this new Leviathan-like context, administrative-law offences are nothing but pure mislabelling of a hard-core punitive strategy and administrative law becomes a shortcut to circumvent the ordinary guarantees of criminal law and criminal procedure[72].

22. The Convention is not indifferent to this criminal policy. On the contrary, it does not leave human rights issues of this magnitude to each State's discretion. No margin of appreciation is accorded to States by Article 7 of the Convention and Article 4 of Protocol No. 7, which are non-derogable provisions. The definition of the confines of criminal law and the application of the principles of legality and *ne bis in idem* are not dependent on the particularities of each domestic legal system. On the contrary, they are subject to strict European supervision performed by the Court, as will be shown below.

B. Tax penalties as a criminal policy instrument

a. The criminal nature of tax penalties

23. Like the wording of Articles 6 and 7 of the Convention, the notion of "criminal proceedings" in the text of Article 4 of Protocol No. 7 must be interpreted in an autonomous way. Furthermore, as a matter of principle, the Convention and its Protocols must be read as a whole[73]. Hence, Article 4 of Protocol No. 7 must be interpreted in the light of the general principles concerning the corresponding words "criminal charge" and "penalty" in Articles 6 and 7 of the Convention respectively[74]. Furthermore, the legal characterisation of the procedure under national law cannot be the sole criterion of relevance for the applicability of the *ne bis in idem* principle under Article 4 of Protocol No. 7. Otherwise, the application of this provision would be left to the discretion of the Contracting States to a

72. I have already criticised this trend in my opinions appended to *A. Menarini Diagnostics S.R.L.*, cited above, and *Grande Stevens and Others*, cited above.

73. See, among many other authorities, *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, § 178, ECHR 2012, and *Ferrazzini v. Italy* [GC], no. 44759/98, § 29, ECHR 2001-VII.

74. See *Nykänen v. Finland*, no. 11828/11, § 38, 20 May 2014; *Haarvig v. Norway* (dec.), no. 11187/05, 11 December 2007; *Nilsson v. Sweden* (dec.), no. 73661/01, ECHR 2005-XIII; *Rosenquist v. Sweden* (dec.), no. 60619/00, 14 September 2004; *Manasson v. Sweden* (dec.), no. 41265/98, 8 April 2003; *Göktan v. France*, no. 33402/96, § 48, ECHR 2002-V; and *Malige v. France*, 23 September 1998, § 35, *Reports of Judgments and Decisions* 1998-VII.

degree that might lead to results incompatible with the object and purpose of the Convention. Precisely in order to avoid this discretion, there may be cases where neither a final acquittal[75] nor a final conviction[76] is capable of triggering the *ne bis in idem* effect.

24. In the present case, the first set of proceedings concerned the imposition of tax penalties. The Court has taken a clear stand on the criminal nature of tax penalties, in the context of Article 6 of the Convention. In *Bendenoun*[77], which concerned the imposition of tax penalties for tax evasion, the Court did not refer expressly to the *Engel* criteria and listed four aspects as being relevant to the applicability of Article 6 in that case: that the law setting out the penalties covered all citizens in their capacity as taxpayers; that the surcharge in question was not intended as pecuniary compensation for damage but essentially as a punishment to deter reoffending; that it was imposed under a general rule whose purpose was both deterrent and punitive; and that the surcharge was substantial. The Court considered, however, that Contracting States must be free to empower tax authorities to impose sanctions such as tax surcharges even if they involved large amounts. Such a system was not incompatible with Article 6 § 1 so long as the taxpayer could bring any such decision affecting him or her before a judicial body with full jurisdiction, including the power to quash in all respects, on questions of fact and law, the decision challenged[78].

25. In *Janosevic*[79] and *Västberga Taxi Aktiebolag and Vulic*[80], the Court made no reference to *Bendenoun* or the particular approach pursued in that case, but proceeded squarely on the basis of the *Engel* criteria[81]. After confirming that the administrative proceedings had determined a "criminal charge" against the applicant, the Court found that the judicial proceedings in the cases before it had been conducted by courts that afforded the safeguards required by Article 6 § 1, since the administrative courts had jurisdiction to examine all aspects of the matters before them. Their examination was not restricted to points of law but could also extend to factual issues, including the assessment of evidence. If they disagreed with the findings of the tax authority, they had the power to quash the decisions appealed against. The Court added that the starting-point for the tax

75. See *Marguš v. Croatia* [GC], no. 4455/10, § 139, ECHR 2014.
76. See *Kurdov and Ivanov v. Bulgaria*, no. 16137/04, § 44, 31 May 2011.
77. *Bendenoun v. France*, 24 February 1994, Series A no. 284.
78. Ibid., § 46.
79. *Janosevic v. Sweden*, no. 34619/97, ECHR 2002‑VII.
80. *Västberga Taxi Aktiebolag and Vulic v. Sweden*, no. 36985/97, 23 July 2002.
81. The Court emphasised the wrong argument: "The resultant tax surcharges were imposed in accordance with tax legislation … directed towards all persons liable to pay tax in Sweden and not towards a given group with a special status" (see *Janosevic*, cited above, § 68; *Västberga Taxi Aktiebolag and Vulic*, cited above, § 79; and again, for example, in *S.C. IMH Suceava S.R.L. v. Romania*, no. 24935/04, § 51, 29 October 2013).

authorities and courts must be that inaccuracies found in a tax assessment were due to an inexcusable act attributable to the taxpayer and that it was not manifestly unreasonable to impose a tax surcharge as a penalty for that act. The tax authorities and courts had to consider whether there were grounds for remission even if the taxpayer had not made any claim to that effect. However, as the duty to consider whether there were grounds for remission only arose in so far as the facts of the case warranted it, the burden of proving that there was a reason to remit a surcharge was, in effect, on the taxpayer. The Court concluded that a tax system operating with such a presumption, which it was up to the taxpayer to rebut, was compatible with Article 6 § 2 of the Convention.

b. *Jussila* and the dividing line between *malum in se* and *malum quia prohibitum*

26. In *Jussila*[82] the Court confirmed the approach taken in *Janosevic* and emphasised that "[n]o 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 Article 6."[83] Moreover, in a clear signal of its intention not to deprive taxpayers of their fundamental safeguards in dealings with the State, the Court added that "[w]hile there is no doubt as to the importance of tax to the effective functioning of the State, the Court is not convinced that removing procedural safeguards in the imposition of punitive penalties in that sphere is necessary to maintain the efficacy of the fiscal system or indeed can be regarded as consonant with the spirit and purpose of the Convention."[84] In so doing, the Court "to a certain extent"[85] abandoned the rationale of *Ferrazzini*[86], since it admitted that matters of pure tax assessment did not fall outside the Convention's material scope. *Ratione materiae*, issues relating to tax penalties may involve the Court in an evaluation of the States' sovereign power of tax assessment. The neutralisation of the public power prerogative in *Jussila* led the Court to an apparent reframing of the specificity of tax obligations in the context of European human rights law.

27. Even where the tax surcharges were not classified in national law as criminal, that fact alone was not decisive for the Court. The fact that tax surcharges were imposed by legal provisions applicable to taxpayers

82. *Jussila*, cited above, § 41.
83. Ibid., § 35.
84. Ibid., § 36.
85. Ibid., § 45.
86. See *Ferrazzini*, cited above, § 29. In fact, the Court has assessed the compatibility of tax policy measures with Article 1 of Protocol No. 1 on several occasions (among the most significant, *NKM v. Hungary*, no. 66529/11, 14 May 2013; *Koufaki and ADEDY v. Greece* (dec.), no. 57665/12 and 57657/12, 7 May 2013; *Da Conceição Mateus v. Portugal* (dec.), nos. 62235/12 and 57725/12, 8 October 2013; and *Da Silva Carvalho Rico v. Portugal* (dec.), no. 13341/14, 1 September 2014).

generally, with a deterrent purpose, was considered far more relevant. As a matter of principle, tax surcharges were not intended solely as pecuniary compensation for certain damage caused to the State, but as a form of punishment of offenders and a means of deterring recidivism and potential new offenders. In the eyes of the Court, tax surcharges were thus imposed by a rule, the purpose of which was simultaneously deterrent and punitive, even where a 10% tax surcharge had been imposed, with an overall maximum possible surcharge of 20%[87]. For the Court, the punitive nature of tax surcharges trumped the *de minimis* consideration of *Bendenoun*. Consequently, proceedings involving tax surcharges were also found to be "criminal proceedings" for the purpose of Article 6 of the Convention.

28. Had the Court stopped here, *Jussila* would have been a simple extension of *Öztürk* to the field of tax penalties. But the Court did not stop here. It went on to note that it was "self-evident that there are criminal cases which do not carry any significant degree of stigma". Consequently, in the Court's judgment, the criminal-head guarantees did not necessarily apply with their full stringency to criminal charges with no significant degree of stigma.[88] By applying Article 6 in a differentiated manner depending on the nature of the issue and the degree of stigma that certain criminal charges carried, the Court distinguished between disposable and non-disposable Convention procedural guarantees, the right of the defendant to a public hearing being one of the former guarantees. In so far as they did not carry any significant degree of stigma, administrative offences could differ from the hard core of criminal law, and therefore the criminal-head guarantees of Article 6 might not apply fully to them. A second-class type of criminal offence, benefiting from only some of the Article 6 guarantees, came into existence in *Jussila*.

29. Unfortunately, the Court has not made any effort, either in *Jussila* or subsequently, to develop a coherent approach to the *magna quaestio* of the dividing line between "hard-core criminal law" and the rest of criminal law, which echoes the outdated distinction between the *mala in se* and the *mala prohibita*. Besides being too simplistic, the Grand Chamber's distinction seems rather artificial. In *Jussila*, as in a few other cases, the social stigma criterion resembles a merely rhetorical argument that the Court does not really use to solve cases[89]. In fact, the Court decided the *Jussila* case very

87. See *Jussila*, cited above, § 38.

88. Ibid., § 43; see also *Grande Stevens and Others*, cited above, § 120; *Kammerer v. Austria*, no. 32435/06, § 26, 12 May 2010; and *Flisar v. Slovenia*, no. 3127/09, § 36, 29 September 2011. The conclusion in *Jussila* that a public hearing was not needed to deal with administrative offences was extended to other procedural issues covered by Article 6, such as, in the *Kammerer* and *Flisar* cases, the presence of the accused at a hearing.

89. In fact, the application of the criterion of social stigma in the Court's case-law has been very limited. It is true that the Court has repeatedly noted the special social stigma implied by the offence of torture (see, among many other authorities, *Ireland v. the United Kingdom*, 18 January 1978, § 167, Series A no. 25; *Aksoy v. Turkey*, 18 December 1996,

pragmatically, on the basis of the fact that the applicant was given ample opportunity to put forward his case in writing and to comment on the submissions of the tax authorities.

30. The lack of conceptual clarity on the definition of "hard-core criminal law" under Article 6 is further aggravated by the fact that the application of the *Engel* criterion is normally more a matter of degree, depending on the weight of the applied and applicable penalties, than a matter of the nature of the charges levelled against the defendant. The Court more often than not prefers to solve the question of the applicability of the *Engel* criteria by resorting to a purely quantitative evaluation, rather than a qualitative one, of the offences at issue. When it embarks on a substantive

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§ 64, *Reports* 1996-VI; *Aydın v. Turkey*, 25 September 1997, §§ 83-84 and 86, *Reports* 1997-VI; *Selmouni v. France* [GC], no. 25803/94, § 74, ECHR 1999-V; *Dikme v. Turkey*, no. 20869/92, §§ 94-96, ECHR 2000-VIII; and *Batı and Others v. Turkey*, nos. 33097/96 and 57834/00, § 116, ECHR 2004-IV). But other than these cases the use of the criterion is scarce. Sometimes the Court refers to the social stigma carried by a conviction as a factor for considering the need for the defendant to take part in the proceedings in person (in a murder case, see *Chopenko v. Ukraine*, no. 17735/06, § 64, 15 January 2015; in a corruption case, see *Suuripää v. Finland*, no. 43151/02, § 45, 12 January 2010), or for determining that the applicant's situation must already have been substantially affected by the measures taken by the police in the preliminary proceedings (in a case of sexual abuse of a minor, see *Subinski v. Eslovenia*, no. 19611/04, § 68, 18 January 2007). The *Suuripää* finding was extended to the case of a tax administrative offence in *Pákozdi v. Hungary* (no. 51269/07, § 39, 25 November 2014). In other instances, the Court has stated that criminal offences punishable by imprisonment carried a significant degree of stigma, when the convicted person had been sentenced to a seven-year term (*Popa and Tanasescu v. Romania*, no. 19946/04, § 46, 10 April 2012), a four-year term (*Sándor Lajos Kiss v. Hungary*, no. 26958/05, § 24, 29 September 2009), or a suspended prison term (*Goldmann and Szénászky v. Hungary*, no. 17604/05, § 20, 30 November 2010), or even only a fine (*Taláber v. Hungary*, no. 37376/05, § 27, 29 September 2009). On other occasions, the Court has simply affirmed that certain legal interests, such as the observance of rules on fire safety, consumer protection or town-planning construction policy, do not fall into the criminal law field, without mentioning the lack of social stigma (see *Kurdov and Ivanov*, cited above, § 43; *S.C. IMH Suceava S.R.L.*, cited above, § 51; and *Inocêncio v. Portugal* (dec.), no 43862/98, ECHR 2001‑I). In *Segame SA v. France* (no. 4837/06, § 59, 7 June 2012) the Court found that supplementary taxes on works of art and related penalties "differ from the hard core of criminal law for the purposes of the Convention". In *Grande Stevens and Others* (cited above, § 122) the Court noted that, quite apart from their financial severity, the penalties which some of the applicants were liable to incur carried a "significant degree of stigma", and were likely to adversely affect the professional honour and reputation of the persons concerned. Hence, the substantive criterion of social stigma is sometimes connected to the penalties applicable to the offence, whilst in cases of murder, torture, corruption or sexual abuse of minor it is linked to the very nature of the conduct. Finally, the Court has also rejected the tautological, organic criterion, according to which offences dealt with by administrative courts or "minor offence" courts are administrative and therefore their classification as "criminal" is precluded (see *Tomasović v. Croatia*, no. 53785/09, § 22, 18 October 2011).

analysis of the nature of the offence, it frequently uses the erroneous *Öztürk* argument of the limited personal scope of the norm[90].

31. In sum, the *Öztürk* policy choice to "criminalise" petty administrative offences for the purposes of Article 6 was fundamentally reviewed in *Jussila*. The apparent extension of this policy choice to tax penalties was diluted in the end by the efficiency-oriented, pragmatic stance of the Court, which labelled these petty offences as, although "criminal", not "hard core criminal", and therefore undeserving of the full protection of the criminal limb of Article 6. The interests of efficient mass tax collection speak louder than any other.

32. Be that as it may, the message of the Court in *Jussila* is valid for Norway as well. The tax penalties imposed in the present case were criminal in nature and the respective tax proceedings were criminal for the purposes of Article 4 of Protocol No. 7. The Norwegian tax penalties of 30%, with an overall possible maximum of 60% for wilful or grossly negligent offences, are well above the *Jussila* standard.

This is also the position of the majority of the Grand Chamber in the present case, since they confirm, contrary to the assertion of the Government[91], that there is not a narrower notion of "criminal" under Article 4 of Protocol No. 7. Hence, the majority reject the approach taken in *Storbråten*[92], *Mjelde*[93] and *Haarvig*[94], where the Court accepted a wider range of criteria than the *Engel* criteria for the purposes of establishing the existence of criminal proceedings under Article 4 of Protocol No. 7.

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90. The application of this criterion has produced unfortunate decisions, such as the one delivered in *Inocêncio* (cited above), which considered the administrative offences (*contraordenações*) at stake to be non-criminal, although the Portuguese *contraordenações* were structured exactly like the German *Ordnungswidrigkeiten* that had been treated as "criminal" in *Öztürk* (compare the German 1968 Law on Administrative Offences, *Gesetz über Ordnungswidrigkeiten*, and the Portuguese 1982 Law on Administrative Offences, *Regime Geral das Contraordenações*).

91. See paragraphs 66 and 67 of the judgment.

92. *Storbråten v. Norway* (dec.), no. 12277/04, 11 February 2007.

93. *Mjelde v. Norway* (dec.), no. 11143/04, 11 February 2007.

94. *Haarvig*, cited above.

Second Part

IV - The *pro persona* legacy of *Sergey Zolotukhin*

A. The combination of administrative and criminal penalties

a. The *idem factum* in administrative and criminal proceedings

33. Article 4 of Protocol No. 7 prohibits anyone from being prosecuted or tried for an offence for which he or she has already been finally acquitted or convicted. An approach emphasising the legal characterisation of the offence (*idem crimen*) would be too restrictive. If the Court limited itself to finding that a person had been prosecuted for offences with a different legal classification, it would risk undermining the guarantee enshrined in Article 4 of Protocol No. 7, for two reasons. First, the same fact may be characterised as a criminal offence in different States, but the constituent elements of the offence may differ significantly. Second, different States may characterise the same fact as a criminal offence or an administrative (that is, non-criminal) offence[95].

34. Accordingly, Article 4 of Protocol No. 7 has to be understood as prohibiting the fresh prosecution or trial of an offence in so far as it arose from identical facts or facts which were substantially the same (*idem factum*)[96]. It is therefore important, in the Court's eyes, to focus on those facts which constituted a set of concrete factual circumstances involving the same defendant and inextricably linked together in time and space, the existence of which must be demonstrated in order to secure a conviction or institute criminal proceedings[97]. This means that the scope of the prohibition encompasses the prosecution of new offences which are in a relationship of apparent concurrence (*concours apparent*, *concorso apparente*, *Gesetzeskonkurrenz*) or true concurrence (*concours idéal de crimes*,

95. For example, Article 4 of Protocol No. 7 has been extended to administrative penalties, such as tax penalties of 40% and 80% of the amounts due (see *Ponsetti and Chesnel v. France* (dec.), no. 36855/97 and 41731/98, ECHR 1999-VI), administrative penalties complementary to criminal penalties (see *Maszni v. Romania*, no. 59892/00, 21 September 2006) and civil penalties (see *Storbråten*, cited above).

96. The Cout has defined *idem factum* as "the same conduct by the same persons at the same date" (see *Maresti v. Croatia*, no 55759/07, § 63, 25 June 2009, and *Muslija v. Bosnia and Herzegovina*, no 32042/11, § 34, 14 January 2014). The Luxembourg jurisprudence has adopted a similar position for the purposes of Article 54 of the CISA (see *Van Esbroeck*, cited above, §§ 27, 32 and 36; *Kretzinger*, cited above, §§ 33 and 34; *Van Straaten*, cited above, §§ 41, 47 and 48; and *Kraaijenbrink*, cited above, § 30).

97. See *Sergey Zolotukhin*, cited above, §§ 82 and 84. This is not the place to analyse the artificial character of the *summa divisio* between the *idem factum* and the *idem legem*. *Idem factum* is to a certain extent conditioned by an *a priori* understanding of the relevant facts in the light of criminal law. This is especially true in the case of continuous offences.

concorso ideale di reati, *Idealkonkurrenz*)[98] with the offence or offences already tried. The same prohibition is valid for a combination of offences (*concours réel de crimes*, *concorso materiale di reati*, *Realkonkurrenz*) when they are connected by temporal and spatial unity. This also means that the *ne bis in idem* effect of a judgment concerning a continuous offence precludes a fresh trial on charges relating to any new individual act forming part of the succession of criminal acts[99].

35. To sum up, *Sergey Zolotukhin* affirms the *ne bis in idem* principle as an individual right in European human rights law, with the same scope as the standard exhaustion-of-procedure principle (*Erledigungsprinzip*)[100]. This guarantee extends to the right not to be prosecuted or tried twice[101]. The European meaning of the principle goes far beyond the maxim of *res judicata pro veritate habetur*, which is aimed fundamentally at protecting the final, authoritative, public statement on the *crimen*, and therefore at ensuring legal certainty and avoiding contradictory judgments. In addition to this, the European understanding of the *ne bis in idem* principle seeks to protect the person suspected of the alleged offence from double jeopardy where a prior acquittal or conviction has already acquired the force of *res judicata*[102].

Nevertheless, the Court required in *Sergey Zolotukhin* that a comparison be made between the decision by which the first "penal procedure" was concluded and the list of charges levelled against the applicant in the new proceedings. Since the facts in the two sets of proceedings differed in only one element, namely the threat of violence, which had not been mentioned in the first set of proceedings, the Court found that the criminal charge under Article 213 § 2 (b) of the Criminal Code encompassed the elements of the offence under Article 158 of the Code of Administrative Offences in their entirety and that, conversely, the offence of "minor disorderly acts" did not contain any elements not contained in the offence of "disorderly acts" and "concerned essentially the same offence"[103].

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98. See *Oliveira v. Switzerland*, n°25711/94, 30 July 1998, *Reports* 1998-V.

99. See my separate opinion in *Rohlena v. the Czech Republic* [GC], no. 59552/08, ECHR 2015, § 9.

100. Literally referring to the individual nature of the right: see *Sergey Zolotukhin*, cited above, § 81.

101. Ibid., § 110, and for a previous example, see *Franz Fischer v. Austria*, no. 37950/97, § 29, 29 May 2001.

102. As has been shown above, this is the underlying ideology of the Seventh Amendment to the United States Constitution and of Article 8 of Chapter V of Title II of the 1791 French Constitution, which shows that *Sergey Zolotukhin* is in line with the historical, *pro persona* understanding of this principle in modern times.

103. See *Sergey Zolotukhin*, cited above, §§ 97 and 121. This might be unintentional, but the fact is that in some other cases the Court does compare the "essential elements" of the alleged offences for the purposes of establishing *idem* (see, for some post-*Zolotukhin* examples, *Muslija*, cited above, § 34; *Asadbeyli and Others v. Azerbaijan*, nos. 3653/05,

36. In view of the above, I share the view of the majority of the Grand Chamber in the present case that the criminal offences for which the applicants were prosecuted, convicted and sentenced were based on the same set of facts for which the tax penalties were imposed on them.

b. The final decision in the administrative proceedings

37. The aim of Article 4 of Protocol No. 7 is to prohibit the repetition of proceedings which have been concluded by a "final" decision. According to the Explanatory Report on Protocol No. 7, 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"[104]. In *Sergey Zolotukhin*, the Court reiterated that decisions against which an ordinary appeal lay were excluded from the scope of the guarantee contained in Article 4 of Protocol No. 7 as long as the time-limit for lodging such an appeal had not expired. On the other hand, extraordinary remedies such as a request for reopening of the proceedings or an application for extension of an expired time-limit are not taken into account for the purposes of determining whether the proceedings have reached a final conclusion.

38. Unlike the majority of the Grand Chamber, I cannot follow the Supreme Court's and the applicants' position as regards the argument that the tax penalty decisions became final on 15 December 2008 for Mr A and on 26 December 2008 for Mr B, that is, before they were convicted for the same conduct by the District Court, even though the six-month time-limit for instituting judicial proceedings pursuant to section 11-1(4) of chapter 11 of the Tax Assessment Act had not yet expired. Since the applicants still had the right of access to a full judicial review, I fail to see how the administrative decisions on tax penalties can be regarded as "irrevocable"[105]. This conclusion is even more forceful bearing in mind that, since the administrative bodies in question are neither independent nor tribunals at all, the right of access to a judicial procedure is necessary in order for the administrative penalties to comply with Article 6 § 1 in the Convention[106].

39. The exact date when the administrative decisions became final is evidently not an anodyne fact. A legal scenario in which the administrative decision to impose tax penalties becomes final first may be different from

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14729/05, 20908/05, 26242/05, 36083/05 and 16519/06, § 157, 11 December 2012; and *Ruotsalainen v. Finland*, no 13079/03, § 56, 16 June 2009).

104. *Sergey Zolotukhin*, cited above, §§ 107 and 108.

105. This was also the point made by the Government (see paragraph 72 of the judgment).

106. See *Västberga Taxi Aktiebolag and Vulic*, cited above, § 93.

one in which the criminal conviction for tax fraud becomes final first. Although the Court has stated that "the question whether or not the *non bis in idem* principle is violated concerns the relationship between the two offences at issue and can, therefore, not depend on the order in which the respective proceedings are conducted"[107], the legal impact of a final criminal conviction on administrative proceedings may differ quite significantly from the legal impact of a final administrative decision on criminal proceedings. The majority shut their eyes to this *distinguo*, without assessing the different legal consequences in Norwegian law of each of these legal scenarios. They simply assume that the administrative and criminal proceedings formed part of an "integrated approach response"[108], concluding that it was not necessary to decide the issue of the finality of the administrative proceedings. I will demonstrate next the negative effects of this position.

B. Parallel administrative and criminal proceedings (*bis*)

a. The sufficient connection in time

40. Although the Court did not address the scenario of parallel proceedings *ex professo* in *Sergey Zolotukhin*[109], it did brush off the erroneous, supplementary condition which *Zigarella* had added to *bis*: in the absence of any damage proved by the applicant, only new proceedings brought in the knowledge that the defendant has already been tried in the previous proceedings would violate *ne bis in idem*[110].

41. Literally, there is nothing in the wording of Article 4 of Protocol No. 7 to suggest that a distinction should be made between parallel and consecutive proceedings, between the continuation of a pending, parallel

107. See *Franz Fischer*, cited above, § 29.

108. See paragraph 141 of the judgment.

109. *Sergey Zolotukhin* deals with two consecutive sets of proceedings: the administrative proceedings were terminated on 4 January 2002 and the criminal proceedings started on 23 January 2002 and were concluded on 15 April 2003.

110. See *Zigarella v. Italy* (dec.), no. 48154/99, ECHR 2002-IX (extracts), and *Falkner v. Austria* (dec.), no. 6072/02, 30 September 2004. In paragraph 36 of the *Sergey Zolotukhin* Chamber judgment the same position is taken, but paragraph 115 of the Grand Chamber judgment refrains from repeating the same sentence. The Grand Chamber only admits that it may regard the applicant as having lost his or her status of "victim" in cases where the domestic authorities institute two sets of proceedings but later acknowledge a violation of the *ne bis in idem* principle and offer appropriate redress by way, for instance, of terminating or annulling the second set of proceedings and erasing its effects. Hence, the Court does not refer to the voluntary opening of a second set of proceedings as a condition for finding a violation of *ne bis in idem* and only requires that an explicit acknowledgment of the violation should occur at domestic level as a condition for the complaint's inadmissibility. Later on, the Court unfortunately returned to the *Zigarella* formulation in *Maresti* (cited above, § 66) and *Tomasović* (cited above, § 29), but see the important separate opinion of Judge Sicilianos in the latter case.

prosecution and the launching of a new prosecution. Strictly speaking, the provision does not preclude several parallel sets of proceedings from being conducted before a final decision has been given in one of them. In such a situation it cannot be said that the individual has been prosecuted several times "for an offence for which he has already been finally acquitted or convicted"[111]. In a situation involving two parallel sets of proceedings, the Convention requires the second set of proceedings to be discontinued as soon as the first set of proceedings has become final[112]. When no such discontinuation occurs, the Court finds a violation[113].

42. However, in a number of cases the Court has set a different standard for certain parallel administrative and criminal proceedings. In *Nilsson*, the Court held for the first time that "while the different sanctions were imposed by two different authorities in different proceedings, there was nevertheless a sufficiently close connection between them, in substance and in time, to consider the withdrawal to be part of the sanctions under Swedish law for the offences of aggravated drunken driving and unlawful driving"[114]. It is not clear what the Court means by the "sufficient connection in time" requirement, since it is not explicit whether the Court is referring to the period of time between the decision which became final first (the applicant's conviction of 24 June 1999 by the Mora District Court) and the decision which became final last (the Supreme Administrative Court's decision of 18 December 2000 dismissing the applicant's appeal), or between the first administrative decision (the notification of 5 May 1999 by the County Administrative Board) and the first criminal court decision (the conviction of 24 June 1999 by the Mora District Court), or between the first criminal court decision (the conviction of 24 June 1999 by the Mora District Court) and the first administrative decision on the withdrawal of the driving licence (the decision of the County Administrative Board of 5 August 1999). In fact, there was a very short overlap between the administrative proceedings, which started on 5 May 1999 and ended on 18 December 2000, and the criminal proceedings, which ended on 24 June 1999.

In *Boman*[115] the Court also found that there was such a time connection, since the police's decision of 28 May 2010 to impose the second driving ban was directly based on the applicant's final conviction by the District Court for traffic offences, delivered on 22 April 2010, and thus did not

111. See *Garaudy v. France* (dec.), no. 65831/01, ECHR 2003-IX (extracts).
112. See *Zigarella*, cited above. There might be an issue with the Convention when two or more criminal proceedings run in parallel against the same defendant for the same facts, even before a final decision is delivered in one of them. The situation of *lis pendens*, forcing the defendant to present several defence strategies at the same time before different authorities, raises an issue of unfairness.
113. See *Tomasović*, cited above, §§ 30 and 32; *Muslija*, cited above, § 37; and *Milenković v. Serbia*, no. 50124/13, § 46, 1 March 2016.
114. See *Nilsson*, cited above.
115. *Boman v. Finland*, no. 41604/11, 17 February 2015.

contain a separate examination of the offence or conduct at issue by the police. The sufficient connection in time was linked to the lack of an autonomous assessment of evidence, as if the two went hand in hand.

43. Contrastingly, in *Glantz*[116], *Nykänen*[117], *Lucky Dev*[118], *Rinas*[119] and *Österlund*[120] the Court took into consideration the dates when the administrative and criminal decisions had become final. In all of those cases, the Court found a violation. In *Glantz*[121] the administrative proceedings were initiated on 18 December 2006 and became final on 11 January 2010, whereas the criminal proceedings were initiated on 15 December 2008. The two sets of proceedings were thus pending concurrently until 11 January 2010, when the first set became final. As the criminal proceedings were not discontinued after the first set of proceedings became final but were continued until a final decision on 18 May 2011, the Court found that the applicant had been convicted twice for the same matter in two sets of proceedings which had become final on 11 January 2010 and 18 May 2011 respectively[122].

In *Rinas*[123] the Court noted that when the criminal proceedings had become final on 31 May 2012, the applicant's appeal against the tax surcharge decisions had still been pending before the Supreme Administrative Court. As the administrative proceedings before the Supreme Administrative Court were not discontinued after the criminal proceedings became final but were continued until a final decision on 13 September 2012, the applicant had been convicted twice for the same matter concerning the tax years 2002 to 2004 in two sets of proceedings which became final on 31 May 2012 and on 13 September 2012 respectively[124].

44. The Court came to a different finding in *Häkkä*[125]. The administrative proceedings started in 2007, when the tax surcharges were imposed on the applicant. He apparently never sought rectification or appealed and therefore those proceedings became final on 31 December 2010 and 31 December 2011 respectively, when the time-limits for

116. *Glantz v. Finland*, no. 37394/11, 20 May 2014.
117. *Nykänen*, cited above.
118. *Lucky Dev*, cited above.
119. *Rinas v. Finland*, no. 17039/13, 27 January 2015.
120. *Österlund v. Finland*, no. 53197/13, 10 February 2015.
121. See *Glantz*, cited above, § 62.
122. The same reasoning was applied in *Nykänen* (cited above, § 52 – the tax proceedings commenced on 28 November 2005 and were finalised on 1 April 2009, whereas the criminal proceedings were initiated on 19 August 2008 and became final on 1 September 2010), and *Lucky Dev* (cited above, § 63 – the tax proceedings commenced on 1 June 2004 and were finalised on 20 October 2009 and the criminal proceedings were initiated on 5 August 2005 and became final on 8 January 2009).
123. *Rinas*, cited above, § 56.
124. A similar situation happened in *Österlund* (cited above, § 51).
125. *Häkkä v. Finland*, no. 758/11, §§ 50-52, 20 May 2014.

rectification and appeal ran out. The criminal proceedings were initiated on 3 April 2008 and concluded on 29 June 2010, when the Supreme Court rendered its final judgment. The two sets of proceedings were thus pending concurrently until 29 June 2010, when the second set became final. The Court did not find a violation, because "the applicant had a real possibility to prevent double jeopardy by first seeking rectification and then appealing within the time-limit which was still open to him"[126]. Hence, according to the Court in *Häkkä*, if the defendant does not make use of administrative appeals, *ne bis in idem* does not operate, even if he or she has already been convicted with final effect in the criminal proceedings.

45. Finally, in *Kiiveri*[127] the Court found that the applicant could no longer claim to be a victim of double jeopardy in relation to the tax year 2002, precisely because the Supreme Court had found that this issue had already been finally decided in the taxation administrative proceedings and had dismissed the criminal charge of aggravated tax fraud "without examining the merits"[128] in so far as the charge concerned the tax year 2002, on the basis of the principle of *ne bis in idem*.

46. The above suffices to show that the "sufficient connection in time" criterion is arbitrary. This is precisely why the Court dispensed with it in the Italian and Greek cases[129].

Contrary to the position of the French Government, who identified the assessment by the tax authority and the judicial investigation as the two phases which ought to proceed simultaneously or to be separated by only a very short interval[130], the majority in the present case chose to attach relevance to the nine-month period from when the tax authorities' decision of 5 December 2008 had become final until the second applicant's conviction of 30 September 2009. Although this period was "somewhat longer"[131] than the two-and-a-half-month period in the case of the first applicant, that additional delay is attributed by the majority to the second applicant's withdrawal of his confession. According to this reasoning, the *ne bis in idem* guarantee becomes flexible, having a narrower scope when the defendant exercises her or his own procedural rights and a wider scope when he or she does not. The punitive mindset of the majority could not be more eloquently shown.

126. Ibid., § 52.
127. *Kiiveri v. Finland*, no. 53753/12, 10 February 2015.
128. Ibid., § 36.
129. I am referring to *Grande Stevens and Others* (cited above), *Kapetanios and Others*,(cited above), and *Sismanidis and Sitaridis* (cited above), in all of which the Court was unanimous.
130. See paragraph 96 of the judgment.
131. See paragraph 150 of the judgment.

b. The sufficient connection in substance

47. The majority explicitly follow the line of reasoning set out in *R.T v. Switzerland*[132] and in *Nilsson v. Sweden*[133] concerning dual administrative and criminal proceedings, where the decisions on withdrawal of a driving licence were directly based on an expected or final conviction for a traffic offence and thus did not contain a separate examination of the offence or conduct at issue[134]. This case-law was further developed in *Lucky Dev*, *Nykänen* and *Häkkä*[135], where the Court found that there was no close connection, in substance and in time, between the criminal and the taxation proceedings. In the three above-mentioned cases, the tax proceedings and the criminal proceedings were parallel and concerned the same period of time and essentially the same amount of evaded taxes. In all of them, the Court noted that the offences had been examined by different authorities and courts without the proceedings being connected, both sets of proceedings having followed their own separate course and become final at different times. Finally, in all of them, the applicants' criminal responsibility and liability to pay tax penalties under the relevant tax legislation were determined in proceedings that were wholly independent of each other. In *Lucky Dev*, the Supreme Administrative Court did not take into account the fact that the applicant had been acquitted of the tax offence when it refused leave to appeal and thereby made the imposition of tax surcharges final[136]. In *Nykänen* and *Häkkä*, neither of the administrative and criminal penalties was taken into consideration by the other court or authority in determining the severity of the sanction, nor was there any other interaction between the relevant authorities[137].

48. Before discussing in detail this line of reasoning, two fallacious arguments must be discarded right from the outset. One says that if Article 4 of Protocol No. 7 were to be interpreted as prohibiting the finalisation of ongoing parallel proceedings from the moment either administrative or

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132. *R.T. v. Switzerland* (dec.), no. 31982/96, 30 May 2000.
133. *Nilsson*, cited above.
134. In *R.T. v. Switzerland* the administrative proceedings started on 11 May 1993 and were concluded with the Federal Court's decision on 5 December 1995, whereas the criminal proceedings were concluded with the imposition of the penal order on 9 June 1993, which was not appealed against. In *Nilsson*, the criminal proceedings were concluded on 24 June 1999, because the Mora District Court judgment was not appealed against, whereas the administrative proceedings started on 5 May 1999 and ended on 11 November 1999. In the latter case, the administrative penalty was imposed after the criminal penalty became final. In the former case, the administrative penalty was imposed before the imposition of the criminal penalty. The cases are not similar. Yet the majority treat them as if they were.
135. *Lucky Dev*, cited above, § 54; *Nykänen*, cited above, § 43; and *Häkkä*, cited above, §§ 50-52.
136. See *Lucky Dev*, cited above, § 62; *Österlund*, cited above, § 50 and 51; and *Rinas*, cited above, §§ 55 and 56.
137. See *Nykänen*, cited above, §§ 51 and 52, and *Häkkä*, cited above, §§ 50 and 52.

criminal proceedings were concluded by a final decision, this would entail "far-reaching, adverse and unforeseeable effects in a number of administrative-law areas"[138]. Such an *argumentum ad terrorem*, which plays the fear-appeal card, is not a legal argument and therefore should be given no credit whatsoever in a court of law. The other example of an inadmissible fallacy is the argument that several European States which have a dual system of sanctions have pleaded for its maintenance before the Court, expressing views and concerns similar to those of the respondent Government[139]. This is called an *argumentum ad nauseam*, playing on the repetition of the argument by several interested stakeholders, and not on its merits. It should *qua tale* have no place in a court's decision.

49. Two erroneous general assumptions must also be denounced. It is erroneous to argue, in an Article 4 of Protocol No. 7 context, that States should enjoy a wide margin of appreciation in this matter as long as the dual sanctions scheme appears to pursue a legitimate aim and does not entail an excessive or disproportionate burden for the defendant. *Ne bis in idem* is a non-derogable right and therefore States enjoy no margin of appreciation[140].

It is also impermissible to argue that it might be coincidental which of the parallel proceedings becomes final first and that if the authorities were to be compelled to discontinue one set of proceedings once the other set became final, this could lead to an arbitrary outcome of the combined proceedings. This line of argument simply begs the question, since it presupposes that there must be more than one set of proceedings for the same facts. Furthermore, it implies that the defendant could use the *ne bis in idem* principle as a tool for "manipulation and impunity"[141], as if the defendant were always in a position to control the pace of the proceedings. Such a vision of the balance of powers in administrative proceedings is disconnected from reality[142]. Ultimately, the underlying assumption of the majority's reasoning is that *ne bis in idem* is not the expression of a subjective right of the defendant, but a mere rule to guarantee the authority of the *chose jugée*, with the sole purpose of ensuring the punitive interest of the State and the impugnability of State adjudicatory decisions. The following reflections will evidence this *pro autorictate* stance of the majority in greater detail.

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138. See the Government's argument in paragraph 84 of the judgment.

139. See this argument in paragraph 119 of the judgment.

140. See, in a similar vein, the Explanatory Memorandum on the Parliamentary Assembly of the Council of Europe Opinion on Draft Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms, Doc. 13154, 28 March 2013, § 8.

141. See paragraph 127 of the judgment.

142. For a good example of the imbalance of power between the administrative authorities and the defendant in administrative proceedings, see my opinion appended to *Grande Stevens and Others*, cited above.

V - The review of *Sergey Zolotukhin*

A. Restriction of *idem factum* by the *bis* criteria

a. Pursuance of different aims addressing different aspects of the social misconduct

50. According to the majority, four substantive conditions must be fulfilled for cumulative administrative and criminal penalties to be acceptable: proceedings pursuing complementary aims and addressing different aspects of the social misconduct at issue; foreseeability of the combination of penalties; no duplication of the collection and assessment of evidence; and an offsetting mechanism between the administrative and criminal penalties.

51. The majority's first condition refers to different proceedings pursuing complementary aims and addressing different aspects of the social misconduct involved. The majority identify in paragraph 144 the different aims pursued by tax penalties under section 10 of chapter 10 (general deterrence and compensation for the work and costs incurred by tax authorities in order to identify defective declarations) and by a criminal conviction under section 12 of chapter 12 of the Tax Assessment Act 1980 (punitive purpose). The majority also point out in paragraph 123 the "additional element" of the criminal offence (fraudulent conduct), which according to them is not addressed by the administrative tax offence. In other words, the majority side with the Government, who contend that ordinary tax surcharges are "imposed objectively without regard to guilt, with a remedial purpose to compensate the State for costs incurred" in the checking process[143].

52. This contention does not stand, for two principled legal reasons. First, there is no provision or other binding instrument in domestic law requiring proportionality between the tax penalties and the costs incurred by the tax administration in order to detect, investigate, prosecute and make good the specific tax offence imputed to the offender. Such a requirement would in any event be simply unfeasible, since it could only be based on a virtual, rough estimation of the costs *per capita* incurred by the tax authorities with the entire machinery of checks and audits carried out in order to identify defective declarations. Hence, if tax penalties pursued a compensatory aim, this would imply an impermissible element of collective guilt, imposing on some taxpayers the costs of the entire system for checking tax declarations.

53. Second, the majority's position neglects the fact that the tax penalty at issue cannot in any possible way be considered merely compensatory. Tax penalties of up to 30% or even 60% are so severe that they undoubtedly

143. See the Government's observations of 11 November 2015, page 29.

include an element of punishment. In *Janosevic*, surcharges normally fixed at 20% or 40% of the tax avoided, without an upper limit and not convertible into a prison sentence in the event of non-payment, were held to fall under the criminal limb of Article 6[144]. Ultimately, the majority are unaware of the inherent punitive purpose of any tax penalty, regardless of its amount, as the *Jussila* precedent established long ago in the case of a 10% tax surcharge that was imposed, with an overall maximum possible surcharge of 20%[145]. It is hard to understand why the Court should suddenly depart from these well-established standards in the present case without any explanation.

In sum, in the Norwegian legal framework, administrative tax proceedings are aimed at deterring potential fraudsters and reoffending. General prevention is the admitted purpose of the tax penalties in question[146]. Pursuing general prevention "necessarily" has side-effects of punishment and special prevention regarding the convicted offender and these side-effects are obviously intended by the State policy[147]. The Supreme Court has made a laudable effort to limit these exemplary, punitive effects by the principle of proportionality[148]. But the Court should not engage in playing with semantics. Instead it should assess in a down-to-earth, realistic fashion tax penalties and their impact on the lives of taxpayers. In this light, general prevention through proportionate punishment is nothing but a "disguised retributive theory" (*verkappte Vergeltungstheorie*)[149].

54. The Government's line of argument can also not be accepted with regard to the "additional element" of the criminal offence, the alleged element of fraudulent intent. Acceptance of the Government's argument would run counter to *Ruotsalainen*[150]. In that case, the respondent

144. See *Janosevic*, cited above, § 69.
145. See *Jussila*, cited above, § 38.
146. See paragraph 47 of the judgment.
147. As the Court itself clearly acknowledged in *Kurdov and Ivanov* (cited above, § 40), referring to the necessarily punitive aim of administrative penalties of a pecuniary nature.
148. See paragraph 50 of the judgment.
149. It is impossible within the limits of this opinion to enter into the immense scholarly discussion on the purposes of administrative offences, and particularly their "disguised" purposes. As an introduction to this discussion, see James Goldschmidt, *Das Verwaltungsstrafrecht. Eine Untersuchung der Grenzgebiete zwischen Strafrecht und Verwaltungsrecht auf rechtsgeschichtlicher und rechtsvergleichender Grundlage*, Berlin, 1902; Erik Wolf, "Die Stellung der Verwaktungsdelikte im Strafrechtssystem", in *Beiträge zur Strafrechtswissenschaft. Festgabe für Reinhard von Frank*, II, Tübingen, 1930; Schmidt, "Straftaten und Ordnungswidrigkeiten", in *Juristen Zeitung*, 1951; Mattes, *Untersuchungen zur Lehre von der Ordnungswidrigkeiten*, Berlin, 1972; Paliero, *Minima non curat praetor, Ipertrofia del diritto penale e decriminalizzazione dei reatti bagatellari*, Padua, 1985; and Delmas-Marty et al., *Punir sans juger? De la répression administrative au droit administratif pénal*, Paris, 1992.
150. See *Ruotsalainen*, cited above, § 56.

Government argued that tax fraud included the element of "wilfulness", whereas the administrative offence was possible on solely objective grounds. The Court's reply was eloquent: the facts in the two sets of proceedings hardly differed, although there was the requirement of intent in the criminal proceedings, but this was not relevant for the purposes of Article 4 of Protocol No. 7. The elements of the two offences therefore had to be regarded as substantially the same for these purposes. The same should apply in the present case.

55. Furthermore, the majority do not compare the subjective elements of the administrative tax offences that are punishable by tax penalties and the criminal tax offences that are punishable by imprisonment or a fine. Consequently, they omit to take into account the ethical reproach inherent in the letter and spirit of the relevant provision of the 1980 Tax Assessment Act (section 10-2 to 4 of Chapter 10). Section 10-3 refers to "excusable" and "cause for which he cannot be blamed" as causes for tax remission. Inexcusability and blameworthiness are intrinsically ethical concepts of the administrative offences which characterise the *mens rea* of the offender. They are to be found in criminal offences as well. The 2010 amendment to this provision deleted the reference to both concepts of inexcusability and blameworthiness, but added the notion of "obviously inadvertent error", which obviously includes an element of ethical reproach for "non-inadvertent" or intentional errors.

Moreover, tax penalties of up to a maximum of 60% may be imposed when acts are committed wilfully or with gross negligence. Hence, they require the establishment of *mens rea* and guilt, as in criminal cases. The subjective element of fraud of the criminal provision of section 12-1 of Chapter 12 – "when he or she is aware or ought to be aware that this could lead to advantages pertaining to taxes or charges" – overlaps with the subjective element of the aggravated tax penalty of up to 60% (intent or gross negligence – section 10-4 of Chapter 10). To put it differently, the subjective elements of the administrative and the criminal offences coincide. There are no different aspects of the social misconduct targeted in the administrative and criminal proceedings at stake.

56. One final note: the majority's first condition pertains ultimately to the determination of *idem*. The establishment of the "different aims" pursued by administrative and criminal offences and of the "different aspects of the social misconduct" targeted by each one of these offences is intrinsically a substantive issue that has to do with the definition of *idem*. These questions must be considered to relate more to the concept of *idem* than to that of *bis*, contrary to the conceptual approach of the majority. In spite of this conceptual confusion, the majority's purpose is very clear: to limit the scope of *idem factum*. By so doing, they inflict a major blow to *Sergey Zolotukhin*.

b. Foreseeability of the combination of penalties

57. The majority's second condition deals with the foreseeability of the duality of administrative and criminal proceedings as a consequence, both in law and practice, of the same social misconduct. Such foreseeability is affirmed *ab initio* in paragraphs 146 and 152 of the judgment, without the slightest effort to delve into the very delicate issue of the required degree of knowledge for administrative liability. A legal issue that has absorbed the attention of the academic community for decades has simply been disregarded[151]. The majority simply assume that citizens in general, and taxpayers specifically, know or should know the entire administrative legal framework, including penalties, and therefore may be made responsible for any faults and defective conduct in the light of this legal framework.

58. The majority do not spend a single line of their reasoning responding to the applicants' argument that the penalties imposed on them were discriminatory, discretionary and therefore not foreseeable because four other defendants (G.A., T.F., K.B. and G.N.) involved in the same set of events did not have tax penalties imposed on them, while the applicants had to endure prison terms and tax penalties[152]. This argument goes to the heart of the majority's second condition.

The facts of the present case show that the 3 April 2009 Guidelines of the Director of Public Prosecutions were not applied to the applicants, either to A, whose conviction in the criminal proceedings dates from 2 March 2009, or even to B, whose conviction dates from 30 November 2009. The Supreme Court noted this fact, but disregarded it with the justification that "the public prosecuting authority reserved the right to institute proceedings in criminal cases based on individual assessment if parallel proceedings were in progress that were not in contravention of [Article 4 of Protocol No. 7]. It has been stated that the case against [A] was continued because a correct sanction was desirable in relation to other cases in the same related set of cases. ... Hence, the basis for the decision was the principle of equal treatment in related cases." The applicants rejected that argument, pointing out that on the basis of the 2009 Guidelines, tax penalties had not been imposed on four other defendants involved in the same set of events. The Government did not specifically dispute this claim. The majority have nothing to say on this major argument submitted by the applicants.

59. In any event, the discretion left by the Guidelines is impermissible in the light of *Camilleri*[153]. This discretion raises an issue of legal uncertainty. The Guidelines created an expectation that the State no longer considered

151. See, as an introduction to this legal issue, the annotations to paragraphs 10 and 11 in Rebman et al., *Gesetz über Ordnungswidrigkeiten, Kommentar*, third edition, Stuttgart, 2016, and *Karlsruher Kommentar zum Gesetz über Ordnungswidrigkeiten*, fourth edition, Munich, 2014.

152. See paragraph 64 of the judgment.

153. *Camilleri v. Malta*, no. 42931/10, 22 January 2013.

the Norwegian two-track system for the punishment of tax fraud lawful or in compliance with the Convention, and therefore the public prosecuting authorities had a legal obligation to appeal against convictions and, prior to their delivery, to drop the charges[154]. The decision of the public prosecuting authorities to proceed differently in the applicants' cases was not foreseeable. The preferential treatment given to four other defendants involved in the same set of events, who were exempted from any tax penalties (G.A., T.F., K.B. and G.N.), only serves as evidence of the discretionary and therefore unforeseeable choice by the domestic authorities.

B. The majority's *pro auctoritate* concept of *ne bis in idem*

a. No duplication of collection and assessment of evidence

60. The majority's third condition consists of a soft prohibition ("as far as possible") of the duplication of the collection and assessment of evidence, with the benefit of an example ("notably"): the interaction between different authorities, administrative and judicial, to ensure that the establishment of facts in one set of proceedings is also used in the other set[155]. To me, this condition is very problematic.

61. As a matter of principle, conditions pertaining to the protection of a non-derogable individual right such as *ne bis in idem* must not be left to the discretion of States. Since the majority's third condition is a mere *de iure condendo* recommendation, it is not a Convention requirement. It has the same effect as the equally *de iure condendo* statement that "the surest manner of ensuring compliance with Article 4 of Protocol No. 7 is the provision, at some appropriate stage, of a single-track procedure"[156]. Both are non-binding *dicta*, which add nothing to the binding case-law of the Court.

62. Additionally, this recommendation merely scratches the surface of a very serious problem. The existence of different pronouncements by the administrative and the judicial authorities on the same facts, based on a different assessment of the same evidence, calls into question the authority of the State. Worse still, a different assessment of the evidence in administrative and criminal proceedings allows for the insidious manipulation of the administrative proceedings for the purposes of the

154. The position of the Norwegian Director of Public Prosecutions after *Sergey Zolotukhin* could not be clearer: "Following the change in the European Court's case-law, it is necessary to apply a 'one-track' system also as regards ordinary tax penalties." See paragraphs 48 and 64 of the judgment.

155. See paragraph 132 of the judgment. The majority do not say a word about the solution, existing in some countries, of cooperation between the administrative and prosecuting authorities in order to determine the appropriate avenue.

156. See paragraph 130 of the judgment.

criminal proceedings. This manipulation is even more worrying than the danger to the State's authority, because it puts the defendant in a defenceless position. That is to say, the criminal conviction is almost a foregone conclusion when the taxpayer's administrative offence has already been established on the basis of a lower burden of proof. The taxpayer's duty to cooperate with the tax authorities in administrative proceedings aggravates this conclusion even further.

63. The majority do not compare the evidentiary rules of administrative and criminal procedure in Norway, in order to ascertain whether there is a danger of duplication in the collection and assessment of evidence in both proceedings. Moreover, they do not analyse the legal framework regulating the interaction between the different administrative and judicial authorities, to check if the establishment of facts in the administrative proceedings impacts on the criminal proceedings and vice versa. In paragraphs 145 and 150 of the judgment the majority simply refer to some instances of *ad hoc* exchange of information between the administrative and judicial authorities, and nothing more.

64. Yet the parties discussed the question thoroughly. The Government acknowledged that the standard of the burden of evidence was different in tax proceedings, to which the "qualified probable cause" standard applied, and criminal proceedings, to which the "strict standard of proof" applied. In fact, this is one of the "major advantages" that administrative proceedings offer, in the Government's opinion[157]. If this is the case, then the majority's third condition is not fulfilled in Norwegian law, for the simple reason that, since different standards of the burden of evidence apply, the evidence must be assessed differently in administrative and criminal proceedings, with the obvious risk of different pronouncements on the same facts.

Between the Charybdis of the risk of contradictory findings in administrative and criminal proceedings owing to different evidentiary standards (*deux poids, deux mesures*) and the Scylla of the manipulation of the administrative evidence for criminal purposes, the defendant is in any event placed in an unfair position in the Norwegian double-track system.

b. Offsetting mechanism between administrative and criminal penalties

65. The majority's fourth condition is the existence of "an offsetting mechanism designed to ensure that the amount of any penalties imposed is proportionate"[158]. Without any previous explanation of why this option has been chosen, the majority do not consider other well-known procedural solutions, such as the suspension of one set of proceedings while another

157. See the Government's observations of 11 November 2015, page 8. The Government also argue that administrative proceedings have the advantage of a faster investigation and adjudication procedure.

158. See paragraph 132 of the judgment.

concurring set of proceedings is pending[159], or other substantive solutions, such as the principle of specialty or the setting of limits for punishment for a combination of criminal and administrative offences, such as a requirement that the overall amount of the penalties imposed should not exceed the highest amount that could be imposed in respect of either of the types of penalty, or that the maximum level of the tax penalty should be set at the minimum level for the criminal offence. The scope and features of the proposed offsetting mechanism proposed are, to say the least, very problematic.

66. The majority's line of reasoning conflicts head-on with the Court's recent position in *Grande Stevens and Others*, which concerns parallel administrative and criminal proceedings. The Italian Government argued without success in that case that, in order to ensure the proportionality of the penalty to the accusations, the Italian criminal courts were able to take into account the prior imposition of an administrative penalty and to reduce the criminal penalty. In particular, the amount of the administrative fine was deducted from the criminal financial penalty (Article 187 *terdecies* of Legislative Decree no. 58 of 1998) and assets already seized in the context of the administrative proceedings could not be confiscated[160]. That argument, which was given no credit by the Court in *Grande Stevens and Others*, is now put at centre stage in the Norwegian context, without any justification by the majority for this sudden change of heart. The majority seem to have forgotten that in *Grande Stevens* the Court decided that the respondent State had to ensure that the new set of criminal proceedings brought against the applicants in violation of *ne bis in idem* were closed as rapidly as possible and without adverse consequences for the applicants[161].

67. The Italian Government also argued that the double-track system was required by Directive 2003/6/EC of 28 January 2003 on insider dealing and market manipulation, in order to fight market manipulation and abuses more efficiently, invoking the Advocate General's opinion in *Hans Åkerberg Fransson*[162]. The Court easily dismissed that argument as invalid[163]. In this context, it is quite puzzling that the Court now cites the opinion of the Advocate General in *Fransson* as supportive of its views[164].

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159. This was a proposal made in *Kapetanios and Others* (cited above, § 72) and *Sismanidis and Sitaridis* (cited above, § 72).

160. See *Grande Stevens and Others*, cited above, § 218.

161. Ibid., § 237. It is useful to bear in mind the IAPL 2004 conclusions, cited above: "The '*bis*', in terms of double jeopardy to be prevented, shall not refer to only a new sanction; it should already bar a new prosecution".

162. See *Grande Stevens and Others*, cited above, § 216.

163. Ibid., § 229.

164. See paragraph 118 of the present judgment. The European Parliament and Council Directive 2014/57/EU of 16 April 2014 on criminal sanctions for market abuse, which accepts the dual system (recital 23), has to be read in conjunction with the European Parliament and Council Regulation (EU) 596/2014 of 16 April 2014 on market abuse

In spite of the fact that the Luxembourg Court disapproved of the Advocate General's perspective and reached a decision in line with the Strasbourg Court's case-law, and in spite of the fact that in *Grande Stevens* the Court rejected that same perspective of the Advocate General, the majority in the present case support his position. The Strasbourg Court willingly distances itself from the Luxembourg Court, which had made an effort to align the positions of both courts in *Fransson*. The judges of the Court prefer to side with the sole voice of the Advocate General, who was vehemently critical of the Court's case-law for being contradictory with European constitutional tradition. The unexplained change of heart in Strasbourg represents a serious setback for the relationship between the two European courts.

68. Furthermore, the majority's offsetting mechanism only applies to the deduction of penalties imposed in the proceedings which become final first. It does not apply in the event of a different outcome in the proceedings which become final first, namely if the court delivers an acquittal or decides to discontinue the case. The reason is obvious. In these cases, there is literally nothing to offset – that is, to compensate for or to deduct – in the subsequent or parallel administrative proceedings.

69. This question is obviously crucial in the light of the recent Greek cases where the administrative courts imposing administrative fines failed to take into account the applicants' acquittal in parallel (applications nos. 3453/12 and 42941/12) and subsequent (application no. 9028/13) criminal proceedings relating to the same conduct[165]. Following the rationale of *Kapetanios and Others*, any acquittal or discontinuance of the criminal case would have a *Sperrwirkung* on other parallel or subsequent administrative proceedings, as the Court also concludes in *Sismanidis and Sitaridis*, which also concerns two cases (applications no. 66604/09 and 71879/12) of parallel administrative and criminal proceedings[166]. The acquitted defendant has the right not to be disturbed again for the same

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(recital 72). The European legislation did not solve the issue of *ne bis in idem*, preferring to pass the hot potato to the States. Nevertheless, the imposition of criminal sanctions on the basis of the mandatory offences set out in the new Directive and of administrative sanctions in accordance with the optional offences provided for by the new Regulation (Article 30 § 1: "may decide not") should not lead to a breach of *ne bis in idem*.

165. In *Kapetanios and Others* (cited above); see application no. 3453/12, on administrative proceedings pending from November 1989 to June 2011 and criminal proceedings pending from 1986 to November 1992; application no. 42941/12, on administrative proceedings pending from September 1996 to November 2011 and criminal proceedings pending from 1988 to June 2000; and finally application no. 9028/13, on administrative proceedings pending from 2011 to February 2012 and criminal proceedings terminated in May 1998.

166. *Sismanidis and Sitaridis* (cited above): see application no. 66602/09, on administrative proceedings pending between September 1996 and May 2009 and criminal proceedings pending between December 1994 and April 1997; and application no. 71879/12, on administrative proceedings pending from November 1996 to February 2012 and criminal proceedings pending from 1998 to February 1999.

facts, which includes the risk of a new prosecution, regardless of the different nature of the (judicial and administrative) bodies involved[167]. In other words, there is an absolute prohibition on pronouncing again on the same facts. Furthermore, the taking into account of the *res judicata* force of the acquittal is an *ex officio* obligation of the courts and administrative authorities in view of the absolute and non-derogable nature of the defendant's right[168].

70. The Greek case-law is also in line with the clear statement of principle made in paragraph 60 of *Lucky Dev*, emphasising that Article 4 of Protocol No. 7 would be violated if one set of proceedings continued after the date on which the other set of proceedings was concluded with a final decision. In *Lucky Dev*, tax surcharges were applied after a final acquittal in the parallel criminal proceedings, and the Court's principled statement is crystal clear: "That final decision would require that the other set of proceedings be discontinued."[169]

71. To sum up, the present judgment contradicts the core of the *Kapetanios and Others*, *Sismanidis and Sitaridis* and *Lucky Dev* jurisprudence. For the majority, the acquittal of the defendant, be it because the acts do not constitute a criminal offence, the defendant did not commit them or it is not proven that the defendant committed them, does not have to be taken into account in subsequent or parallel administrative proceedings. This evidently also raises an issue with regard to Article 6 § 2 of the Convention. Any new pronouncement on the merits would call into question the presumption of innocence resulting from the acquittal[170].

72. The majority's offsetting mechanism is also not applicable in a scenario where the proceedings which become final first are the administrative proceedings and no tax penalties are imposed because the respective administrative liability has not been proven. In the majority's view, the taxpayer can still be convicted for the same facts and sentenced in criminal proceedings in this scenario.

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167. *Kapetanios and Others*, cited above, §§ 71 and 72. The French version of *Sergey Zolotukhin* is more expressive since it includes in paragraph 83 the risk of new prosecutions (*risque de nouvelles poursuites*) in addition to new trials. See also paragraph 59 of the *Van Straaten* judgment of the Court of Justice of the European Union, cited above: "in the case of a final acquittal for lack of evidence, the bringing of criminal proceedings in another Contracting State for the same acts would undermine the principles of legal certainty and of the protection of legitimate expectations."

168. See *Kapetanios and Others*, cited above, § 66. That is precisely the conclusion reached in *Melo Tadeu v. Portugal* (no. 27785/10, § 64, 23 October 2014): "*La Cour estime qu'un acquittement au pénal doit être pris en compte dans toute procédure ultérieure, pénale ou non pénale*."

169. See *Lucky Dev*, cited above, § 60.

170. See *Kapetanios and Others*, cited above, § 88, and *Sismanidis and Sitaridis*, cited above, § 58.

73. By now, it is plain to see that the fourth condition is a *chèque en blanc* for States to do as they please. But worse still is the fact that the majority do not explain how the offsetting mechanism works in Norwegian law. Paragraph 50 of the judgment alone provides a summary of the case-law, which leaves the reader with the impression that discretion reigns in the way criminal courts sometimes decide to take into account previous administrative penalties and sometimes decide not to. That impression is borne out in the case at hand, as demonstrated below. Furthermore, there is no indication whatsoever in the judgment that a similar offsetting mechanism exists in tax proceedings, whereby previous criminal penalties would have to be taken into account in the determination of tax penalties.

74. The Government stated that "[i]mposed tax surcharges will be taken into account when the courts assess what is a fair and adequate sanction for a company, see Section 28 *litra* g of the 2005 Penal Code. When a natural person is sentenced, courts will take into account any tax surcharges that have been imposed, pursuant to Section 27 of the 1902 Penal Code, transposed in Section 53 of the 2005 Penal Code."[171] Section 27 provided: "When a fine is imposed, due consideration should be given not only to the nature of the offence but also especially to the financial position of the convicted person and to what he can presumably afford to pay in his circumstances." No mention is made of penalties in parallel or previous proceedings relating to the same facts, let alone to tax penalties. No mention is made either of the limits of the combination of penalties, such as, for instance, a requirement that the overall amount of the penalties imposed should not exceed the highest amount that could be imposed in respect of either of the types of penalty. In fact, the taking into consideration of previous penalties is not even mentioned in the event that a sentence of imprisonment has been imposed.

To put it simply, there is no offsetting mechanism in Norwegian law, but a general, undifferentiated indication given by the legislature to the judge that the financial situation of the convicted person should be taken into account when sentencing him or her to a fine. No more, no less.

75. The Supreme Court's case-law based on the above mentioned Penal Code provisions, in so far as it has been made available to the judges of the Grand Chamber, may be creative, but it is certainly not foreseeable. It is so broadly couched that even the most experienced lawyer cannot anticipate whether and how tax penalties will be taken into consideration in the imposition of criminal pecuniary penalties. Furthermore, its impact is very limited in practical terms. Since it does not allow for any offsetting in imprisonment cases, the Supreme Court's case-law limits the alleged impact of the compensatory effect to cases of lesser gravity, but denies it in the most serious cases.

171. See the Government's observations of 11 November 2015, page 8.

Mindful of the weaknesses of the domestic legal framework, a laudable effort has been made by Norwegian judges to fill the legal black hole and put some proportionality into an arbitrary, excessive and unfair system: arbitrary in the choice of single- or double-track punishment, excessive in the penalties applied and procedurally unfair in the way it treats defendants. But *ne bis in idem* "is not a procedural rule which operates as a palliative for proportionality when an individual is tried and punished twice for the same conduct, but a fundamental guarantee for citizens"[172].

76. Like the Government, the majority are seduced by an "efficiency interests"-driven approach[173], according to which the rationale of the *ne bis in idem* principle applies to a "lesser degree to sanctions falling outside the hard core of criminal law, such as tax penalties"[174]. They overlook the fact that the content of a non-derogable Convention right, such as *ne bis in idem*, must not be substantially different depending on which area of law is concerned. There is no leeway for such an approach in Article 4 § 3 of Protocol No. 7.

77. Finally, and most importantly, in the case at hand the tax penalties were taken into account by the domestic court in the following way as regards the first applicant: "A noticeable sanction has already been imposed on the defendant with the decision on tax surcharge. Most of the tax has already been paid." The consideration given to the tax penalty in the case of the second applicant is even more succinct: "Account must be taken of the fact that a tax surcharge of 30% has been imposed on the defendant"[175]. In neither of the cases did the domestic courts care to explain the impact of the previous tax penalties on the criminal penalties. The cosmetic reference to previously imposed tax penalties may appease some less demanding consciences, but it is certainly not a predictable and verifiable legal exercise. In this context, the conditions, degree and limits of the tax penalties' impact on criminal sanctions can only be the object of pure speculation, remaining in the realm of the unknown, inner belief of the trial judges, inaccessible to the defendants.

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172. Case C-213/00 P, *Italcementi SpA v. Commission of the European Communities*, Opinion of Advocate General Ruiz-Jarabo Colomer delivered on 11 February 2003, § 96, and Case C-150/05, cited above, Opinion of the same Advocate General delivered on 8 June 2006, § 58. Therefore, the view expressed in paragraph 107 of the present judgment that *ne bis in idem* concerns mainly a procedural issue ("is mainly concerned with due process"), rather than a substantive issue ("is less concerned with the substance of the criminal law than Article 7"), is essentially wrong.

173. The "interests of efficiency" are stressed by the majority themselves (see paragraph 134 of the judgment).

174. See paragraph 85 of the judgment, where reference is made to the Government's explicit argument that the *Jussila* qualifying reasoning regarding Article 6 was transposable to Article 4 of Protocol No. 7. This argument patently overlooks the absolute and non-derogable nature of this latter Article.

175. See judgments of the Follo District Court of 2 March 2009 and the Oslo City Court of 30 September 2009.

VI – Conclusion

78. In spite of its human rights-oriented rationale, *Öztürk* did not provide a clear conceptual framework for the definition of the dividing line between administrative and criminal offences. In the midst of some uncertainty in the Court's case-law, *Jussila* offered a restrictive solution which sought to distinguish hard-core criminal cases which carry a significant degree of stigma and those which do not, limiting the applicability of the criminal-head guarantees in the case of the latter group. Subsequent case-law clarified neither the substantive criterion of significant degree of stigma nor the distinction between the disposable and non-disposable procedural guarantees.

79. Just as *Jussila* qualified and limited the impact of *Öztürk*, so too does *A and B v. Norway* qualify and limit the impact of *Sergey Zolotukhin*. The past, generous stance on *idem factum* is significantly curtailed by the new proposed *bis* straitjacket. Mistrustful of defendants, the majority decide to abandon the fundamental principle in European legal culture that the same person may not be prosecuted more than once for the same facts (principle of unity of repressive action or *Einmaligkeit der Strafverfolgung*). *Ne bis in idem* loses its *pro persona* character, subverted by the Court's strict *pro auctoritate* stance. It is no longer an individual guarantee, but a tool to avoid the defendants' "manipulation and impunity"[176]. After turning the rationale of the *ne bis in idem* principle upside down, the present judgment opens the door to an unprecedented, Leviathan-like punitive policy based on multiple State-pursued proceedings, strategically connected and put in place in order to achieve the maximum possible repressive effect. This policy may turn into a never-ending, vindictive story of two or more sets of proceedings progressively or successively conducted against the same defendant for the same facts, with the prospect of the defendant even being castigated, in a retaliatory fashion, for exercising his or her legitimate procedural rights, and especially his or her appeal rights.

80. The sole true condition of the majority's "efficiency interests"-oriented approach[177] is a simulacrum of proportionality, limited to a vague indication to take into consideration the previous administrative penalties in the imposition of fines in the criminal proceedings, an approach which is very distant from the known historical roots of *ne bis in idem* and its consolidation as a principle of customary international law. The combination of criminal penalties and administrative penalties with a criminal nature was specifically rejected by the Court in *Grande Stevens and Others*, as well as by the Luxembourg Court in *Hans Åkeberg Fransson*. After the delivery of its death certificate in that Italian case, such

176. See paragraph 127 of the judgment.
177. See paragraph 134 of the judgment.

an approach is now being resuscitated as a "calibrated regulatory approach"[178]. The progressive and mutual collaboration between the two European courts will evidently once again be deeply disturbed, Strasbourg going the wrong way and Luxembourg going the right way. The Grand Chamber examining the *Sergey Zolotukhin* case would not have agreed to downgrade the inalienable individual right to *ne bis in idem* to such a fluid, narrowly construed, in one word illusory, right. Me neither.

178. See paragraph 124 of the judgment.