

GLOSS TO THE JUDGEMENT OF THE COURT OF JUSTICE OF THE EUROPEAN UNION IN CASE C-524/15, CRIMINAL PROCEEDINGS AGAINST LUCA MENCI

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ABSTRACT

This gloss discusses the position of the Court of Justice of the European Union taken in the judgment passed on 20 March 2018 in the case of Luca Menci (C-524/15) in reference to the restrictions of *ne bis in idem* principle. The main thesis of the Court concerned the admissibility of restrictions of *ne bis in idem* based on the principle of proportionality as a limitation clause and its accordance with the Convention for the Protection of Human Rights and Fundamental Freedoms. The analysis of the right not to be tried or punished twice in Article 4 Protocol 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms allows us to formulate opposite conclusions. The application of the balancing test as a limitation clause for *ne bis in idem*, finds no support in the case-law of the ECtHR too. According to the Author, the position taken in Menci infringes Article 52(3) of the Charter of Fundamental Rights, according to which the meaning and scope of the rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms shall be at least be the same.

Keywords: Ne bis in idem, balancing test, limitations of fundamental rights, fundamental rights

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THESIS:

1. Article 50 of the Charter of Fundamental Rights of the European Union must be interpreted as not precluding national legislation in accordance with which criminal proceedings may be brought against a person for failing to pay value added tax due within the time limits stipulated by law, although that person has already been made subject, in relation to the same acts, to a final administrative penalty of a criminal nature for the purposes of Article 50 of the Charter, on condition that that legislation
 - pursues an objective of general interest which is such as to justify such a duplication of proceedings and penalties, namely combating value added tax offences, it being necessary for those proceedings and penalties to pursue additional objectives,
 - contains rules ensuring coordination which limits to what is strictly necessary the additional disadvantage which results, for the persons concerned, from a duplication of proceedings, and
 - provides for rules making it possible to ensure that the severity of all of the penalties imposed is limited to what is strictly necessary in relation to the seriousness of the offence concerned.
2. (...)

1. INTRODUCTION

The *Ne bis in idem* principle is a right that protects a person from being tried or punished twice in criminal proceedings for the same act¹.

¹ It is worth to underline that according to the European Court of Human Rights (ECtHR) jurisprudence, Article 4 of Protocol 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (Protocol 7) comprises three distinct but interrelated guarantees: no one shall be liable to be tried, be tried or be punished for the same offence. See: ECtHR Judgements: of 29 May 2001, Case Franz Fischer v. Austria, application no. 37950/97, hudoc.int, para 29; of 10 February 2009, Case Zolotukhin v. Russia, application no. 14939/03, hudoc.int, para 110.

The main interest that lays behind the right is legal certainty². The guarantee protects not only individual rights but also the integrity of the first final decision³. Furthermore, according to the Article 50 of the Charter of Fundamental Rights (Charter), no one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.⁴ The *ne bis in idem* principle embracing the area of all Member States facilitates European integration⁵. Therefore, it is not only human rights, but it constitutes also the general principle of European Union law too.⁶

Within the European Union there are many different levels of possible cumulation of penal responsibility for the same act and, in consequence, many levels of the application of *ne bis in idem*. They may be called as domestic (relating to different kinds of penal responsibility in the same Member State), transnational or horizontal (relating to the same kind of responsibility in different Member States), European or vertical levels (relating to responsibility before European Commission and national court or authority).⁷ However, these are not all possible levels of cumulation,

² Michiel Luchtman, "The ECJ's Recent Case Law on Ne Bis in Idem: Implications for Law Enforcement in a Shared Legal Order," *Common Market Law Review* 55, Issue 6 (2018): 1721.

³ See more about rationale of *ne bis in idem*: Bas van Bockel, *The Ne Bis in Idem Principle in EU Law* (Alphen aan den Rijn: Kluwer Law International, 2010), 25–30.

⁴ The difference between Article 50 of the Charter and art. 4(1) of Protocol 7 relates to the scope of the reference of the rights, which is only national in the Protocol. The transnational scope of the application has also *ne bis in idem* provided for in Article 54 of the Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (CISA) and the difference will be important for the further considerations.

⁵ Luchtman, "The ECJ's Recent Case Law," 1741; John A.E. Vervaele, "*Ne Bis In Idem*: Towards a Transnational Constitutional Principle in the EU?," *Utrecht Law Review* 9 (2013): 211–229.

⁶ Valsamis Mitsilegas and Fabio Giuffrida, "Ne bis in idem," in *General principles for a common criminal law framework in the EU. A guide for legal practitioners*, ed. Rosario Sicurella, Valsamis Mitsilegas, Raphaelae Parizot, and Annalisa Lucifora (Milan: Giuffrè Editore, 2017), 209.

⁷ Vervaele, "*Ne Bis In Idem*," 220.

because they can have a mixed character too. The reason of *ne bis in idem* development and its growing importance was not only the process of European Union integration, but also the autonomous way of understanding criminal responsibility, developed in jurisprudence of the ECtHR starting from the Engel case⁸ and then accepted by the Court of Justice of the European Union (Court or CJEU).⁹ Moreover, the essential step for the development of *ne bis in idem* was made by the ECtHR in the judgment of Zolotukhin v. Russia¹⁰, according to which the principle should 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’. ‘Idem’ was defined as *idem factum*, not *idem crimen*. As regards the jurisprudence of the Court, two approaches to the understanding of ‘idem’ could be distinguished. The first one required three conditions to be fulfilled: identity of the facts, unity of the offender and unity of the legal interest protected.¹¹ According to the second one, the only criterion should be the identity of the underlying material acts. The second position was mainly adopted in cases related to the interpretation of art. 54 CISA,¹² but the provision regards only the transboundary accumulation of responsibil-

⁸ ECtHR, Engel and others v. the Netherlands, Appl. No. 5100/71, judgment of 8 June 1976, para 80–82. See more about the development of formally administrative sanctions which have criminal character: Adrienne De Moor-van Vugt, “Administrative Sanctions in EU Law,” *Review of European Administrative Law* 5 (2012): 13; Antoine Bailleux, “The fiftyth shade of grey Competition law, „criministrative law” and „fairly fair trials,”” in *Do Labels Still Matter: Blurring Boundaries Between Administrative and Criminal Law, The Influence of the EU*, ed. Francesca Galli, and Anne Weyembergh (Bruxelles: Institute d’etudes Europeennes, 2014), 137–152.

⁹ CJUE Judgment of 5 June 2012, criminal proceedings against Łukasz Bonda, Case C-489/10, ECLI:EU:C:2012:319, para 37.

¹⁰ ECtHR Judgements of 10 February 2009, Case Zolotukhin v. Russia, application no. 14939/03, hudoc.int, para 80–82.

¹¹ See e.g.: CJUE Judgment of 7 January 2004, Aalborg Portland and Others v. Commission, Joined Cases C-204/00 P, C- 205/00 P, C-211/00 P, C-213/00 P, C-217/00 P et C-219/00 P, ECLI:EU:C:2004:6, para 38; CJUE Judgment of 7 June 2011, Arkema France and others v. Commission, T-217/06, ECLI:EU:T:2011:251, para 292; CJUE Judgment of 14 February 2012, *Toshiba Coporation and others v Úřad pro ochranu hospodářské soutěže*, Case C-17/10, ECLI:EU:C:2012:72, para 97.

¹² See e.g.: CJUE Judgment of 9 March 2006, *Hof van Cassatie v L.H. Van Esbroeck*, Case C-436/04, ECLI:EU:C:2006:165, para 35–36; CJUE Judgment

ity. Therefore, a more important example of such an approach is the CJUE Judgment of 26 February 2006, *Åklagaren v. H. Åkerberg Fransson*, Case C-617/10,¹³ because in this judgment the Court interpreted *ne bis in idem* formulated in Article 50 of the Charter.

The considerations may lead to the conclusion that standards of *ne bis in idem* in the case-law of the ECtHR and the Court were the same. However, in the judgment of 16 November 2016 passed in the case of A. and B. v. Norway¹⁴ the ECtHR redefined what constitutes the second prosecution. According to the ECtHR, the duplication of criminal and administrative proceedings does not breach Article 4 of Protocol 7, provided that the proceedings are sufficiently closely connected in time and in substance. There are substantive links, if the purposes of the proceedings are complementary and they relate to different aspects of the same act. The imprecise character of the criteria presented in A. and B. v. Norway limited the impact of the judgment passed in the case of Zolotukhin. As it was described by Judge Pinto de Albuquerque in his dissenting opinion to A. and B. v. Norway: „*The past, generous stance on idem factum is significantly curtailed by the new proposed bis straitjacket.*”¹⁵

At this stage, the Court faced on 20 March 2018 three cases that dealt with preliminary questions related to *ne bis in idem*. They were: criminal proceedings against Luca Menci, Case C-524/15¹⁶; Enzo Di Puma v. Commissione Nazionale per le Società e la Borsa (Consob) and Commissione Nazionale per le Società e la Borsa (Consob) v. Antonio Zecca, Joined cases C-596/16 et 597/16¹⁷; Garlsson Real Estate SA, in liquidation, Stefano Ruccucci, Magiste International SA v. Commissione Nazionale per le Società e la Borsa (Consob), Case C-537/16.¹⁸ They concerned the cumulation of responsibility for the same act as a crime and an administrative offence.

of 28 September 2006, *J.L. Van Straaten v Staat der Nederlanden.*, Case C-150/05, ECLI:EU:C:2006:614, para 53.

¹³ ECLI:EU:C:2013:105.

¹⁴ ECtHR Judgement of 15 November 2016, Case A. and B. v. Norway, application no. 24130/11 and 29758/11, hudoc.int.

¹⁵ Para 79 of the dissenting opinion of Judge Pinto de Albuquerque.

¹⁶ EU:C:2018:197.

¹⁷ EU:C:2018:192.

¹⁸ EU:C:2018:193.

Although they regarded the level of cumulations which was defined above as domestic, they are important for all the other levels of cumulation mentioned above. Having in mind the development of quasi-criminal enforcements, helps to realize how important is the problem and how broad is the scope of the reference of the judgments.

Taking into account the actual jurisprudence of the ECtHR, the judgments may be described as the Court's response to the judgment of the ECtHR in case A. and B. v. Norway.¹⁹ The question on the influence of A. and B. v. Norway on the Court's case-law can be formulated. Did the Court follow in the footsteps of the ECtHR, or maintain the position taken in *Åklagaren v. H. Åkerberg Fransson*? Did the Court provide for higher or lower standards of *ne bis in idem* than the ECtHR?

I have decided to refer in the gloss only to one of the three Court's judgments passed on 20 March 2018. Among the judgments I have chosen Menci, because it was the first judgment passed on that day. In comparison to the two other judgments, Menci is more detailed than judgments posed in the cases of *Garlsson* and *Di Puma*.

2. FACTUAL AND LEGAL BACKGROUND

The Italian Amministrazione Finanziaria took a decision ordering Mr Menci, as a proprietor of a sole trading business, to pay the VAT due and imposed administrative financial penalty representing 30% of the Tax debt (84 748.74 EUR). The decision was the result of administrative proceedings concerning allegation of the failure to pay within the time limit the VAT resulting from the annual tax return for the tax year 2011. The decision became final and Mr Menci started paying the penalty in installments, what was accepted by the authority.

Then criminal proceedings against Mr Menci were initiated. The ground for the proceedings was the same act (behaviour) of failure to pay VAT. Failure to pay VAT constituted the offence provided for in Article

¹⁹ Luchtman, "The ECJ's Recent Case Law," 1718; Gianni Lo Schiavo, "The principle of *ne bis in idem* and the application of criminal sanctions: of scope and restrictions," *European Constitutional Law Review* 14, Issue 3 (2018): 645.

10a(1) and Article 10b(1) of Legislative Decree No 74/2000. According to the same legal act, the criminal and administrative proceedings are to be conducted independently and neither administrative proceedings nor criminal could be suspended pending the result of the other proceedings. An administrative authority and a court are entitled to impose penalties independently. Only at the stage of the penalties execution the consequences of the multiplicity proceedings are deducted. According to Article 21(2) of Legislative Decree 74/2000 administrative penalties are not enforceable unless the criminal proceedings have been finally concluded by dismissal of the case, acquittal or termination of the proceedings. However, the rule does not prevent conducting independently administrative and criminal proceedings for the same act.

Therefore the Tribunale di Bergamo, that conducted the criminal proceedings in Mr. Menci case, decided to refer to the Court the question for a preliminary ruling whether Article 50 of the Charter interpreted in the light of Article 4 of Protocol 7 and the related case-law of the ECtHR, preclude the possibility of conducting criminal proceedings concerning the same act concerning the failure to pay VAT for which a final administrative penalty has been imposed on the same person.

Advocate General Campos Sánchez-Bordona delivered his opinion on 12 September 2017. According to his conclusions, Article 50 of the Charter requires for its application the existence of the same ‘material facts’ which, regardless of their legal classification, must be the basis for the imposition of tax penalties and criminal penalties. This rule is infringed, *„if criminal proceedings are commenced or a penalty of a criminal nature is imposed on a person who, in respect of the same act has previously had a tax penalty imposed on him by a judgment which has become final, where, despite its name, that penalty is in fact criminal in nature.”*

3. JUDGEMENT OF THE COURT

The Court examined the nature of proceedings and penalties imposed on Mr Menci and assessed that they had a criminal character according to the criteria accepted by the Court in the Bonda case. The proceedings regarded the same offence understood as the existence of the same facts

(*idem factum*). Therefore, the cumulation of proceedings and sanctions could be evaluated from the perspective of the right guaranteed in Article 50 of the Charter.

Assessing the cumulation the Court began from the statement that in the judgment of 27 May 2014, criminal proceedings against Zoran Spasic, Case C-129/14,²⁰ it was ruled that a limitation to *ne bis in idem* may be justified on the basis of Article 52 (1) of the Charter (par. 41). The provision constitutes the general rule of limitation of the rights and freedoms recognized by the Charter. According to Article 52(1) of the Charter, the limitation must be provided for by law and respect the essence of those rights and freedoms. The Article requires also the consistency of the limitation with the principle of proportionality. It means that they should be necessary and should meet objectives of general interest recognized by the EU or the need to protect the rights and freedoms of others. When there is a choice between appropriate measures, the least onerous should be applied and the disadvantages caused by the measure must not be disproportionate to the aims pursued.

There were no doubts that the duplication of proceedings and penalties was in this case provided for by law. As regards the essential content of the right not to be tried or punished twice, The Court took position that the right is respected because the duplication is allowed only under conditions exhaustively defined in law. The limitation also meets the objective of general interest because it supports the collection of all the VAT due. The Court noticed that proceedings and penalties relate to different aspects of the same unlawful conduct at issue.

The Court recalled also Article 52(3) of the Charter according to which, so far as the Charter contains the rights which correspond to rights guaranteed by the ECHR, their meaning and scope are the same. In the judgment of 15 November 2016, A. and B. v. Norway the ECtHR has held that the duplication of tax and criminal proceedings and penalties punishing the same violation of tax law does not infringe *ne bis in idem*, if the proceedings have sufficiently close connection in substance and time. It constituted for the Court the base for the argument, that the duplication

²⁰ ECLI:EU:C:2014:586.

of proceedings and penalties is possible even in the light of Article 4 of Protocol 7.

To sum up, the Court did not accept the position of the Advocate General. Assuming that Article 50 of the Charter does not preclude duplication of criminal and administrative proceedings of criminal nature and such penalties, the Court enumerated conditions for the state. The first one is pursuing an objective of general interest. According to the Court, the duplication of proceedings and penalties is justified, when they pursue additional objectives. Moreover, the rules ensuring coordination of proceedings which limit their additional disadvantages for the persons concerned should be provided for, as well as the rules that ensure that the severity of all the penalties imposed for the same person is limited to what is strictly necessary in relation to seriousness of the offence concerned.

4. COMMENT

The meaning of the judgment results from the following thesis. First of all, the Court stated that the limitations of the right enshrined in Article 50 of the Charter may be justified on the basis of Article 52 (1) of the Charter. Moreover, the cumulation of the proceedings and penalties respects the essence of the right and it is not excluded in the light of Article 4 of Protocol 7.

The reference to the accordance of the restriction of the right not to be tried or punished twice based on the principle of proportionality with the standard of the correspondent right provided for in the ECHR - requires the interpretation of the Article 52(1) of the Charter especially in conjunction with Article 52(3) of the Charter.²¹ According to the provision, in so far as this Charter contains rights which correspond to the rights guaranteed by the ECHR, the meaning and the scope of those rights shall be the same as those laid down by the ECHR. Furthermore, the Court can

²¹ The interpretative directive results from the third subparagraph of Article 6(1) TEU, according to which the rights, freedoms and principles set out in the Charter are to be interpreted in accordance with the general provisions in Title VII of the Charter and with due regard to the explanations referred to in the Charter.

develop an autonomous approach to the rights enshrined in the Charter, but only if the Court guarantees more extensive protection than provided for in the ECHR. Therefore, the shape of the right on the ground of the ECHR has to be taken into consideration during the interpretation of Article 50 of the Charter. According to the Explanations relating to the Charter, they are determined not only by the text of the legal acts, but also by the case-law of the ECtHR.

It has to be also clarified that when the Charter recalls the ECHR it comprises not only the European Convention on Human Rights and Fundamental Freedoms, but also Protocols to the Convention.²² One may raise an argument that not all the Member States of the EU are parties to Protocol 7. However, the importance of the ECHR and the Protocols does not result from the obligations taken by every Member State which is a party to the ECHR and the Protocols, but from the binding character of the Charter, which refers in Article 52(3) of the Charter to the ECHR. There is no difference between the Protocols to the ECHR that were ratified by all Member States and those which were not in the Charter and in the Explanations to the Charter.²³ One cannot find any notion on that, although the drafters of the Charter were aware of the reservations made by Member States to the ECHR and the Protocols.²⁴

Although the ECHR does not provide for the limitation of the right not to be tried or punished twice based on the proportionality principle, the Court declared in *Menci* that the acceptance of such limitations of the right is in accordance with the way the ECtHR understands the right. The argument raised by the Court was based on the judgment of 15 November 2016, *A. and B. v. Norway*, in which the ECtHR has

²² Steve Peers and Sacha Prechal, "Article 52 - Scope and interpretation of Rights and Principles," in *The EU Charter of Fundamental Rights. A Commentary*, ed. Steve Peers, Tamara Hervey, Jeff Kenner, and Angela Ward (Oxford: Hart Publishing, 2014), 1498.

²³ Explanations relating to the Charter of Fundamental Rights (2007/C 303/02), O.J. 2007, C 303/17–35.

²⁴ John A.E. Vervaele, "Schengen and Charter-related *ne bis in idem* protection in the Area of Freedom, Security and Justice: M and Zoran Spasic," *Common Market Law Review* 52, Issue 5 (2015): 1349.

held that the duplication of tax and criminal proceedings and penalties punishing the same violation of tax law does not infringe *ne bis in idem*.²⁵

However, there is a fundamental difference between the position taken by the ECtHR in the case of *A. and B. v. Norway* and the position taken in the case of *Menci*, as well as in two other cases adjudicated on 20 March 2018. In the case of *A. and B. v. Norway* the ECtHR did not declare that the duplication of criminal proceedings for the same behaviour constitutes a permissible limitation to *ne bis in idem*, because it was assessed as permissible from the perspective of the balancing test. The ECtHR stated that under some circumstances two proceedings can be treated as one and therefore such a situation is outside the scope of the application of *ne bis in idem*. Two proceedings have to be sufficiently close in substance and in time. According to the ECtHR, in such a situation there is not an element that in the Latin formula of *ne bis in idem* constitutes ‘bis’. The ECtHR used the balancing test to assess whether, even if the two proceedings were treated as one, therefore the situation is outside the scope of application of *ne bis in idem*, such an integrated response to the failure to declare income and pay taxes did not result in any disproportionate prejudice or injustice.²⁶ Therefore, the Court did not accept other limitations of *ne bis in idem* than provided for in Article 4(2) of Protocol 7, especially not limitations based on the balancing test. The balancing test was applied by the ECtHR at a different level. *A. and B. v. Norway* is a subject of fair criticism, mainly because of the lack of precision concerning the criteria of closeness of two proceedings.²⁷ However, the judgment did not approve an introduction of such extensive opportunities of the right’s restriction as it would be possible when the limitation clause based on the principle of proportionality is applied. If two or more proceedings do not fulfill the re-

²⁵ Para 60–62.

²⁶ Para 144–153.

²⁷ See: The Dissenting Opinion of Judge Pinto de Albuquerque, par. 50–56; Luchtman, “The ECJ’s Recent Case Law,” 1727–1728; Katalin Ligeti and Stanislaw Tosza, “Challenges and Trends in Enforcing Economic and Financial Crime: Criminal Law and Alternatives in Europe and the US,” in *White Collar Crime: A Comparative Perspective*, ed. Katalin Ligeti and Stanislaw Tosza (Oxford: Hart Publishing, 2019), 32; Gulia Lasagni and Sofia Mirandola, “The European *ne bis in idem* at the Crossroads of Administrative and Criminal Law,” *Eucrim* 2 (2019): 128–129.

quirements of being so close in substance and in time, that they can be treated as one proceeding, the second one constitutes an infringement of the right not to be tried or punished twice. Then, the assessment of the cumulation from the perspective of the principle of proportionality does not matter, because the limitation clause based on principle of proportionality is not a limitation clause admissible to the restriction of the right. Summarizing, the application of the balancing test in reference to restrictions of the right not to be tried and punished twice does not have a basis in the jurisprudence of the ECtHR.

Taking into account the analysis, the question whether the meaning and the scope of *ne bis in idem* is at least not lower than provided for in the ECHR has to be formulated. One can find different answers to the question in the literature. Judgments passed on 20 March 2018 are assessed as providing for the more extensive protection of *ne bis in idem* than the protection guaranteed by the ECtHR.²⁸ According to other authors, they constitute a modified version of the criteria adopted by the ECtHR in *A. and B. v. Norway*²⁹. However, in my opinion the judgments are incoherent with the case-law of the ECtHR and they do not provide for higher or even equal protection of *ne bis in idem*.

As it was emphasized before, the ECtHR stipulated in the case *A. and B. v. Norway* the specific conditions that have to be fulfilled to treat two or more proceedings as one. Although the criteria are not precise, in many situations the cumulation of proceedings will lead to them being excluded. The requirements constitute a test which not every cumulation of penal proceedings for the same act may pass. What is interesting, taking into account the criteria presented in *A. and B. v. Norway*, the Advocate General Campos Sánchez-Bordona assessed the proceedings that took place in the case of *Menci*. According to his Opinion, there are not sufficiently close connected to treat them as one proceeding. Therefore, even if the standard regarding 'bis' has been relaxed by the ECtHR, not all kinds of cumulation of penal responsibilities are able to fulfill the requirements presented in *A. and B. v. Norway*.

²⁸ Schiavo, "The principle," 657, 663; Luchtman, "The ECJ's Recent Case Law," 1748.

²⁹ Zoran Burić, "Ne Bis in Idem in European Criminal Law - Moving in Circles?," *EU and Comparative Law Issues and Challenges Series*, Issue 3 (2018): 517–518.

In *Menci* the Court did not recall the criteria of the closeness of two or more proceedings. However, contrary to way the judgments passed on 20 March 2018 are read by some commentators, it does not mean that the Court provided for higher standards for *ne bis in idem* protection. Instead of the criteria the Court accepted an admissibility of the restrictions of *ne bis in idem* if they fulfill the criteria provided for in Article 52(1) of the Charter. Therefore, the Court applied the less precise criteria which constitutes elements of the principle of proportionality.

One may say, that “at the end of the day” *A. and B. v. Norway* and *Menci* lead to the same loose protection of *ne bis in idem*, and presumably therefore the position taken in the judgments is treated as a modified version of the criteria adopted by the ECtHR in *A. and B. v. Norway*. However, the difference between *A. and B. v. Norway* and *Menci*, as well as two other judgments passed on 20 March 2018, is in the way and the scope the protection has been loosened. The right not to be tried or punished twice, which is according to the ECHR a non-derogable right, limited only by the limitation clause described in a detailed way, became in *Menci* a relative right, which protection depends on the strength of interests which are in conflict. Such a way of understanding *ne bis in idem* does not respect the need of protection of the legal certainty.

5. CONCLUSIONS

In conclusion, the application of the balancing test as a limitation clause for *ne bis in idem*, finds no support in the case-law of the ECtHR. It reduces the level of *ne bis in idem* protection in comparison to the case-law of the ECtHR and, therefore, such a position infringes Article 52(3) of the Charter.

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