The «excessive burden» as the only limit to double prosecution

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Título

El «exceso punitivo» como único límite al bis in ídem

Resumen

Un análisis de la doctrina del Tribunal Constitucional, del Tribunal Europeo de Derechos Humanos y del Tribunal de Justicia de la Unión Europea conduce a concluir que el único límite actual a la prohibición del *bis in ídem,* en el marco de los procedimientos administrativos y penales, es el exceso punitivo. De este modo, hoy en día se admite tanto la dualidad de sanciones (administrativas y penales) como la duplicidad de procedimientos (administrativos sancionadores y penales) por los mismos hechos, siempre que la retribución impuesta a la conducta realizada (el castigo total) sea proporcional a la gravedad de la infracción cometida.

Palabras clave

Derechos fundamentales. Ne bis in ídem. Doble proceso. Procedimiento administrativo sancionador. Infracción tributaria. Delito fiscal. Sanción de carácter penal. Exceso punitivo. Proporcionalidad.

Abstract

Analysis of the case-law of the Spanish Constitutional Court, the European Court of Human Rights and the European Court of Justice reveals that, within the framework of administrative penalty procedures and criminal proceedings, the only limit to the duplication of penalties and proceedings is the «excessive burden». This means that today both the duplication of administrative and criminal penalties, and the duplication of administrative and criminal proceedings are accepted, as long as the total punishment imposed is proportionate to the seriousness of the offence committed.

Keywords

Fundamental rights. Ne bis in idem. Double prosecution. Administrative penalty proceedings. Tax offence. Tax crime. Penalty of a criminal nature. Excessive burden. Proportionality.

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Sumario

1. Introduction

As is generally known, the *ne bis in idem* principle implies that no one shall be liable to be **tried or punished** twice in respect of the same acts. It prohibits, therefore, the imposition of two or more criminal penalties by a final judgment (double criminality) and the commencement of two or more sets of criminal proceedings (double prosecution) against the same person [1]. These prohibitions do not only apply in the field of purely criminal proceedings [2], but also to administrative penalty proceedings of a «criminal nature» [3], which are currently at the centre of the doctrinal debate in the context of an intensifying fight against tax fraud.

This article will pay special attention to the procedural aspect of the *ne bis in idem* principle (double prosecution), bearing in mind at all time its material facet (double punishment). The ultimate objective is to show how the courts have departed from the classical conception of this principle and have undertaken a new approach wherein both aspects are intermingled. Furthermore, not only have they given prominence to the material aspect over the merely instrumental character of the procedural one, but they have also established the «excessive burden» as the only limit to the duplication of penalties and proceedings.

To enable a better understanding of our analysis, we should first discuss the dual significance of this principle, so that we can subsequently focus on its procedural aspect and, in particular, on the criteria laid down in the case-law for establishing that there has been no violation of the right to *ne bis in idem* from a substantive point of view (multiple punishments), even when there has been an infringement of its formal aspect (duplication of proceedings).

2. Ne bis in idem as a fundamental right: its substantive and formal aspects

The *ne bis in idem* principle laid down in Articles 14.7 of the International Covenant on Civil and Political Rights (1966) [4], 4.1. of the Protocol no. 7 (1984) to the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) [5], 54 of the Schengen Agreement (1985) [6] and 50 of the Charter of Fundamental Rights of the European Union (2000) [7], prohibits the commencement of two or more sets of criminal proceedings and the imposition of two or more criminal penalties by a final judgment against the same person in respect of the same acts.

1 *Sergey Zolotukhin v. Russia* [GC], no. 14939/03, § 110, ECHR 2009; and Opinion of Advocate General M. Campos Sánchez-Bordona, delivered on 12 September 2017, Case C-524/15, *Luca Menci*, § 37.

2 *Butnaru and Bejan-Piser v. Romania,* no. 8516/07, 23 June 2015.

3 *Janosevic v. Sweden,* no. 34619/97, ECHR 2002-VII; *Jussila v. Finland* [GC], no. 73053/01, ECHR 2006-XIV; *Sergey Zolotukhin v. Russia* [GC], no. 14939/03, ECHR 2009.; and *Ruotsalainen v. Finland,* no. 13079/09, 16 June 2009.

4 Signed by the Kingdom of Spain on 28 September 1976 and ratified on 13 April 1977 (BOE no. 103, 30 April 1977).

5 The Kingdom of Spain acceded to the Convention for the Protection of Human Rights and Fundamental Freedoms on 24 November 1977, which was ratified on 26 September 1979 (BOE no. 243, 10 October 1979). For its part, the Protocol no. 7 was signed by Spain on 22 November 1984 and ratified on 15 October 2009 (BOE no. 249, 15 October 2009).

6 Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (Official Journal L 239, 22 September 2000). The Agreement on the Accession of the Kingdom of Spain was signed on 25 June 1991 (BOE no. 181, 30 July 1991) and ratified on 5 April 1994 (BOE no. 81, 5 April 1994). See, on this matter, De la Oliva Santos, A.: «*La regla del non bis in ídem en el Derecho Procesal de la Unión Europea: algunas cuestiones y respuestas*», *La Justicia y la Carta de Derechos Fundamentales de la Unión Europea*, Ed. Colex, Madrid, 2008, pp. 167-185; and Huelin Martínez de Velasco, J.: «*La jurisprudencia del Tribunal de Justicia de las Comunidades Europeas en materia penal: ¿Hacia una "comunitarización" del tercer pilar de la Unión Europea?*», *Nuevos desafíos del derecho penal internacional: terrorismo, crímenes internacionales y derechos fundamentales*, Ed. Tecnos, Madrid, 2009, pp. 507-540.

7 Official Journal of the European Union, C 326, 26 October 2012, pp. 391-407.

In national law, even though this fundamental right is not laid down in the Spanish Constitution, in accordance with the consolidated case law doctrine of the Spanish Constitutional Court[8], it is an implicit part of the principle of criminal legality enshrined in its Article 25.1, under which «*no one shall be convicted or punished for any act or omission which did not constitute a criminal offence, misdemeanour or administrative offence under existing legislation at the time when it was committed*»[9]. In this regard, although the constitutional ban on *bis in idem* has a unique substantive significance that avoids the «duplicity of administrative and criminal penalties in respect of the same facts» (material aspect), it also precludes, in principle, «the imposition of multiple punishments upon a person for the same offence in different penalty procedures» (formal aspect)[10]. As a result, this constitutional guarantee avoids both «the cumulative application of multiple rules and the duplication of procedures for the same offence after the first judgment has acquired the authority of a final decision»[11].

But let's go one step at a time. From a substantive point of view, *ne bis in idem*, in compliance with the principles of legality and prior definition of criminal offences, «**prevents the same person from being punished more than once, on the same basis, in respect of the same acts**, be it by the conduct of two sets of penalty proceedings -leaving aside its criminal or administrative nature- or within a single procedure»[12]. Consequently, **in order to avoid a disproportionate burden**[13], it prohibits double administrative and criminal penalties in those cases where the facts, offender and legal basis are found to be identical[14]. The material approach of this principle is therefore subject to the threefold condition of identity of the facts, unity of offender and unity of the legal interest protected[15] in a way that **«the same person»**[16] **cannot be sanctioned more than once for a «single unlawful course of conduct»**[17] **designed to protect «the same legal asset»**[18].

8 SSTC (Constitutional Court Judgments) 66/1986, 26 May, FJ (legal ground) 2; 154/1990, 15 October, FJ 3; 234/1991, 16 December, FJ 2; 270/1994, 17 October, FJ 5; 204/1996, 16 December, FJ 2; 177/1999, 11 October, FJ 3; 2/2003, 16 January, FFJJ 2 and 8; 48/2007, 12 March FJ 3; 188/2005, 4 July, FJ 2; 236/2007, 7 November, FJ 14; 86/2017, de 4 July, FJ 5; and ATC (Inadmissibility Decision of the Constitutional Court) on 197/2009, 20 June, FJ 4.

9 STC (Constitutional Court Judgment) 2/1981, 30 January, FJ 3. Furthermore, the Spanish legislator has established, in tax matters, «the principle of non-concurrence of tax penalties». See Articles 178 and 180.1 of the Spanish General Taxation Law 58/2003 (*Ley General Tributaria*) of December 17 (BOE no. 302, 18 December 2003).

10 STC 289/1994, 31 October, FJ 3.

11 STC 2/2003, 16 January, FJ 3.c).

12 STC 2/2003, 16 January, FJ 3.a).

13 STC 154/1990, 15 October, FJ 3.

14 STC 2/1981, 30 January, FJ 4.

15 ECJ Judgment of 7 January 2004, *Aarlborg Portland and Others*, Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P, § 338.

16 Although in most cases this subjective criterion appears to be easily identifiable, it could present difficulties when the penalties at issue concern both legal and natural persons (manager – sole shareholder). In effect, while natural and legal persons are, in principle, legally distinct [*Isaksen v. Norway* (dec.), no. 13596/02, 2 October 2003; STS (Spanish Supreme Court Judgment) 31 March 2010, FD 6 (Roj: STS 1763/2010); STC 70/2012, 16 April, FJ 5; *Pirttimäki v. Finland*, no. 35232/11, § 51, 20 May 2014; and ECJ Judgment of 5 April 2005, *Orsi and Baldetti*, C-217/15 and C-350/15, §§ 22, 23], in those cases where there is an absolute substantial identity between the legal person and its manager (sole shareholder), in a way that they both have the same interests and that the legal personality is irrelevant in the commission of the criminal offence, consideration should be given to only holding the natural person liable for the offence committed, through corporate veil piercing. This would avoid double criminality and thus the infringement of the *ne bis in idem* principle. See on this matter, Circulars 1/2001 of November 17, on criminal liability of legal persons in accordance with the reform of the Criminal Code contained in Organic Law 5/2010, p. 19; and 1/2016 of January 22, on criminal liability of legal persons in accordance with the reform of the Criminal Code contained in Organic Law 1/2015, p. 29 (*Circulares 1/2011, de 17 de noviembre, relativa a la responsabilidad penal de las personas jurídicas conforme a la reforma del Código Penal efectuada por Ley orgánica 5/2010; y 1/2016, de 22 de enero, sobre la responsabilidad penal de las personas jurídicas conforme a la reforma del Código Penal efectuada por Ley Orgánica 1/2015*).

17 The ECHR has defined «identity of the facts» as a «set of concrete factual circumstances involving the same defendant and inextricably linked together in time and space», regardless of their legal qualification. See, in this regard, *Sergey Zolotukhin v. Russia* [GC], no. 14939/03, §§ 71, 84, ECHR 2009; *Grande Stevens and Others v. Italy*, no. 18640/10 and 4 others, § 221, 4 March 2014; *Nykänen v. Finland,* no. 11828/11, § 42, 20 May 2014; *Rinas v. Finland*, no. 17039/13, § 44, 27 January 2015; *Kapetanios and Others v. Greece*, no. 3453/12 and 2 others, § 64, 30 April 2015; *A and B. v. Norway* [GC], *nos.* 24130/11 and 29758/11, § 108, 15 November 2016.

18 Indeed, the prohibition of *bis in idem* «does not fall solely on punishing the same facts, but it essentially involves sanctioning the same offence» (ATC 329/1995, 11 December, FJ 2). It is therefore necessary that the penalties imposed are designed to protect different legal interests in order to ensure the protection of the *ne bis in idem* principle. See, in this regard, STC 236/2007, 7 November, FJ 14.

From a formal or procedural viewpoint**, it prohibits, in principle, that a person is prosecuted a second time**[19] **for a matter which has already been finally judged**[20]**, that is to say, that has been the subject of a judgment that has acquired the force of *res judicata***[21]. In this respect, it is important to point out that until the year 2003, the Constitutional Court only recognized the procedural aspect of *ne bis in idem* in the field of purely criminal proceedings, disregarding the coexistence of administrative and criminal proceedings and, thus, excluding the administrative proceedings from its protection. Since the judgement 2/2003 of January 16, the Constitutional Court has stated that the *ne bis in idem* principle is not confined to the right not to be punished twice but extends to the right not be prosecuted or tried twice, regardless of the criminal or administrative nature of the proceedings. However, the formal or procedural approach does not apply to all types of administrative procedures, but only to those that are to be equated to criminal proceedings on account of their characteristics and degree of complexity, besides the nature and severity of the resulting penalty[22] (nonetheless, Spanish administrative penalty procedures are, in general, hard to equate to criminal proceedings).

The question that arises in this context is how to proceed when a conduct may constitute both an administrative and a criminal tax offence. In such cases, the Spanish Constitutional Court relies on the **supremacy of the penal order over the administrative order**[23] to impose three limits on the Administrations' sanctioning powers: a) they are subject to judicial review; b) the Administration cannot carry out any action or procedure while the judicial authority has not ruled; and c) they have to respect the status of *res judicata*[24]. The supremacy of the penal order over the administrative order is therefore conceived as a further guarantee of the *ne bis in in idem* principle in a way that, when the offence is susceptible to an administrative sanction and a criminal penalty at the same time, the criminal prevails over the administrative one[25].

This has led the Spanish legislator to establish that, in tax matters, «*the sentence precludes the imposition of an administrative penalty in respect of the same facts*» (Article 251.2 of the General Taxation Law)[26].

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19 This formal aspect not only involves the prohibition of double prosecution at domestic level, but also at the European level in light of Article 50 CFREU, read together with Article 54 of Schengen Agreement (ECJ Judgment of 27 May 2014, *Spasic*, C-129/14), under which «*a person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party*». Moreover, in the framework of extradition and European arrest warrants procedures, the Spanish Constitutional Court has stated that if someone has been subjected to criminal prosecution in Spain, they cannot be tried again in another country in respect of the same facts, even when the Spanish Court in question had granted a stay of proceedings. Otherwise, their right to effective judicial protection would be infringed (STC 3/2019, 14 February, FFJJ 3 and 5). See Sanz Hermida, A. M.: «*Aplicación transnacional de la prohibición del "bis in ídem" en la Unión Europea*», *Revista Penal*, no. 21, 2008, pp. 126-135; and Coutron, L.; and Lecompte, F. «*Le principe ne bis in ídem dans la jurisprudence de la Cour de justice de l'Union européenne : de la diversité dans l'unité ?*», *Revue du Droit Public et de la science politique en France et à l'étranger*, no. 1, 2018, pp. 5-17.

20 SSTC 2/2003, 16 January, FJ 3.b); and 3/2019, 14 January, FJ 3.

21 That is, there has to be an irrevocable decision «on the merits» of the case. See SSTC 159/1987, 26 October, FJ 2; and 60/2008, 26 May, FJ 9; ECJ Judgment of 10 March 2005, *Miraglia*, C-469/03, § 35; and *Sergey Zolotukhin v. Russia* [GC], no. 14939/03, § 107, ECHR 2009.

22 STC 2/2003, 16 January, FJ 8.

23 SSTC 77/1983, 3rd October, FFJJ 3 and 4; and 2/2003, 16 January, FJ 3.c). See on this matter Garberí Llobregat, J.: «*La vertiente formal de la prohibición de "bis in ídem" y sus (discutibles) límites*», *La Ley*, no. 4, 2007 (electronic version: La Ley 2786/2007), pp. 1-3.

24 STC 2/2003, 16 January, FJ 3.c). The supremacy of the penal order over the administrative sanctioning order in those cases where the conduct at issue is susceptible to both an administrative and a criminal penalty is based on the idea that the possibility to be subject to both administrative and criminal proceedings may lead to a situation where «the same facts are declared proven and not proven by different courts» [SSTC 77/1983, 3 October, FJ 4; SSTC 2/2003, 16 January, FJ 3.c); and 148/2016, 22 July, FJ 5.d)].

25 At first, the Constitutional body gave preference to the penalty imposed in the first place, regardless of its criminal or administrative nature (STC 177/1999, 11 October, FJ 4). However, it later stated that the penal procedure had to be carried out with preference over the administrative one. See on this matter Moreno Fernández, J.I.: «*Los principios constitucionales de la potestad sancionadora a la luz de la jurisprudencia constitucional*», *Lecciones de Derecho Tributario inspiradas por un maestro: liber amicorum en homenaje a Eusebio González García*, Vol. I, Universidad del Rosario, Bogotá, 2010, p. 123.

26 Consequently, in those cases where the Tax Administration has brought a taxpayer before a criminal court because the elements of a criminal tax offence are present and, instead of staying the administrative procedure until the criminal one has concluded, she imposes an administrative penalty, this penalty shall be declared null and void, pursuant to Article 217.1, e) and b) of the General Taxation Law. This is because, the Tax Administration, under these circumstances, not only did not follow the legally established procedure, but also did not have competency to sanction the offence committed [STS 9 June 2011, FD 5 (Roj: STS 3789/2011)]. In this regard, Magro Servet, V., claims that, in those cases where the Administration illegitimately continues the administrative sanctioning procedure, a favourable approach for the offender should be considered in a way that he will only be subjected to the administrative penalty if the criminal one is more serious [«*El principio non bis in ídem en los casos de concurrencia de sanción administrativa y posterior derivación al orden penal*», *Revista Aranzadi Doctrinal*, no. 4, 2014 (electronic version: Aranzadi database, BIB 2014\2165), p. 4].

However, when the conduct at issue has not been considered an offence in criminal proceedings, the Tax Administration «*can initiate a new procedure (…) in accordance with the facts that were deemed proven in the penal process*» (Article 251.2 of the General Taxation Law). This means that in case of acquittal, the duplication of proceedings is allowed (and, thus, the violation of the procedural aspect of *ne bis in idem*), insofar as its substantive guarantee is not infringed. On the contrary, the imposition of a double punishment (which would imply a violation of the substantive aspect of *ne bis in idem*) cannot be accepted without exceeding the bounds of Article 25.1 of the Spanish Constitution [27].

3. Prohibition of double prosecution: case law criteria for determining whether the right to ne bis in idem has been violated

3.1. Preliminary considerations

As previously mentioned, from a procedural point of view, *ne bis in idem* bars double prosecution, that is, **it prohibits a duplication of proceedings of a criminal nature for the same facts and against the same person [28], when a prior acquittal or conviction has already acquired the force of *res judicata*** [29]. Even so, our domestic and European Courts, have established case law criteria for establishing whether there has been an infringement of the procedural aspect of *ne bis in idem*:

- ***The «criminal nature» of the administrative sanction*** *as a criterion for determining whether the administrative procedure is to be equated to criminal proceedings* (2nd point).
- ***The sufficiently close connection in substance and in time*** between the proceedings at issue (3rd point).
- ***The deduction of the prior penalty from the amount of the subsequent one or the adjustment of the penalties «taken as a whole»*** in order to prevent an «excessive burden» (4th point).

3.2. The «criminal nature» of the administrative penalty as a criterion for determining whether the administrative procedure is to be equated to criminal proceedings

The *ne bis in idem* principle does not exclude on an automatic basis the conduct of dual penalty proceedings in respect of the same acts by different punitive authorities of the state, but only of proceedings which are regarded as «criminal» (even if they are classified in domestic law as «administrative»). In fact, the Spanish Constitutional Court has stressed that «the constitutional ban of initiating or resuming penalty procedures when a final decision has already been issued **does not extend to all penalty procedures, but only to those which, according to their characteristics (degree of complexity) and the type of penalty that may be imposed (nature and severity), are to be equated to criminal proceedings»**, in order to determine «if being subject to the penalty procedure at issue is as burdensome as being subject to criminal proceedings» [30]. As a result, when «the administrative procedure cannot be equated to criminal proceedings due to the simplicity of the administrative penalty procedure, the offence and the nature of the penalty, there would be no infringement of the right not to be subjected to two penalty procedures» [31].

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27 See De Vicente Martínez, R.: «*Teoría y práctica o el Dr. Jekyll y Mr. Hyde (a propósito de la sentencia del Tribunal Constitucional 177/1999, de 11 de octubre, sobre el principio ne bis in ídem)», Actualidad Penal, Sección Doctrina*, Vol. 2, 2000 (electronic version: La Ley 3316/2001), p. 3; and Garberí Llobregat, J.: «*La vertiente formal de la prohibición de "bis in ídem" (…)», ob. cit*., p. 2.

28 In this regard, see Moreno Fernández, J.I.: «*Los principios constitucionales de la potestad sancionadora a la luz de la jurisprudencia constitucional*», (…), *ob. cit*., p. 124.

29 STC 159/1987, 26 October, FJ 2.

30 STC 2/2003, 16 January, FJ 8.

31 STC 2/2003, 16 January, FJ 8.

It is important to point out in this regard that even though the Spanish Constitutional Court has stated that tax inspection procedures are of an «**inquisitive nature»** within their field of competence (investigate and record facts that might be used in a subsequent administrative or criminal penalty procedure), this inquisitive nature has not been extended to administrative penalty procedures [32]. Moreover, the Court has determined that, «in the current legislative framework, it is rarely possible to equate administrative penalty procedures to criminal proceedings». This does not exclude, however, that «in some specific cases, conducting both administrative and criminal proceedings -against the same person and in respect of the same acts- may be a violation of the right not to be tried twice» [33].

How can we ascertain then that an administrative proceeding is really of a «criminal nature» despite being nominally framed as «administrative»? The European Court of Human Rights (ECtHR) has set out three criteria, commonly known as the «Engel criteria» [34], as the model test for determining whether administrative proceedings are to be equated to criminal proceedings:

a) ***The legal classification of the offence under national law:*** when the domestic legal classification categorises both penalties as «criminal», the *ne bis in idem* principle is applied immediately, but, when one of them is characterised as «administrative», it is necessary to examine it in the light of the second and third criteria (which are alternative and not necessarily cumulative) to assess whether the penalty is targeted towards certain offences that have a criminal connotation [35].

b) ***The nature of the offence:*** in order to determine the nature of the offence, regard is to be had to the essential elements of the provision, such as its addressee, aim and legal interest protected. The provision will therefore be of a «criminal nature» when it is directed at the general public [36], when it is established for the purposes of punishment and deterrence (that is, when it is not only intended as pecuniary compensation for any costs or damage as a result of the conduct) [37], and when it protects legal interests, the protection of which is normally guaranteed by provisions of criminal law [38].

c) ***The degree of severity of the penalty imposed*** is determined on the basis of the maximum penalty foreseen in the applicable legal provisions. Thus, on one hand, when the penalty involves the loss of liberty, it is presumed to be criminal in nature [39]; on the other hand, when the penalty is administrative, its severity depends on the importance of the surcharges imposed [40].

Following those three criteria, the ECtHR has repeatedly found proceedings for the imposition of «administrative» sanctions to be of a «criminal nature», bringing them within the ambit of «penal procedures» for the purposes of Article 4 of Protocol no. 7 [41]. For instance, concerning tax penalties, the ECtHR has reiterated that when the tax surcharge is not intended as pecuniary compensation for any costs that may have been incurred as a result of the taxpayer's conduct, but to exert pressure on taxpayers to comply with their legal obligations (deterrent) and to punish breaches of those obligations

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32 STC 50/1995, 23 February, FJ 6.

33 STC 2/2003, 16th January, FJ 8.

34 *Engel and Others v. the Netherlands*, 8 June 1976, § 82, Series A no. 22. These criteria were later applied in cases *Sergey Zolotukhin v. Russia* [GC], no. 14939/03, § 53, ECHR 2009; and *A and B. v. Norway* [GC], *nos.* 24130/11 and 29758/11, § 105, 15 November 2016, among others. The ECJ fully applied, for the very first time, the *Engel criteria* in Judgment of 5 June 2012, *Bonda*, C-489/10, § 37.

35 *Janosevic v. Sweden,* no. 34619/97, § 66, ECHR 2002-VII; and *Sergey Zolotukhin v. Russia* [GC], no. 14939/03, § 53, ECHR 2009.

36 *Jussila v. Finland* [GC], no. 73053/01, § 38, ECHR 2006-XIV.

37 *Janosevic v. Sweden,* no. 34619/97, § 69, 70, ECHR 2002-VII; *Sergey Zolotukhin v. Russia* [GC], no. 14939/03, § 55, ECHR 2009; and *Ruotsalainen v. Finland,* no. 13079/09, § 46, 16 June 2009.

38 *Sergey Zolotukhin v. Russia* [GC], no. 14939/03, § 55, ECHR 2009; and *Maresti v. Croatia*, no. 55759/07, § 59, 25 June 2009.

39 *Sergey Zolotukhin v. Russia* [GC], no. 14939/03, § 56, ECHR 2009.

40 In this regard, the ECtHR has considered that a 10% tax surcharge is not severe enough to be considered a «criminal charge», even though it was not intended as pecuniary compensation for damage, but essentially as a punishment to deter recidivism [*Morel v. France* (dec.), no. 54559/00, ECHR 2003-IX]. On the contrary, the ECtHR has concluded that surcharges fixed at 20-40% of the tax avoided are of sufficient severity to be considered as «criminal charges» (*Janosevic v. Sweden,* no. 34619/97, § 69, 70, ECHR 2002-VII). See also Calderón Ortega, J.M., «*El TJUE confirma la aplicación del derecho fundamental de "ne bis in ídem" en el marco de litigios tributarios internos*», *Quincena fiscal*, no. 11, 2013, (electronic version, Aranzadi database, BIB 2013\1178), p. 3.

41 See, for example, *Tomasović v. Croatia*, no. 53785/09, §§ 20-25, 18 October 2011, where the applicant was first fined in minor-offences proceedings and then convicted in criminal proceedings for possession of heroin; *Grande Stevens and Others v. Italy*, no. 18640/10 and 4 others,

(punitive), **they are placed on an equal footing with criminal penalties**[42]. Consequently, the prior conduction of tax penalty procedures «of a criminal nature» precludes, in principle, criminal proceedings for tax evasion in respect of the same acts from being brought against the same person and, thus, a subsequent criminal (or administrative -criminal in nature-) penalty for the same facts.

Lastly, also the European Court of Justice (ECJ) has rendered judgments related to this matter, stressing that the *ne bis in idem* principle «does not preclude a Member State from imposing successively, for the same acts of non-compliance with declaration obligations in the field of [recovery of taxes], a tax penalty and a criminal penalty in so far as the first penalty is not criminal in nature»[43], and that therefore, «**it is possible to impose tax and criminal penalties concurrently but not to impose a nominally administrative penalty which is really of a criminal nature in addition to another criminal penalty**»[44].

In light of the foregoing considerations, it should be noted that none of the criteria used to determine whether the administrative penalty procedure is to be equated to criminal proceedings take into account the characteristics and degree of complexity of the proceedings at issue, but that they focus exclusively on the analysis of the penalty imposed as a result of it, especially given that, from a procedural viewpoint, the aim is to figure out if a person has been subjected to two sets of proceedings genuinely criminal in nature[45]. As a matter of fact, other than the Spanish Constitutional Court, which not only takes into account the sanction imposed, but also concentrates on the particularities of the procedure for the purposes of determining whether the fact of being subjected to the administrative sanctioning procedure in question «could be considered as burdensome as being subjected to criminal proceedings»[46], the rest of the case-law has developed to adopt a material interpretation of the

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§§ 94-101, 4 March 2014, in which the applicants had been subjected to a penalty «of a criminal nature» following the proceedings before the financial markets regulator, and to criminal proceedings for the same facts. However, in other cases like, for example, *Müller-Hartburg v. Austria*, no. 47195/06, §§, 13, 15, 25, 19 February 2013, the ECTHR considered that the duplication of criminal (three years imprisonment for fraudulent conversion) and disciplinary (temporary ban on practising as a lawyer) penalties regarding the same facts did not infringe the *ne bis in idem* principle because the disciplinary proceedings against the applicant did not involve the determination of a «criminal charge».

42 *Janosevic v. Sweden,* no. 34619/97, §§ 68-70, ECHR 2002-VII, where the applicant had first to pay tax surcharges amounting to 20% or 40% of the increased tax liability for certain irregularities in his tax returns and was later sentenced to 10 months imprisonment for tax fraud and a bookkeeping offence in respect of the same facts; *Ruotsalainen v. Finland,* no. 13079/09, § 46, 16 June 2009, in which the applicants were fined for petty tax fraud through a summary penal order and subsequently issued with a fuel fee debit (not only compensatory, but also deterrent and punitive) in administrative proceedings; and *A and B. v. Norway* [GC], *nos.* 24130/11 and 29758/11, §§ 137-139, 15 November 2016, where the applicants had first been accused and indicted by the prosecution services and had had tax penalties imposed on them by the tax authorities, which they had both accepted and paid, before being criminally convicted.

43 ECJ Judgment of 26 February 2013, *Åkerberg Fransson*, C-617/10, § 37. In this case, the applicant was first fined with administrative tax penalties for VAT irregularities and then prosecuted for an offence of tax evasion upon the same act. The national court decided to stay proceedings and refer a question to the Court for a preliminary ruling, so that it clarified if the *ne bis in idem* principle precluded criminal proceedings for tax evasion from being brought against a defendant where a tax penalty has already been imposed in respect of the same facts (Articles 50 CFREU and 54 of Schengen Agreement). For further information on this case, see Martín, A.J.; Carrasco González, F.M.; and García, A.: *«Sentencia del TJUE (Gran Sala) de 26 febrero de 2013, Hans Åkerberg Fransson, C-617/10», Revista Española de Derecho Financiero*, no. 158, 2013, pp. 316-319; and Bernitz, U.: «*The Akerberg Fransson Case Ne bis in ídem: Double Procedures for Tax Surcharge and Tax Offences not Possible*», *Human Rights in Contemporary European Law*, Ed. Hart, Oxford, 2015, pp. 191-209.

44 Opinion of Advocate General M. Campos Sánchez-Bordona, delivered on 12 September 2017, Case C-524/15, *Luca Menci*, § 30. In fact, Advocate General Campos Sánchez-Bordona considers that «it would be difficult to deny that provisions of tax law providing for penalties are aimed at punishing taxable persons whose frauds have been detected while at the same time serving as a warning or deterrent to others, in order to prevent those persons from giving in to the temptation of not paying their taxes. Admittedly, since administrative and criminal penalties are a reflection of the State's right to punish, [he] cannot see how (other than by means of an artificial, merely doctrinal construction) it is possible to deny that the former have a dual aim of deterrence and punishment, leading them to resemble provisions of a strictly criminal nature». Moreover, he believes that «in reality, all penalties have a punitive element and their preventive or deterrent effect is derived specifically from the punishment they involve» (§ 113).

45 Moreover, Pérez Nieto, R., points out that, on a national level, the fundamental question arises as to whether «among the administrative sanctioning procedures in force in our legal system, there are any that might be able to preclude subsequent criminal proceedings for the purposes of the *ne bis in idem* principle» and, on top of that, «whether tax penalty procedures that only affect financial interests could be at some point equated to criminal proceedings» («*Principios y garantías de Derecho sancionador tributario: culpabilidad, non bis in ídem, prueba ilícitamente obtenida, derecho a no autoincriminarse*», *V Congreso tributario: Cuestiones tributarias problemáticas y de actualidad*, Consejo General del Poder Judicial, no. 156, Madrid, 2010, p. 7).

46 STC 2/2003, 16 January, FJ 8. However, given that the Constitutional Court considers that in the current legislative framework, the administrative penalty procedures are rarely possible to be equated to criminal proceedings, it could be understood, as indicated by Alcácer Guirao, R., that the ECtHR case-law would not apply to the Spanish shaping of *ius puniendi* [«*El derecho a no ser sometido a doble procesamiento (…)*», *ob. cit*., p. 36].

prohibition of double prosecution. Here we encounter what is to be regarded as the reinforcement of the substantive aspect of *ne bis in idem* at the expense of its procedural aspect.

3.3. The sufficiently close connection in substance and in time between the criminal and administrative sanctioning proceedings

After pointing out, in the previous section, the necessity of determining whether the proceedings at issue could be regarded as «criminal», we shall now address the second criterion, which concerns «the sufficiently close connection in substance and in time» between the criminal and administrative sanctioning proceedings, introduced by the ECtHR in «*A and B v. Norway*» [47]. The ECtHR held that **the *ne bis in idem* principle does not exclude the conduct of dual proceedings when they have been sufficiently closely connected in substance and in time**. This means that when both procedures have been combined in an integrated manner so as to form a «coherent whole» [48] and have been conducted either simultaneously or progressively (in instances where doing so is motivated by interests of efficiency and proper administration of justice), the duplication of proceedings is compatible with the «bis» criterion [49]. The ECHR did however note that «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», in a way that the duplication could be incompatible with the *ne bis in idem* principle [50]. Nevertheless, it is taken as a «risk», so even in the case of duplication of criminal and administrative (of a substantively criminal nature) proceedings, the «connection in substance and in time» between them may be enough to forego the *ne bis in idem* protection [51].

Contrary to the position of the ECtHR, ECJ Advocate General Campos Sánchez-Bordona was reluctant to accept the line of case-law represented by the judgment in «*A and B v. Norway*», since, as he established in his Opinion on «*Luca Menci*», «the case-law of the [ECJ] ha[d] consolidated a statement of the law to the effect that two parallel or consecutive sets of proceedings, which lead to two substantively criminal penalties in respect of the same acts, continue to be two sets of proceedings (bis) and not one» [52]. He therefore proposed the ECJ to disregard the ECtHR case-law and to carry out its own interpretation of the *ne bis in idem* principle, asserting that «the duality of parallel (administrative and criminal) proceedings, regardless of their degree of closeness in time, and of the associated penalties of a criminal nature at the end of those proceedings imposed by the punitive authorities of the State which rule on the same unlawful acts, is not a necessary requirement permitting the limitation of the right protected by the principle of *ne bis in idem*, **even if it has the laudable aim of protecting the Union's financial**

47 *A and B v. Norway* [GC], *nos.* 24130/11 and 29758/11, § 130, 15 November 2016. In this case, the applicants had made transactions through their companies gaining approximately 12 million euros which were not declared to the Norwegian tax authorities, resulting in unpaid taxes totalling around 3 million euros. The applicants argued that they had been subjected to double jeopardy on account of the same matter, having first been accused and indicted by the prosecution services and having had tax penalties imposed on them by the tax authorities, before being criminally convicted (§ 56). On the other hand, the Norwegian Government alleged that the *ne bis in idem* principle prohibited the repetition of proceedings after the decision in the first proceeding had acquired legal force, but that the conduction of «parallel proceedings» fell outside the scope of its protection (§§ 73-74).

48 *A and B. v. Norway* [GC], *nos.* 24130/11 and 29758/11, §130, 15 November 2016.

49 *A and B. v. Norway* [GC], *nos.* 24130/11 and 29758/11, §134, 15 November 2016.

50 *A and B. v. Norway* [GC], *nos.* 24130/11 and 29758/11, §133, 15 November 2016.

51 In this regard, two sets of proceedings would lack the required temporal connection when there is only a limited overlap in time. For example, in the case of *Jóhannesson and Others v. Iceland*, no. 22007/11, 18 May 2017, where the applicants had been tried and punished twice for the same offence through the imposition of a 25% tax surcharge and the subsequent criminal trial and conviction for aggravated tax offences, the ECtHR pointed out that, during nine years and three months, the proceedings were conducted in parallel for just a little more than a year. For this reason, it could not be found that there was a sufficiently close connection in substance and in time between the tax proceedings and the criminal proceedings in the case for them to be compatible with the *bis* criterion in Article 4 of Protocol No. 7 (§ 56).

52 Opinion of Advocate General M. Campos Sánchez-Bordona, delivered on 12 September 2017, Case C-524/15, Luca Menci, §§ 69-73.

interests and ensuring that serious fraud does not go unpunished»[53]. This last line has been highlighted because there currently appears to be a tendency to consider that all means of action are valid if their aim is to protect tax credit and to ensure that alleged fraudsters are not left unpunished, while in fact, setting such considerable limitations to fundamental rights could put into doubt the system of rights and guarantees established so far.

This said, it seems that the establishment of the substantive and temporary connection criterion as a basis for determining that there has not been a violation of *ne bis in idem* could call into question the level of protection that this fundamental right intends to achieve. There is no doubt that when criminal and administrative proceedings are conducted in parallel, there is not yet a prior «final» decision that could potentially «activate» the procedural protection of *ne bis in idem*, but in the event that both procedures are to be equated to «criminal» proceedings, there would be a simultaneous subjection to two sets of proceedings equally burdensome. In effect, it is remarkable that we have reached a point where the temporary connection between «two» sets of proceedings of a criminal nature (in some cases conducted simultaneously, but in others, consecutively –when a judgement that acquired the force of *res judicata* was already delivered–), can turn them into «one» for the purpose of analysing a possible violation of the procedural aspect of *ne bis in idem*, considering that its essence is precisely not to be prosecuted twice for the same offence[54]. The unconvincing introduction of this criterion is another reflection of the gradual disappearance of the procedural approach to *ne bis in idem*.

3.4. The deduction of the prior penalty from the amount of the subsequent one or the adjustment of the penalties «taken as a whole» in order to prevent an «excessive burden»

The third criterion used in case law for establishing whether the *ne bis in idem* principle has been infringed refers, on one hand, to the deduction of the prior administrative sanction from the amount of the subsequent criminal penalty (deduction of the prior penalty), and, on the other hand, to the adjustment of all the penalties in a way so that their severity does not exceed the seriousness of the offence (adjustment of the penalties «taken as a whole»).

On the domestic level, the Spanish Constitutional and Supreme Courts are applying the «deduction of the prior penalty» criterion, according to which «**the fact that there is a final administrative sanction does not preclude a new criminal penalty in respect of the same facts, provided that the prior administrative one is deducted from the amount of the latter with the aim of guaranteeing that the punishment is proportionate to the seriousness of the offence**»[55]. This stems from the scope of the **substantive guarantee** of *ne bis in idem*, the central aim of which is to prevent that anyone bears an excessive burden. Accordingly, «there would be no constitutionally banned duplication of sanctions, despite the fact that it has been established that the facts, offender and legal basis are identical, when the second set of proceedings deducts the prior sanction from the penalty which may be imposed, so

53 Indeed, Advocate General Campos Sánchez-Bordona has put forward a contrary view, since he has considered that this that case-law of the ECtHR «emphasises the almost insurmountable obstacles which national courts must address in order to ascertain a priori, with a minimum degree of certainty and foreseeability, when that temporal connection exists». Moreover, he has insisted on the fact that «the introduction into EU law of a criterion for interpretation of Article 50 of the Charter which rests on the degree of the substantive and temporal connection between one type of proceedings (criminal proceedings) and another (administrative proceedings in which a penalty is imposed) would add significant uncertainty and complexity to the right of individuals not to be tried or punished twice for the same acts», given that «the fundamental rights recognised in the Charter must be easily understood by all and the exercise of those rights calls for a foreseeability and certainty» (Opinion of Advocate General M. Campos Sánchez-Bordona, delivered on 12 September 2017, Case C-524/15, Luca Menci, §§ 56, 73, 88).

54 Nevertheless, and perhaps as a result of the difficult acceptance of these criteria, the ECtHR has started to nuance the «temporary connection» condition. Indeed, in *Ragnar Thorisson c. Islandia*, no. 52623/14, §§ 42, 50, 12 February 2019, the ECtHR seems to limit the cases where the «connection in time» condition is fulfilled to those proceedings that have progressed currently at some point, that is to say, that had been conducted in parallel. We will then have to wait and see whether its future judgments will continue in this direction or, on the contrary, will follow the line of case-law represented by *A and B. v. Norway* [GC], *nos.* 24130/11 and 29758/11, §130, 15 November 2016.

55 STS 22 July 2004, FD 1 (Roj: STS 5472/2004).

as to mitigate the negative effects of the first final sanctioning decision» [56]. In other words, as, by virtue of the «deduction of the prior penalty» criterion, there is indeed just one penalty in respect of the offence, neither the substantive guarantee of the *ne bis in idem* principle (the right not to be punished twice), nor, consequently, its procedural aspect, would have been violated.

At the EU level, the ECJ has chosen to analyse the set of penalties imposed «as a whole». It was Advocate General Cruz Villalón who initially stated, in his Opinion on «*Åkerberg Fransson*» [57], that the *ne bis in idem* principle enshrined in Article 50 CFREU must be interpreted as meaning that «it **does not preclude the Member States from bringing criminal proceedings relating to facts in respect of which a final penalty has already been imposed in administrative proceedings relating to the same conduct**, provided that the criminal court is in a position to take into account the prior existence of an administrative penalty for the purposes of mitigating the punishment to be imposed by it». Along these lines, the ECJ has recently asserted, in «*Luca Menci*» [58], that criminal proceedings may be brought against a person, even though she had already been subject, in relation to the same acts, to a final administrative penalty of a criminal nature, on condition that the national legislation: 1) pursues an objective of general interest which is such as to justify such a duplication of proceedings and penalties (in this case, combating tax fraud) [59]; 2) 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 [60]; and 3) provides for rules making it possible to ensure that **the severity of all the penalties imposed is limited to what is strictly necessary in relation to the seriousness of the offence concerned**. This last condition reflects that it is not necessary anymore to deduct the exact amount of the administrative penalty from the criminal one, but **it is sufficient that the double penalty does not impose an excessive burden on the person concerned** [61].

As regards the ECtHR, it seems that it has aligned with the line of case-law maintained by the ECJ on this matter. While the ECtHR originally noted that the fact that the first fine had been included in the second one did not diminish the severity of the penalties [62], it asserted, in «*A and B v. Norway*», that the

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56 STC 2/2003, 16 January, FJ 6. In this regard, Puerta Seguido, F., and Beltrán de Felipe, M., point out that the Constitutional Court is accepting double punishment based on the «untrue» argument that, in reality, there is only one penalty, and thus, is restricting the scope of protection of the *ne bis in idem* («*Perplejidades acerca de los vaivenes en la jurisprudencia constitucional sobre el ne bis in ídem*», *Revista Española de Derecho Constitucional*, no. 71, 2004, p. 392)

57 Opinion of Advocate General P. Cruz Villalón, delivered on 12 June 2012, Case C-617/10, *Åkerberg Fransson*, § 96.

58 ECJ Judgment of 20 March 2018, *Luca Menci*, C-524/15, in which Mr. Menci was first subject to administrative proceedings that gave rise to a decision of the Italian Tax authority that ordered Mr. Menci to pay the VAT due and imposed on him and administrative penalty. After the final conclusion of those administrative proceedings, criminal proceedings were initiated before the District Court of Bergamo in respect of the same acts on the ground that the failure to pay VAT also constituted a criminal offence. The national Court decided to stay proceedings and to refer the following question to the ECJ for a preliminary ruling: does Article 50 CFREU preclude the possibility of conducting criminal proceedings concerning an act (non-payment of VAT) for which a final administrative penalty has been imposed on the defendant? (§ 16).

59 It should be recalled, on one hand, that Article 52.1 CFREU accepts that limitations may be imposed on the exercise of rights enshrined by the CFREU, as long as they are necessary and genuinely meet objectives of general interest recognised by the Union; and, on the other hand, that the ECJ has reiterated that the combating of tax fraud that affects the EU's financial interests constitutes a general interest. In fact, the ECJ has pointed out repeatedly that the Member States must ensure that, in cases of serious fraud affecting the EU's financial interests in relation to VAT, criminal penalties that are effective and deterrent are adopted (if they are not to disregard their obligations under Articles 325 TFEU, 2.1. of the Council Act of 26 July 1995 drawing up the Convention on the protection of the European Communities' financial interests, and 4.3 TEU, in connection with the Council Directive 2006/112/CE, of 28 November 2006, on the common system of value added tax). See on this matter ECJ Judgments of 5 December 2017, *M.A.S. and M.B.,* C-42/17, § 39-43; of 8 September 2015, *Taricco and Others*, C-105/14 § 37; of 20 March 2018, *Di Puma and Others*, C- 596/16 and C-597/16, § 44; and of 17 January 2019, *Dzivev and Others*, C-310/16, § 27.

60 In effect, the *ne bis in idem* principle requires that the duplication of proceedings and penalties does not exceed what is necessary in order to combat tax fraud, in addition to being effective and deterrent enough in punishing the unlawful conduct. Consequently, the duplication of administrative and criminal penalties (both of a criminal nature) is allowed when the administrative penalty is not effective enough in itself to punish sufficiently the offence. *A sensu contrario,* in the event of a previous criminal conviction following criminal proceedings, the bringing of the proceedings relating to an administrative fine of a criminal nature would exceed what is strictly necessary to punish the offence, in so far as the previous criminal conviction was such as to punish the offence committed in an effective, proportionate and dissuasive manner. In this respect, see ECJ Judgment of 20 March 2018, *Garlsson Real Estate and Others*, C-537/16, § 63.

61 The Spanish legislator has also adopted this position by stating, in Article 31.2 of the Public Sector Law 40/2015 of October 1 (*Ley 40/2015, de 1 de octubre, de Régimen Jurídico del Sector Publico*), that, when any European Union body has already imposed a sanction for the same acts that have been brought before a competent Spanish body, the latter has to resolve the matter taking into account the already imposed sanction in the calculation of the new one.

62 *Tomasović v. Croatia*, no. 53785/09, § 23, 18 October 2011, in which the ECJ considered that the applicant was tried and convicted twice for possessing heroin, notably as a minor offence (punished by an administrative fine) and then as a criminal offence (punished by a suspended sentence of four months imprisonment and a fine), even though the previous administrative fine was taken into account in the subsequent criminal conviction.

fact that the sanction imposed in the proceedings which become final first was taken into account in those which become final last prevented the individual concerned from bearing an excessive burden [63]. What is more, it seems that the ECtHR has recently admitted that, when the second penalty is not to be considered as disproportionate, it can be presumed that the already imposed sanction in the prior administrative proceedings was sufficiently taken into account in the sentencing in the criminal proceedings, even if the judgment did not provide any details on the calculation in this respect [64].

The interpretation of the *ne bis in in idem* principle developed by the ECtHR, ECJ and Spanish Courts appears to reflect that, in those cases where there has been a duplication of proceedings and punishments (in respect of a conduct that is classified as both an administrative offence and a crime), but either the first sanction has been included in the second one or both sanctions together are not disproportionate, even if someone has been prosecuted twice, this double prosecution could be considered lawful on the grounds that it has not implied an excessive burden [65]. That is to say, **the ultimate purpose of the aforementioned constitutional guarantee is to ensure the proportionality of the punishment, while the procedural aspect forms a merely instrumental guarantee, not so much aimed at precluding the duplication of proceedings (with some exceptions), but at avoiding that an excessive burden is placed on the individual concerned**.

The above considerations lead us not only to abandon the classic conception of *ne bis in idem* as a principle that has a twofold scope -substantive and procedural-, but also to note that the procedural aspect does not constitute, in itself, an autonomous guarantee with regard to the substantive one [66]. In effect, in order to understand the latest decisions taken by the ECtHR, the ECJ and the Spanish Courts, we need to embrace the approach of *ne bis in idem* adopted by them, which is that the essence of this fundamental right lies in its substantive side, while the procedural aspect is a merely instrumental guarantee in service of the latter.

4. Conclusion: the scope of ne bis in idem protection is only to ensure proportionality

In light of what has been put forward up to this point, we can conclude that there has been an important shift that has changed the perception of the *ne bis in idem* principle and that affects both its procedural and substantive aspects. Although, initially, the ECtHR, the ECJ and the Spanish Courts defined in an almost identical way the implications of each of the two aspects of the prohibition of *bis in idem*, it being

63 *A and B v. Norway* [GC], *nos.* 24130/11 and 29758/11, § 132, 15 November 2016.

64 *Ragnar Thorisson c. Islandia*, no. 52623/14, § 47, 12 February 2019. The practical problem that this judgment might raise is that the Spanish and foreign courts start presuming that the first penalty was included in the second one, insofar as both together do not reach the maximum penalty prescribed by law.

65 STC 2/2003, 16 January, FJ 6. In this regard, as noted by Alcácer Guirao, R., the scope of the procedural aspect of *ne bis in idem* «will only concern the duplication of criminal proceedings» since «in case of duplication of administrative and criminal proceedings, only the prohibition of double penalties will govern». In any case, the substantive aspect of this principle «will be safeguarded with the compensation [or adjustment] of the sanctions technique». («*El derecho a no ser sometido a doble procesamiento: discrepancias sobre el bis in ídem en el Tribunal Europeo de Derechos Humanos y en el Tribunal Constitucional*», *Revista de Derecho Administrativo*, no. 61, 2013, pp. 27-28).

66 In fact, even in the field of criminal law, when a procedure that has led to the imposition of a criminal penalty is reversed on the grounds of violation of substantive or procedural guarantees, there is no obstacle, from a constitutional point of view, to send the case back to the moment when the breach at issue occurred or even to permit retrial with full compliance with due-process guarantees. This way, the defendant would be subject to a double set of proceedings, but as a guarantee to protect him from an unfair trial and not as a violation of his right not to be punished (in fact, there was not even one penalty imposed) or tried twice. On the other hand, and in direct relation with this, it should be noted that, in the Spanish legal system, there is no Double Jeopardy Clause such as the one enshrined in the Fifth Amendment of the US Constitution, which provides that «*No person (…) shall be subject for the same offence to be twice put in jeopardy of life or limb*». This constitutional guarantee bars the government from prosecuting a person a second time for an offence after he has been acquitted or convicted. However, as Bierschbach, R.A explains, the defendant's interests have to be balanced with «the state's need for effective enforcements of its criminal laws», which «is satisfied by guaranteeing to society the right to one full and fair opportunity to prove a defendant's guilt» («*One Bite at the Apple: Reversals of Convictions Tainted by Prosecutorial Misconduct and the Ban on Double Jeopardy*», *Michigan Law Review,* Vol. 94, no. 5, 1996, p. 1352). In the same vein, see Stoner, R.C.: «*Double Jeopardy and Dual Sovereignty: A Critical Analysis*», *William & Mary Bill of Rights Journal,* Vol. 11, 1970, pp. 946-959; and Rudstein, D.S.: «*A brief History of the Fifth Amendment Guarantee Against Double Jeopardy*», *William & Mary Bill of Rights Journal,* Vol. 14, 2005, pp. 193-242.

understood that the material aspect prevented the duplication of penalties and the procedural one the duplication of proceedings, we have witnessed an important case-law development that has moved away from this initial distinction to introduce a new interpretation, by virtue of which not only the border between these two aspects has completely disappeared, but the scope of their protection has also been significantly reduced.

On the one hand, **the procedural aspect has turned out to be an instrument «in service» of the substantive guarantee**. This is evidenced by the use of purely material criteria for ruling out the possibility of its infringement, as is the case with the elements used to determine whether the administrative proceedings are to be equated to criminal proceedings (elements which focus exclusively on the sanction), or with the deduction of the prior penalty from the amount of the subsequent one and the compensation of the penalties «taken as a whole». Consequently, although the concept was originally closely tied to the prohibition of the duplication of equally burdensome proceedings against the same person with regard to the same facts, at present, even when an individual has been subjected to two sets of proceedings concerning the same facts, if the first penalty was deducted from the amount of the second (criminal penalty minus administrative sanction) or they were both compensated (criminal penalty adjusted according to the administrative sanction previously imposed), there is no violation of *ne bis in idem,* not merely with regard to its material aspect, but, also, in respect of its procedural one. Simply put, **duplication of proceedings is allowed when the punishment imposed is proportionate to the offence committed.**

On the other hand, **the scope of the substantive aspect has been redirected**. Until now, the essence of this guarantee consisted of avoiding the duplication of penalties in respect of the same acts in those cases where the threefold condition of identity of the facts, unity of offender and unity of the legal interest protected was fulfilled. Now, however, the aim of preventing the impunity of tax defrauders has led our highest courts to **admit the duplication of penalties as long as these penalties, taken together, do not entail an excessive burden.**

In brief, it is clear from the above that the *ne bis in idem* principle **no longer precludes the duplication of proceedings and penalties, but focuses exclusively on ensuring that the severity of the penalties imposed is limited to the seriousness of the offence concerned.**

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