Samenloop van sancties. Fiscale boete en vrijheidsstraf wegens dezelfde vergrijpen. Nauw verband tussen bestuursrechtelijke en strafrechtelijke procedure. Ne bis in idem. Geen schending art. 4 Protocol 7 EVRM. Ruimte voor strafrechtelijke naast bestuursrechtelijke bestraffende sanctie

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Samenloop van sancties. Fiscale boete en vrijheidsstraf wegens dezelfde vergrijpen. Nauw verband tussen bestuursrechtelijke en strafrechtelijke procedure. Ne bis in idem. Geen schending art. 4 Protocol 7 EVRM. Ruimte voor strafrechtelijke naast bestuursrechtelijke bestraffende sanctie.

Klagers, A en B, maakten zich beiden schuldig aan het niet doorgeven aan de Noorse fiscus van de verkoopwinst op hun aandelen. De Noorse belastingdienst legde beide klagers naast een navordering van de verschuldigde belasting over eerdere jaren ook een fiscale boete op, waartegen klagers niet in beroep gingen. Nadat het besluit onherroepelijk was geworden, klaagde het Openbaar Ministerie A en B aan wegens ernstige belastingfraude. De strafrechter veroordeelde hen ieder tot een jaar gevangenisstraf, ermee rekening houdend dat klagers al een belastingboete hadden gekregen. In hoger beroep en cassatie bleef dit oordeel in stand.

Klagers dienen in 2011 klachten in tegen Noorwegen bij het EHRM en stellen dat het opleggen van de fiscale boete door de Noorse Belastingdienst en de daaropvolgende veroordeling en strafoplegging door de strafrechter wegens dezelfde vergrijpen — belastingfraude — in strijd komt met het verbod van bis in idem, zoals gegarandeerd door art. 4 Zevende Protocol.

Het Hof maakt duidelijk dat voor de eerste set van procedures (de belastingboete van 30%) de bekende Engel-criteria (om te bepalen of sprake is van een criminal charge in de zin van art. 6 lid 1 EVRM) leidend zijn om uit te maken of deze procedures ook "criminal" zijn in de zin van art. 4 Zevende Protocol. Het Hof volgt het oordeel van de nationale rechter dat hiervan sprake is in het onderhavige geval.

Het Hof bepaalt dat staten gelegitimeerd moeten kunnen kiezen voor complementaire juridische reacties op sociaal onwenselijk gedrag via verschillende procedures die samen een coherent geheel vormen en gericht zijn op verschillende aspecten van het maatschappelijke probleem in kwestie, mits dit geen onevenredige last oplevert voor betrokkene. Het is de taak van het Hof om in specifieke gevallen te bepalen of de in het geding zijnde nationale maatregel een 'double jeopardy' oplevert voor betrokkene of dat het gaat om het resultaat van een geïntegreerd systeem dat het mogelijk maakt dat verschillende aspecten van een overtreding op een voorzienbare en proportionele wijze kunnen worden geadresseerd.

Volgens het Hof kan het niet het effect zijn van art. 4 Zevende Protocol dat dit verdragsstaten verbiedt om hun rechtssysteem zo in te richten dat er wordt voor-

AB 2017/188

EUROPEES HOF VOOR DE RECHTEN VAN DE MENS (GROTE KAMER)
15 november 2016, nr. 24130/11, nr. 29758/11
(G. Raimondi, I. Karakaş, L. Lopez Guerra, M. Lazarova Trajkovska, A. Nusberger, B.M. Zupančič, K. Hajiyev, K. Pardalos, J. Laffranque, P. Pinto de Albuquerque, L.-A. Sicilianos, P. Lemmens, P. Mahoney, Y. Grozev, A. Harutyunyan, G. Kucsko-Stadlmayer, D. Bugge Norden)
m.nt. T. Barkhuysen en M.L. van Emmerik

Art. 4 Protocol 7 EVRM

H&I 2017/2
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zien in de oplegging van een standaard bestuurlijke boete wegens ten onrechte niet betaalde belasting (hoewel deze sanctie kwalificeert als "criminal" voor de verdragsrechtelijke eisen van een eerlijk proces) en om daarnaast in de ernstigere zaken, waar dit passend is, de overtreder tevens strafrechtelijk te vervolgen voor een additioneel element bij de niet-betaling, zoals frauduleus handelen, dat niet geadresseerd is in de "bestuurlijke" terugvorderingsprocedure en de daarmee samenhangende boete.

Om het Hof te overtuigen dat geen sprake is van dubbeling ("duplication") van berechting of straf zoals verboden in art. 4 Zevende Protocol moet de aangesproken staat overtuigend aantonen dat de dubbele procedures in kwestie een voldoende nauwe samenhang hebben, zowel inhoudelijk als temporeel ("sufficiently closely connected in substance and in time"). De procedures moeten, met andere woorden, op een geïntegreerde wijze worden gecombineerd, zodat zij een coherent geheel vormen. Dit impliceert niet alleen dat de nagestreefde doelen en de gebruikte middelen in essentie complementair zijn en gelinkt in tijd, maar ook dat de mogelijke gevolgen van deze procedures proportioneel en voorzienbaar zijn voor de geadresseerde personen. Het Hof geeft een opsomming van verschillende materiële factoren om te bepalen of er een voldoende nauwe inhoudelijk verband bestaat. Verder overweegt het Hof dat de mate waarin de bestuurlijke procedure de kenmerken heeft van een gewone strafrechtelijke procedure een belangrijke factor is. Als de procedure in kwestie niet de kenmerken heeft van "hard core criminal law" is er mogelijk eerder aanleiding te concluderen dat de dubbeling van procedures voor de betrokken persoon geen onevenredige last oplevert.

Naast de eis van een voldoende inhoudelijk verband tussen de verschillende procedures, geldt de eis van een voldoende temporele band. Dit betekent niet dat beide procedures van begin tot eind gelijktijdig moeten worden gevoerd. Tegelijkertijd moet de connectie in tijd er wel altijd zijn. Zij moet voldoende nauw zijn om betrokkene te behoeden voor onzekerheid. Hoe zwakker het verband in tijd is, hoe zwaarder de bewijslast voor de staat is om deze vertraging uit te leggen en te rechtvaardigen.

Het Hof is van oordeel dat er in casu een voldoende inhoudelijk en temporeel verband bestaat tussen de bestuursrechtelijke (belastingboete) en strafrechtelijke (de oplegging van een jaar gevangenisstraf) procedure, om ze te beschouwen als twee onderdelen van één systeem en er geen sprake is van twee afzonderlijke procedures.

Het Hof is met zestien stemmen tegen één van oordeel dat art. 4 Zevende Protocol niet geschonden is.

A en B,
tegen
Noorwegen.

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. Re-

ferring 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

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/France*, 23 September 1998, § 35, *Reports of Judgments and Decisions* 1998-VII; *Nilsson/Sweden* (dec.), no. 73661/01, ECHR 2005-XIII; *Haarvig/Norway* (dec.), 11187/05, 11 December 2007; *Storbråten/Norway* (dec.), 12277/04, 1 February 2007; and *Mjelde/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 /Finland* ([GC], 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

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)

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./Switzerland* and *Nilsson/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/Finland*,11828/11, § 48 and *Glantz v. Finland*, 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/ 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/Italy* (dec.), 48154/99, ECHR 2002-IX (extracts)) and two Chamber judgments (*Tomasovic/Croatia*, 53785/09, 18 October 2011, and *Muslija/Bosnia and Herzegovina*, 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 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/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/Switzerland* ([GC], 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./Switzerland and Nilsson/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./Switzerland* and *Nilsson/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/Sweden* ((dec.), 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./Switzerland*, cited above).

98. On the other hand, the Greek Government pointed to *Kapetanios and Others/Greece* (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/Romania*, 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 /Finland*, 41604/11, § 41, 17 February 2015, with reference to *R.T. /Switzerland* and *Nilsson / 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 — his 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

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/France* [GC], 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. /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/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/Sweden*, 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/Finland*, 17039/13, 27 January 2015, and *Österlund /Finland*, 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 /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 € 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/ Greece*, 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 /Austria*, 23 October 1995, § 51, Series A 328-C; and *Grande Stevens*, cited above, §§ 204–211), unlike the reservation made by France (see *Göktan/France*, 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 /Belgium* [GC], 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 /the United Kingdom*, 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./Switzerland* and *Nilsson/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./ Switzerland* — in which the revocation of a licence was effected before the criminal proceedings, and *Nilsson/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./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/Germany*, 6 September 1978, § 68, Series A 28; also *Maaouia/France* [GC], 39652/98, § 36, ECHR 2000-X; *Kudła/Poland* [GC], 30210/96, § 152, ECHR 2000-XI; and *Stec and Others/the United Kingdom* (dec.) [GC], 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/Sweden*, 34619/97, §§ 68–71, ECHR 2002-VII; and *Västberga Taxi Aktiebolag and Vulic/Sweden*, 36985/97, §§ 79–82, 23 July 2002), but also for the purposes of Article 4 of Protocol No. 7 (see *Manasson /Sweden* (dec.), 41265/98, 8 April 2003; *Rosenquist*, cited above; *Synnelius and Edsbergs Taxi AB/Sweden* (dec.), 44298/02, 17 June 2008; *Carlberg/Sweden* (dec.), 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 Fische/. Austria*, 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

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.

Noot

1. De hier opgenomen Straatsburgse uitspraak lijkt op het eerste gezicht nieuw licht te doen schijnen op het leerstuk van het verbod van bis in idem als het gaat om de samenloop van (bestraffende) bestuurlijke sancties en strafrechtelijke sancties vanwege hetzelfde feit. De twee eveneens opgenomen Afdelingsuitspraken *AB* 2017/190 en 191 betreffen de samenloop tussen (ingrijpende) herstelsancties (de intrekking van een marktvergunning) en een bestuurlijke boete. Reden om deze uitspraken hier gezamenlijk te annoteren is gelegen in het feit dat in alle uitspraken de crux is dat het totale sanctiepakket (ongeacht het reparatoire dan wel punitieve karakter) evenredig moet zijn. En met deze evenredigheid en het thema handhaving raken we tegelijkertijd de kern van het wetenschappelijk oeuvre van Lex Michiels, aan wie dit themanummer van de *AB* is gewijd ter gelegenheid van zijn afscheid als hoogleraar staats- en bestuursrecht aan Tilburg University (vgl. F.C.M.A. Michiels & B.W.N. de Waard, *Rechterlijke toetsing van bestuurlijke punitieve sancties*, Den Haag, 2007). De opgenomen uitspraken illustreren tevens een tendens in de Nederlandse bestuursrechtspraak om rekening te houden met de evenredigheid van het totaal aan sancties in één geval, waarbij als het even kan ook wordt gelet op de afdoening in het strafrechtelijk traject. In deze noot gaan we eerst kort in op de Straatsburgse zaak *A. en B.*, mede in het licht van de als baanbrekend beschouwde uitspraak inzake *Zolotukhin* (EHRM 10 februari 2009, *AB* 2009/309, m.nt. Barkhuysen en Van Emmerik), zonder overigens op alle finesses van het leerstuk van ne bis in idem in te gaan. Vervolgens bespreken wij kort de opgenomen Afdelingsuitspraken in het licht van enige andere recente uitspraken waarin de samenloop van diverse sancties centraal staat.

2. Eerst iets over de achtergrond van het beginsel van ne bis in idem. Op basis daarvan mag voor eenzelfde overtreding niet twee keer een bestuurlijke boete of andere bestraffende sanctie worden opgelegd. Voor bestuurlijke sancties is dit beginsel voor Nederland nog niet internationaal vastgelegd, zij het dat art. 50 EU Grondrechtenhandvest dit wel doet maar dat geldt alleen wanneer lidstaten EU-recht ten uitvoer leggen. Dit beginsel, dat niet wordt gegarandeerd door art. 6 EVRM, is immers vastgelegd in het niet door Nederland geratificeerde Zevende Protocol bij het EVRM. Verder heeft Nederland een voorbehoud gemaakt bij de vergelijkbare garantie in art. 14 lid 7 IVBPR, in die zin dat wordt aangesloten bij de beperkte strekking van art. 68 Wetboek van Strafrecht ('…kan niemand andermaal worden vervolgd wegens een feit waarover te zijnen aanzien bij gewijsde van de rechter (…) onherroepelijk is beslist.'). Dit neemt echter niet weg dat dit beginsel in het algemeen ook voor bestuurlijke boetes wordt erkend en ook in art. 5:43 Awb is opgenomen, zij het dat deze bepaling voor die gevallen alleen een verbod van dubbele bestuurlijke beboeting bevat. Bovendien bevat deze wet ook een gedetailleerde regeling voor de verhouding met het strafrecht, in de zin dat uiteindelijk één weg moet worden gekozen (*una via*, art. 5:44 Awb; zie daarover de recente conclusie van A-G Keus, ECLI:NL:CBB:2017:130). Daarbij heeft de Hoge Raad mede onder verwijzing naar de genoemde bepalingen van Protocol 7 en het IVBPR het verbod van bis in idem als algemeen geldend rechtsbeginsel aangemerkt, ook buiten de beperkte strekking van art. 68 Sr (HR 3 maart 2015, *AB* 2015/159, m.nt. Stijnen). Hieruit volgt dat hoewel het verbod van bis in idem uit Protocol 7 niet als zodanig geldt voor Nederland, het wel mede de invulling bepaalt van de wel geldende verboden op dit vlak zoals hiervoor omschreven. Vandaar ook de aandacht voor de hier opgenomen EHRM-uitspraak.

3. In de al genoemde zaak *Zolotukhin* koos het EHRM voor een brede, feitelijke uitleg van het begrip 'hetzelfde feit' (het 'idem'). Art. 4 Protocol 7 EVRM moet volgens het Hof zo worden uitgelegd dat het de vervolging/bestraffing verbiedt van een tweede overtreding ('second offence') voor zover die voortvloeit uit dezelfde feiten of wezenlijk dezelfde feiten. Om te achterhalen of daarvan sprake is moet de aandacht met name worden gericht op die feiten 'which constitute a set of concrete factual circumstances involving the same defendant and inextricably linked to-

gether in time and space, the existence of which must be demonstrated in order to secure a conviction or institute criminal proceedings'. Het moet dus gaan om samenhangende feiten die bewezen moeten worden gelet op de delictsomschrijving. Of daarvan sprake is, zou in de regel moeten kunnen worden afgeleid uit de eerste (onherroepelijke) sanctiebeslissing en het document waarmee de tweede bestraffende procedure wordt ingeleid (de Hoge Raad lijkt hier vooralsnog niet in mee te gaan, HR 9 februari 2016, *AB* 2016/351, m.nt. Saris en Van Boven). Gevolg was dat deze bepaling een breed bereik kreeg en vaker dan voorheen een sanctie blokkeerde. Vóór de *Zolotukhin*-uitspraak kon onder omstandigheden aan dat gevolg worden ontkomen door ook de juridische kwalificatie van de feiten en daarmee de achtergrond van de sanctionerende bepaling een rol te laten spelen en op basis daarvan te concluderen dat het niet gaat om hetzelfde feit. Daarbij riep de uitspraak de vraag op of lidstaten nog konden vasthouden aan langjarige praktijken van gecombineerde sancties, bijvoorbeeld op het terrein van het verkeersrecht, of, zoals in de hier opgenomen uitspraak, het belastingrecht.

4. In de uitspraak *A en B/ Noorwegen* werden beide klagers — aandeelhouders in een onderneming — zowel bestuursrechtelijk als strafrechtelijk bestraft wegens het niet opgeven van verkoopwinst aan de belastingdienst. Dat het om hetzelfde feit (het 'idem') ging, stond vast, net als het feit dat beide sancties als 'criminal' zijn aan te merken. De rechtsvraag betrof de toelaatbaarheid van dubbele bestraffing daarvoor (het 'bis'). Het betrof zowel een belastingboete ter hoogte van 30% van de fiscale navordering als een door de strafrechter opgelegde vrijheidsstraf, waarbij deze laatste rekening hield met de eerder opgelegde fiscale boete. Anders dan mogelijk verwacht (zie onder meer P.J. Wattel, 'Bis in idem', *NJB* 2017/205, p. 239), komt het Hof tot de conclusie dat deze beide bestraffende sancties (voor de term 'criminal' in de zin van art. 4 Protocol 7 wordt zoals bekend aansluiting gezocht bij de zogenaamde *Engel*-criteria uit art. 6 EVRM) voor hetzelfde feit naast elkaar kunnen worden opgelegd. Daartoe moeten de beide procedures die leiden tot sancties een voldoende nauwe samenhang hebben, zowel inhoudelijk als in tijd ('sufficiently closely connected in substance and in time'). De procedures moeten op een voldoende samenhangende manier zijn gecombineerd, zodat zij een coherent geheel vormen. Factoren die hierbij een rol spelen zijn 1. of de verschillende procedures complementaire doelen dienen en aldus niet alleen in abstracto maar ook in concreto verschillende aspecten van het hetzelfde 'sociale wangedrag' adresseren; 2. of de cumulatie van procedures voorzienbaar is; 3. of de verschillende betrokken autoriteiten samenwerken of overleg hebben en daarbij met name de verzameling van het bewijs en de beoordeling daarvan één keer verrichten en gebruiken in beide procedures, en 4. bovenal dat het totaalpakket aan sancties evenredig is, dat wil zeggen dat er een systeem moet zijn waarin bij de oplegging van de tweede sanctie rekening kan worden gehouden met de eerst opgelegde sanctie. Het Hof lijkt al met al een uitweg te hebben willen vinden om systemen in verschillende verdragsstaten (zoals in Noorwegen), waarbij twee punitieve sancties volgen op een en dezelfde overtreding onder strikte voorwaarden toch in overeenstemming met art. 4 Protocol 7 EVRM te achten. Het lijkt er op dat het Hof hier een weg inslaat waartoe zij in het arrest *Christoffer Nilsson* (EHRM 13 december 2005, *AB* 2006/285, m.nt. Barkhuysen en Van Emmerik) al een voorzichtige opening had gemaakt. In die zaak betreffende de intrekking van een rijbewijs en een strafrechtelijke veroordeling (die door het Hof beide als 'criminal' werden aangemerkt) wegens dronken rijden, oordeelde het Hof dat er tussen beide procedures een voldoende nauwe band bestond, zowel inhoudelijk als temporeel, zodat er geen schending was van art. 4 Protocol 7. Een vergelijkbare benadering is te zien in de meer recente rijbewijszaak *Rivard/ Zwitserland* (EHRM 4 oktober 2016, klacht no. 21563/12). Hiermee lijkt het er op dat het Hof juist op de terreinen van zogenaamde 'soft core criminal law' (vgl. EHRM 23 november 2006, *Jussila/ Finland*, *AB* 2007/51, m.nt. Barkhuysen en Van Emmerik), zoals verkeersrecht en belastingrecht, de grenzen opzoekt van het onder voorwaarden toch mogelijk maken van de oplegging van verschillende punitieve sancties vanwege dezelfde feiten. Het feit dat verschillende verdragsstaten hebben geïntervenieerd lijkt hierbij ook een rol te hebben gespeeld.

Dat het Hof de voorwaarden uit *A* en *B* terecht streng toetst blijkt uit de recente belastingzaak *Johannesson e.a./IJsland* (EHRM 18 mei 2017, klacht no. 22007/11 waarin het Hof art. 4 Protocol 7 wel geschonden acht, nu er maar een beperkte overlap in tijd was van de twee procedures en er afzonderlijke verzameling van bewijs door verschillende autoriteiten had plaatsgevonden.

5. In een zeer uitvoerige en scherpe dissenting opinion (hier niet opgenomen) veegt rechter Pinto de Albuquerque in niet mis te verstane bewoordingen de vloer aan met de meerderheidsuitspraak van zijn collega's. Hij besluit zijn afwijkende mening als volgt: "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." En daar zit geen woord Spaans bij. In minder krachtige termen toont annotator Haas zich ook teleurgesteld over de uitspraak, terwijl Van Bockel een meer genuanceerde benadering ten beste geeft (vindplaatsen hierna). Iedereen lijkt het er wel over eens dat het Hof met deze uitspraak ruimte laat aan de verdragsstaten om de genoemde gevestigde praktijken van dubbele bestraffing, zeker buiten het klassieke strafrecht, onder strikte voorwaarden EVRM-conform te achten. Daarbij valt op dat het Hof in het kader van de beoordeling of er sprake is van een 'bis' toch weer een rol laat spelen welke doelen met een straf worden nagestreefd (zie de hiervoor genoemde factor 1) en daarmee hoe de feiten juridisch te kwalificeren, een lijn waarvan in het kader van de beoordeling van het 'idem' in de *Zolothukin*-uitspraak juist afscheid is genomen door feitelijk gedrag centraal te stellen (vgl. ook Wattel 2017). Gevolg van dit alles is dat een toch al ingewikkeld leerstuk nog een tandje lastiger is geworden. Daaraan draagt verder bij de verhouding met art. 50 EU Grondrechtenhandvest waar nu de vraag aan de orde is of het HvJ EU de Straatsburgse lijn gaat volgen.

6. Heeft dit gevolgen voor het bestuursrechtelijk sanctierecht? Niet direct. Wanneer echter de Nederlandse rechter voor zijn interpretatie van wat een dubbele bestraffing is — onverplicht, omdat hij gelet op art. 53 EVRM ook meer rechtsbescherming zou mogen bieden — zou aansluiten bij de 'pakket-benadering' van het EHRM in de hier opgenomen uitspraak, zou dat anders kunnen worden. Dat geldt ook wanneer het HvJ EU dat bij de toepassing van art. 50 EU Grondrechtenhandvest zou doen. In dat laatste geval zou immers de nieuwe benadering ook gelden voor Nederlandse autoriteiten als zij Unierecht ten uitvoer brengen. Een belangrijke waarborg voor betrokkenen blijft echter hoe dan ook de vierde eis die het EHRM formuleert, namelijk dat het totaalpakket aan sancties evenredig moet zijn en dat dit ook getoetst moet kunnen worden (bij de oplegging van de tweede sanctie).

7. In de twee in deze *AB*-aflevering opgenomen uitspraken over de toelaatbaarheid van een combinatie van het opleggen van een bestuurlijke boete en het intrekken van een marktvergunning als reactie op het tewerkstellen van illegalen wordt (eveneens) vergeefs een beroep gedaan op het verbod van bis in idem. De Afdeling erkent weliswaar (net als de Hoge Raad) dat het verbod van bis in idem ook buiten de regeling van art. 5:43 e.v. Awb, die alleen ziet op een combinatie van bestuurlijke boetes met andere bestuurlijke boetes of met strafvervolging, geldt als algemeen rechtsbeginsel. Maar vervolgens komt zij tot de conclusie dat dit verbod niet wordt overtreden omdat de intrekking niet een bestraffende ('criminal') sanctie zou zijn (vgl. voor een analyse van de jurisprudentie op dit punt Michiels, Blomberg & Jurgens, *Handhavingsrecht*, Deventer, 2016, hoofdstuk 5; B. de Kam, *De intrekking van beschikkingen mede in Europees en rechtsvergelijkend perspectief* (diss. Nijmegen), Deventer, 2016). Tegelijk wordt betrokkenen wel rechtsbescherming geboden via toetsing van de intrekkingssanctie aan het evenredigheidsvereiste van 3:4 lid 2 Awb. Niet expliciet duidelijk wordt of daarbij ook mee is gewogen het feit dat ook al een forse boete is opgelegd. Dat zou naar ons oordeel wel voor de hand liggen.

8. In recente bestuursrechtelijke en strafrechtelijke jurisprudentie zijn ook voorbeelden te vinden van uitspraken waarin als eis wordt gesteld dat het totale sanctiepakket (ook los van de vraag of sprake is van bis in idem) evenredig is. Zo houdt de Centrale Raad van Beroep bij de bepaling van de hoogte van een bestuurlijke boete wegens schending van de inlichtingenplicht op grond van de Wet Werk en Bijstand rekening met een strafbeschikking op grond van de Opiumwet (beide sancties volgden op de aanwezigheid van een hennepkwekerij, CRvB 22 november 2016, ECLI:NL:CRVB:2016:4606) en oordeelt het Hof Den Bosch de strafvervolging van een verdachte terzake van het verrichten van taxivervoer zonder vergunning in strijd met de beginselen van een goede procesorde, nu hij op grond van datzelfde feit reeds een forse dwangsom heeft verbeurd (Hof 's Hertogenbosch 2 februari 2017, ECLI:NL:GHSHE:2017:349). Ook de Hoge Raad heeft recent een arrest gewezen inzake de samenloop van de zogenaamde (op het EU-recht gegronde) randvoorwaardenkorting in het economisch bestuursrecht en een strafrechtelijke boete. De Hoge Raad concludeert weliswaar dat het hier niet gaat om twee punitieve sancties en daarmee ook niet om een schending van het *ne bis in idem* beginsel. Wel overweegt hij ten overvloede dat het totale sanctiepakket evenredig moet zijn (HR 14 februari 2017, ECLI:NL:HR:2017:241). Het laatste woord zal zeker niet gezegd zijn als het gaat om de samenloop van sancties. Waar het om gaat in deze bestuursrechtelijke en strafrechtelijke jurisprudentie is dat de rechter die in laatste instantie aan zet is, de evenredigheid van het totaalpakket aan sancties garandeert. En daarmee is Lex Michiels weer in beeld, ditmaal als lid van de Afdeling bestuursrechtspraak.

9. De EHRM-uitspraak inzake A en B is ook gepubliceerd in *EHRC* 2017/61, m.nt. Van Bockel en *BNB* 2017/14, m.nt. Haas.

T. Barkhuysen en M.L. van Emmerik