EU protection of the substantive criminal law principles of guilt and ne bis in idem under the Charter of Fundamental Rights: Underdevelopment and overdevelopment in an incomplete criminal justice framework

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Abstract
European Union (EU) law is increasingly influencing the substantive criminal law of the member states. In this area of law – in which criminal liability and subsequent punishment are at stake – protection of fundamental rights is indispensable, as a result of which means the Charter has great potential relevance. This article examines the protection of fundamental rights by Union law in the field of substantive criminal law since the Charter has become binding and compares it to the protection offered by the European Court of Human Rights (ECtHR). The article focuses on two fundamental rights that rule substantive criminal law: the principle of guilt and the ne bis in idem principle. It holds that EU law still does not provide a full foundation to both principles of criminal substantive law. Given the particular nature of EU law, the practice of the institutions in substantive criminal law, and the current case law of the European Court of Justice and the ECtHR, we argue that the current level of protection in these parts of the criminal law is insufficiently convincing. Progress needs to be made in the recognition and appreciation of the principle of guilt, while the ne bis in idem principle might be overextended.

Keywords
Substantive criminal law, Charter of Fundamental Rights, principle of guilt, ne bis in idem principle

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Introduction

While most professional participants in criminal court proceedings may not always be aware of it in their daily practice, criminal law has long stopped being a strictly national legal matter. Initially, the Council of Europe and more recently, in particular, the European Union (EU) have influenced this area of law, which used to be shaped and coloured by national culture and politics only. The entry into force of the EU Treaty of Lisbon (hereinafter the Treaty) on 1 December 2009 provided another huge boost to the efforts to arrive at a common area of freedom, security and justice. With the Treaty, the communitarization of fighting crime in the Union took further shape, while it simultaneously gave the Charter of Fundamental Rights of the EU (hereinafter the Charter) binding force.

With the Treaty’s abolition of intergovernmental checks in favour of supranational powers in the area of criminal law, the influence of the EU on substantive criminal law, criminal procedure law and the practice of criminal justice increases. Particularly in this context, the scrupulous and adequate protection of fundamental rights continues to be an important perspective for the criminal justice system. Much attention in this regard is given to criminal procedure, but substantive criminal law and the meaning and scope of criminal liability also have a significant influence on the possibilities of the authorities to limit the freedom of individuals in a society as well as to protect that freedom against others.

Against this background, it is remarkable that little has been published on the meaning of the Charter for substantive criminal law and its essential principles. This article aims to make a contribution towards filling that gap, by raising the question to what extent the protection of fundamental rights of the EU Charter since the Lisbon Treaty came into force has proved to adequately acknowledge and protect the interests at stake. To illustrate the importance of the Charter specifically for substantive criminal law, we will offer two case studies. After giving a brief general overview of the extent to which substantial criminal law is present in EU law, and showing how some of the features of EU fundamental rights law complicate the protection of substantive criminal law rights and principles, as well as providing some general observations on its protection of substantive criminal law rights, we will argue that the potential added value of EU law in relation to the case law of the European Court of Human Rights (ECtHR) varies quite a lot between different aspects of criminal law, and not always for good reason. We illustrate this point in depth by discussing two cases in particular: the principle of guilt and the ne bis in idem or double jeopardy principle. At the end of each discussion, critical reflections will be offered. The final paragraph offers a brief conclusion.

European criminal law before and after the Lisbon Treaty

Over the past 40 years, the EU has rapidly become an increasingly important source of criminal law.¹ With each step in the European process of integration, the influence of the EU on the criminal law...
law systems in member states proved to be bigger than could have been foreseen on the basis of primary Community law. For the time being, the horizon of this increasingly intensive cooperation is the principal of mutual recognition: A judicial decision in one member state shall be recognized in the other member states as if it were a ruling from a court in their own state. This requires considerable trust of the member states in each other’s criminal law and criminal procedures. To reinforce the trust and enhance the instrument of mutual recognition, there has been a vast amount of harmonization in the area of substantive criminal law and criminal procedure law.

The Lisbon Treaty formally changed the position of cooperation in criminal matters within the Union considerably. According to Article 4(2) Treaty on the Functioning of the European Union (TFEU), the common area of freedom, security and justice currently concerns a shared competence between the Union and the Member States. The abolition of the pillar structure and the communitarization of cooperation in the field of criminal law have important consequences for the decision-making process and the distribution of competences between the EU and the Member States. This means that European cooperation in this area has been grounded even more firmly into Union law in a constitutional sense. In the light of these developments, the number of legislative measures and judicial decisions relating to criminal law is expected to rise even further.

Article 83 TFEU is the most important provision with respect to the Union’s competence to further harmonize substantive criminal law. Its first paragraph gives the Union competence with regard to cooperation against serious forms of cross-border crime. To that purpose, the Union can harmonize substantive criminal law relative to 10 categories of crime that are specified exhaustively. Union law thus currently mentions significantly more areas of competence than was the case under the third pillar. However, in almost all the areas now mentioned, measures were already created under the third pillar. Illicit arms trafficking is the only category mentioned in Article 83(1) TFEU that has not yet been subject to harmonization of offences. The second paragraph of Article 83 TFEU confers on the Union the competence of harmonization with a different objective. It allows harmonization where this is necessary in order to realize the effective implementation of EU law and policies. Measures based on Article 83(2) are quite varied in nature. The exact scope of the competences to also harmonize criminal law in other new areas very much depends on the interpretation of various legal terms. In particular, the concepts of ‘essential’ and ‘effective implementation’ mentioned in Article 83(2) TFEU will be crucial for the operational range of the Union’s criminal law competences. Moreover, it is not certain whether other provisions of the

2. Compare, for example, Mitsilegas, EU Criminal Law, 2009, pp. 112–113; B. Hecker, ‘Europäisches Strafrecht post-Lissabon’, in K. Ambos, ed., Europäisches Strafrecht post-Lissabon (Göttingen, Germany: Universitätsverlag Göttingen, 2011), pp. 13–28; F. Goudappel, ‘Options for the Development of European Criminal Law Under the Treaty of Lisbon’, in M. Trybus and L. Rubini, eds., The Treaty of Lisbon and the future of European Law and Policy (Cheltenham, UK: Edward Elgar, 2012), pp. 341–354.
3. See also Directive 2008/51/EC of 21 May 2008 amending Directive 91/477/EEC on control of the acquisition and possession of weapons, OJ L 179/1.
4. They range from racism and xenophobia, to unauthorized entry or residence in Union territory, see Framework Decision 2008/913/JHA of 28 November 2008, on combating certain forms and expressions of racism and xenophobia, OJ L 328/55 and Framework Decision 2002/946/JHA of 28 November 2002, on the strengthening of the penal framework to prevent the facilitation of unauthorized entry, transit and residence, OJ L 328/1.
5. See in more detail J. Öberg, ‘Union Criminal Law Regulatory Competence after Lisbon Treaty’, European Journal of Crime, Criminal Law and Criminal Justice 2011, pp. 289–318; J. Vogel, ‘Die Strafgesetzgebungskompetenzen der Europäischen Union nach Art. 83, 86 und 325 AEUV’, in K. Ambos, ed., Europäisches Strafrecht post-Lissabon (Göttingen, Germany: Universitätsverlag Göttingen, 2011), vol. 19, pp. 41–56, 46; Asp, The Substantive Criminal Law, 2012.
TFEU can also provide a basis for the harmonization of criminal law. In view of recent history, it should come as no surprise if, in practice, the use of Union competences will once again turn out to be wider than the wording of the Treaty text suggests.

The EU criminal justice framework: An incomplete system?

The Lisbon Treaty settled the debate about the legitimacy of EU criminal law, at least in a formal-legal sense. While the scope of EU involvement in substantive criminal law seems ever-increasing, this calls for a more substantial debate now about the question under which circumstances and in which way EU criminal law is desirable or, conversely, rather undesirable. That debate needs to address the question as to how a balanced and consistent substantive European criminal law system of at least the same quality as the national criminal law systems in which it interferes can be brought about.

So far, the answer to that question given by the EU institutions is not the same for both substantive criminal law and criminal procedural law. With regard to procedural law, the focus has been on harmonizing the rights of the individual, both victims and defendants, by means of secondary Union law. In contrast, harmonization of substantive law is characterized mainly by the wish to create conditions to fight crime in the Union easily and effectively. As a result, legal protection that follows from sharply defined offences is only marginal. As the drive for harmonization typically concerns the minimum levels of harmonization, member states are allowed to widen criminalization even further, whereas they are not permitted to delineate the scope of the offences more strictly. This has produced several well-known examples of broad definitions, such as those on money laundering and on trafficking in human beings. The European Commission,

6. In 2012, the Commission tabled a proposal for a Directive on the fight against fraud to the Union’s financial interests by means of criminal law and based itself on Article 325(4) TFEU.
7. In that way, see, for example, J.I.U. Eceizabarrena, ‘La eficacia ‘federalizante ‘de los Derechos Fundamentales de la Unión Europea. Análisis de sus manifestaciones en el Derecho penal’, Civitas. Revista española de derecho europeo, p. 249–277; T. Marguerly, ‘European Union Fundamental Rights and Member States Action in EU Criminal Law’, Maastricht Journal of European and Comparative law (2013), vol. 20, issue 2, pp. 282–301, 291.
8. Likewise, Mitsilegas, EU Criminal Law, 2009, p. 112; Summers, Schwarzenegger, Ege, and Young, The Emergence, 2014, p. 84; E. Herlin-Karnell, ‘EU Competence in Criminal Law after Lisbon’, in A. Biondi et al., eds., European Union Law after the Treaty of Lisbon (Oxford, UK: Oxford University Press, 2012), pp. 331–346, in particular p. 346.
9. See P.H.P.H.M.C. van Kempen, ‘Waarborgen tegen de ontwrichtende werking van Eurostrafrecht. Over de bedreiging van het Nederlandse materieelstrafrechtelijk systeem, een Europees “Algemeen Deel” en een speciale nationale wet voor het strafrecht uit de Europese Unie’, in M. S. Groenhuijsen and J. B. H. M. Simmelink (red.), Glijdende Schalen (De Hullu-bundel), (Nijmegen, the Netherlands: Wolf Legal Publishers, 2003), pp. 247–266.
10. In 2009, a Procedural Rights Roadmap was created, based on the Stockholm programme, which gave rise to various directives. By now, directives have been adopted regarding the right to information in criminal proceedings, the right of access to a lawyer, the protection of (the rights of) victims, and the presumption of innocence, the right to silence and the right to be present at trial. A directive about the right to legal aid in detention is in preparation. The proposals made by the Commission are not always merely a minimalistic codification of Strasbourg case law in all respects.
11. In the same sense, compare J. W. Ouwerkerk, ‘Europeanisering van het Nederlandse strafrecht. Blessing in disguise’, Nederlands Juristenblad (2013), p. 2506.
12. In practice, however, Member States still opt for differing definitions of money laundering, See J. Ferwerda, ‘Definitions of Money Laundering in Practice’, in B. Unger, J. Ferwerda, M. van den Broek and I. Deleanu (eds.), The Economic and Legal Effectiveness of the European Union’s Anti-money Laundering Policy (Cheltenham, UK: Elgar Publishing, 2014), pp. 87–96.
13. For information about this, see for example, J. E. B. Coster van Voorhout, ‘Human Trafficking for Labour Exploitation: Interpreting the Crime’, Utrecht Law Review (2007), pp. 44–69.
in particular, seems intent on continuing in the same vein. The Commission also argues in favour of
minimum penalties at the EU level, to complement the usual minimum levels for maximum
penalties.\textsuperscript{14} The Council and the Parliament, however, appear to advocate a re-evaluation in favour
of a more restrained policy of harmonization.\textsuperscript{15}

Against this background, the pressing question is as to what confines the possibilities of
criminalization and penalization. Relatively, ‘soft’ principles such as the so-called \textit{ultimum reme-
dium} notion, which means that criminalization and criminal law enforcement are a last resort only
to be used where other responses are not sufficiently adequate, admittedly are an important
perspective in the political debate, but they prove to be incapable of indicating concrete limits
to Union-based substantive criminal law in a legal sense.\textsuperscript{16} Given that reinforcement of
the framework of human rights by the Union’s accession to the ECHR is not to be expected in the
short term, it is all the more important that the Union itself provides an adequate level of protection
of fundamental rights in this field.

EU fundamental rights law is complicated by the fact that it does not always merely impose
limits on the scope of national substantive criminal law. In particular, the Melloni ruling makes it
clear that the protection of fundamental rights provided by Union law is not always just the lower
limit of protection; unlike in principle that of the ECHR, the fundamental rights protection offered
by Union law may sometimes not be exceeded by a member state. This is particularly problematic
in the area of criminal law, because on a national level in addition to human rights, there are often
other principles and assumptions that are applied to scale down the legislator’s otherwise almost
unlimited powers of criminalization to acceptable proportions.

Furthermore, fundamental rights not only protect the person suspected of an offence but also
(potential) victims. In those circumstances, the fundamental rights of the suspect on whom the full
force of criminal law is brought to bear will be infringed in the name of the fundamental rights of
the victim.\textsuperscript{17} Considering Article 53 of the Charter, it seems that the Charter cannot detract from
those positive obligations prescribed by the ECtHR. Article 52(3) of the Charter even emphasizes
that the meaning and scope of the provisions of the Charter must at least be equal to the protection
of the corresponding fundamental rights and freedoms from the ECHR and its associated protocols.
This obligation to achieve at least equal levels of protection also applies with respect to the case
law of the ECtHR.\textsuperscript{18} This would appear to entail that the doctrine of positive obligations –
including the elements requiring criminalization – will have to be incorporated into the protection

\textsuperscript{14} See the draft guidelines on the fight against fraud to the Union’s financial interests by means of criminal law (COM
(2012) 363) and on the protection of the euro and other currencies against counterfeiting by criminal law (COM (2013)
42).
\textsuperscript{15} Conclusions of the Council of 12 November 2009, doc. no. 15936/09 and the European Parliament, \textit{Report on an EU
Approach on Criminal Law}; 24 April 2012.
\textsuperscript{16} M.S. Groenhuijsen & J.W. Ouwerkerk, ‘Ultima ratio en criteria voor strafbaarstelling in Europees perspectief’, in: M.S.
Groenhuijsen, e.a. (red.), Roosachtig strafrecht (De Roos-bundel), Deventer: Kluwer 2013, p. 249–279, in particular p.
257 ff.
\textsuperscript{17} See P.H.P.H.M.C. van Kempen, ‘Four Concepts of Security – A Human Rights Perspective’, \textit{Human Rights Law
Review} 13 (1) (2013), pp. 1–23 at 16–23; L. Lazarus, ‘Positive Obligations and Criminal Justice. Duties to Protect or
Coerce?’, in L. Zedner and J. V. Roberts, eds., \textit{Principles and Values in Criminal Law and Criminal Justice. Essays in
Honour of Andrew Ashworth} (Oxford, UK: Oxford University Press, 2012), pp. 135–155; A. Ashworth, \textit{Positive
Obligations in Criminal Law} (Oxford, UK: Hart Publishing, 2013), pp. 196–211.
\textsuperscript{18} See the official explanations relating to the Charter of Fundamental Rights, \textit{OJ} 303/17, 14.12.2007, p. 33 (on Article
52). See also S. Peers and S. Prechal, ‘Article 52 – Scope and Interpretation of Rights and Principles’, in S. Peers, T.
provided by the Charter. However, this, again, raises the question to which extent this conceptual shift in the notion of human rights can be translated into the legal system of the Union with its own characteristics and idiosyncrasies.19

**Fundamental limits and requirements regarding substantive criminal law**

Against this background, one may come to expect that one of the Union’s primary centres of attention is the agreement on and imposition of various fundamental limits on the power of the European legislator to criminalize conduct. The Charter contains various fundamental rights which are in varying degrees potentially relevant to substantive criminal law. The number of potential rights that can affect substantive criminal law is too high to discuss these here in detail. For example, provisions in the Charter imply all sorts of limits to the kinds of conduct the legislator can criminalize through specific offences and to what the court can convict a defendant for. This follows from, inter alia, the rights regarding human dignity (Article 1); private life (Article 7); thought, conscience and religion (Article 10); expression (Article 11); assembly and association (Article 12); the arts and sciences (Article 13); asylum (Article 18); non-discrimination (Article 21); cultural, religious and linguistic diversity (Article 22); and the child (Article 24). The scope and meaning of specific offences must be such that they do not conflict with these rights. It goes beyond the aim of this article to analyse the limitations for national criminal law that flow from them.

Moreover, however, there are various provisions that are relevant to the whole of substantive criminal law in a more general way. First of all, this applies to the principle of legality laid down in Article 49 of the Charter. The principle of legality was already a general principle of EU law before the entry into force of the Charter. The interpretation of the principle is inspired strongly by Article 7 ECHR.20 In view of Article 52(1) of the Charter, this is unlikely to change. Nevertheless, the Charter has already made its mark in the area of legality, albeit in a somewhat unusual way. In anticipation of the Charter becoming binding, the ECtHR expanded the meaning of the principle of legality as early as September 2009 while referring to that Charter. As a result, the **lex mitior** principle is now covered by the Convention as well.21 If the maximum penalty for an offence changes after the offence was committed, the lighter maximum penalty needs to be applied.

19. On those issues, see M. Beijer, *The limits of fundamental rights protection by the EU. The scope for the development of positive obligations* (Cambridge, UK: Intersentia, 2017).

20. For example, see ECJ 3 May 2007, C-303/05, ECLI: EU: C:2007:261 (*Advocaten voor de Wereld*). For a convenient overview, refer to V. Mitsilegas, ‘Article 49’, in S. Peers, T. Harvey et al., eds., *The EU Charter of Fundamental Rights: A Commentary* (Oxford, UK: Hart Publishing, 2014), pp. 1352–1371.

21. ECtHR (Grand Chamber) 17 September 2009, no. 10249/03 (*Scoppola (no. 2) v. Italy*), EHRC 2009/123 with annotation by Spronken & Pesteridou. For more information on this, see M. Bohlander, ‘Retrospective Reductions in the Severity of Substantive Criminal Law – The Lex Mitior Principle and the Impact of Scoppola v. Italy no. 2’, *Criminal Law Review* (2011), pp. 627–641 and the annotation by Spronken & Pesteridou in *EHRC* 2009/123. The ECJ accepted the *lex mitior* principle in ECJ 3 May 2005, vol. 8, C-387/02, ECLI: EU: C: 2005:270 (*Berlusconi*).
Various member states have consequently been forced to adopt a more generous application of the *lex mitior* rule.\(^{22}\)

The two other principles from the Charter that have a more general meaning for criminal law are the presumption of innocence (Article 48) and the principle of ne bis in idem (Article 50). We will now concentrate on two of the aforementioned topics: the general meaning of the principle of guilt (for which the principle of legality is relevant as well, incidentally) and the principle of ne bis in idem. Although it may be said that the latter has a procedural aspect because it prohibits certain prosecutions, its core is of a substantive nature: Just like the principles of legality and guilt, it protects against overreaching criminal responsibility and over punishment. The respective development of both principles within the EU further goes to show that in terms of substantive criminal law principles improvements can and need to be made. A mere reiteration of the case law of the Strasbourg court can be too little or too much.

**Principle of guilt**

A necessary requirement for the fairness of a criminal conviction is that the defendant is guilty of the offence committed. There is no place for criminal liability if an individual ‘cannot help’ committing a criminal offence. The criminal justice system must therefore rule out vicarious liability. Where the principle of legality imposes requirements on the ‘form’ of criminal liability, the principle of guilt relates to the limits of what can be regarded as punishable on substantive grounds.

The principle of guilt belongs to the core principles of criminal law of at least the original member states of the EU. There is no consensus though on its scope and unassailability.\(^{23}\) For example, in the United Kingdom, the use of criminal strict liability is not allowed in principle, because an offence requires both an actus reus and mens rea, but the legislator can deviate from that main rule. Moreover, it is the prerogative of that same legislator to decide which defences can free the defendant from liability. It is true that under certain circumstances, non-statutory appeals to the absence of guilt qualify as a negation of mens rea, but if the absence of any guilt relates to an objectified element, for example, the court does not deem itself competent to provide non-statutory reasons to waive liability.\(^{24}\) There are different outlooks in the Netherlands,\(^{25}\) Germany\(^{26}\) and Italy.\(^{27}\) In those countries, the principle of guilt functions in a broader way as a rule that means that the absence of any blame always precludes a criminal conviction.

These differences partly explain why the development of the principle of guilt on an international level is a struggle. Even more important is the fact that the ECHR only provides a procedural principle of guilt (the presumption of innocence) and, thus, does not explicitly protect a principle of

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22. The Dutch Supreme Court (Hoge Raad) ruled as such in HR 12 July 2011, ECLI: NL: HR: 2011: BP6878. See on the comparable Danish situation T. Baumbach, ‘The Notion of Criminal Penalty and the *Lex Mitior* Principle in the *Scoppola v. Italy* case’, *Nordic Journal of International Law* 80 (2011), pp. 125–142.
23. Cf. the conclusion by Advocate General Stix-Hackl before ECJ 11 July 2002, C-210/00, ECLI: EU: C: 2001:645 (*Käserei Champignon Hofmeister*), pp. 47–49.
24. J. Blomsma, *Mens Rea and Defences in European Criminal Law* (dissertation Maastricht) (Cambridge, UK: Intersentia, 2012), p. 289.
25. See, among other sources, HR 14 February 1916, *NJ* 1916, 681 (*Melk en water*).
26. See, among other sources, the Lisbon ruling of the *Bundesverfassungsgericht*: BVerfG 30 June 2009, ECLI: DE: BVerfG:2009: es20090630.2bve000208, para 364.
27. See Article 27(1) of the Italian constitution and the ruling of the Italian Constitutional Court 1988, no. 364.
guilt for substantive criminal law. The Charter does not contain a provision that relates to the latter principle of guilt either. Yet, there is good reason to look more closely at the meaning of the Charter with respect to that principle of guilt. After all, ECtHR case law on both Articles 6(2) and 7 ECHR contains elements that are relevant to the substantive criminal law principle of guilt. Since Articles 48 and 49 of the Charter concern equivalent rights of the aforementioned provisions of the ECHR, they are required to provide at least the same amount of protection against criminal liability (see Articles 52(3) and 53).

**The ECHR**

Although the ECHR did not provide for a substantive principle of guilt, the ECtHR has tried to limit the freedom to criminalize in this area. According to the ECtHR, the presumption of innocence as well as the principle of legality preclude that the acts of one person are attributed to another person. To that extent, both principles are related. Vicarious liability is impermissible. The cases of *A.P., M.P. and T.P. v. Switzerland* and *E.L., R.L. and J.O.-L. v. Switzerland* concerned heirs who upon accepting an estate were fined for offences committed by the testator. The Court ruled:

> It is a fundamental rule of criminal law that criminal liability does not survive the person who has committed the criminal act. [...] In the Court’s opinion, such a rule is also required by the presumption of innocence enshrined in Article 6 § 2 of the Convention. Inheritance of the guilt of the dead is not compatible with the standards of criminal justice in a society governed by the rule of law.

The imposition of a sanction on a perpetrator’s heir is therefore at odds with the presumption of innocence. Also from the perspective of Article 7 ECHR (principle of legality), the ECtHR rules out holding someone criminally liable for the deeds of another person. Again, such a vicarious liability is impermissible. It is exactly the resulting legal uncertainty and arbitrariness that the principle of legality aims to provide protection against:

> Another consequence of cardinal importance flows from the principle of legality in criminal law, namely a prohibition on punishing a person where the offence has been committed by another.

Although it is generally believed that vicarious liability should have no place in criminal law, the Court’s legal reasoning is hardly convincing. From the word ‘guilty’ in both Article 6 paragraph 2 and Article 7, it is derived that some principle of guilt is present in the ECHR. Unsurprisingly, the ECtHR seems hesitant to go as far as also precluding strict liability. That is to say, to preclude a criminal conviction in the absence of culpability on the part of a person who committed an offence himself. The fact that a 15-year-old boy who engaged in sexual contact with a 12-year-old girl under British law had no option to appeal on the grounds of an excusable mistake about her age was not at odds with the presumption of innocence, according to the ECtHR. The Court does not see it as its duty.

28. ECtHR 29 October 2013, no. 17475/09 (*Varvara v. Italy*), para 44-45.
29. ECtHR 29 August 1997, no. 19958/92 (*A.P., M.P. & T.P. v. Switzerland*), and ECtHR 29 August 1997, no. 20919/92 (*E.L., R.L. and J.O.-L. v. Switzerland*), respectively.
30. ECtHR 29 August 1997, no. 19958/92, para 48 (*A.P., M.P. & T.P. v. Switzerland*).
31. ECtHR 29 October 2013, no. 17475/09 (*Varvara v. Italy*).
to dictate the content of domestic criminal law, including whether or not a blameworthy state of mind should be one of the elements of the offence or whether there should be any particular defence available to the accused.\textsuperscript{32}

In the same vein, Article 7 ECHR does not seem to preclude a conviction in absentia of a ‘blameworthy state of mind’, seeing that

\begin{quote}
[a]rticle 7 of the Convention does not explicitly demand any ‘psychological’, ‘intellectual’ or ‘moral’ link between the substantive element of the offence and the person deemed to have committed it.\textsuperscript{33}
\end{quote}

Where attribution of (elements of) a criminal act to a defendant who is a natural person takes place, while that defendant has at least some reasons to argue that the criminal act cannot be attributed to him, the procedural nature of the presumption of innocence becomes important. That is particularly important in cases where procedure requires the defendant to disprove the alleged act, control and/or attributable mental state. It depends on the objective of that presumption and the degree to which the defendant is genuinely given the opportunity to defend himself whether the use of that presumption remains within the limits set by the presumption of innocence.\textsuperscript{34} Contrary to what is sometimes argued in the literature,\textsuperscript{35} one cannot simply deduce from this that the ECHR always offers at least as much protection against the absence of a culpability requirement as it does against presumptions of the presence of culpability.\textsuperscript{36} That is a subtle difference, which is not without importance. After all, it implies that the legislator may have room to introduce criminal offences without a requirement of mens rea, even if it is not allowed to assume the fulfilment of the mens rea requirement for offences that do contain such a requirement. The latter option, the assumption of culpability, seems more problematic to us than the first one when seen from the perspective of the principle of legality and the procedural perspective of the presumption of innocence: after all, both would be stripped of their meaning if elements of offences did not need to be proved or when the

\textsuperscript{32} ECtHR 30 August 2011 (Dec.), no. 37334/08 (G. v. United Kingdom).

\textsuperscript{33} ECtHR 29 October 2013, no. 17475/09 (Varvara v. Italy). ECtHR 20 January 2009, no. 75909/01 (Sur Fondi SRL et al. v. Italy), para 116 seems to go further: ‘[l]a logique de la peine et de la punition ainsi que la notion de “guilty” (…) vont dans le sens d’une interprétation de l’article 7 qui exige, pour punir, un lien de nature intellectuelle (conscience et volonté) permettant de déceler un élément de responsabilité dans la conduite de l’auteur matériel de l’infraction’. In view of the later ruling in the Varvara case, that element of liability no longer seems to constitute a ‘lien de nature intellectuelle’ by necessity. The consideration in Sur Fondi must be seen in the light of the facts of that ruling in particular. The highest Italian court in this case had ruled that the defendant could rely on a mistake as to a point of law, but in a separate punitive procedure, property had nevertheless been taken away. The fact that a penalty had been imposed despite the fact that absence of culpability had been established explicitly and that the same factors had also led to an acquittal in a previous criminal case, prompted the ECtHR to make the observation quoted.

\textsuperscript{34} See other sources ECtHR 7 October 1988, no. 10519/83 (Salabiaku v. France); ECtHR 25 September 1992, no. 13191/87 (Pham Hoang v. France) ECtHR 23 July 2002, no. 34619/97 (Janosevic v. Sweden), para 100–101; ECtHR 23 July 2002, no. 36985/97 (Vastberga taxi aktiebolag and Vidic v. Sweden); ECtHR 30 March 2004, no. 53984/00 (Radio France et al. v. France); ECtHR 19 October 2004 (Dec.), no. 66273/01 (Falk v. the Netherlands); ECtHR 20 January 2011, no. 52131/07 (Haxhishabani v. Luxembourg); ECtHR 30 June 2011, n. 30754/03 (Klouvi v. France).

\textsuperscript{35} See, for example, J. Blomsma, Mens Rea and Defences, p. 225 ff.; M. J. M. Krabbe, Excusable evil. An Analysis of Complete Defenses in International Criminal Law (dissertation Maastricht) (Antwerpen, Belgium: Intersentia, 2014), pp. 285–286.

\textsuperscript{36} However, the Court is not entirely consistent in its wording; see, for example, ECtHR 16 March 2000 (Dec.), no. 28971/95 (Hansen v. Denmark), in which the Court considers that criminalization ‘on objective grounds’ in general must remain within reasonable limits.
court in some other way was allowed to assume immediately that the defendant fulfilled the requirement(s) regarding that element. If attribution is based on assumptions of control, and there is no opportunity for any defence, this may be incompatible with the presumption of innocence.\(^{37}\) However, it is uncertain whether the ECtHR always rejects a person’s conviction for an act committed by him if he cannot be blamed for the commission of that act, in view of the aforementioned \textit{G. v. the United Kingdom} case.

**Union law**

The case law of the European Court of Justice (ECJ) in Luxembourg displays parallels with the approach taken by the ECtHR in Strasbourg. In that case law too, the principle that criminal liability is personal can be distinguished from the wider notion of no criminal liability without guilt.\(^{38}\) The ECJ frequently gives the former principle pride of place in competition cases.\(^{39}\) The ECJ qualifies the wider principle of *nulla poena sine culpa* as a principle ‘typical of criminal law’. To date, however, it does so only in cases that do not concern criminal law according to the Court.\(^{40}\) In multiple cases, in which national law had created criminal liability for objective facts – thus without it being necessary to meet the requirements of a subjective element as well – the Court found this to be compatible with Union law.\(^{41}\)

In 2013, a preliminary ruling procedure addressed the question whether an excusable mistake as to a point of law precludes a fine ex Article 101 TFEU.\(^{42}\) A-G Kokott argued that this must be the case because of the principle of guilt, but the Court rules otherwise. The fact that the company involved characterized its conduct incorrectly from a legal point of view and therefore assumed that its conduct was permissible does not mean that the authorities cannot impose a fine if the company ‘could not be unaware of the anti-competitive nature’ of that conduct.\(^{43}\) Put differently, if the company should understand that its conduct is factually anticompetitive in nature, imposing a fine is still also possible if there is an excusable mistake as to a point of law. Incidentally, one could argue that the company is culpable, seeing that it must have known of the ‘anti-competitive nature’ of its conduct. However, in our opinion that is a problematic kind of culpability from a legal point of view. After all, the culpability then centres on the fact that one did not refrain from certain conduct, although one could assume that one was still operating within the rules of the law. The Court would then thus apply a certain rule of conduct not laid down by law as such.

\(^{37}\) ECtHR 30 June 2011, no. 30754/03 (\textit{Klouvi v. France}).

\(^{38}\) Cf. explicitly A-G Kokott in his conclusion for ECJ 18 June 2013, C-681/11, ECLI: EU: C:2013:126 (\textit{Schenker & Co.}), para 40.

\(^{39}\) See, among other sources, ECJ 8 July 1999, C49/92 P, ECLI: EU: C:1999:356 (\textit{Commission v. Anic Partecipazioni}), para 145 and 204; ECJ 11 December 2007, C280/06, ECLI: EU: C:2007:775 (\textit{ETI}), para 39; ECJ 10 September 2009, C97/08 P, ECLI: EU: C:2009:536 (\textit{Akzo Nobel}), para 56; ECJ 19 July 2012, C628/10 P & C14/11 P, ECLI: EU: C:2012:479 (\textit{Alliance One International and Standard Commercial Tobacco}), para 42.

\(^{40}\) See, among other sources, ECJ 18 November 1987, 137/85, ECLI: EU: C:1987:493 (\textit{Maizena}), para 14; ECJ 11 July 2002, C-210/00, ECLI: EU: C:2002:440 (\textit{Käseerei Champignon Hofmeister}).

\(^{41}\) See ECJ 10 July 1990, C-326/88, ECLI: EU: C:1990:291 (\textit{Hansen}), para 19; ECJ 27 February 1997, C-177/95, para 36 (\textit{Ebony Maritime & Loten Navigation}); ECJ 11 July 2002, C-210/00, ECLI: EU: C:2002:440 (\textit{Käseerei Champignon Hofmeister}).

\(^{42}\) ECJ 18 June 2013, C-681/11 (\textit{Schenker & Co.}).

\(^{43}\) ECJ 18 June 2013, C-681/11 (\textit{Schenker & Co.}), para 38.
Occasionally, the ECJ reviews the use of presumptions also in light of the presumption of innocence. In the \textit{Spector Photo Group}, ruling the key question was whether insider trading requires deliberate use of inside information. It becomes clear from the history of the creation of the pertinent Directive that the Community legislator deliberately neglected to include such a moral component in the required criminalization. According to the ECJ, this is the case because of the special nature of insider dealing, as a result of which this moral component can be presumed as soon as the constituent elements mentioned in the insider trading provision are present.\footnote{ECJ 23 December 2009, C-45/08, ECLI: EU: C:2009:806 (\textit{Spector Photo Group & Van Raemdonck}), para 36.} Thus, the Court sees a rebuttable presumption of intent, which, because it can be rebutted, remains within the limits imposed by the presumption of innocence.

\textit{Reflections}

The principle of ‘no punishment without guilt’ – or to be more precise: no criminal liability in the absence of culpability – is one of the foundations of a decent criminal justice system.\footnote{See, for example, also C. van den Wyngaert, et al., \textit{Strafrecht & strafprocesrecht in hoofdlijnen} (Antwerpen, Belgium: Maklu, 2014), p. 290; W. Gropp, \textit{Strafrecht. Algemeener Teil} (Berlin, Germany: Springer, 2015), pp. 116–118); J. de Hullu, \textit{Materieel strafrecht. Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht} (Deventer, the Netherlands: Kluwer, 2015), pp. 207–217; S. M. Puig, \textit{Derecho penal: parte general} (Barcelona, Spain: Peppetor, 2004), pp. 132–136); see also the chapters on France (by C. Elliot, p. 215) and Spain (by C. Gómez-Jara Diez & L.E. Chiesa, p. 491), in K. J. Heller and M. D. Dubber, eds., \textit{The Handbook of Comparative Criminal Law} (Stanford, CA: Stanford Lawbooks, 2011).} Among other things, it is manifested in the fact that typically a criminal act requires some form of mens rea. The additional meaning of the ECHR is very limited here. The same goes for case law of the ECJ which is partly based on the Charter.

The summary recognition of the substantive criminal law principle of guilt poses more of a problem in the context of Union law than in connection with the ECHR. Admittedly, nowadays, the ECtHR (through the construction of positive obligations) requires that certain acts are punishable in the member states, but in principle this involves a limited category of serious acts, whereas the ECtHR does not act as a sort of legislator that fairly precisely prescribes the content of statutory criminal law provisions. With the EU, that is entirely different: it fairly precisely dictates through, inter alia, Directives what criminal offences should look like. Moreover, this occurs in a wide range of areas, which most certainly do not only involve serious acts. In addition to this, Union law in these areas often interferes with or even upsets the existing national criminal law systems that do have the substantive criminal law principle of guilt as part of their foundation. This makes it of paramount importance that the substantive criminal law principle of guilt is also explicitly recognized in Union law and is used as a fundamental principle in the further development of EU criminal law.\footnote{See also Van Kempen, ‘Waarborgen tegen de ontwrichtende werking van Eurostrafrecht’, 2003.} Although it is desirable from the point of view of legality and legitimacy that the Union legislator is primarily responsible for such recognition, there is also a task for the ECJ. It could begin by giving the substantive criminal law principle of guilt a stronger foundation in Union law on the basis of, inter alia, Article 48 of the Charter with respect to the presumption of innocence and backed up by the criminal law principle of legality in Article 49 of the Charter. It would also be useful if the Court, contrary to what it has done so far, recognized the principle of guilt as a \textit{general principle} of EU law. The fact that the ECtHR has not gone as far does not take
anything away from the fact that such a principle is indispensable for an autonomous system of
criminal liability. In such an autonomous system, a prohibition on vicarious liability should – in
principle – be categorical, while strict liability should only be allowed under strict conditions.

**Ne bis in idem**

Unlike the principle of guilt, the European principle of ne bis in idem has seen significant develop-
ment. Article 50 of the Charter secures the rights of everyone not ‘to be tried or punished again
in criminal proceedings for an offence for which he or she has already been finally acquitted or
convicted within the Union in accordance with the law’. This is an important limitation to the
possibilities and scope for criminal liability, which makes it a crucial principle of substantive
criminal law.

**Applicability in both national and transnational situations**

The wording of Article 50 (‘within the Union’) makes it clear that this provision does not only
relate to interstate situations but also applies to multiple prosecutions or punishments within one
member state. The Åkerberg Fransson ruling – which concerns a combination of sanctions that
were imposed by the Swedish tax authorities and a criminal prosecution in the same member state –
confirms that a transnational dimension is not required. Article 50 of the Charter therefore
applies to both national and transnational situations, as long as the second trial takes place within
the ambit of Article 51 of the Charter. It is not easy to determine in the context of ne bis in idem
whether a trial falls within the sphere of influence of Union law. At any rate, that is the case if the
second trial concerns an offence within the parameters discussed in paragraph 3. The major
importance of alignment and coordination of prosecutions where ne bis in idem is concerned may
call for the applicability of the Charter even though the prosecuted offence has no basis in Union
law. Applicability of the Charter should at least be recognized when member states for the
investigation and prosecution of criminal offences have been cooperating on the basis of Union
law and these member states both seek to try the defendant for these offences.

The aforementioned double scope of application – in both national and transnational situations –
is fairly unique. The necessity of a ne bis in idem rule within the jurisdiction of one and the same
state is fairly undisputed, but transnational application of that rule is considerably less obvious.
Both Article 4 of the Seventh Protocol to the ECHR and Article 14(7) International Covenant on
Civil and Political Rights (ICCPR) explicitly relate exclusively to double jeopardy within one and
the same national legal order. However, within the EU, it is exactly the transnational and supranational
application that has been of eminent importance for a long time. If rulings by national
courts become increasingly applicable in other member states, transnational application of the

47. ECJ 26 February 2013, C-617/10, ECLI: EU: C:2013:105 (Åkerberg Fransson).
48. Idem.
49. D. Spinellis, ‘Global report – the ne bis in idem principle in “global” instruments’, Revue Internationale de droit pénal
73 (2002-3/4), pp. 1149–1162, 1150; J. A. E. Vervaele, ‘The Transnational ne bis in idem Principle in the EU: Mutual
Recognition and Equivalent Protection of Human Rights’, Utrecht Law Review (2005), pp. 100–118, 102; J. Lelieur,
‘“Transnationalising” ne bis in idem: How the Rule of Ne Bis in Idem Reveals the Principle of Personal Legal
Certainty’, Utrecht Law Review (2013), vol. 8, pp. 198–210.
50. About ne bis in idem as a general principle of Union law see ECJ 13 February 1969, 14/68, ECLI: EU: C:1969:4 (Walt
Wilhelm); ECJ 15 October 2002, C-238/99 P, ECLI: EU: C:2002:582 (Limburgse Vinyl Maatschappij).
ne bis in idem principle seems only logical. Article 54 of the Schengen Execution Agreement (SEA) contains such a transnational ne bis in idem provision. The first instrument to see the principle of mutual recognition applied, the Framework Decision 2002/584/JHA on the European arrest warrant, also contains a ne bis in idem provision. A final judgment in any other member state constitutes an imperative reason to reject the implementation of the arrest warrant. To that extent, the ne bis in idem principle recognized in Union law has special supplementary value, both in principle and in practical terms, to the value of the ECHR, the ICCPR and many variants of the principle in national law.

**Equivalent effect in national and transnational situations?**

The foregoing does not yet clarify whether Article 50 of the Charter has the same scope and application in national ne bis in idem situations as in transnational cases or cases with a supranational component. Seeing that the ECHR only relates to double prosecution and punishment within one state, Article 52(3) of the Charter, strictly speaking, does not preclude the option to interpret the principle more narrowly beyond those situations, while there is also nothing to prevent a broader interpretation for exactly those cases than the one adopted by the ECtHR for national situations. With regard to the concept of ‘criminal procedure’, Luchtman quite rightly raises the question whether its meaning depends on the circumstance that the two prosecutions do not take place within the same legal order. That question crops up in particular with respect to the concept of ‘criminal procedure’. Before the entry into force of the Charter in a cross-border context, one had to look at Article 54 of the SEA, which does not relate to punitive sanctions other than those based on criminal law stricto sensu and within a national system. However, we agree with Luchtman that there is no convincing rationale for such a dichotomy. Moreover, in the *Akerberg Fransson* case, the Court indicated in general which sanctions are to be regarded as criminal sanctions, without hinting at a difference between national internal cases and interstate cases. Given the system of Union law, it seems arbitrary to interpret the single concept of ‘criminal procedure’ in different ways in different contexts. Having said that, when seen from national angles, this may be different. States tend to have more confidence in their own system than in the systems of other states. From that perspective, states will have fewer qualms about according to the principle of ne bis in idem a wider scope within the national legal order than when this happens for interstate situations. After all, this requires mutual trust and implies a form of mutual recognition of the decisions of other member states.

From the explanation of Article 50 of the Charter, it can be concluded that the right – at least within one and the same member state – has the same meaning and scope as Article 4 of the Seventh Protocol of the ECHR. That explanation is taken into consideration by the ECJ in a restrictive way.

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51. Cf. J. A. E. Vervaele, ‘The Transnational Ne Bis in Idem Principle in the EU’, pp. 100–118, 117–118.
52. Before the entry into force of Framework Decision 2002/584/JHA, the requested state only had to assess, on the basis of the European Extradition Convention, whether a prosecution was taking place in the *requested* State or whether a penalty had already been imposed for the offence.
53. M.J.J.P. Luchtman, ‘Transnationale rechtshandhaving in de EU en het ne bis in idem-beginsel’, *SEW* (2011), pp. 281–292.
54. However, it is conceivable that efforts of the national or Community legislator to limit the scope of Article 50 in this respect fall within the system of limitations of Article 52(1) of the Charter.
55. Explanations relating to the Charter of Fundamental Rights, *OJ* 2007 C 303/31 (re: Article 50).
56. See, for example, ECJ 5 June 2014, C-398/12, ECLI: EU: C:2014:1057 (*M*), para 37.
50 of the Charter does not oppose reopening a case that has been finally decided under national law if there are newly discovered facts (as provided by Article 4(2) of the Seventh Protocol of the ECHR), but such a reopening is only allowed in the member state in which the final decision has been made.\textsuperscript{57} With respect to the cardinal concepts of ‘final decision’, ‘criminal procedure’ and ‘the same offence’, the interpretation of Article 50 of the Charter by the ECJ and the broader interpretation adopted in Strasbourg appear to be the same. However, it remains to be seen how the restrictive interpretation of the \textit{bis}-aspect by the Grand Chamber of the ECtHR in the recent case of \textit{A. and B. versus Norway} will influence the jurisprudence from Luxembourg.\textsuperscript{58} The ECJ is, of course, free to provide more extensive protection. Nonetheless, in the case of two procedures in the same state, Article 50 of the Charter is particularly relevant for the countries that did not ratify the Seventh Protocol of the ECHR. On 1 February 2017, these countries only included Germany, the United Kingdom and the Netherlands.\textsuperscript{59} In these jurisdictions, the Union law principle of \textit{ne bis in idem} plays a significant complementary role in national internal situations. However, for countries that are ratifying or have ratified the protocol, that role is more limited than the role the Seventh Protocol plays, since Article 4 of the protocol also applies to cases not related to Union law.

\textbf{Substance of the protection}

According to the ECJ, the finality of a first conviction does not mean that there no longer can be room for an extraordinary remedy (such as revision of final judgments) or for ‘the exceptional bringing of separate proceedings based on different evidence, rather than the mere continuation of proceedings which have already been closed’.\textsuperscript{60} Final decisions, in addition to conviction, at any rate include acquittals,\textsuperscript{61} decisions that the case is time-barred,\textsuperscript{62} final settlements through a transaction\textsuperscript{63} and findings of ‘non-lieu’, which may only be derogated from on the basis of new objections.\textsuperscript{64}

Whether the two procedures both qualify as ‘criminal’ is of even more importance for the scope of protection under Article 50 of the Charter. In the \textit{Åkerberg Fransson} case, the ECJ confirms that this does not merely depend on the national classification but has to be evaluated also on the basis of criteria from the famous Strasbourg rulings \textit{Engel} and \textit{Öztürk}.\textsuperscript{65} Consequently, the accumulation of various disciplinary and administrative law sanction procedures within the sphere of influence of Union law is impermissible in principle. Nevertheless, the recent judgment of the ECHR on the \textit{bis}-aspect in \textit{A. and B. versus Norway} may, in this regard, shift the most critical question away from whether both proceedings are criminal in nature, towards the question whether they have a sufficient connection in substance and in time to regard them as one procedure.\textsuperscript{66}

\textsuperscript{57} Idem, para 40.
\textsuperscript{58} ECtHR (Grand Chamber) 15 November 2016, nos. 24130/11 and 29758/11 (\textit{A. and B. v. Norway}).
\textsuperscript{59} See <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=117&CM=8&DF=01/04/2015&CL=ENG>, where we must observe for the sake of completeness that Turkey has not ratified the Seventh Protocol either, but it is not bound to the Charter either of course.
\textsuperscript{60} ECJ 5 June 2014, C-398/12, ECLI: EU: C:2014:1057 (\textit{M.}).
\textsuperscript{61} ECJ 28 September 2006, C-150/05, ECLI: EU: C:2006:614 (\textit{Van Straaten}).
\textsuperscript{62} ECJ 28 September 2006, C-467/04, ECLI: EU: C:2006:610 (\textit{Gasparini}).
\textsuperscript{63} ECJ 11 February 2003, C-187/01 and C-385/01, ECLI: EU: C:2003:87 (\textit{Gözütok and Brügge}).
\textsuperscript{64} ECJ 5 June 2014, C-398/12, ECLI: EU: C:2014:1057 (\textit{M.}).
\textsuperscript{65} ECJ 26 February 2013, C-617/10, ECLI: EU: C:2013:105 (\textit{Åkerberg Fransson}).
\textsuperscript{66} ECtHR (Grand Chamber) 15 November 2016, nos. 24130/11 and 29758/11 (\textit{A. and B. v. Norway}).
Either way, in the transnational context, the use of the Engel-criteria is a considerable expansion compared to Article 54 of the SEA. In a national context, this means that countries that are not bound by the Seventh Protocol can also no longer ignore the existence of a una via principle. Influenced by European developments, various countries have come to a general recognition of the ne bis in idem principle, in the sense that they no longer consider it to be merely a criminal law principle, but rather a broader, general ban on the accumulation of punitive sanctions.67

Meanwhile, the importance of a una via provision has grown. This is because for the interpretation of ‘the same offence’ (the third crucial concept), less independent value is accorded to a difference in the legal nature and seriousness of the allegation, whereas the unity of place, time and alleged actions has consequently become more decisive. In this respect, in Zolotukhin v. Russia, it was actually the Grand Chamber of the ECtHR that explicitly established a link with the factual interpretation of ‘the same offence’ used by the ECJ in the context of cross-border cooperation in criminal law.68 This ruling constituted a significant expansion of the legal protection to be derived from Article 4 of the Seventh Protocol of the ECHR for an individual prosecuted for the second time in the same member state. After all, the unity of time, place and alleged actions is usually necessary for a determination of ‘idem’, whereas similarities of the legal nature of the allegations, the legal interest to be protected and the seriousness of the alleged offences and threatening sanctions may be required in varying degrees. Thus, the more factual the concept of ‘same offence’, the more often a second prosecution will be barred by it constituting ‘bis in idem’. That is why the Zolotukhin case forced various national courts to reconsider their interpretation of ‘the same offence’. Countries that did not ratify the Seventh Protocol still have to address the issue, because the provided protection applies by virtue of Article 50 of the Charter. Of course, this is only the case if the second prosecution falls within the sphere of influence of Union law. Otherwise, the Charter does not apply either.

Reflections

The potential meaning of the Union law principle of ne bis in idem for the member states is considerable. Firstly, that is the case because the protection of Article 50 of the Charter covers both national and transnational situations, insofar as they fall within the sphere of influence of the Charter pursuant to Article 51. The question is whether the protective effect of the provision is the same in both situations. It is hard to imagine that the ECJ would create a level of protection for transnational situations that differs from the level for national situations. If that is indeed not the case, both situations will see a level of protection of at least the one that flows from Article 4 of the Seventh Protocol. However, that is not to say that both situations are equivalent: contrary to the internal national effect of the principle, the state will need to rely on the decisions by other states in

67. For the recent recognition of a una via principle in Belgium: P. de Koster, ‘Le principe ‘non bis in idem’: de la révolution à l’intégration: cinq ans après l’arrêt Zolotoukhine’, Droit pénal de l’entreprise 2015, p. 3-19. For an analysis of this problem in French law, see E. Rosenfeld & J. Veil, ‘Sanctions administratives, sanctions pénales’, Pouvoirs 2008, p. 61-73. For the Netherlands, two rulings of the Dutch Supreme Court (Hoge Raad) merit attention: HR 15 May 2012, ECLI: NL: HR:2012: BW5166; HR 3 March 2015, ECLI: NL: HR:2015:434.

68. ECtHR (Grand Chamber) 10 February 2009, no. 14939/03 (Zolotukhin v. Russia), ECJ 8 March 2006, C-436/04, ECLI: EU: C:2006:165 (Van Esbroeck) and ECJ 16 November 2010, C-261/09, ECLI: EU: C 2010:683 (Mantello), respectively. The ECJ takes a different approach to the problem where it concerns antitrust law. See, for critical analysis of this distinction, A. Rosanò, ‘Ne bis interpretation in idem? The two faces of the ne bis in idem principle in the case law of the European Court of Justice’, German Law Review 18(1) (2017), pp. 39–58.
the case of transnational application. A higher level of protection in transnational situations pursuant to Article 50 of the Charter will also de facto increase the level of mutual recognition by states of each other’s decisions. This is so because they would have to assume more readily that a case has already been disposed of in another member state. In this situation, it is not an instrument of mutual recognition that boosts mutual recognition, but it turns out that states (perhaps unintentionally) are bound to such recognition by the Charter as well.

In this context, it is interesting that Article 50 of the Charter – as we saw before – requires at least the level of protection of Article 4 of the Seventh Protocol. That also applies to countries that have not yet ratified this protocol. Accordingly, in (national and perhaps transnational) cases relating to Union law, these states will have to adopt the approach of the ECJ and therefore that of the ECtHR, while this is not required in cases concerning non-Union law. In cases not concerning Union law, the national court thus has more freedom to assume that it is not dealing with a case of ‘idem’. However, that would mean that that state would apply two variants of the ne bis in idem principle in its own legal order: a stricter variant for cases concerning Union law and a weaker one in all other cases. In terms of clarity and consistency, that seems undesirable to us and hard to defend. After all, why would a defendant in a national case that concerns Union law but lacks a transnational element deserve more protection than in any other national criminal case? We expect that the national courts eventually will no longer be able to shy away from bringing its ne bis in idem case law clearly in line with that of the ECJ and therefore also with the case law about Seventh Protocol of the ECHR, even when they have not ratified that protocol.

Finally, that leads us to the question of the desirability of the broad protection advocated by the ECJ.69 That is not an easy question. The problem lies not so much in the application in national internal situations. We take the view that the state can be expected to set up its own system (which is under the control of only the national authorities themselves) in such a way that double prosecution and punishment are avoided. In our opinion, the same can be said (particularly because the state is in charge) if multiple sanctions take place via different systems of sanctions. States are thus required to coordinate how a case will be dealt with if different sanction systems are applicable. The necessity to do so also follows from the case law of the ECtHR on the bis-aspect of the double jeopardy principle, for that case law allows an accumulation of punitive sanctions, but only if both procedures have a close connection in both substance and time.70 This will usually only be achieved through coordination. In view of this, it is desirable that a substantive and, therefore, broader concept of ‘the same offence’ should be used within national legal orders, in line with the approach of the ECJ and the ECtHR. Consequently, in the event of multiple sanctions via different systems of sanctions, it will be assumed more readily that the case concerns ‘the same offence’. This requires the alignment of and coordination between various sanction systems within one legal order.

This level of alignment and coordination is much harder (if not impossible) for states to bring about if those different sanction systems also originate from different states. Therefore, the question is whether in this context it is equally desirable to work with a broad substantive concept of ‘the same offence’ and with a broad interpretation of ‘criminal procedure’. A consequence could be that a state cannot initiate criminal proceedings against a suspect if he has already been on the

69. Ostensibly broad at any rate, for in concrete cases, there need not necessarily be an essential difference with another approach of to the concept of ‘the same offence’.
70. ECtHR (Grand Chamber) 15 November 2016, nos. 24130/11 and 29758/11 (A. and B. v. Norway).
receiving end of administrative punitive sanctions abroad. Particularly, because there is as yet no harmonization of sanction systems and no real coordination of prosecution between countries, the question presents itself whether the mutual recognition effect resulting from Article 50 of the Charter is satisfactory. As long as harmonization and coordination have not been sufficiently achieved, we assert that it would be better in transnational cases if a foreign administrative sanction does not automatically preclude a subsequent criminal prosecution. Instead, it should be required in our view that the administrative sanction is taken into consideration when later dealing with the question whether prosecution is desirable and when establishing any criminal sanction.

Eventually, we think that the same level of protection needs to be offered in cases relating to Union law and those cases that do not concern Union law, and with both transnational and national duplication of sanctions, namely: protection in line with the approach of the ECJ and the ECtHR. However, we believe one exception should be allowed: Administrative punitive sanctions in a member state must not automatically be an impediment to later criminal prosecution and punishment in another member state, at least not as long as there is no instrument of alignment and coordination for interstate cases concerning Union law in which various sanction systems are applicable. Only in the long term can there be room for full standardization of the protection offered in various situations by the principle of ne bis in idem. In our opinion, the interest of a good administration of justice may under certain conditions deserve to be given priority over those of clarity, consistency and the interest of the defendant of seeing his case settled the first time around. The view that both the authority and capacity to coordinate between multiple sanction systems is of great importance finds support in recent developments in the case law of the ECtHR relative to the *bis*-aspect. The requirement of sufficient connection in both substance and time between multiple procedures in order to count as one instead of two (bis) procedures can only be met through coordination. Presently, such coordination is, however, only available within a single national legal orders.

**Concluding remarks**

The influence of Union law on the national substantive criminal law of the member states has become significant. However, this has not yet resulted in a complete system of protection of crucial fundamental criminal law principles. Against the background of general fundamental rights doctrines (such as the existence of positive human rights obligations) and specific EU law doctrines (such as the maximum harmonization and the consequences thereof as shown by Melloni), more should be expected. Although the Charter principles of legality and of ne bis in idem do to some extent affect national criminal law, Union law hardly consolidates or evolves other fundamental criminal law principles, such as the substantive criminal law principle of guilt. The underdevelopment of that principle in Union law is problematic, in view of the fact that EU criminal law increasingly interferes with or even replaces the parts of existing national criminal law systems that do have the substantive criminal law principle of guilt as part of their foundation. Eventually, this may lead to a criminal law system that is only weakly based on the principle of guilt. That is why there is an important responsibility for the European institutions – including the ECJ – to recognize the substantive criminal law principle of guilt as a general rule. There is also a

71. See “Reflections” under paragraph 5.2. on ECtHR (Grand Chamber) 15 November 2016, nos. 24130/11 and 29758/11 *A. and B. v. Norway*.
responsibility for the states, which must remain alert so as not to see their criminal law systems weakened in this respect. It is a different scenario with respect to the Union law principle of ne bis in idem. Both in terms of its meaning (a stricter check for ‘idem’) and its scope (applies to both national internal cases and to interstate cases), Union law actually has an essential complementary affect in practice. The wide reach will manifest itself more clearly when there have been more interstate cases around the ne bis in idem principle. That influence on meaning and scope can be expected to increase. All in all, it looks as though the institutions of the Union, which have been dealing with and ruling on criminal law issues for quite some time now, still lacks sufficient criminal law ‘genes’.

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