



Research Article

THE PUNITIVE POWER OF INDEPENDENT ADMINISTRATIVE AUTHORITIES: FOCUS ON FINANCIAL AND TAX VIOLATIONS (A COMPARATIVE STUDY)

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ABSTRACT

Background: In France, some independent administrative authorities have been granted punitive powers concerning violations committed against stated regulatory rules. In this regard, the issue of the accumulation of penalties has been repeatedly raised concerning sanctions imposed by independent administrative authorities and criminal justice penalties. For example, a certain action could be criminalised by virtue of the Penal Law, necessitating a custodial sanction or a fine, while also considered a mere breach under financial and monetary laws, leading to the imposition of a certain financial penalty.

This raises the question of whether the infliction of both criminal and administrative sanctions on financial and tax crimes violates the 'ne bis in idem' principle. The French Constitutional Council has addressed this issue extensively; it has banned the accumulation of criminal penalties and administrative sanctions of a punitive nature upon the fulfilment of certain conditions. Interestingly, these conditions did not apply to tax disputes, permitting the accumulation of penalties in this specific field. However, the accumulation of penalties was banned and deemed impermissible in financial markets. Therefore, a major question can be raised: Why has the Constitutional Council adopted two different approaches in those two similar fields?

Methods: In pursuit of the research goals, this study employed a combination of comparative, historical, and analytical methodologies. By examining the legal nature of independent administrative authorities, this study conducts a comprehensive examination of relevant legal texts, encompassing constitutional provisions, legislation, and judicial decisions, to analyse the ne bis in idem principle in France. A comparative analysis approach was utilised to compare the rulings of the French Constitutional Council, the French Court of Cassation, and European judicial bodies.

Results and conclusions: *In various jurisdictions, including France and the EU, the principle of non-accumulation of criminal penalties and administrative sanctions is recognised, yet differences arise in its application. Jurisdictions vary in approach, with some strictly prohibiting accumulation while others allow flexibility based on factors like offence nature and societal interests. The French Constitutional Council sets standards, allowing dual penalties in tax matters but not in finance. Rulings by the French Constitutional Council and Court of Cassation offer insights into applying the principle, revealing complexities in balancing regulatory enforcement and individual rights.*

1 INTRODUCTION

Independent administrative authorities are established public entities vested with complete legal authority, enabling them to issue binding decisions and decrees. In 1978, some independent administrative authorities were instituted in France and then began to spread widely to establish some balances that were deemed necessary for the practice of economic activities, individual freedoms, and various other domains. These authorities were granted the legal power to issue decisions of control and supervision and impose sanctions in certain fields, such as economics and finance.

In this context, the French Constitutional Council has clarified that enabling these independent administrative authorities to issue and impose sanctions may not be considered contradictory to the principle of separation of powers, provided that these sanctions may not include any custodial penalties. Therefore, the issuance of these sanctions should be based on several standards and guarantees to protect the rights and freedoms granted by the Constitution.¹

The Constitutional Council decided that all constitutional principles concerning criminal penalties should apply to any other sanctions of a punitive nature, even where the legislator has permitted independent authorities of a non-judicial nature to issue and impose such sanctions. Granting punitive powers to some independent administrative authorities is justified to maintain various financial and economic interests, considering the inefficiency of some criminal penalties imposed by competent criminal judges in the financial and economic sectors. Accordingly, it has been established that sanctions imposed by independent administrative authorities are effective.

However, granting independent administrative authorities the power to impose punitive administrative sanctions is debatable when criminal penalties for the same violations are still applicable. Such duality of sanctions may be considered contradictory to the *ne bis in idem* principle. Given that the accumulation of both criminal penalties and administrative sanctions of a punitive nature was permitted for tax disputes but was banned for financial market disputes, the French Constitutional Council addressed this issue.

1 Décision n 86-217 DC (Conseil Constitutionnel, 18 septembre 1986) <<https://www.conseil-constitutionnel.fr/decision/1986/86217DC.htm>> accède 10 février 2024.

2 THE EMERGENCE OF INDEPENDENT ADMINISTRATIVE AUTHORITIES IN FRANCE

In 1978, the first independent administrative authority, the National Commission on Informatics and Liberty, was established in France.² The establishment of such authorities marked the beginning of a trend that spread rapidly during the 1980s in response to the state's new role towards the establishment of some balances necessary for the practice of economic activities and freedoms.

The spread of these new authorities was further supported by the failure of traditional administrative structures to address the complexities of modern society.³ Consequently, economics witnessed the emergence of these authorities for the first time in 1991, when an independent administrative authority was established for bank control.⁴

3 THE NON-DEPENDENCY OF ADMINISTRATIVE AUTHORITIES TO THE EXECUTIVE AUTHORITY

The independent administrative authorities are official and complete public authorities and not just advisory bodies; they have the legal power to issue decisions and decrees. Their functions are not limited to mere management procedures but are mainly concerned with control, that is, to develop the required frameworks and monitor certain activities in different fields (e.g. economics and finance). This aims to guarantee the smooth workflow of these activities, as well as the fulfilment and respect of specific balances. Therefore, the legislator has granted these authorities several legal powers to ensure the complete and due performance of their assigned duties, including the required powers of regulation, supervision, and infliction of sanctions. Hence, the French legislator preferred to call these entities 'authorities' rather than organisations or bodies to manifest their special nature and distinguish them from other traditional administrative bodies.⁵

Accordingly, an issue has been raised as to whether establishing a new authority not included in the traditional bodies of the state is permissible. In fact, the French Constitutional Council has duly answered this question while addressing the issue of the National Commission on Informatics and Liberty. The council emphasised the full

2 Dominique Custos, 'Independent Administrative Authorities in France: Structural and Procedural Change at the Intersection of Americanization, Europeanization and Gallicization' in Susan Rose-Ackerman and Peter L Lindseth (eds), *Comparative Administrative Law* (Research Handbooks in Comparative Law series, Edward Elgar Pub 2010) 277, doi:10.4337/9781849808101.00026.

3 Kawthar Bougheita, 'The Independent Administrative Authorities in the Economic and Financial Fields' (Master's thesis, Faculty of Law and Political Science, University Center of Maghnia 2016) 13.

4 Bruno Genevois et Louis Favoreu, 'Le Conseil constitutionnel et l'extension des pouvoirs de la Commission des opérations de bourse' (1989) 4 *Revue Française de Droit Administratif* 671.

5 Bougheita (n 3) 17.

independence of this authority⁶; therefore, the presence of another new authority (i.e. other than the three known major authorities) may not be considered contradictory to the French Constitution. It is permissible to establish such a new authority and acknowledge its independence and regulatory power, considering that control authorities shall be entitled to self-legislation; that is, they are permitted to escape the traditional shackles of administrative dependency and hierarchical order.⁷

Consequently, the legal powers of these independent authorities may not be subject to supervision by executive authorities. These authorities may also be entitled to all other powers as required. For instance, they may exercise legislative authority over the development and application of their own executive regulations.

The French Constitutional Council has acknowledged the right of these authorities to develop their executive regulations, noting that Article (21) of the Constitution may not be considered a legal impediment to the permissibility of granting the power of legislation to another authority other than the Prime Minister, when concerning the development of executive regulations.⁸ However, this should be limited to specific fields determined by laws and regulations. It is noteworthy, though, that the Constitutional Council held a legislative provision unconstitutional because it failed to specify the standards for developing executive regulations by independent authorities, as this unconstitutional provision was limited to the general rules of the General Commission.⁹

Moreover, these independent authorities may be entitled to exercise the role of judicial authority regarding the imposition of sanctions. However, this judicial role arguably conflicts with the principle of separation of powers. Evidently, the right to exercise the power of imposing punishment makes independent administrative authorities appear as semi-judicial authorities, hence presenting them as contradictory to the principle of separation of powers, given in Article (16) of the Declaration of the Rights of Man and of the Citizen of 1789.¹⁰

The French Constitutional Council has clarified that granting independent administrative authorities the power to punish may not be considered contradictory to the separation of powers principle, as such power is merely exercised within the framework of a necessary administrative mandate. This mandate must be their commitment to the stated technical restrictions as well as the desired targets of constitutional value.¹¹

6 Décision n 86-217 DC (n 1).

7 Genevois and Favoreu (n 4) 684.

8 Décision n 86-217 DC (n 1).

9 Décision n 88-248/DC (Conseil Constitutionnel, 17 Janvier 1989) <<https://www.conseil-constitutionnel.fr/decision/1989/88248DC.htm>> accede 10 février 2024.

10 Jean Waline, *Droit Administratif* (26e édn, Dalloz 2016).

11 *ibid.*

Furthermore, in another decision, the Constitutional Council added that the legislator granted the power to punish any independent administrative authority, provided that the potential penalty does not include a custodial sanction. Additionally, it requires that the exercise of such power is based on certain legal grounds accompanied by specific measures that shall guarantee the protection of all rights and freedoms granted to all people by virtue of the Constitution.¹²

In this sense, the independent authorities' exercise of the power to punish is, in fact, subject to all established constitutional principles (e.g. the principles of 'non-retroactively of criminal penalties' and 'necessity and proportionality of penalties'). Moreover, according to the constitutional judiciary, all constitutional principles regarding criminal penalties shall also apply to any other sanctions of a punitive nature, even if the legislator has granted the power to impose such sanctions to any other non-judicial authority.¹³

4 JUSTIFICATIONS FOR GRANTING THE INDEPENDENT ADMINISTRATIVE AUTHORITIES THE PUNITIVE POWER

4.1. Maintaining the State's Financial and Economic Interests

(The Unique Nature of Independent Administrative Authorities)

Over the years, a large arsenal of criminal laws has continually interfered with the financial and economic fields by criminalising several types of actions, thereby causing severe damage to the state's financial and economic interests. Consequently, a new attitude has been adopted, calling for the exclusion of these actions from the scope of criminal law, as they should be addressed by independent administrative authorities with certain punitive powers that may be used against such actions. Consequently, the power to punish was transferred entirely or partially from the criminal judiciary to these new independent authorities.

Granting punitive power to these new independent administrative authorities is meant to replace the criminal penalties with other administrative sanctions; it removes the criminal judge's oppressive power in favour of other competent authorities.¹⁴ Interestingly, most sanctions imposed by these independent administrative authorities in the financial and economic fields have been so severe that they are similar to criminal penalties. Hence, they

12 Décision n 89-260/DC (Conseil Constitutionnel, 28 Juillet 1989 <<https://www.conseil-constitutionnel.fr/decision/1989/89260DC.htm>> accede 10 février 2024.

13 Louis Favoreu et Loïc Philip, *Les Grandes Décisions du Conseil Constitutionnel* (Grands arrêts - Grandes décisions, 12e éd., Dalloz 2003).

14 Mousa Rahmouni, 'The Judicial Oversight of Independent Control Authorities in Algerian Legislation' (Master's thesis, University of Batna 1 - Hadj Lakhdar 2012/2013) 66.

are known as 'Administrative Sanctions of Punitive Nature', taking into consideration that these sanctions may vary between financial and non-financial penalties.¹⁵

4.2. The Inefficiency of Criminal Penalties Imposed by Criminal Judiciary in the Economic and Financial Sectors

Granting competent judges punitive powers after the introduction of independent administrative authorities proved inadequate. The judicial system suffers several problems, including delays in adjudicating cases and the lack of any significant criminal errors by the concerned party in many cases.¹⁶ Consequently, the desired deterrent effect of the criminal penalty shall not be achieved because of the delay in the adjudication process.¹⁷ This problem is mainly caused by the huge body of legislation in criminal law and the enormous number of claims submitted before the judiciary. Accordingly, most defendants enjoyed many legal guarantees granted to them by virtue of criminal law, not to mention that some criminal penalties (especially the penalty of imprisonment) were widely considered inadequate for the nature of these activities, as well as the inability to adjust many administrative violations as criminal actions punishable by such penalties.¹⁸

4.3. The Efficiency of Sanctions Imposed by Independent Administrative Authorities

The legislator granted independent administrative authorities the legal power required to impose sanctions due to various significant justifications. The legislator's main objective is to seek the best and most efficient ways to control economic activity in different sectors, to ensure good market functioning and conduct, and to minimise the judge's role in these sectors, which should be solely subject to the economic control of independent administrative authorities.¹⁹

Independent administrative authorities have been practically proven more efficient in exercising such legal powers. They are capable of providing diversity and gradation in their sanctions, with the fulfilment of a number of guarantees that avoid any deviations in implementation.²⁰ Additionally, they are capable of finding innovative solutions that could

15 Najwa Sultani and Mounira Rakti, 'The Independent Administrative Authorities between Independency and Dependency' (Master's thesis, Faculty of Law and Political Science, University 8 May 1945 Guelma 2015/2016) 67.

16 Mireille Delmas-Marty et Catherine Teitgen-Colly, *Punir sans Juger? De la Répression Administrative au Droit Administratif Pénal* (Economica 1992) 18.

17 Rahmouni (n 14) 66.

18 Mohamed Bahi Abuyounis, *Judicial Oversight of the Legitimacy of General Administrative Sanctions* (Dar Al Gamaa Al Gadida 2000) 29.

19 Ghanam Mohamed Ghanam, *The Administrative Criminal Law* (Dar Al-Nahda Al-Arabia 1998) 3-5.

20 Radia Shebouti, 'The Independent Administrative Authorities in Algeria: A Comparative Study' (PhD thesis, University of Mentouri 2014/2015) 20.

be unusual to traditional laws, a fact granted to independent administrative authorities by virtue of the punitive power transferred to them from ordinary criminal judges.

Moreover, the sanctions imposed by those independent administrative authorities are, in fact, faster and far more deterrent than the traditional penalties of ordinary criminal judges (e.g. the suspension of licences or approvals, the ban from practising a profession, or the ban from certain markets), which will undoubtedly be more damaging and effective than criminal fines or suspended imprisonment.

5 THE CONSTITUTIONALITY OF GRANTING PUNITIVE POWERS TO THE INDEPENDENT ADMINISTRATIVE AUTHORITIES

The French Constitutional Council initially rejected granting punitive power to independent administrative authorities. Then, the Council changed its position and granted this power to such authorities in certain fields only. Later, the Council upheld the punitive power of these authorities in all fields upon the fulfilment of certain controls.²¹

To this effect, on 28 July 1989, the French Constitutional Council issued a decree confirming the constitutionality of granting punitive powers to the independent administrative authorities. In this decree, the French Constitutional Council explicitly acknowledged the power and right of these authorities to impose general administrative sanctions. The decree stated that:

“There is no constitutional principle whatsoever that might prohibit an administrative authority from imposing sanctions through the exercise of their powers and privileges as a public authority, provided that the imposed sanction does not include a custodial penalty and that this power is exercised pursuant to the stated measures of rights and freedoms protection as granted to all by virtue of the Constitution.”²²

Additionally, on 17 January 1989, the French Constitutional Council clarified that pursuant to Article (6) of the Declaration of the Rights of Man and the Citizen, all sanctions imposed by public authorities (even if they are non-judicial authorities) shall be subject to the same guarantees governing judicial penalties.²³

21 Décision n 89-260/DC (n 12).

22 *ibid*, para 6.

23 Décision n 88-248/DC (n 9); Rahmouni (n 14) 69.

6 THE ACCUMULATION OF CRIMINAL PENALTIES AND ADMINISTRATIVE SANCTIONS OF PUNITIVE NATURE

6.1. The Ne Bis in Idem Principle

6.1.1. The Legislative Basis for the Ne Bis in Idem Principle

Justice requires that any person be subject to legal punishment for their crime only once. In other words, imposing more than one penalty for infringement is impermissible. In contemporary legal systems, this principle is considered a major pillar of criminal and administrative law. For instance, the Fifth Amendment of the U.S. Constitution provides an explicit legal provision that prevents an accused person from being tried or sentenced again on the same charge (i.e. Double Jeopardy).²⁴ This legal principle is meant to ensure respect for the binding force of the final court rulings.

Furthermore, Article (50) of the Charter of Fundamental Rights of the European Union (CFR) explicitly refers to the same legal principle, which is also emphasised by the European Court of Justice (ECJ), pursuant to the provision of Article (4) of the protocol annexed to the Convention for the Protection of Human Rights and Fundamental Freedoms.²⁵ Several other legislations, such as German and American legislation, have granted this legal principle high constitutional value. Accordingly, the German Judiciary does not acknowledge the implementation of multiple penalties for the same act, even if these penalties fall within two different areas of law: criminal and administrative.²⁶

Article (454) of the Egyptian Criminal Procedures Law states:

“A criminal claim initiated against a defendant shall be considered as concluded by the issuance of a final court ruling, whether it is an acquittal or a conviction; thus, if a court ruling is issued on the subject-matter of this criminal claim, the claim may not be reheard again unless it is through one of the legally stated methods of an appeal.”²⁷

Similarly, in the UAE, Article (268) of the UAE Criminal Procedures Act states:

“A criminal claim initiated against a defendant shall be considered as concluded by the issuance of a final court ruling, whether it is an acquittal or a conviction; thus, if a court ruling is issued on the subject-matter of this criminal claim, the

24 Saba Khan, ‘A Defendant’s Fifth Amendment Right and Double Jeopardy in Contempt Cases’ (2016) 32(4) *Touro Law Review* 833.

25 ‘Charter of Fundamental Rights’ (*Citizens Information*, 31 January 2023) <<https://www.citizensinformation.ie/en/government-in-ireland/european-government/eu-law/charter-of-fundamental-rights/>> accessed 10 February 2024.

26 *ibid.*

27 Criminal Procedure Code of the Arab Republic of Egypt no 150 of 1950, art 454 <<https://manshurat.org/node/14419>> accessed 10 February 2024.

claim may not be reheard again, unless it is through one of the legally stated methods of appeal.²⁸

Therefore, the *ne bis in idem* principle is mainly based on two legal grounds: the principle of legality and the principle of *res judicata*. According to the latter principle, it is illegal to have a second adjudication for the same incident; hence, the disciplinary authority may not be entitled to reconsider the same incident.²⁹

Furthermore, it is worth noting that the application of the *ne bis in idem* principle in the disciplinary field is actually based on the principle of double jeopardy in the criminal field.³⁰ That is, if a person is punished again for the same act, this punishment is considered unjustified and excessive, contradicting the principle of proportionality. In other words, an employee at fault may not be subject to more than one disciplinary penalty for the same violation.³¹

Nonetheless, this principle does not prohibit the infliction of a criminal penalty alongside the disciplinary penalty,³² as both belong to two different areas of law. Hence, this might not be considered contradictory to the *ne bis in idem* principle.³³ For instance, a public official who has committed an act of forgery may be subject to a disciplinary penalty in addition to a criminal penalty. To conclude, criminal liability does not preclude disciplinary liability, but both liabilities may be invoked together.³⁴

6.1.2. The Judicial Basis for the Ne Bis in Idem Principle

The *ne bis in idem* principle is considered one of the most important legal principles for guaranteeing rights and protecting freedoms. Therefore, the Supreme Constitutional Court in Egypt has adopted it as a constitutional principle.³⁵ In this context, the Court ruled on the unconstitutionality of the First Clause of Article (43) of the General Sales Tax Act, issued by virtue of Law No. 11 of 1991 (and amended in 1996), that is, the obligation to order all perpetrators jointly to pay a compensation whose value is no more than the tax itself.³⁶

28 Federal Decree-Law no 38 of 2022 'Promulgating the Criminal Procedures Law', art 268 <<https://uaelegislation.gov.ae/en/legislations/1609>> accessed 10 February 2024.

29 Abdel-Fattah Abdel-Barr, *The Disciplinary Guarantees of Public Office* (Dar Al-Nahda Al-Arabia 1979) 452.

30 Abdel-Aziz Khalifa, *The Disciplinary Guarantees of Public Office* (Dar Al-Nahda Al-Arabia 1997) 175.

31 Youssef Helmy Khater Sherif, *Means of Administrative Activity of the State (Public Employee - Administrative Decision)* (Dar Al-Nahda Al -Arabia 2007) 232.

32 Mohamed Majed Yakout, *Explanation of Disciplinary Procedures in Public Employment, Trade Union Professions, and Private Work* (Monshaat Al-Maaref 2004)665.

33 Khalifa (n 30) 175.

34 Abdel-Kader Abdel-Hafez, *The Disciplinary Penalties of Public Officials* (Dar Al-Fiker 1983) 106.

35 Case no 22 Judicial Year 8 'Constitutional' (Supreme Constitutional Court of the Arab Republic of Egypt, 4 January 1992) <<http://hrlibrary.umn.edu/arabic/Egypt-SCC-SC/Egypt-SCC-22-Y8.html>> accessed 10 February 2024.

36 Case no 9 Judicial Year 28 'Constitutional' (Supreme Constitutional Court of the Arab Republic of Egypt, 4 November 2007) <<http://hrlibrary.umn.edu/arabic/Egypt-SCC-SC/Egypt-SCC-9-Y28.html>> accessed 10 February 2024.

The Court has provided the following reasoning in its ruling:

“According to the contested legal provision, the legislator has stipulated that a taxpayer who has been convicted of tax evasion shall pay compensation whose value is no more than the tax itself; hence, the competent judge will have no choice but to order such compensation in all cases (i.e. pursuant to the phrase 'all perpetrators jointly'); and that is in addition to the other criminal penalties that might be ordered as stated in the provision of this contested provision (i.e. imprisonment, fine or both penalties). In this sense, all of those penalties concern only one action, which is committing a violation of any of the clauses stated in the provision of Article (44) of the General Sales Tax Act, issued by virtue of Law No. 11 of 1991.”

Therefore, the Court concluded that the state's legislation may not jeopardise any of the rights and freedoms granted naturally to all people in democratic societies as basic guarantees for the protection of human rights and dignity. Of course, these rights comprise all rights concerning personal freedom, including the right not to be punished more than once for the same act; thus, whether the penalty is civil or criminal, the imposed punishment may not be excessive but rather proportional and gradual in accordance with the committed violation.³⁷

There is no doubt that any violation of the *ne bis in idem* principle is contradictory to the principle of legality. In other words, the most important principles of justice would be deemed violated if it is permissible to bring the defendant to a retrial and impose more than one penalty for the same action.³⁸

Therefore, the Supreme Constitutional Court has ruled:

“An authority may exercise its disciplinary power by imposing a certain penalty for a specific action. However, this authority may not impose a second penalty for the same incident. Therefore, the administrative authority shall always seek balanced discretion, based on the apparent appropriateness between the gravity of the committed administrative violation on one hand, and the type and magnitude of the imposed penalty on the other hand. otherwise, such discretion will be deemed as a deviation by the disciplinary power from its purposes.”³⁹

37 Case no 3 Judicial Year 10 'Constitutional' (Supreme Constitutional Court of the Arab Republic of Egypt, 2 January 1993) <<http://hrlibrary.umn.edu/arabic/Egypt-SCC-SC/Egypt-SCC-3-Y10.html>> accessed 10 February 2024.

38 Mohamed Gawdat El-Malat, 'The Disciplinary Liability of Public Officials' (DrSc(Law) thesis, Cairo University 1967) 311.

39 Case no 24 Judicial Year 18 'Constitutional' (Supreme Constitutional Court of the Arab Republic of Egypt, 5 July 1997) <<http://hrlibrary.umn.edu/arabic/Egypt-SCC-SC/Egypt-SCC-24-Y18.html>> accessed 10 February 2024.

Both Egypt and France have adopted this legal principle. The Supreme Administrative Court in Egypt has stated: "As one of the most important and unquestionable basics of justice, it is impermissible to punish an employee twice for the same administrative violation."⁴⁰

6.2. The Accumulation of Criminal Penalties and Administrative Sanctions of Punitive Nature

Originally, the issue of combining two or more penalties has always been raised in relation to the sanctions imposed by independent administrative authorities on the one hand and the penalties of the criminal judiciary on the other. A similar issue of equivalent importance concerns the different nature of criminal penalties and administrative sanctions issued by independent administrative authorities, considering the issuing authority and the regulation of the committed action itself. A certain action could be criminalised by virtue of the Penal Law, hence necessitating a custodial sanction or a fine or considered a mere violation pursuant to financial and monetary laws, thus imposing a certain financial penalty. Accordingly, could the same person be punished twice for the same act?

The principle of non-accumulation of penalties is considered one of the basic doctrines of Criminal Law and prohibits any cases of double jeopardy.⁴¹ Nonetheless, this field involves another application of this principle. For example, it is permissible to combine a criminal penalty and a disciplinary penalty based on the diversity and variance of protected interests (e.g. public interest, administrative interest, or professional interest).⁴² Hence, what is the case with the criminal penalties and administrative sanctions imposed by independent administrative authorities?

Article (27) of Federal Law No. 4 of 2000 concerning the UAE securities and commodities market, the Securities and Commodities Authority may impose various disciplinary sanctions on market mediators, including a fine of no more than one hundred thousand Dirhams. In addition, as those sanctions are disciplinary in nature, they may be combined with other criminal penalties. This duality may not be considered contradictory to the *ne bis in idem* principle, as each penalty has a different purpose.

The UAE legislator has emphasised that the scope of administrative sanctions is different from that of criminal penalties, avoiding any duality that might be considered a violation of the *ne bis in idem* principle. However, it is fair to say that UAE Law indeed

40 Case no 4360 Judicial Year 53 (Supreme Administrative Court of the Arab Republic of Egypt, 13 June 2009) <<https://www.elmodawanaeg.com>> accessed 10 February 2024.

41 Martin Wasmeier, 'The Principle of *ne Bis in Idem*' (2006) 77 (1-2) *Revue Internationale de Droit Pénal* 121, doi:10.3917/ridp.771.0121.

42 Libor Klimek, 'Ne Bis in Idem as a Modern Guarantee in Criminal Proceedings in Europe' (2022) 5(4) *Access to Justice in Eastern Europe* 103, doi:10.33327/AJEE-18-5.4-a000439.

involves a combination of criminal penalties and administrative sanctions of a punitive nature in the field of taxes.⁴³

For example, with regard to Tax Procedures, the provision of Article (25) of Federal Law No. 7 of 2017 states the following:

“1. The authority shall issue an assessment for the entity's administrative fines and shall notify this entity of the matter within the period of (5) working days, with regard to any of the following violations: ... 3) The taxpayer's failure to pay the tax stated as 'Payable' in his submitted tax return, or in his tax assessment after his notification during the period stated in the Tax Law.”⁴⁴

In addition, with regard to Tax Evasion, Article (26) states that:

“1. Without prejudice to any harsher penalty that might be stated in another law, the following entities shall be subject to punishment by imprisonment and paying a fine of no more than five-fold of the due tax, or by either one of those two penalties:1.1) A taxpayer who has deliberately abstained from paying his/her payable tax or administrative fines.”⁴⁵

Hence, pursuant to those two articles, there is a clear duality of penalties imposed for the same action, represented basically in the taxpayer's abstention from paying his due tax, as such an action is considered a criminal crime and an administrative violation at the same time.

Moreover, despite the severity of the sanctions imposed by independent administrative authorities, competent criminal judges may also add further financial sanctions for the same actions. Therefore, the legislator has to adopt a clear position in such a case so that an appropriate proportion between the committed action and the imposed sanction may be reached, irrespective of the precedence of inflicting a financial sanction. In other words, given that both criminal and administrative sanctions have the same (repressive) purpose, the principle of proportionality shall permit the accumulation of penalties of the same type while also providing a basic guarantee against the excessive punishment of someone with a penalty.

6.3. Position of Constitutional Judiciary regarding the Accumulation of Criminal Penalties and Administrative Sanctions of Punitive Nature

Initially, by virtue of Decree No. (248/88) issued on 17 January 1989,⁴⁶ the French Constitutional Council adopted a legal principle stating that combining administrative, financial sanctions, and criminal penalties is impermissible. Nonetheless, this adopted legal

43 *ibid* 104.

44 Federal Decree-Law no 7 of 2017 'Concerning Excise Tax', art 25 <<https://uaelegislation.gov.ae/en/legislations/1223>> accessed 10 February 2024.

45 *ibid*, art 26.

46 Décision n 88-248/DC (n 9).

principle was later modified in Decree No. (260-89) issued on 28 July 1989.⁴⁷ The Constitutional Council decided that the Stock Exchange Commission may issue financial sanctions in addition to the penalty imposed by the criminal judge, provided that the total amount of all imposed financial sanctions not exceed the amount with the highest value of one of the two imposed sanctions.

It also stipulated that this legal principle may not take effect in cases of accumulated criminal penalties and administrative sanctions unless otherwise stated by law. In fact, the French Constitutional Judiciary does not give much constitutional value to this legal principle. Pursuant to French legislation, it is permissible to combine a criminal penalty and administrative sanction, especially when those sanctions are imposed for an action that fulfils both the criminal and administrative aspects.

In this sense, in its 28 July 1989 decree, the French Constitutional Council emphasised that the ban on the accumulation of penalties indeed lacks the necessary constitutional character, especially when those various sanctions belong to two different penal systems (e.g. to combine a criminal penalty and an administrative sanction); as in this case, there are different causes for the infliction of each penalty. However, despite its approval of the permissibility of combining the criminal penalty and administrative sanctions, the French Constitutional Council highlighted the importance of adhering to the principle of proportionality, especially when each sanction is attributed to the same cause and nature. For instance, if both the criminal and administrative sanctions imposed for a violation are financial fines, the criminal and administrative fines may not exceed the maximum limit stated for each sanction in both cases.⁴⁸

The Judicial Court of Paris adopted the same approach. In one famous incident, the court ruled that a person who has been sanctioned by the Commission with a fine of 10,000,000.00 francs may not be subject to any other fines.⁴⁹ Considering this legal provision is limited to the assumption that a competent judge will decide on the case, a major issue could be raised after the issuance of a final decision by the Stock Exchange Commission. Hence, if the Commission has yet to decide on the committed violation, the competent judge will not pay much attention to the possibility of combining the two sanctions (pursuant to the Decree issued on 3 December 1993).

In this context, it is fair to say that an independent administrative authority will not interfere in the first place unless the committed violation constitutes a criminal act. Otherwise, the authority may ask the Public Prosecution to enforce the Criminal Procedure Law, pursuant to the well-known principle that “criminal claims shall suspend administrative ones”. Nonetheless, this solution may be considered contradictory to the independence of

47 Décision n 89-260 DC (Conseil Constitutionnel, 28 juillet 1989) <<https://www.conseil-constitutionnel.fr/decision/1989/89260DC.htm>> accede 10 février 2024.

48 *ibid.*

49 Wasmeier (n 41) 121.

procedures, as the independent administrative authority is not obligated to postpone its consideration of the committed violation until criminal adjudication on the matter is concluded. In addition, this solution could be considered contradictory to the ultimate purpose of granting punitive powers to independent administrative authorities, which is to ensure fast and flexible intervention, as well as effective sanctions.

6.3.1. The Principle of Non-Accumulation of Criminal Penalties and Administrative Sanctions

The French Constitutional Council has adopted the principle of non-accumulation of criminal penalties and administrative sanctions as long as all four requirements are fulfilled:

- the committed action itself shall be punishable in accordance with the concerned legal provisions;
- the imposed sanctions shall protect the same social interests;
- the imposed sanctions shall be of a similar nature;
- and the imposed sanctions shall be issued by virtue of the same legal system.⁵⁰

6.3.2. Contradiction of the Preferential Approach towards the Accumulation of Criminal and Administrative Sanctions between the Taxation and Financial Law

The French Constitutional Council has permitted the accumulation of criminal penalties and administrative sanctions of a punitive nature in the field of tax disputes based on the following two standards: a) the grossness of the committed action itself and b) the integration of tax and criminal procedures.⁵¹ There could be a clear contradiction in the French Constitutional Council's application of these standards. While acknowledging these standards in the field of tax disputes, they have been dismissed in the field of market or financial disputes, thus banning any duality of sanctions regarding the latter.

In French Law, Article (1729) of the General Tax Law determines some tax sanctions for fraudulent actions and other intentional violations concerning tax returns, while Article (1741) of the same law determines criminal penalties for the taxpayer who deliberately

50 Décision n 2014-453/454 QPC et 2015-462 QPC (Conseil Constitutionnel, 18 mars 2015) <https://www.conseil-constitutionnel.fr/decision/2015/2014453_454QPCet2015462QPC.htm> accede 10 février 2024.

51 Décisions n 2016-545 QPC (Conseil Constitutionnel, 24 juin 2016) considérants 22 <<https://www.conseil-constitutionnel.fr/decision/2016/2016545QPC.htm>> accede 10 février 2024 ; Décision n 2016-546 QPC (Conseil Constitutionnel, 24 juin 2016) considérants 22 <<https://www.conseil-constitutionnel.fr/decision/2016/2016546QPC.htm>> accede 10 février 2024 Décision n 2018-745 QPC (Conseil Constitutionnel, 23 novembre 2018) considérant 19 <<https://www.conseil-constitutionnel.fr/decision/2018/2018745QPC.htm>> accede 10 février 2024; Vincent Dussart, 'Cumul des sanctions pénales et fiscales : une validation constitutionnelle définitive?' (*Lexbase freemium*, 12 juillet 2016) N3859BWT <<https://www.lexbase.fr/article-juridique/33333856-jurisprudence-cumul-des-sanctions-penales-et-fiscales-une-validation-constitutionnelle-definitive>> accede 10 février 2024.

conceals part of the money subject to the stated tax.⁵² In this regard, the French Constitutional Council confirmed that both legal provisions may apply to the same person committing the same actions. In addition, they stress that tax evasion control is based on the ultimate goal of constitutional value,⁵³ which is mainly based on Article (13) of the Declaration of the Rights of Man and the Citizen. The Constitutional Council added that both criminal penalties and tax sanctions should protect social interests.

To justify their exclusion of the *ne bis in idem* principle from the tax dispute field, the French Constitutional Council explained that the adopted procedures for inflicting both criminal and tax sanctions are not different from each other and may be considered integrative procedures.⁵⁴

A thorough investigation should have been conducted regarding the fulfilment of all four standards, as issued on 18 March 2015.⁵⁵ This could prevent any duality of sanctions, as previously mentioned. However, the French Constitutional Council has clarified its logic through a different approach, as it has confirmed that criminal and administrative procedures may together enable the protection of the state's financial interests and ensure equality before the tax authority.⁵⁶

Therefore, we respectfully disagree with the French Constitutional Council, believing that a reference to the constitutional value of public contribution to taxes shall systematically constitute any incident of tax evasion as a gross action, hence leading to the duality of sanctions in all conditions, despite the fact that the concept of the grossness of actions shall be left solely to the discretion of the legislator. In addition, all criminal actions may originally be considered gross actions; hence, the legislator intervenes by making such actions subject to criminal penalties.

However, who decides cases where actions of greater grossness justify the initiation of different procedures, leading to the infliction of several penalties? For instance, by virtue of Articles (L.228) and (231a) of the Tax Procedures Act, the initiation of any criminal prosecution for tax evasion shall be based on prior complaints by the Tax Department after the approval of these complaints by the Tax Crimes Commission. In this way, the French Constitutional Council grants the administrative authority the power to evaluate any duality of sanctions, which will, in turn, lead to the cancellation of any criminal penalties in favour of the administrative sanctions in case it decides not to submit these complaints to the competent criminal prosecution authorities.⁵⁷

52 Code général des impôts (1950) arts 1729, 1741 <https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006069577/> accessed 10 February 2024.

53 Anne-Valérie Le Fur et Dominique Schmidt, 'Le Traitement du Cumul des Sanctions Administratives et Pénales en Droit Interne: Entre Incohérences et Insécurité Juridique' (2016) 36 Recueil Dalloz 4.

54 *A and B v Norway* App nos 24130/11, 29758/11 (ECtHR, 15 November 2016) <<https://hudoc.echr.coe.int/eng?i=001-168972>> accessed 10 February 2024.

55 Décision n 2014-453/454 QPC (n 50).

56 *ibid.*

57 *ibid.*

6.3.3. Grossness of Actions is a Standard of Inconsistency and Contradiction concerning the Duality of Sanctions

The French Constitutional Council permits the accumulation of criminal penalties and administrative sanctions of a punitive nature in the field of tax disputes based on the fulfilment of the standard of grossness of actions. Why would the French Constitutional Council adopt the same approach as the financial markets? If its logic is based on the fact that tax fraud control shall have priority over financial markets fraud control, as the state's role is to protect collective interests (e.g. tax disputes), then we will find that public funds deserve much larger protection than investors' interests, justifying the application of a double punishment, which is not the case here.⁵⁸

However, we believe that this conclusion is far from realistic. In other words, the misuse of financial market rules will undermine the reliability of those markets, a problem that could produce serious repercussions for the state's economy as a whole. Therefore, we believe that the French Constitutional Council should have permitted the duality of sanctions for financial markets as well, considering that it has clearly stated that the objectives desired from the infliction of both criminal penalties and administrative sanctions in the field of stock market disputes are the same, the ultimate goal of which is the protection of public interest.

6.4. The Position of the French Court of Cassation and European Judiciary regarding the Accumulation of Criminal Penalties and Administrative Sanctions of Punitive Nature

In a well-known case, the Sanctions Commission, affiliated with the Financial Market Authority, fined an investor EUR 250,000.00. Subsequently, the public prosecution initiated prosecution procedures before the criminal judiciary, litigation which was concluded by the issuance of a court ruling for three-month imprisonment with suspension to avoid any obstruction to the market function pursuant to Article (465-2) of the Monetary and Financial Law.

This court ruling was appealed before the French Court of Cassation on the grounds that the administrative sanctions imposed by the Financial Market Authority are sanctions of a punitive nature and, hence, may not be accumulated with other penalties issued for the same actions as the result of criminal procedures. In other words, the procedures of criminal prosecution should not have been initiated on the basis of the defendant's right to avoid double jeopardy, which has been clearly stated by virtue of all of the following legal provisions: Article (4) of Additional Protocol No. 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms; Article (14) of Part VII of the International

58 Le Fur and Schmidt (n 53) 5.

Covenant on Civil and Political Rights (ICCPR); and Article (50) of the Charter of Fundamental Rights of the European Union (CFR).

However, the French Court of Cassation dismissed this appeal in a precedent that ended any controversy regarding the duality of criminal and administrative sanctions in the financial field. The Court of Cassation decided that there is no contradiction between Article (50) of the CFR and the permissibility of accumulating administrative sanctions imposed by the Financial Markets Authority and criminal penalties for the same actions, which are, in fact, misdemeanours,⁵⁹ provided the fulfilment of the following two conditions:

- 1) This duality of sanctions shall always be based on the principle of inflicting a punishment that is effective, proportional, and deterrent. This is supported by Article (14-1) of Directive No. (CE/6/2003) issued on 28 January 2003, commonly used as a basis for the fulfilment of public interest as recognised by the European Union.⁶⁰ This is also affirmed by Article (52) of the Charter to ensure the integration of European financial markets and the consolidation of investor trust.
- 2) The total value of the applicable fine may not exceed the maximum limit of the imposed higher sanctions.

On this basis, it is evident that the legitimacy of the principle of accumulation of penalties (i.e. criminal and administrative sanctions) has been subject to a process of modification through a number of procedural developments. For instance, the Coulon Report suggested that public prosecutors should be concerned with evaluating the appropriateness of criminal prosecutions and selecting the most appropriate methods for such prosecution.⁶¹

In a decision dated 13 September 2017, the Criminal Chamber of the Court of Cassation ruled that the Financial Markets Council did not qualify as a criminal court within the context of the *ne bis in idem* principle. Therefore, it was deemed entirely permissible for the accused, who had previously received sanctions from the Financial Markets Council for actions that were also subject to prosecution before a criminal court, to be found guilty of fraud and subsequently sentenced by the criminal court.⁶²

Hence, acts falling under the jurisdiction of independent administrative authorities, tax administration, and administrative courts can be excluded from the offences falling within the jurisdiction of French courts in criminal matters⁶³. Additionally, in a decision issued on

59 Pourvoi n 12-83.579 (Cour de cassation, Chambre criminelle, 22 janvier 2014) <<https://www.legifrance.gouv.fr/juri/id/JURITEXT000028511881>> accede 10 février 2024.

60 *ibid.*

61 Jean-Marie Coulon, *La dépenalisation de la vie des affaires: Rapport au garde des Sceaux, ministre de la Justice* (Coll des rapports officiels, La Documentation française 2008).

62 Pourvoi n 15-84.823 (Cour de cassation, Chambre criminelle, 13 septembre 2017) <<https://www.legifrance.gouv.fr/juri/id/JURITEXT000035574367>> accede 10 février 2024.

63 Pierpaolo Rossi-Maccanico, 'A Reasoned Approach to Prohibiting the Bis in Idem: Between the Double and the Triple Identities' (2021) 4 EU Crim 268, doi:10.30709/eucrim-2021-032.

6 December 2017, the Criminal Chamber rejected the application of Article 4P7 to a defendant charged with tax fraud in criminal court, citing that they had already been penalised by the tax administration for the same acts.⁶⁴ The Criminal Chamber of the Court of Cassation has determined that the European rule of *non bis in idem* applies exclusively to offences falling under French law within the jurisdiction of courts handling criminal matters. It does not prohibit the imposition of tax sanctions in addition to penalties imposed by the criminal court⁶⁵. This interpretation is supported by the legislative basis in tax law, specifically the first paragraph of Article 1741 of the General Tax Code, which states that prescribed penalties are applicable “independently of any applicable tax sanctions.”

6.5. Position of the European Court of Human Rights and the European Court of Justice

The European Court of Human Rights has stated that pursuant to the Convention for the Protection of Human Rights and Fundamental Freedoms; there is indeed a contradiction between the *ne bis in idem* principle in the field of taxes—Article (4) of Protocol No. 7 of the Convention issued on 22 November 1984—and the permissibility of criminal prosecution of the same person in this field, after already incurring another criminal or semi-criminal sanction for the same actions.⁶⁶

However, the European Court of Justice (ECJ) has emphasised that to safeguard the financial interests of the European Union; each member state shall be entitled to determine its own applicable sanctions, as those sanctions may take the form of administrative sanctions, criminal penalties, or a combination of both types. That is, Article (50) does not prohibit the initiation of new criminal procedures to issue a criminal penalty against the same person if the already issued tax sanction is punitive.⁶⁷

The national legislation may authorise criminal proceedings against an individual for failing to pay value-added tax within specified time limits, even if the person has already received a final administrative penalty of a criminal nature for the same acts. This authorisation is contingent upon the legislation aiming to achieve the public interest objective that justifies

64 Pourvoi n 16-81.857 (Cour de cassation, Chambre criminelle, 6 décembre 2017) <<https://www.legifrance.gouv.fr/juri/id/JURITEXT000036176844>> accede 10 février 2024.

65 Pourvoi n 94-85.796 (Cour de cassation, Chambre crimine, 20 juin 1996) <<https://www.legifrance.gouv.fr/juri/id/JURITEXT000007067811/>> accede 10 février 2024.

66 *Sergey Zolotukhin v Russia* App no 14939/03 (ECtHR, 10 February 2009) <<https://hudoc.echr.coe.int/?i=001-91222>> accessed 10 February 2024; *Ruotsalainen v Finland* App no 13079 (ECtHR, 16 June 2009) <<https://hudoc.echr.coe.int/?i=001-92961>> accessed 10 February 2024.

67 Marie-Claire Sgarra, ‘La CJUE se prononce sur le cumul des sanctions pénales et fiscales : le juge français au pied du mur!’ (*LexBase freemium*, 11 mai 2022) N1397BZR <<https://www.lexbase.fr/article-juridique/84739394-brevesslacjueseprononcessurlecumuldessanctionspenalesetfiscaleslejugefrancaisaupied>> accede 10 février 2024.

any duplication of procedures and penalties, particularly in combating VAT fraud, and ensuring that these measures also serve any additional necessary objectives. Additionally, the legislation must incorporate rules that ensure coordination to minimise the additional harm caused to individuals by duplicative procedures and establish rules to ensure that the severity of all imposed penalties is proportional to the seriousness of the crime committed.⁶⁸

Furthermore, the European Court of Human Rights has decided to evaluate the nature of the imposed sanctions (to decide whether they are criminal penalties or administrative sanctions of a punitive nature) based on their own concept of the criminal field.⁶⁹ The European Court of Justice (ECJ) has, however, decided that this discretionary power does not fall within its jurisdiction but is a matter for the criminal judiciary, in accordance with the three major standards as stated by the European Court of Justice (ECJ):

Standard (I): the legal characterisation of the committed action itself as stated by virtue of the internal laws;

Standard (II): the nature of the committed crime itself;

and Standard (III): the nature and grossness of the imposed sanction. In this sense, the national judiciary shall consider and respect all stated national principles concerning the *ne bis in idem* principle, considering that the imposed sanctions shall be effective, proportional, and deterrent.⁷⁰

The European Court of Human Rights, in its landmark judgment *A and B vs Norway*⁷¹, allowed for an exception to the principle of *ne bis in idem*, which prohibits double jeopardy. It determined that the accumulation of criminal and administrative proceedings is permissible when integrated to form a coherent whole.⁷² When the procedures involved are connected by a “sufficiently close material and temporal link,”⁷³ this link “must be sufficiently close so that the individual is not exposed to uncertainty and delays.”⁷⁴ Regarding the assessment of the material connection, the Court states that four relevant

68 Case C-524/15 *Luca Menci* (CJEU (Grand Chamber) ECJ, 20 March 2018) <<https://curia.europa.eu/juris/liste.jsf?language=en&num=C-524/15>> accessed 10 February 2024.

69 *Sergey Zolotukhin v Russia* (n 66); *Ruotsalainen v Finland* (n 66).

70 Case C-617/10 *Aklagaren v Hans Akerberg Fransson* (CJUE (Grand Chamber), 26 February 2013) <<https://curia.europa.eu/juris/liste.jsf?num=C-617/10>> accessed 10 February 2024; Case C-399/11 *Stefano Melloni v Ministerio Fiscal* (CJUE (Grand Chamber), 26 February 2013) Consid 60: Juris-Data N 2013-004004 <<https://curia.europa.eu/juris/liste.jsf?num=C-399/11&language=EN>> accessed 10 February 2024; C-570/20 *BV* (CJUE (First Chamber), 5 May 2022) <<https://curia.europa.eu/juris/liste.jsf?num=C-570/20>> accessed 10 February 2024.

71 *A and B v Norway* (n 54).

72 *Rossi-Maccanico* (n 63) 268.

73 *A and B v Norway* (n 54) para 130; *Jóhannesson and others v Iceland* App no 22007/11 (ECtHR, 18 May 2017) para 49 <<https://hudoc.echr.coe.int/eng?i=001-173498>> accessed 10 February 2024.

74 *Rossi-Maccanico* (n 63) 268.

elements must be taken into account⁷⁵, which, when available, allows the combination of administrative and criminal penalties in separate proceedings to be allowed under four conditions, which are:

- (i) the complementary purposes pursued by the proceedings, addressing different aspects of the prohibited conduct;
- (ii) whether the duplication of proceedings is a foreseeable consequence, both in law and in practice, of the same prohibited conduct;
- (iii) whether there is coordination between the relevant sets of proceedings to avoid duplication in the collection and assessment of evidence and
- (iv) the proportionality of the overall amount of the imposed penalties.

7 CONCLUSIONS

The French Constitutional Council has affirmed the constitutionality of independent administrative authorities imposing sanctions, asserting that neither the principle of separation of powers nor any other constitutional principles hinder their legal authority, provided sanctions fall within their jurisdiction. Additionally, the Council has ruled that combining criminal penalties and administrative sanctions is impermissible unless four conditions are met: the action is punishable under the law, both sanctions protect the same social interests, they are of a similar nature, and all proceedings and sanctions fall under the same legal system. These rulings uphold the balance between administrative powers and constitutional principles, ensuring fairness and consistency in the enforcement of penalties.

The French Constitutional Council has adopted varying standards regarding the principle of non-accumulation of penalties, permitting it in certain fields while prohibiting it in others. For example, in tax matters, the combination of criminal penalties and punitive administrative sanctions is allowed based on the severity of the offences. Yet, in the financial sector, it is strictly forbidden. We advocate for extending this principle to the financial domain, aligning with the French Court of Cassation's stance. Regarding the Council's reservations on dual penalties in tax disputes, particularly when imprisonment is involved, legislative intervention for clarity is recommended. The *ne bis in idem* principle should only be restricted when absolutely necessary, requiring clear rules for individuals to anticipate potential duplications in legal proceedings and penalties.

75 Benjamin Ricou, 'Actualité du cumul de sanctions pénales et fiscales : des divergences aux convergences' (*LexBase freemium*, 27 Février 2019) N7870BXR <<https://www.lexbase.fr/article-juridique/50112027-lepointsuractualiteducumuldesanctionspenalesetfiscalesdesdivergencesauxconvergences>> accede 10 février 2024.

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