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ENVIRONMENT AND SOCIETY

John A. E. Vervaele

Fundamental Rights in the European Space for Freedom, Security and Justice: The Prætorian *ne bis in idem* Principle of the Court of Justice[1]

Introduction

For some years the Court of Justice of the European Communities (ECJ) has developed a complete series of general principles of Community law that also covers criminal law and criminal procedure law[2]. With the entry into force of cooperation in the field of Justice and Home Affairs (JHA) around the third pillar, as set out by the Treaty of Maastricht, and the extension of the jurisdiction of the Court of Justice to third pillar matters introduced by the Treaty of Amsterdam, the ECJ has had the opportunity of extending the scope of application of these general principles to new policy areas more directly related to the principle of due process and fundamental rights.

Prior to the entry into force of cooperation in the field of JHA in accordance with the third pillar, the Member States drew up *ad hoc* agreements on cooperation in criminal matters in the framework of European Political Cooperation[3]. But the breakthrough came in the form of the Schengen Agreement in 1985. France, Germany and the three Benelux countries agreed on closer cooperation between them in the field of migration, police cooperation and judicial cooperation in criminal matters, and the creation of a Schen-

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[1] This article has been published in *Montserrat de Hoyos Sancho* (ed.): El Proceso Penal en la Unión Europea: garantías esenciales, Lex Nova, Valladolid, Spain, 2008, 78–99.

[2] See for example Case 80/86, *Kolpinghuis*, [1987] ECR 3969 and commentary on it by Sevenster, "Criminal Law and EC Law", 29 CML Rev. (1992), 29–70.

[3] *J.A.E. Vervaele*: Fraud against the Community. The need for European fraud legislation (Deventer, 1992), p. 345 and *J.A.E. Vervaele – A.H. Klip* (eds): European Cooperation between Tax, Customs and Judicial Authorities (Kluwer Law International, 2002).

gen Information System (SIS). Schengen cooperation was very successful and many Member States of the European Union (EU) joined it. The Schengen intergovernmental agreements of 1985 and 1990 and the Schengen Area have been incorporated into the structure of the EU through a Protocol annexed to the Treaty on European Union (TEU) and to the Treaty of Amsterdam. The provisions relating to asylum, immigration policy, etc. were integrated into the first pillar (which is to say, into the Treaty establishing the European Community: Title IV), the rules on police cooperation and judicial cooperation in criminal matters around the third pillar. However, special legal arrangements have been agreed for the United Kingdom and Ireland (which are not subject to the Schengen Area) on the possiblity of opting to join this agreement, for Denmark in the case of abandoning it, and for Iceland and Norway, countries that are not within the Union, that are part of the Schengen structure.

The incorporation of Schengen into Community law also included articles 54 to 58 of the 1990 Convention implementing the Schengen Agreement of 1985 (CISA) on the application of the *ne bis in idem* principle. These articles are set out under Title VI of the TEU (third pillar regulations) upheld in law in articles 34 TUE and 31 TUE[4]. Article 54 states that: "A person whose trial has been finally disposed of in one contracting party may not be prosecuted in another contracting party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing contracting party". Article 55 contains exceptions to the rule of *ne bis idem*, but they must be formally presented at the time of signing or ratification of the Convention. One of the possible exceptions is that the acts took place either wholly or partially in their own territory. Another important article in this context is article 58 that points out that national regulations can be wider and go beyond the provisions of the Schengen acquis on *ne bis idem*, providing greater protection.

Article 2 of the Schengen Protocol states that the Court of Justice of the European Communities will exercise the powers conferred upon it by the relevant applicable provisions of the Treaties. The Treaty of Amsterdam has broadened the jurisdiction of the EJC to questions relating to the third

[4] 1999/436/CE: Council Decision, of 20th May, 1999, Official Journal nº L 176 of 10/07/1999 p. 0017– 0030.

pillar, so that it may rule amongst other matters on the validity and the interpretation of the framework and other decisions as well as the measures taken to apply them. Member States must accept this jurisdiction in accordance with article 35(2) TUE and when they accept, according to article 35(3) TUE, they can choose to confer the power to request a preliminary ruling from the ECJ on any jurisdictional organ or only on those jurisdictional organs against whose decisions no appeal may be lodged. Unfortunately, some states (including Spain) have opted for the second option and the majority of the new Member States have not recognised any such competence. However, the interpretation of the ECJ is held as valid across the Union, even in those countries which have not recognised its competence.

The *ne bis in idem* principle

The *ne bis in idem* principle is a general principle of (criminal) law in many national legal orders, sometimes even codified as a constitutional right such as the clause relating to *ne bis in idem* (prohibiting dual punishment – *double jeopardy*) of the Fifth Amendment of the Constitution of the United States of America. Historically it has been considered that the principle of *ne bis in idem* only applies nationally and is limited to criminal justice. Concerning the substance of the principle, a distinction is traditionally made between *nemo debet bis vexari pro una et eadem causa* (no one should have to face more than one prosecution for the same offence) and *nemo debet bis puniri pro uno delicto* (no one should be punished twice for the same offence). Some countries limit the principle to the prohibition of double punishment.[5] On the subject of double prosecution, there is great debate over the meaning of prosecution. Does it also include the judicial investigation or is it limited to the judgement of the charges laid before the Courts? In the latter case, some States have *una via* provisions in national law, which oblige the authorities to choose at a certain stage of the investigation between either criminal or administrative procedure.

The rationale of the *ne bis in idem* principle is manifold. It is of course a principle of judicial protection for the citizen against the *ius puniendi* of the

[5] In that case, a double prosecution can still be recognized as a violation of the principles of a fair administration of justice.

state and as such forms part of the principles of due process and a fair trial. On the other hand respect for the *res judicata* (*pro veritate habitur*) of final judgments[6] is of importance for the legitimacy of the legal system and of the state.

The *ne bis in idem* principle raises many questions. The greater part of the case law of the States refers to the definition of *idem* and of *bis*. In order to consider the meaning of the same/*idem*, it may be asked whether the legal definition of the offences should be considered as the basis of the definition of the term the same (*idem*), or should it be the set of facts (*idem factum*)? Does it depend on the judicial rights protected by the legal provisions and their scope? Are natural and legal persons different with regard to the application of the principle? Is the reach of the principle limited to double punishment under criminal law or does it include other punitive sanctions that may be imposed under private law or administrative law? What is a firm and final sentence? Does it include having no case to answer or the dismissal of the proceedings? What does the execution of a firm judgement mean? Does it include settlements with the public prosecutor or with other judicial authorities? Are proceedings or an additional sanction (*Erledigungsprinzip*) prevented out of respect for the *ne bis in idem* principle, or can the authority, taking account of the first punishment (*Anrechnungsprinzip*), impose a second one? In the cases of *Gützütok* and *Brüge*, the discussion is limited to the concept of a firm sentence and settlements.

The *ne bis in idem* principle is also established as an individual right in international human rights treaties, such as the International Covenant on Civil and Political Rights of 19 December 1966 (Article 14 (7))[7]. The Euro-

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[6] *Interest reipublice ut sit finis litium, bis de eadem re ne sit actio.* ("it is in the public interest that there be an end to litigation, there will be no action twice on the same matter").

[7] The Human Rights Committee ruled that Article 14 (7) does not apply to foreign *res judicata*, UN Human Rights Com-mittee 2 November 1987. The Netherlands has formulated the following reservation:
"Article 14, paragraph 7

The Kingdom of the Netherlands accepts this provision only insofar as no obligations arise from it further to those set out in article 68 of the Criminal Code of the Netherlands and article 70 of the Criminal Code of the Netherlands Antilles as they now apply. They read:

1. Except in cases where court decisions are eligible for review, no person may be prosecuted again for an offence in respect of which a court in the Netherlands or the Netherlands Antilles has delivered an irrevocable judgement.

2. If the judgement has been delivered by some other court, the same person may not be prosecuted for the same offence in the case of (I) acquittal or withdrawal of proceedings or (II) conviction followed by complete execution, remission or lapse of the sentence."

pean Convention on Human Rights (ECHR) does not contain such a provision and the former European Commission on Human Rights[8] denied the existence of the principle as such under Article 6 of the ECHR, without however precluding in absolute terms that certain double prosecutions might violate the fair trial rights under Article 6 ECHR. The provision has meanwhile been elaborated in the Seventh Protocol to the ECHR (Article 4), but only a minority of the 25 EU Member States has ratified Protocol no 7. For Belgium, Germany and the Netherlands the Seventh Protocol is not binding. However, case-law might serve as inspiration here. The majority of the cases refer to the definition of *idem*. After some contradictory judgements[9] on the application of article of the Seventh Protocol, the ECtHR fixed its criteria on the decision in the case of *Franz Fischer v. Austria*[10], based on *idem factum*; although in the case of *Götktan v France*[11] the Court seemed to place its trust once again in the legal *idem*.

Although there is no ECtHR decision on the definition of firm judgements that have been executed and settlements, it is also clear from the Strasbourg case law that the *ne bis in idem* principle is not limited to double punishment, but also includes double prosecution, which means that the accounting principle is not enough to respect the principle of *ne bis in idem*. This underlines the importance of cooperation at the level of the inquiry and of preferably introducing *una via* provisions rather than anti-cumulation of sanctions. In addition, the element of *bis* also includes the combination of two criminal charges in the sense of Article 6, for instance, the imposition of a criminal punitive sanction and an administrative punitive sanction.[12]

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[8] European Commission on Human Rights, 13 July 1970, Application 4212/69, CDR 35, 151.

[9] *Gradinger v. Austria*, judgment of 23 October 1995, Series A no 328-C and *Oliveira* v. *Switzerland* judgment of 30 July 1998, Reports of Judgments and Decisions 1998-V, p. 1990.

[10] *Franz Fischer v. Austria* of 29 May 2001, Series A no 312 (C), confirmed in W.F. v. Austria, judgment of 30 May 2002 and *Sailer* v. *Austria*, judgment of 6 June 2002. See http://www.echr.coe.int for these decisions.

[11] *Göktan* v. *France*, Judgment of 2 July 2002, http://www.echr.coe.int/.

[12] The double jeopardy clause in the Fifth Amendment is not limited to criminal law, but includes civil and administrative punitive sanctions. However, the leading case, *United States* v. *Halper*, 490 U.S. 435 (1989), has once again recently been restricted in Hudson v. U.S., 522 U.S. 93 (1997); See also *J.A.E. Vervaele*: La saisie et la confiscation à la suite d'atteintes punissables au droit aux Etats-Unis, Revue de Droit Pénal et de Criminologie, 1998, 974–1003.

The transnational (horizontal) *ne bis in idem* principle Europe[13]

Very few countries recognize the validity of a foreign judgment in criminal matters for execution or enforcement in their national legal systems without it being founded on a treaty. Even the recognition of *res judicata* in respect of a foreign criminal judgment is problematic, certainly when it concerns territorial offences. Recognition of foreign *res judicata* means that the prospect of a new prosecution or punishment is no longer possible (negative effect) or that the decision has to be taken into account in the context of judgements pending in other cases (positive effect). The majority of common law legal systems actually do recognize the *res judicata* effect of foreign judgments. In the civil law system, the Netherlands have the most far-reaching and liberal provisions. The Dutch Criminal Code contains a general *ne bis in idem* provision that is applicable to both domestic and foreign judgements, regardless of where the offence was committed.[14] The principle of *ne bis in idem* is also important as a basis for rejecting cooperation in extradition proceedings, and letters rogatory, etc. However, there is no rule of international law that imposes an international *ne bis in idem* principle. The application depends on the content of the international treaties. Even when States acknowledge the international *ne bis in idem* principle, different problems can arise in transnational scenarios due to the different interpretations of the principle in respect of *idem,* of *bis*, etc. (see *supra*).

In Europe, in the framework of the Council of Europe, efforts have been made since the 1970s to introduce a regional international *ne bis in idem* principle. In this cooperation framework the *ne bis in idem* principle only applies *inter partes*, which means that it can be or must be applied between the contracting States in case of a concrete request. It is not considered to be an individual right *erga omnes*. *Ne bis in idem* is a mandatory provision under the 1970 Convention of the Council of Europe on the International Validity of Criminal Judgements (Articles 53–57) and under the 1972 Convention on the Transfer of Proceedings in Criminal Matters (Articles 35–37). However, both Conventions have a rather low ratification rate and con-

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[13] *Britta Specht*: Die zwischenstaatliche Gelung des Grundsatzes ne bis in idem (Berlin, 1999).

[14] For commentary on the Dutch *ne bis in idem* in Art. 68 of the Criminal Code, see *Peter Baauw*: "Ne bis in idem", in B. Swart and A. Klip (eds.), International Criminal Law in the Netherlands, MPI, Freiburg im Breisgau, 1997, pp. 75–84.

tain quite a number of exceptions to the *ne bis in idem* principle. In the 1990 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (Article 18, paragraph 1e), which is more widely ratified, it is optional, but some Contracting States did include it in their ratification declaration as a ground for the refusal of cooperation requests.

European Justice Ministers were fully aware that the deepening and widening of European integration would lead to an increase in transborder crime and of transnational justice in Europe. In the framework of the European Political Cooperation, before the coming into force of the Maastricht Treaty with its Third Pillar on Justice and Home Affairs, the 1987 Convention on Double Jeopardy was elaborated between the Member States of the EC. This Convention deals with the *ne bis in idem* principle in a transnational setting in the EC. The Convention has been poorly ratified,[15] but its substance has been integrated into the CISA to such an extent that it may qualify with good reason as the first multilateral convention that establishes an international *ne bis in idem* principle as an individual right *erga omnes*. The Schengen provisions have served as a model for several *ne bis in idem* provisions in the EU instruments on Justice and Home Affairs,[16] which is why the judgement of the ECJ in the cases of *Gözütok* and *Brügge* currently go beyond the regulations of the CISA. The Convention on the Financial Protection of the European Communities and its several protocols contain various provisions on *ne bis idem*.[17] As does the Convention on the fight against corruption Involving officials of the European Communities or officials of member states of the European Union.[18]

The importance of the principle of *ne bis in idem* is certainly not limited to the third pillar of the EU. The EC has administrative powers to impose sanctions in the field of competition and far-reaching powers to harmonize national administrative sanctioning in many EC policies. The ECJ has had

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[15] The *ne bis in idem* Convention has been ratified by Denmark, France, Italy, the Netherlands and Portugal and is provisionally applied between them.

[16] *H. H. Kühne*: *ne bis in idem* in den Schengener Vertragsstaaten, J.Z., 1998, 876–880, *Wolfgang Schomburg*: Die Europäisie-rung des Verbots doppelter Strafverfolgung – Ein Zwischenbericht, N.J.W. 2000, 1833–1840 and *Christine Van den Wyngaert – Guy Stessens*: The international non bis in idem principle: Resolving some of the unanswered questions, I.C.LQ., 1999, 786–788.

[17] See Art. 7 of the Convention, OJ 1996 C 313/3.

[18] OJ 1997 C 195/1, Art. 10.

occasion to address the issue of *ne bis in idem* in the field of competition.[19] In line with regulation 17/62,[20] the ECJ had already pointed out in the case of *Walt Wilhelm*[21], as is expressed in article 4 of Protocol 7 of the ECHR, that double prosecution, once by the Commission and once by the national authorities, was in accordance with the Regulation and did not violate the *ne bis in idem* principle, given the fact that the scope of the European rules and the national rules differed. However, were this to result in the imposition of two consecutive sanctions, a general requirement of natural justice would demand that any previous punitive decisions be taken into account in determining any sanction that might be imposed (*Anrechnungsprinzip*).

For years now the ECJ has built on an old tradition that confirms that the *ne bis in idem* principle, as it is expressed in article 4 of Protocol 7 of the ECHR is a general principle of Community law,[22] which means that it is not limited to criminal sanctions, but that it also applies in competition matters. However, the ECJ appears to limit the *ne bis in idem* principle to double punishment and still accepts *Anrechnungsprinzip*. This problem has not been solved by the new competition regulation 1/2003,[23] which provides that, besides the European Commission, national competition authorities will also apply European competition rules, including the rules concerning enforcement (art. 35). The European Commission and the national authorities will form a network based on close cooperation. In practice, conflicts of jurisdiction and problems regarding *ne bis in idem* should be avoided through best practice on cooperation, after which competition authorities can suspend or terminate their proceedings (Article 13). There is however no obligation to do this, which means that double prosecution is not excluded as

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[19] *Wouter P. J. Wils*: The principle of '*ne bis in idem*' in EC Antitrust Enforcement: a Legal and Economic Analysis, World Competition, volume 26, Issue 2, June 2003.

[20] Regulation 17/62, OJ P 013, 21/02/1962, P. 0204–0211, English special edition: Series 1 Chapter 1959–1962 P. 0087.

[21] Case 14/68, *Walt Wilhelm* v. *Bunderskartellamt,* [1969] ECR 3.

[22] See for instance Judgment of 14/12/1972, Boehringer Mannheim / Commission (Rec.1972, p. 1281) (DK1972/00323 GR1972-1973/00313 P 1972/00447 ES1972/00261 SVII/00061 FIII/00059) and Judgment of the Court of 15 October 2002. Limburgse Vinyl Maatschappij NV (LVM) (C-238/99 P), DSM NV and DSM Kunststoffen BV (C-244/99 P), Montedison SpA (C-245/99 P), Elf Atochem SA (C-247/99 P), Degussa AG (C-250/99 P), Enichem SpA (C-251/99 P), Wacker-Chemie GmbH and Hoechst AG (C-252/99 P) and Imperial Chemical Industries plc (ICI) (C-254/99 P) v. Commission of the European Communities.

[23] Regulation 1/2003, OJ L 001, 04/01/2003, p. 0001–0025, in force from 1 May 2004.

such. It is quite clear that the jurisprudence of the ECJ on international *ne bis in idem* in cases relating to competition is not totally in agreement with the jurisprudence of the ECtHR on the national *ne bis in idem* principle and that it accepts the principle of taking into account, the *Anrechnungsprinzip*.

Finally, the principle of transnational *ne bis in idem* only comes into effect in the European Union. This means that a firm can be penalised twice over for infringing different regulations on competition, for example by regulatory authorities in the USA and in Europe[24].

The *ne bis in idem* rule can be of importance in other sectors in which the EC has sanctioning power, e.g. within the area of European public procurement.[25] The EC has also harmonized sanctioning regimes in the Member States. The package on the protection of the financial interests of the EC is a good example. Member States have to impose administrative and criminal sanctions for irregularities and fraud. Article 6 of regulation 2988/95[26] provides for suspension of national administrative enforcement during criminal proceedings. However, the administrative proceedings must be resumed when the criminal proceedings are concluded and the administrative authority must impose the prescribed administrative sanctions, including fines. The administrative authority may take into account any penalty imposed by the judicial authority on the same person in respect of the same facts. It is obvious that these provisions do not reflect the full effect of the *ne bis in idem* principle. Article 6 provides only that the reopening of the administrative proceedings after the criminal proceedings can be precluded by general legal principles. The *ne bis in idem* principle should bar such reopening if the same persons and the same facts are involved, but the regulation does not mention this explicitly.

The Corpus Juris[27] on European Criminal Law does not provide for a specific transnational *ne bis in idem* provision, but deals with the problem in Article 17 in the framework of concurring incriminations, as far as double criminal sanctioning is concerned, and imposes the accounting principle in case a criminal sanction is imposed after an administrative sanction.

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[24] Case nº T-223/00, Kyowa Hakko Kogyo Co, sentence of 9th July, 2003, nyr.

[25] Regulation 1605/2002, Arts. 93–96, OJ L 248, 16/09/2002, p. 0001–0048 and Regulation 2342/2002, Art. 133, OJ L 357, 31/12/2002, p. 0001–0071.

[26] Regulation 2988/95, OJ L 312, 23/12/1995, p. 0001–0004.

[27] *Mireille Delmas Marty – J.A.E. Vervaele* (eds): The Implementation of the Corpus Juris in the Member States, vol. 1–4, Intersentia, Antwerpen Groningen, Oxford 2000-2001, 394 p.

Finally, another way of regulating the problem is not to consider double prosecution at a transnational level. Transnational consultation procedures are more than necessary. Certain EU instruments provide for a consultation between Member States and give priority to some criteria of jurisdiction[28]. The need for coordination of judicial action in the EU has led to the creation of Eurojust, which among other matters is authorised to coordinate judicial investigations in order to avoid conflicts of jurisdiction and problems relating to the *ne bis in idem* principle. However, Eurojust[29] has to request a decision from Member States, and the authority of Eurojust is limited to the most serious crimes.

The *ne bis in idem* as the beginning of the development of general principles in the field of freedom, security and justice: the *Gözütok and Brügge* judgements of the ECJ

The CISA has been an important landmark for the establishment of a multilateral treaty-based international *ne bis in idem*. The interpretation of the Schengen *acquis* in the field of *ne bis in idem* has provided the ECJ with its first opportunity to pronounce on the third pillar, the legal nature of its rights and the general principles that are applicable.

In the joined cases of *Gözütok and Brügge*[30], the national courts referred to the ECJ for a preliminary ruling under Article 35 EU on the interpretation of Article 54 of the CISA, raising interesting questions on the validity and the scope of an essential principle in the field of human rights, the *ne bis in idem* principle in the EU/Schengen context. As this was a landmark case, we will move on to analyse it in greater detail below, focusing on the transnational dimension.

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[28] See, for example, art. 7(3) of the Decision Framework 2000/383/JAI on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro, OJ of 14.6.2000 L 140/1 and art. 3 of the Proposal for a Framework Decision concerning the application of the principle of *ne bis in idem*, D.O. 2003 C 100/12.

[29] Council Decision of 28th February, 2002, OJ 2002, L 63/1.

[30] Judgement of the Court of Justice, 11th February, 2003 in joined-cases C-187/01 and C-385/01 (Request for a preliminary ruling from *Oberlandesgerich Köln* and *Rechtbank van eerste aanleg te Veurne*): *Hüseyin Gözütok* (Case C-187/01) and *Klaus Brügge* (Case C-385/01), (2003) ECR I-5689.

Facts of the case

Mr Gözütok, a Turkish national who had lived in the Netherlands for several years, was suspected of the possession of illegal quantities of soft drugs. In the course of searches of his coffee-and teahouse in 1996, the Dutch police did indeed find several kilos of hashish and marijuana. The criminal proceedings against Mr Gözütok were discontinued because he accepted a so-called "*transactie*" proposed by the Dutch Public Prosecutor's Office (agreement offered by the Justice Ministry in the context of the abatement of a public prosecution), as provided for in Article 74(1) of the Dutch Criminal Code: 'The Public Prosecutor, prior to the trial, may set one or more conditions in order to avoid criminal proceedings for serious offences, excluding offences for which the law prescribes sentences of imprisonment of more than six years, and for lesser offences. The right to prosecute lapses when the conditions are met. Mr Gözütok paid the proposed sums of NLG 3 000 and NLG 750. Mr Gözütok subsequently drew the attention of the German authorities after a notification of suspicious transactions by a German Bank to the German financial intelligence unit, which had been set up in the framework of the EC obligations against money laundering.[31] The German authorities obtained further information concerning the abovementioned offences from the Dutch authorities and decided to arrest Mr Gözütok and to prosecute him for dealing in narcotics in the Netherlands. In 1997, the District Court of Aachen (*Amtsgericht Aachen*) in Germany convicted Mr Gözütok and sentenced him to a period of one year and five months' imprisonment, suspended on probation. Both Mr Gözütok and the Public Prosecutor's Office appealed. The Regional Court of Aachen (*Landgericht Aachen*) discontinued the criminal proceedings brought against Mr Gözütok inter alia on the ground that under Article 54 of the CISA, the German prosecuting authorities were bound by the definitive discontinuance of the criminal proceedings in the Netherlands. In a second appeal by the Public Prosecutor's Office to the Higher Regional Court (*Oberlandesgericht Köln*), the Court decided to stay the proceedings and refer the matter to the ECJ for a preliminary ruling on the basis of Article 35 EU Treaty.

Mr Brügge, a German national living in Germany, was charged by the Belgian prosecution authorities with having intentionally assaulted and

[31] Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering, OJ L 166, 28/6/1991, p. 0077–0083.

wounded Mrs Leliaert in Belgium, which constituted a violation of several provisions of the Belgian Criminal Code. Mr Brügge faced a double criminal investigation, one in Belgium and another in Germany. In the Belgian criminal proceedings, the District Court (*Rechtbank van eerste aanleg te Veurne*) had to deal with both the criminal and civil aspects of the case, due to the fact that Mrs Leliaert, who became ill and unable to work because of the assault, claimed pecuniary and non-pecuniary damages as a civil party. In the course of the proceedings before the District Court of Veurne in Belgium, the Public Prosecutor's Office in Bonn in Germany offered Mr Brügge an out-of-court settlement in return for payment of DEM 1 000, in line with Section 153a in conjunction with Paragraph 153(1), second sentence, of the German Code of Criminal Procedure. The District Court of Veurne decided to stay the proceedings and refer the question to the ECJ for a preliminary ruling on the basis of Article 35 EU Treaty.

Legal background and the preliminary questions

In the *Gözütok* case, the German Higher Regional Court referred the following questions to the ECJ for a preliminary ruling: "Is there a bar to prosecution in the Federal Republic of Germany under Article 54 of the Schengen Implementation Convention if, under Netherlands law, a prosecution on the same facts is barred in the Netherlands?" In particular, "is there a bar to prosecution where a decision by the Public Prosecutor's Office to discontinue proceedings after the fulfilment of the conditions imposed (*transactie* under Netherlands law), which under the law of other Contracting States requires judicial approval, bars prosecution before a Netherlands court?" The Belgian District Court referred the following question to the ECJ for a preliminary ruling: "Under Article 54 of the Schengen Implementation Convention is the Belgian Public Prosecutor's Office permitted to require a German national to appear before a Belgian criminal court and be convicted on the same facts as those in respect of which the German Public Prosecutor's Office has made him an offer, by way of a settlement, to discontinue the case after payment of a certain sum, which was paid by the accused?" Given the similarity of the substance of the questions, the cases were joined and examined together.

The opinion of the Advocate General D. Ruíz-Jarabo Colomer

The AG stuck to a strict interpretation of Article 35 (1) TEU, which precludes any view on the application of the *ne bis in idem* principle to the case pending before the national court or with regard to the discontinuance of the criminal action. For this reason the AG declared that the ECJ had to disregard the terms in which the German Higher Regional Court formulated the first of its questions. For that reason the AG reformulated all the preliminary questions into two interpretative questions:

> "1. The first is whether the *ne bis in idem* principle stated in Article 54 of the Convention also applies when in one of the signatory States a criminal action is extinguished as the result of a decision to discontinue proceedings, taken by the Public Prosecutor's Office once the defendant has fulfilled the conditions imposed on him.
>
> 2. If the reply to the above question is positive, the German court wonders whether it is necessary for the decision taken by the Public Prosecutor's Office to be approved by a court."

The AG qualifies Article 54 as a genuine expression of the *ne bis in idem* principle in a dynamic process of European integration. It is not a procedural rule but a fundamental safeguard, based on legal certainty and equity, for persons who are subject to the exercise of *ius puniendi* in a common area of Freedom, Security and Justice. He also is of the opinion that the *ne bis in idem* principle is not only applicable within the framework of one particular legal system of a Member State. A strict application of national territoriality is incompatible with many situations in which there are elements of extra-territoriality and in which the same act may have legal effects in different parts of the territory of the Union. On the other hand the *ne bis in idem* rule is also an expression of mutual trust of the Member States in their criminal justice systems. In the same way as the Dutch "*transactie*", the penal settlement is not of a contractual nature, but rather an expression of criminal justice. They do exist in many national legal orders, they are a form of administering justice, which protects the rights of the accused and culminates in the imposition of a penalty. Since the rights of the individual are protected, it is irrelevant whether the decision to discontinue the criminal action is approved by a court. A verdict is given on the acts being judged and on the guilt of the perpetrator. It involves the delivery of an implicit final decision on the conduct of the accused and the imposition of penalising measures. The rights of the victims are not affected, while they are not

barred from claiming compensation. The phrasing of the provision in Article 54 concerning *res judicata* is, in the opinion of the AG, not homogenous in the various language versions (finally disposed, *rechtskräftig abgeurteilt*, *onherroepelijk vonnis*, *définitivement jugée*, *juzgada en sentencia firme*…). Member States do not agree on this point. France, Germany and Belgium are in favour of a restrictive interpretation limited to court decisions; the Netherlands and Italy, joined also by the European Commission plead in favour of a more extensive interpretation, including out-of-court judicial settlements. The AG underlines that the terms used by the various versions are not homogeneous and that a strict interpretation, limited to court judgments, may have absurd consequences that are contrary to reason and logic. Two persons suspected of the same offence could face a different application of the *ne bis in idem* principle if the one is acquitted in a final judgement and the other accepts an out-of-court settlement.

The AG concludes: "The *ne bis in idem* principle stated in Article 54 of the Convention implementing the Schengen Agreement on the gradual abolition of checks at the common borders also applies when criminal proceedings are discontinued under the legal system of one Contracting Party as the consequence of a decision taken by the Public Prosecutor's Office, once the defendant has fulfilled certain conditions – and it is irrelevant whether that decision has to be approved by a court – provided that: 1. the conditions imposed are in the nature of a penalty; 2. the agreement presupposes an express or implied acknowledgement of guilt and, accordingly, contains an express or implied decision that the act is culpable; and 3. the agreement does not prejudice the victim and other injured parties, who may be entitled to bring civil actions."

The reasoning and interpretative answer of the Court[32]

The ECJ not only followed the rephrasing of the preliminary questions by the AG, but also subscribed to his main arguments. The discontinuation is due to a decision of the Public Prosecutor's Office, being part of the admin-

[32] For other comments in literature see *Markus Rübenstahl – Ute Krämer*, European Law Reporter 4/2003, 177–185; *Klaus Adomeit*, NJW, 2003, 1162–1164; *Maria Fletcher*, The Modern Law Review, 2003, 769–780; *Oliver Plöckinger*, Österreichische Juristenzeitung, vol 58, 2003, 98–101; *Nadine Thwaites*, Revue de Droit de l´Union Européenne, vol 1, 2002, 295–298; *Joachim Vogel*: Europäisches *ne bis in idem*, EuGH, NJW, 2003, 1173

istration of criminal justice. The result of the procedure penalises the unlawful conduct, which the accused is alleged to have committed. The penalty is enforced for the purposes of Article 54 and further prosecution is barred. The ECJ considers the *ne bis in idem* principle as a principle having proper effect, regardless of matters of procedure or form, such as the approval by a court. In the absence of an express indication to the contrary in Article 54, the principle of *ne bis in idem* must be regarded as sufficient to apply. The area of freedom, security and justice implies mutual trust in each other's criminal justice systems. The validity of the *ne bis in idem* principle is not dependent upon further harmonisation.

The arguments of Germany, Belgium and France that the wording and the general schema of Article 54, the relationship between Article 54 and Articles 55 and 58, the intentions of the Contracting Parties and certain other international provisions with a similar purpose, preclude Article 54 from being construed in such a way as to apply to procedures barring further prosecution in which no court is involved, fail to convince the ECJ. The ECJ does not find any obstacle in Articles 55 and 58 and considers irrelevant the intentions of the Contracting Parties, since they predate the integration of the Schengen *acquis* into the EU. Concerning the Belgian Government's argument of possible prejudice to the rights of the victims, the ECJ follows the Opinion of the AG, underlining that the victim's rights to bring civil actions is not precluded by the application of the *ne bis in idem* principle.

For these reasons the ECJ ruled that the *ne bis in idem* principle, laid down in Article 54 of the CISA "also applies to procedures whereby further prosecution is barred, such as the procedures at issue in the main actions, by which the Public Prosecutor of a Member State discontinues criminal proceedings brought in that State, without the involvement of a court, once the accused has fulfilled certain obligations and, in particular, has paid a certain sum of money determined by the Public Prosecutor".

Evaluation of the Gözütok and Brügge judgements of the ECJ

With the entry into force of the Treaty of Amsterdam in May, 1999, the EU was much more aware of the need for a transnational *ne bis in idem* principle in the area of Freedom, Security and Justice. The provisions of international treaties relating to this principle were very different and their appli-

cation in each Member States varies greatly. Point 49(e) of the Action Plan of the Council and the Commission on the implementation of the area of Freedom, Security and Justice[33] provides that measures will be established within five years of the entry into force of the Treaty 'for the coordination of criminal investigations and prosecutions in progress in the Member States with the aim of preventing duplication and contradictory rulings, taking account of better use of the *ne bis in idem* principle'. In the Programme of measures to implement the principle of mutual recognition of decisions in criminal matters,[34] the *ne bis in idem* principle is included among the immediate priorities of the EU and reference is *inter alia* made to the problem of out-of-court settlement. In effect it became clear, also through national case law, that national courts were experiencing problems with transactions and the application of the Schengen provisions on the transnational *ne bis in idem* principles. In fact, it had been made quite clear in national case-law that national judges had problems with the Dutch style of *transactie* and the application of the Schengen regulations on the transnational *ne bis in idem*. In the meantime, the relevant Schengen *acquis* were brought in and are now in force, not as domestic governmental regulations though but as rules that are integrated into the third pillar in the field of freedom, security and justice. This means that the Tampere Conclusions of the Special European Council[35] that define mutual recognition as a cornerstone of judicial cooperation in criminal matters apply to the latter Schengen regulations.

The ECJ explicitly states that the area of freedom, security and justice implies mutual trust in the other criminal justice systems, and that the validity of the *ne bis in idem* principle is not dependent on further harmonization. The ECJ also considers that the intentions of the Contracting Schengen Parties are no longer of value, as they predate the integration of the Schengen *acquis* in the EU. Although the CISA was fundamentally linked to the internal market and to the four freedoms, it was an intergovernmental instrument.

This is as such remarkable, since the Dutch proposal[36] at the time of the drafting of Article 54 to include out-of-court transaction settlements was

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[33] OJ C 19, 23.01.1999.

[34] OJ C 12, 15.01.2001.

[35] Tampere Conclusions, 15th and 16th October, 1999, http://ue.eu.int.

[36] As provided for under Art. 68(3) of the Dutch Criminal Code.

rejected. The intention of the Contracting Parties to exclude transactions from the *ne bis in idem* principle was clear. However, the integration of the Schengen provisions in the EU, based upon the decision of the IGC and ratified by the national authorities not only changed the conceptual framework of these provisions, but also their meaning and effect. A parallel can be drawn here with the general principles of Community law in the internal market. Community loyalty and non-discrimination, for example, influenced the meaning and effect of several national criminal provisions, without taking into account the intentions of the national legislator.

It is typical of an integrated legal order such as the EC that the conceptual framework of integration interferes with national sovereignty, also in respect of cooperation and transnational aspects.[37] What happened during the process of market integration in the EC is now repeated in the process of justice integration in the EU. Rights and remedies for the market citizen are transformed into rights and remedies for the Union citizen. National decisions, including criminal decisions, can have an EU-wide effect in a new setting of European territoriality. This is also what makes the European integration process so different from the dual sovereignty in the USA, where the constitutional double jeopardy does not bar double prosecution in several states. When a defendant in a single act violates the 'peace and dignity' of two sovereign powers by breaking the laws of each, in the USA, he has committed two distinct offences[38] with two different values to protect. In the EU we have a single area of Freedom, Security and Justice and an integrated legal order in which full effect should be given to fundamental standards.

However, with this decision the ECJ did not solve all the problems of the *ne bis in idem* principle. As mentioned above, the interpretation of the term final judgment is only one of the problem points. The ECJ points out in the joined case on *ne bis in idem* that it "*also applies to procedures whereby further prosecution is barred, such as the procedures at issue in the main actions, by which the Public Prosecutor in a Member State discontinues, without the involvement of a court, a prosecution brought in that State once the accused has fulfilled certain obligations and, in particular, has paid a certain sum of money determined by the Public Prosecutor*" a wording that

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[37] See e.g. Judgment of the Court of 2 February 1989. *Ian William Cowan* v. *Trésor public*. Case 186/87, ECR 1989, p. 00195.

[38] *Heath* v. *Alabama*, 474 U.S. 82 (1985).

is much wider than the formula used by the AG who spoke of conditions with the nature of a penalty, the decision of guilt and no prejudice to victims. More concretely, the question is whether procedural agreements, such as plea bargaining or full or partial immunity deals for collaboration with the law enforcement authorities fall under the scope of the *ne bis in idem* principle? In some countries these deals can be connected to an out-of-court settlement in the form of a transaction. Another problem is the full application of the *ne bis in idem* rule if the first proceedings were conducted for the purpose of shielding the person concerned from criminal responsibility. Under which conditions can the *ne bis in idem* be set aside and by whom?

With the *Gözütok and Brügge* case on the agenda it was foreseeable that in the absence of European legislative the ECJ would receive other preliminary questions on the interpretation of the *ne bis in idem* principle. Preliminary questions might be expected on the scope of the principle as well as on the definition of *idem* and of *bis*. In that light it is important to underline that a couple of days after the ECJ ruling in the *Gözütok and Brügge* case, Greece submitted a proposal for a framework decision on *ne bis in idem*[39] with the aim to establish common legal rules in order to ensure uniformity in both the interpretation of those rules and their practical implementation. The framework decision would replace Articles 54–58 of the CISA. The proposal defines criminal offences (Article 1) as offences *sensu strictu* and administrative offences or breaches punished with an administrative fine on the condition that they may be appealed before a criminal court. Judgments also include any extra-judicial mediated settlements in criminal matters and any decisions which have the status of *res judicata* under national law shall be considered as final judgments. Article 4 provides for exceptions to the *ne bis in idem* principle if the acts to which the foreign judgment relates constitute offences against the security or other equally essential interests of that Member State or were committed by a civil servant of the Member State in breach of official duties. It is a solid initiative, but its reach is rather too narrow. In fact, it is quite absurd to exclude punitive administrative sanctioning if they are not appealable before a criminal court, and equally so in the light of the ECtHR case law, even though it does fit in with the German tradition of administrative criminal law (*Ordnungswidrigkeiten*).

[39] Initiative of the Hellenic Republic with a view to adopting a Council Framework Decision concerning the application of the '*ne bis in idem*' principle, OJ C 2003 100/4.

The draft also contains far too many exceptions to the *ne bis in idem* rule. Finally, the draft does not deal with the applicability of the principle to legal persons. The discussions in the Council are underway but are quite difficult on several points, including the issues at stake in the *Gözütok and Brügge* case. The initiative was discussed in the Council of Ministers, but the multitude of divergent opinions between Member States rapidly brought to light the inviability of a legislative solution. Once again, it fell to the European Court of Justice to assume its praetorian role and fill the legal vacuum

The shower of preliminary questions on *ne bis in idem*

Judgement C-469/03, Miraglia:
there has to be a judgement of substance.

In the framework of a joint investigation between the Italian and the Netherlands authorities, Miraglia was arrested in Italy in the year 2001. He was accused of having organised the transport of 20 kilos of heroin from the Netherlands to Bologna. In 2002, the court of Bologna revoked all detention orders. At the same time, the judicial authorities in the Netherlands instigated a criminal investigation against Miraglia for the same facts. In 2001, the Netherlands prosecutor's office decided not to pursue the action against the accused. It was clear to the ECJ that this decision was taken because criminal proceedings had been initiated against him in Italy for the same facts. That is to say, the decision of the Netherlands authorities resolved a positive conflict of jurisdiction in favour of the Italian jurisdiction.

The Prosecutor's office of Bologna then requested judicial assistance in criminal matters. The request was denied by the authorities in Amsterdam, based on the reservation formulated by the Netherlands to art. 2 (b) of the European Convention on Judicial Assistance, as the Netherlands had decided that "to close the case without imposing any penalty". The Netherlands judicial authorities added that any request for judicial assistance would be turned down on the basis of article 54 of the CISA.

The aforementioned reservation of the Netherlands is formulated as follows: "The Kingdom of the Netherlands has formulated the following reservation concerning Article 2(b) of the European Convention on Mutual Assistance: 'The Government of the Kingdom of the Netherlands reserves

the right not to grant a request for assistance; (b) in so far as the request concerns a prosecution or proceedings incompatible with the principle *ne bis in idem*'."

Furthermore, article 255 of the Netherlands criminal code foresees in its first section: "Where a case does not proceed to judgment, (…) no further proceedings may be taken against the defendant in respect of the same acts, unless new evidence is brought forward."

The Tribunal of Bologna decided to stay the proceedings and submit the following preliminary question to the European Court of Justice: "Must Article 54 of the CISA apply when the decision of a court in the first State consists of discontinuing the prosecution without any adjudication on the merits of the case and on the sole ground that proceedings have already been initiated in another State?"

According to the ECJ, the decision of the Netherlands prosecutor's office cannot be considered a decision finally disposing of the case against that person within the meaning of article 54 of the CISA, as it has been taken only on the ground that criminal proceedings have been initiated in another Member State against the same accused and for the same facts and without there having been any substantive determination with regard to the merits of the case.

It is clear that the ECJ requires a determination of the merits in order to qualify a decision of the public prosecutor as a decision that finally disposes of the case. In this case, the ECJ could have been firmer. In fact, it is not a question of a classic dismissal of the criminal action, but of a decision that resolves a positive conflict of jurisdiction. It could have used the case to set out obligations in that respect, with regard to both the resolution of the jurisdictional conflicts and the obligations of mutual assistance.

Judgement C-150/05, Van Straaten: Acquittal due to lack of evidence

Van Straaten was prosecuted in the Netherlands, in the first place, for having imported a quantity of about 5 kilos of heroin from Italy to the Netherlands, in second place, for holding a quantity of approximately 1 kilo of heroin in the Netherlands, and, in third place, for possession of firearms and ammunition. Van Straaten was acquitted in 1983 of the first accusations by the district court of 's-Hertogenbosch (*Arrondissementsrechtbank te 's-Hertogenbosch*), which considered that this fact had not been legally and satis-

factorily proven, in other words, due to lack of evidence and with regard for the principle *in dubio pro reo*. However, van Straaten was prosecuted in Italy, along with other people, for having exported a quantity of 5 kilos of heroin to the Netherlands on various occasions, through an *in absentia* sentence in 1999 dictated by a court in Milan. Based on this sentence and on an arrest warrant issued by the public prosecutor of Milan in 2002, the Italian judicial authorities placed a description in the Schengen Information System (SIS) for the detention of van Straaten and his subsequent extradition. The Netherlands added a reservation to the SIS description, in accordance with section 95 (3) CISA, such that the arrest could not be made on its territory. Van Straaten was informed of the SIS description in 2003 and requested the Netherlands police to delete it. This request was refused by the Netherlands police as it was not the issuing authority. In application of art. 111 of the CISA, a Netherlands judge was required to take cognizance of the case. Italy was obliged to execute the definitive decision of the Netherlands judge, but the latter harboured doubts over the interpretation of art. 54 of the CISA, with respect to the definition of *idem* as well as with regard to the effects of the acquittal due to lack of evidence in relation to *ne bis in idem*.

Reference to point 6.2 (*cfr.infra*) may be made for the definition of *idem*. With regard to the second question, the Netherlands judge asked if the *ne bis in idem* principle is applicable to a decision by the judicial authorities of a contracting State in which a defendant is acquitted due to lack of evidence. The ECJ responds in the affirmative, making reference to the principles of legal safety and legitimate trust and the right to free circulation in the area of freedom, security and justice.

The definition of idem and the decision criteria: judgements Van Esbroeck (*C-436/04*)*, Van Straaten* (*C-150/05*)*, Gasparini* (*C-467//04*)*, Kretzinger* (*C-288/05*) *and Kraaijenbrink* (*C-367/05*)

The ECJ has had to respond to many questions relating to the definition of *idem*. The first case was that of *van Esbroeck*. Van Esbroeck, a Belgian citizen was convicted by a court in Norway when the Schengen agreement had still not come into force in that country, as the author of a crime of illegal importing narcotic drugs. Having served half of the sentence he was freed on parole and returned to Belgium where he was accused of having exported the substances to Norway. In both cases it was a question of trans-

port of the same drugs. A petition for a preliminary ruling was presented by the Belgian High Court: Can art. 54 of the CISAS be applied when a person is prosecuted for a second time for the same facts if the first conviction took place in a Member state when that provision was yet to come into force? The ECJ upheld the possibility of applying the *ne bis in idem* principle provided that it was in force in the contracting States at the time of the assessment of the requirements for the application of the latter principle by the court dealing with the second proceeding. It may therefore be said, then, that the ECJ opted for the application *ec nunc* and not *ex tunc*. Of greater importance is the response of the ECJ on *idem*. It clearly favours the *idem factum* criteria: " the relevant criterion for the purposes of the application of that article [54 CAAS] is identity of the material acts, understood as the existence of a set of facts which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected". The punishable facts consisting of exporting and importing the same narcotic drugs and under prosecution in different contracting States of the CISAS should, therefore, be considered in principle as the same facts. However, the ECJ underlines that the definitive assessment, in particular, will correspond to the competent national courts.

The decision to opt for *idem factum* instead of *idem iure* (the legal qualification or the protected legal rights) was thrown into doubt by the advocate general, Eleanor Sharpston, in the *Gasparini* case. The shareholders and administrators of the company, Minerva, agreed to import refined olive oil through the port of Setúbal (Portugal) from Tunis and Turkey, without making the required customs declaration and set up a system of false bookkeeping in an attempt to show that the oil came from Switzerland. The merchandise was subsequently transported in lorries from Setúbal to Málaga in Spain. In Portugal, a prosecution for community fraud took place, which was time-barred, and subsequently a prosecution in Spain for smuggling.

The AG Sharpston, with wide experience in community matters, including the field of free trade, perceived two areas of friction in the case-law of the ECJ relating to the *ne bis in idem* principle. She criticised the ECJ for congratulating itself on applying the *ne bis in idem* principle when "identity of the material facts" exists and not requiring "unity of the legal interest protected". The second criticism is much more fundamental and interesting. The AG inists on a coherent application of *ne bis in idem* (in community law and the law of the third pillar), underlining that the ECJ requires, in

order to apply *ne bis in idem*, a triple requirement: identity of the material facts, unity of the offender and unity of the protected legal interest".

However, the ECJ did not change its opinion and reaffirmed in the *Kretzinger* case the criterion of *idem factum* developed in the *Van Esbroeck* case. Kretzinger transported cigarettes from non-EU member states, from Greece to Great Britain, through Italy and Germany, without of course making any customs declaration. Kretzinger was convicted for the first and second trip by a court in Italy (a judgement in contumacy) as well as by a court in Germay. The German court considered that the two firm sentences pronounced in Italy had still not been executed, for which reason there was no procedural obstacle under art. 54 CAAS. On the definition of *idem*, the ECJ clearly stated that "the relevant criterion for the purposes of the application of that article [art. 54 of the CISA] is identity of the material acts, understood as the existence of a set of facts which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected".

The definition of *idem* is also covered in the *Kraaijenbrink* judgement. Mrs. Kraaijenbrink was convicted in the Netherlands of various crimes of receiving the proceeds of drug trafficking. On the one hand, a Belgian court in the city of Ghent, convicted him of the same facts, but legally qualified as financial exchanges made with the same money in Belgium. The ECJ reaffirms the definition of *idem* applied in the *van Esbroeck* case and underlines that the mere fact that the competent national judicial organ confirms that the facts in question are linked to each other by a single criminal intention is not in itself decisive for the definition of *idem*. However, the rule in art. 54 of the CISA is a minimum standard. The contracting States are free to guarantee greater protection.

It is clear that the ECJ is not searching for unity of case-law between community law and the law built up around the third pillar in this context, but a consistent criteria that guarantees the free circulation of people in the area of freedom, security and justice and respect for human rights. Sharpston, who was also the advocate general for the *Kretzinger* and *Kraaijenbrink* cases, did not stress coherence between community law and the law of the third pillar any further and took up the criterion of *idem factum* from *van Esbroeck*, as was confirmed by the ECJ.

Can acquittal because the offence is time-barred be considered as an idem: *Gasparini (C-467/04)?*

In the *Gasparini* case, the ECJ shows itself to be very aware of the essential differences between the procedural rights of the Member States. It is true, states the ECJ, that the legislation of the States in the field of limitation periods have not been harmonised. Nevertheless, neither the treaty, nor art. 54 of the CISA make the application of *ne bis in idem* conditional upon the requirement that the States harmonise their legislation. The ECJ points out that it must be added that the *ne bis in idem* principle necessarily implies the existence of mutual trust between the States. On these grounds, the ECJ declares the *ne bis in idem* principle in art. 54 of the CISA to be applicable to the decision of a court in a contracting State, dictated after having brought the criminal proceedings, by virtue of which a defendant is acquitted finally because the offence that caused the criminal prosecution is time-barred.

This sentence is surprising in some ways. In fact, it is not a matter here of an acquittal following a judgement on the merits of the case. It is in reality a question of a procedural grounds that bar prosecution. In this sense, it would have been more logical to refer to the content of the *ne bis in idem* principle. Traditionally, as stated in the opening paragraph of this article, a distinction is made between *nemo debet bis vexari pro una et eadem causa* (no one should have to face more than one prosecution for the same offence) and *nemo debet bis puniri pro uno delicto* (nobody ought to be punished twice for the same offense). A *ne bis in idem* applicable to a time-barred prosecution has a much stronger link with *ne bis vexari* than with *ne bis puniri*. It is surprising that neither the AG nor the Court had studied whether the *ne bis in idem* of art. 54 of the CISA also includes the *ne bis in idem vexari*. They have limited themselves to dealing with the time-barred aspect of the criminal action in the context of a judgement considered *idem factum*. In my opinion, it is a mistaken path to follow.

Firm judgement and execution of the penalty: Kretzinger (C-288/05)

Is it to be understood that a sentence has been executed or is being executed if the prison term has been conditionally suspended? And, what happens if the accused has been held on remand or in custody? Can this also be considered as the execution of a sentence? The *Kretzinger* case has assumed

importance, given that Germany considered that Italy had suspended the prison sentence and had taken no steps to arrest and surrender the person convicted *in absentia*. The ECJ considers that the penalty imposed by the court of a contracting State ”has been enforced” or ”is being enforced” when, in application of the right of the latter contracting State, the defendant has been sentenced to a prison term the execution of which has been suspended. However, it should not be thought that the penalty that is imposed ”has been enforced” or ”is being enforced” when the defendant has been held on remand for a short time, and when, according to the law of the State enforcing the sentence, the length of time on remand should count towards the subsequent enforcement of the prison sentence, given that it concerned an arrest that took place at some point before the judgement was delivered.

Conclusion

The rapid drafting of legal instruments in the field of JHA, in order to reinforce the efficacy of criminal justice in European territory (the European arrest warrant and surrender procedures, the European warrant on the freezing of assets and evidence, the European warrant on confiscation of crime-related proceeds, the European evidence warrant, the European warrant on the execution of sanctions and the proposed European warrants on the table), as much as to increase the legal protection of the citizens (the framework decision for the protection of victims of crime, the framework decision on the protection of private life in the third pillar and the proposed framework decision on procedural guarantees for suspects and defendants in criminal proceedings throughout the European Union), makes it clear that the ECJ will have a lot work in the near future to lay down the guiding principles of criminal justice in the European judicial area in criminal matters. The set of judgements on *ne bis in idem* is simply the start of the important role of the ECJ in the area of European criminal justice. It also underlines the important interaction between national courts and the ECJ in the preparation of the general principles of law of the Union. For this reason, it is important that all the contracting States recognise the jurisdiction of the ECJ in order to interpret the law of the ”Third Pillar” and not to limit it (as Spain does) to courts of the last instance. Furthermore, in this respect it is also important that no States decide to opt out.

The praetorian approach to the interpretation of *ne bis in idem* also illustrates that a real need exists to ratify the Reform Treaty Project including the Charter of Fundamental Rights (CFR)[40], as a binding text. The CFR refers to the ECHR as a minimum standard and in accordance with the Reform Treaty Project, the EU could also be part of the ECHR. The scope of article 50 CFR[41] relating to *ne bis in idem* is totally transnational in the EU, but its scope of application is disappointing due to the literal tone of the text: "No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law". Overly stressing the criminal procedures, this wording is not at all in line with current ECtHR case law. Moreover, the provision appears to allude only to final judgements.

In a common area of freedom, security and justice based on mutual trust, it is necessary to draw up objective critera in order to resolve positive conflicts of jurisdiction and to avoid as much as possible *ne bis in idem* situations. For this reason, the European Commission has drafted a green paper on conflicts of jurisdiction and the *ne bis in idem* principle on criminal procedures[42]. The European Commission stress the relation between conflicts of jurisdiction and *ne bis in idem*. Without objetive rules on positive conflicts of jurisdiction, *ne bis in idem* has a perverse consequence: whoever is first to exercise jurisdiction has priority. *Ne bis in idem* does not lose value, in situations that are not covered and not resolved by criteria for the resolution of conflicts of jurisdiction. For this reason, the Green Paper proposes the drafting of a Framework Decision, based on article 31 TEU, that will replace articles 54–58 of the CISA. However, the Commission wishes to limit it to a general definition, leaving the ECJ with enough room to develop the principle. Furthermore, it is necessary to draw up a horizontal approach on *ne bis in idem* in the instruments on mutual recognition (Eurowarrants). At present, *ne bis in idem* is a reason for obligatory or facultative

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[40] Drawn up in Nice, 7th December 2000, but not legally binding.

[41] Council of the European Union, Charter of Fundamental Rights of the European Union – Explanation relating to the complete text of the Charter, December 2000, available in English http://ue.eu.int/df/docs/en/EN_2001_1023.pdf (accessed 5/12/07).

[42] COM (2005) 696 final and Commission Staff working document SEC (2005) 1767. See *Martin Wasmeier – Nadine Thwaite*: The development of ne bis in idem into a transnational fundamental right in EU law: comments on recent developments, European Law Review, 2006, 565–578.

non-execution, according to the instrument. It would have to be a reason for obligatory non-execution in all instruments, based on the common definition of the framework decision. With regard to the content of the principle, the Commission relies fundamentally on the case-law built up by the ECJ. Bearing in mind the consultations on Green Paper and the discussions with experts, the European Commission considers the preparation of Framework Decision on this matter, politically speaking, to be inviable.

In contrast with the disagreement between the experts at the Ministries of Justice, the academic experts have been able to reach agreement. The Max Planck Institute of foreign and international criminal Law has brought together a group of experts in order to prepare the so-called Proposal of Friburg on Concurrent Jurisdiction and the Prohibition of Multiple Prosecutions in the EU[43]. The 2003 text refers to the prevention of multiple prosecutions at an international level through the imposition of *forum*/jurisdictional rules, the application of the transnational *ne bis in idem* and finally, as a security network, the application of the previously explained principle of 'taking into account'. With regard to the question of transnational *ne bis in idem*, it proposes a *ne bis in idem factum* law for natural and juridic persons. The *ne bis in idem* principle should be applied to all procedures and punitive sanctions, whether of an administrative or criminal nature, national or European. The text proposes using the expression "*finally disposed of*" instead of "*finally acquitted or convicted*". This terminology includes all decisions adopted by the prosecuting authorities that put an end to the procedures, such that it would only be possible to reopen a case in exceptional circumstances. This means, for example, that the German or Dutch extrajudicial agreements (*Einstellung gegen Auflagen, transactie*) and the French *ordonnance de non-lieu moitivée en fait* would be included in the definition of *ne bis in idem*. This proposal provides an excellent set of regulations *de lege lata*, both for the legislator and for the judge, and at a European as well as at a national level.

For the moment, the ECJ has drawn up an *ius comune* of *ne bis in idem*, considering it to be a fundamental transnational law in the area of freedom, security and justice. *Ne bis in idem* has moved from being a principle of

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[43] Http://www.iuscrim.mpg.de/forsch/straf/projekte/nebisinidem.html. See also *Albin Eser – Christoph Burchard*: Interlokales "ne bis in idem" in Europa? Von "westfälischem" Souveränitätsdpathos zu europäischem Gemeinschaftsdenken, in H.-J. Derra (Hrsg.), Freiheit, Sicherheit und Recht. Festschrift fúr Jürgen Meyer, Nomos, 2006, 499–524.

sovereignty or of the State that is strictly related to its territory and its *ius puniendi*, to being a human right of European citizens in a common judicial area. The question remains open as to the need to resolve conflicts of jurisdiction in a common area that is characterised by increasing transfrontier activity. It will be necessary to draw up criteria on the choice of jurisdiction and grant Eurojust or a future European Public Ministry authority for coordination and decision making in matters relating to conflicts of criminal jurisdiction.