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European Criminal Law and General Principles of Union Law

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1. Introduction: the ECJ and General Principles of Community Law

The European Court of Justice, partly followed in this by the European legislator, has regulated Community law and policy through a set of general principles of law. For the Community legal order in the first pillar, general legal principles have developed from functional policy areas such as the internal market, the customs union, the monetary union, the common agricultural policy, the European competition policy, etc., which are of great importance for the quality and legitimacy of Community law. The principles in question are not so much general legal principles of an institutional character, such as the priority of Community law, direct effect or Community loyalty, but rather principles of law which shape the fundamental rights and basic rights of the citizen. I refer to the principle of legality, of *nulla poena*, the inviolability of the home, the *nemo tenetur* principle, due process, the rights of the defence, etc. Many of these legal principles have been elevated to primary Community law status by the European Court of Justice, often as a result of preliminary questions. Nevertheless, a considerable number of them have also been elaborated in the context of contentious proceedings before the Court of Justice, such as in the framework of European competition law and European public servants law.

The European Court of Justice has introduced fundamental rights, including the legal guarantees in criminal and punitive law, into Community law by way of the general principles of Community law. Some of them have meanwhile also been consolidated by the legislator in primary and/or secondary Community law. Through this, the Court and the legislator have not only regulated the Community acts of the European institutions, but also the acts of the Member States in the application and enforcement of Community law.

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Given the fact that the enforcement in the Member States of much of Community law takes place by means of criminal law and/or punitive law, these principles also have a direct effect on national criminal law and/or punitive law.

The European Court of Justice has to a considerable extent been urged to its elaboration of the general principles of law and thus to the guaranteeing of a minimum level of fundamental rights protection by the case law of the Constitutional Courts and Councils of State in Italy, France and Germany, especially after the Court of Justice came to the conclusion in its decision in *Stork*² that Community law cannot be tested against national fundamental rights. The German *Bundesverfassungsgericht* considered that this undermined the national protection of fundamental rights and in *Solange I*³ declared itself competent to test secondary Community law against the fundamental rights contained in the German Constitution until such a time as the Community would have developed a catalogue of fundamental rights with an equivalent value to German fundamental rights

The Court of Justice has clearly understood the message and has filled the gap left by the lack of a catalogue of fundamental rights with case law by means of the general principles of Community law and has in this way managed to develop an equivalent standard to that prevailing in the Member States. For this reason, the German *Bundesverfassungsgericht* has reviewed its opinion in *Solange II*⁴ and has recognized the priority of Community law also over national fundamental rights, for as long as the level of built-up fundamental rights protection is at the least maintained.

2. The Third Pillar and the Position of the ECJ

Evidently, the third pillar presents a completely different picture. I say evidently, as the pillar structure was created as a political compromise after the failed attempts of a number of Member States to secure a specific position within the Community's integration policy for policy concerning justice, domes-

² ECJ, 4 February 1959, *Stork/High Authority*, (1959) ECR 17.

³ *Bundesverfassungsgericht* 25 July 1979, *BverfGE*, 37, 271 and *C.M.L.Rep.* 1974, 540.

⁴ *Bundesverfassungsgericht* 22 October 1986 (*Solange II*).

tic affairs, foreign affairs and security. First of all, the jurisdiction of the Court of Justice is not the same as within the first pillar. Only with great difficulty did the Court of Justice manage to secure a place in the European Union's third-pillar law. Upon the creation of the third pillar by the Maastricht Treaty the jurisdiction of the Court of Justice was still entirely optional. The Court of Justice could only obtain jurisdiction if a specific third-pillar Convention expressly provided for such jurisdiction. This resulted in a fragmented and ad hoc approach and in heated debate over each separate instrument. The issue at hand especially delayed the adoption of the third-pillar Convention concerning Europol, now that among others the Dutch Parliament threatened not to ratify the Convention if no jurisdiction of the Court of Justice was provided for. This political debate led to a compromise which formed the basis for the Court of Justice's jurisdiction under the Treaty of Amsterdam.

By now the Court of Justice does have the power to answer preliminary questions, although the power to submit such questions has in a number of Member States been limited to courts deciding in the final instance. Moreover, the Court of Justice has jurisdiction to review the legality of framework decisions and decisions, but only in actions brought by a Member State or the Commission. Several actions and remedies under Community law are not included in the EU, as for instance the action against EU institutions for failure to act, or the action against Member States for infringements of EU law, such as, for instance, for not implementing (in due time, or in substance) framework decisions. However, in sum it can be stated that the jurisdiction of the ECJ has been strengthened under the Treaty of Amsterdam, in such a way that the Court has sufficient room for manoeuvre to elaborate general principles of European Union law, awaiting the coming into force of the Constitutional Treaty. Moreover, the ECJ has already made a start with this process by deciding the first leading cases.⁵

Secondly, it can be stated that initially optional jurisdiction was somewhat understandable given the strongly intergovernmental character of the third pillar. However, ever since the entry into force of the Treaty of Amsterdam it is quite obvious that the third pillar is fully-fledged European Union law and thus

⁵ See *infra*, point 5.

subject to the particularities of European Union law insofar as these deviate from international law. In that sense it is quite surprising that in 2004 some Member States still argued before the Court of Justice that third-pillar law is intergovernmental law that is governed by international law and is therefore removed from the application of general principles of European Union law.⁶ It is to be expected that the Court of Justice will reject this line of reasoning and will elaborate some general legal European Union principles based on the Area of Freedom, Security and Justice.

Thirdly, the European Union has not – or rather: not yet – been given an ultimatum by the national judiciary. We are still awaiting decisions along the lines of *Solange*. That these have not yet emerged may be explained from the fact that before the entry into force of the Treaty of Amsterdam binding third-pillar law was restricted to Convention law. The framework decisions have given rise to an entirely different legal situation and even though the Treaty itself denies them direct effect, it is crystal clear that framework decisions, such as the one concerning the European arrest warrant, will give rise to constitutional court decisions in the Member States which could find themselves on a tense footing with the content of the framework decision and with the concept of mutual recognition which was developed into a key concept for judicial cooperation in the Tampere conclusions. Full mutual recognition presupposes '*reconnaissance de plein droit*', *ipso iure*. This leads to the prohibition of testing on the merits in the country of execution, makes an exequatur procedure unnecessary and considerably reduces the number of grounds for refusal. Mutual recognition presupposes mutual trust in each other's legal systems and legal acts. Mutual trust is associated with international or transnational comity and non-inquiry. The executive authorities do not ask questions concerning the legal quality of the requesting state or of the request. Legality and legitimacy are presupposed to exist *ipso iure* and are thereby removed from judicial testing in the requested state. It is true that in practice many new framework decisions for the implementation of the Tampere programme are based on mutual recognition, but in respect of their content they are still a compromise between the old, conventional

⁶ See *infra*, point 4.2, conclusions of AG J. Kokott in Case C-105/03, criminal proceedings against M. Pupino, No. 22.

approach to judicial cooperation and the new mutual recognition approach. Many compulsory and optional grounds for exception which provide room for the Member States to conduct a policy of their own are still built into the framework decisions. This room can of course also be used to bring national fundamental rights to the fore, especially in the area of the quality of criminal justice in the requesting state. This, too, might of course give rise to interesting legal disputes which may end up before the Court of Justice. If the Court of Justice is unable or not able in time to outline the general principles of law, a decision along the lines of *Solange* in the field of Justice and Home Affairs cannot be ruled out. In the transition to the Constitutional Treaty, and thus to the full jurisdiction of the ECJ, the ECJ will do everything in its power to bridge the gap.

3. Justice Integration: Effective and Fair Law Enforcement in the EU

In international law states still have difficulty accepting that individuals are subjects of international law, rather than mere objects of international law.⁷ It is even more difficult for them to accept that individuals have subjective rights deriving from human rights conventions, not only in the territory of each individual state, but also in the common area of the contracting states. To what extent are states really prepared to assume responsibility when they have effective control or when they exercise power and authority over persons? It is quite clear that under international law it is very difficult to establish a joint responsibility for human rights violations.

However, in a common Area of Freedom, Security and Justice, one might expect to find a political-legal project of a much more developed justice integration approach than in international law. Article 1(2) of the EU Treaty stresses the importance of the process of creating an ever closer union among the peoples of Europe. One could legitimately expect that in such a common judicial area at least the minimum norms of the ECHR and of ECtHR case law are fulfilled and that compliance in transnational relations is not limited to gross violations of human rights, as is the case with the European

⁷ See the contribution by A. Smeulers *supra*, p. ???

arrest warrant. In fact, the draft framework decision for the European evidence warrant does not even include a human rights clause at all. One should be able to expect that the ECHR is respected to the fullest possible extent, in such a way that the protection which is granted in the internal legal orders of the Member States is assimilated at the level of transnational relations and that no loss of legal guarantees therefore occurs for the citizen in transnational dealings. In practice, however, states qualify transnational acts of justice as governmental acts which are not subject to judicial testing and whereby they take mutual trust and non-inquiry as starting points, which has the consequence of creating a Delaware effect and considerably lowers the protection of fundamental rights in transnational relations.

For this reason, it is absolutely essential to break this pattern of non-inquiry and to insert a public order clause or human rights clause in the framework decisions, which permits the courts in the requested state to test the legality of the request.⁸ I expressly argue in favour of reserving this test for the courts, rather than to have it performed by the political authorities. This test does not have to lead to the reintroduction of the *exequatur* procedure and could take place by interlocutory or fast-track proceedings. Recently it proved possible for a request by the Spanish judicial authorities to the Belgian judicial authorities for the arrest and extradition of the Spanish married couple Garcia-Moreno to be heard up to three times in record time by the *Hof van Cassatie* [Supreme Court].

Why is this public order clause or human rights clause so important and why is it not superfluous in the case of mutual recognition? This is best illustrated by an example from private international law, the *Krombach/Bamberski* case.⁹ After having received medical treatment in Germany from Mr Krombach, a French girl died. In Germany, the case was dropped. However, the victim's family deposited a criminal and civil complaint against Mr Krombach in France. Both aspects were investigated by the French *juge d'instruction*. The French Court assumed jurisdiction on the basis

⁸ Cf. also A.H. van Hoek & M. Luchtman, 'The European Convention on Human Rights and transnational cooperation in criminal matters', in A.H. van Hoek et al., *Multilevel governance and one level citizen*.

⁹ A.H. van Hoek, Case C-7/98, *D. Krombach v. A. Bamberski*, Judgment of the Full Court of 28 March, (2000) ECR I-1395.

of the nationality of the victim. The accused doctor became afraid to travel to France for fear of being arrested. He appointed a barrister, but because of the accused's absence, the barrister was unable to play any role of significance in the French criminal procedure. The doctor was sentenced in absentia (*jugement par contumace*) to 15 years' imprisonment and by default to payment of considerable damages. The French authorities requested the German authorities to execute the civil law part of the judgment. This led to legal proceedings in Germany up to the level of the *Bundesgerichtshof* which submitted preliminary questions to the Court of Justice. The *Bundesgerichtshof* defined the right to a lawyer as an essential part of a fair trial and the absence of one as a violation of a substantial norm of German procedural law, to the extent that it belongs to the German *ordre public*. The question was, however, whether this national public order is acceptable under the public policy clause in Article 27(1) of the Brussels Convention. Although the ECJ stressed that the Convention uses a narrow concept of public policy, it did accept that it can be used, if the infringement constitutes a manifest breach of a rule of law regarded as essential in the legal order of the state in which enforcement is sought or of a right recognized as being fundamental within that legal order. The *Krombach* case clearly indicates that the Court of Justice has an express role to play in further defining the transnational protection of fundamental rights. This elaboration of the concept cannot just be left to the national judicial authorities, as this would invite the risk of fragmentation as well as the danger of undermining the common EU instruments by an overly broad, nationally orientated definition of the *ordres publics*. It is up to the Court of Justice to draw the outlines of a European concept of *ordre public*, based on the *material* violation of fundamental rights. In its development of this concept the Court will evidently make use of Article 8(2) EU. If the Constitutional Treaty enters into force, the Court can also make direct use of the Charter of Fundamental Rights. This reasoning also applies to the proposed European evidence warrant which, although limited to evidence in real time, includes coercive measures. Here, too, mutual recognition depends on judicial scrutiny, under the control of the ECJ.

4. Analysis of the Case Law of the Court of Justice

The Court of Justice has not awaited the entry into force of the Constitutional Treaty and will not await it further to start drawing some outlines. The Court of Justice is clearly of the opinion that EU law is based on institutional principles of its own which deviate from international law. The Court of Justice is also aware of the political and legal dimension of the European judicial area. Up to now, the case law has been quite limited, but it is still punctuated by considerations as to principles. Cases C-187/01 and C-385/01, *Hüseyin Güzütok and Klaus Brügge*, Judgment of the Court of Justice of 11 February 2003, ECR 2003, I-5689 and Case C-105/03, *Criminal Procedure against Maria Pupino*, deserve detailed discussion.

A. THE TRANSNATIONAL NE BIS IN IDEM PRINCIPLE IN THE EUROPEAN JUDICIAL AREA

4.1 *The ne bis in idem principle as regulatory instrument*

The *ne bis in idem* principle is a general principle of (criminal) law in many national legal orders, sometimes codified at constitutional level, like the double jeopardy clause in the Fifth Amendment of the US Constitution. The *ne bis in idem* principle has been historically elaborated as a principle that only applies nationally and is limited to criminal justice. Concerning the substance of the principle, traditionally 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* (no one should be punished twice for the same offence). Some countries limit the principle to prohibition of double punishment.¹⁰

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 state, being part of the principles of due process and fair trial. On the other hand, the respect for the *res judicata* (*pro veritate habitur*) of the final

¹⁰ In that case, a double prosecution can still be recognized as a violation of the principles of fair administration of justice.

judgments¹¹ is an important factor for the legitimacy of the legal system and the legitimacy of the state.

The *ne bis in idem* principle raises many questions.¹² Most of the case law in the different states is about the definition of *idem* and *bis*. Do we consider the legal definition of the offences or the set of facts (*idem factum*) as the basis for the definition of the same/*idem*? Does it depend on the scope of and the legal values to be protected by the legal provisions? Are natural and legal persons different persons for the application of the principle? Is the scope of the principle limited to double criminal sanctioning or does it also include other forms of punitive sanctions under private law or administrative law? What is a final judgment? Does it include acquittal or a dismissal of the charges? What does an enforced final judgment mean? Does it also concern final settlements by prosecuting or other judicial authorities out of court? Does the respect for the *ne bis in idem* principle require a bar on further prosecution or punishment (*Erledigungsprinzip*), or can the authority impose a second punishment taking into account the first punishment (*Anrechnungsprinzip*)?

4.2 The *ne bis in idem* principle: domestic and international application

Traditionally, the *ne bis in idem* principle is recognized by the states for application in their own domestic legal order. Generally speaking, the principle only applies in the field of criminal law and to final judgments in criminal matters. That means that double prosecution remains fully possible, as does the combination of administrative punitive sanctions with criminal sanctions. Also is it possible to combine criminal sanctions with out of court settlements. Finally, some states do not apply the *ne bis in idem* fully, by barring the second punishment, but do take into account the first sanction when imposing or executing the second one (*Anrechnungsprinzip*).

Very few countries recognize the validity of foreign judgments in criminal matters for execution or enforcement in the national legal order without a treaty basis. States do consider their *ius puniendi* and the full exercise of it as

¹¹ *Interest reipublice ut sit finis litium, bis de eadem re ne sit actio.*

¹² See for instance the Report of the UK Law Commission on double jeopardy, 17.24.01, <http://www.lawcom.gov.uk/>

essential to their sovereignty. Even the recognition of *res judicata* to a foreign criminal judgment is problematic, certainly when it concerns territorial offences. Besides self-interest, states do not always have sufficient confidence and trust in the other state's administration of justice. Recognition of foreign *res judicata* means that a new prosecution or punishment is barred (negative effect) or that the decision is taken into account in the context of other cases to be judged (positive effect). The refusal to recognize the validity of foreign judgments leads to multiple prosecution, which is certainly problematic for the individual, but can also be problematic for the international relationships between states. Most common law legal systems do recognize the *res judicata* effect of foreign judgments. In the civil law system the Netherlands certainly has the most far-reaching and liberal provisions. The Dutch Criminal Code contains a general *ne bis in idem* provision that is applicable to domestic and foreign judgements, regardless of the place where the offence was committed.¹³ However, the Netherlands stand quite alone in this respect.

There is no rule of international law (*ius cogens*) imposing the international *ne bis in idem* between states. The application depends upon the content of international treaties. We may find treaty based *ne bis in idem* provisions both in human rights treaties as in bilateral or multilateral treaties dealing with judicial cooperation in criminal matters.

The *ne bis in idem* principle is established as an individual right in international human rights legal instruments, such as the International Covenant on Civil and Political Rights of 19 December 1966 (Article 14(7)). The European Convention on Human Rights (ECHR) does not contain such a provision and the former European Commission on Human Rights¹⁴ 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 was elaborated in the Seventh Protocol to the ECHR (Article 4), but only a minority of the 25 EU Member States have ratified Protocol no 7. However, the case law could be inspiring.

¹³ For a comment on the Dutch *ne bis in idem* in Art. 68 of the Criminal Code, see P. Baauw, 'Ne bis in idem', in B. Swart and A. Klip (eds.), *International Criminal Law in the Netherlands*, MPI, Freiburg im Breisgau, 1997, 75-84.

Most of the cases are about the definition of *idem*. After some contradictory judgments¹⁵ on the application of Article 4 of Protocol 7, the ECtHR proceeded to follow its judgment in *Franz Fischer v. Austria*,¹⁶ which was based on *idem factum*, but in the case of *Göktan v. France*¹⁷ the Court again seems to rely on the legal *idem*. Although the case law is limited, some conclusions can be derived from it. The ECHR only deals with the national *ne bis in idem*, meaning within the domestic legal order of the Party States, not with the international or transnational *ne bis in idem*. This is in line with the application of Article 14(7) of the UN International Covenant on Civil and Political Rights.¹⁸ It is also clear from the Strasbourg case law that the *ne bis in idem* principle is not limited to double punishment, but includes double prosecution, which also means that the accounting principle is not enough to respect the *ne bis in idem*. This underlines the importance of cooperating at the level of the inquiry and to introduce *una via* provisions, rather than anti-cumulation of sanctions. Second, the *bis* also includes the combination of two criminal charges in the sense of Article 6, meaning for instance the imposition of a criminal punitive sanction and an administrative punitive sanction.¹⁹

The *ne bis in idem* principle is also important as a ground for refusal to cooperate in the framework of international treaties dealing with judicial coopera-

¹⁴ European Commission on Human Rights, 13 July 1970, Application 4212/69, CDR 35, 151.

¹⁵ *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.

¹⁶ *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.

¹⁷ *Göktan v. France*, Judgment of 2 July 2002, <http://www.echr.coe.int/>

¹⁸ The Human Rights Committee ruled that Article 14(7) does not apply to foreign *res judicata*, UN Human Rights Committee, 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.'

¹⁹ The double jeopardy clause in the Fifth Amendment is not limited to criminal law, but does include civil and administrative punitive sanctions. However, recently the leading case, *United States v. Halper*, 490 U.S. 435 (1989), was again somewhat restricted in *Hudson v. U.S.*, 522 U.S. 93 (1997); See also Vervaele, J.A.E., '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.

tion in criminal matters. The *ne bis in idem* principle was included in the milestone multilateral treaty on Extradition of the Council of Europe of 13 December 1957. Article 9 provided not only for the classic formulation of the *ne bis in idem*, dealing with final judgments (*res judicata*), but also included final decisions of a procedural character. The former ground for refusal is mandatory, while the latter is optional. Article 8 also includes an optional *ne bis in idem* ground for refusal concerning *lis pendens*. The Extradition Convention deals with *ne bis in idem* in a classic intergovernmental setting between the requesting and requested state.

Ne bis in idem provisions are not limited to extradition, but have been included in many Council of Europe Conventions concerning judicial cooperation in criminal matters. In Europe efforts have been made since the 1970s, in the framework of the Council of Europe, to introduce a regional international *ne bis in idem* principle. As such, *ne bis in idem* is provided for under the 1970 Convention of the Council of Europe on the International Validity of Criminal Judgments (Articles 53-57) and under the 1972 Convention on the Transfer of Proceedings in Criminal Matters (Articles 35-37) as mandatory. However, both these Conventions have a rather poor ratification rate and contain quite a lot 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(1e)), which was ratified by a large number of signatories, the principle is optional, but some Contracting States did include it in their ratification declaration as a ground for refusal of cooperation requests. In these Conventions the *ne bis in idem* principle has the objective of avoiding double punishment, but not double prosecution or investigation. That is the reason why we do not find any *ne bis in idem* provisions in the Council of Europe Convention of 20 April 1959 on mutual assistance in criminal matters or in the additional protocols dealing with judicial letters rogatory.

Even if states recognize the international *ne bis in idem* principle, problems can arise in international settings because of the different interpretations of the principle concerning *idem*, *bis*, etc. Is the ECtHR dealing with these questions and can the individual claim the application of the *ne bis in idem* principle as a subjective right or even a human right? Does the *ne bis in idem*

principle serves as an impediment to international cooperation in general and to the surrender of suspects in particular or is it a human right of the accused? In the cooperation framework the *ne bis in idem* principle only applies *inter partes*, meaning that it can be or must be applied between the contracting states in a concrete request. It is not considered an individual right *erga omnes*. However, this state-to-state approach has meanwhile been affected by case law of the ECtHR.²⁰ In the *Soering* case,²¹ the ECtHR decided on the conformity with Articles 3 and 6 ECHR of an extradition of a suspect to the USA. It ruled that although Article 1 of the ECHR, which provides that ‘the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention’, cannot be read as justifying a general principle to the effect that a Contracting State may not surrender an individual unless satisfied that the conditions awaiting him in the country of destination are in full accordance with each of the safeguards of the Convention, this does not absolve the Contracting Parties from responsibility under that Convention for all and any foreseeable consequences outside their jurisdiction.²² From this decision it is quite clear that the rule of comity and non-inquiry does not apply in the case of possible flagrant violations of human rights. The requested state has the duty to scrutiny as to whether the requesting state properly respects these rights. Further the respect of human rights is a joined responsibility of both states and citizens are entitled to an effective remedy in this field. This means that the extradition procedure not only affects state-state relations, but also the subjective rights of citizens. Also in the cases *Droz v. France and Spain*²³ and *Iribarne Perex v. France*,²⁴ which both concerned international execution of criminal convictions, the ECtHR ruled that Contracting States are obliged to refuse cooperation if it emerges that the conviction is the result of a flagrant denial of justice.

²⁰ See P. Garlick, ‘The European arrest warrant and the ECHR’ and N. Keijzer, ‘Extradition and Human Rights: a Dutch Perspective’, in R. Blekxtoon & W. van Ballegooij, *Handbook on the European arrest warrant*, T.M.C Asser Press, The Hague, 2004, 167-194.

²¹ ECtHR, 7 July 1989, *Soering v. U.K.*, A 161.

²² Paragraph 86.

²³ ECtHR, 26 June 1992, *Droz v. France and Spain*.

²⁴ ECtHR, 24 October 1995, *Iribarne v. France*.

4.3 Regional integration in the EU and the transnational application of the *ne bis in idem* principle

4.3.1 Transnational application in the single market of the Community

The importance of the *ne bis in idem* principle is certainly not limited to EU third-pillar law. Even before the coming into force of the Treaty of Maastricht, the *ne bis in idem* principle played a role in EC law. The EC has administrative sanctioning powers in the field of competition and far-reaching powers to harmonize national administrative sanctioning in many EC policies. The ECJ has paid attention to the *ne bis in idem* principle in the field of competition.²⁵ Under Regulation 17/62,²⁶ the ECJ held already in 1969 in *Wilhelm v. Bundeskartellamt*²⁷ that double prosecutions, one by the Commission and one by national authorities, were in line with the Regulation and did not violate the *ne bis in idem* principle, given the fact that the scope of the European and national regulatory provisions was different. However, if the result were to be the imposition of two consecutive sanctions, a general requirement of natural justice demands that any previous punitive decision must be taken into account in determining any sanction to be imposed (*Anrechnungsprinzip*). The ECJ over the years built up a longstanding tradition in confirming that the *ne bis in idem* principle, as enshrined in Article 4 of Protocol 7, is a general principle of Community law,²⁸ which means not limited to criminal sanctions and applied in competition matters. However, it seems that the ECJ limits the *ne bis in idem* principle to double punishment, and accepts the *Anrechnungsprinzip*. This problem has not been solved in the

²⁵ 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.

²⁶ Regulation 17/62, OJ P 013, 21/02/1962, p. 0204-0211, English special edition: Series 1 Chapter 1959-1962 p. 0087.

²⁷ Judgment of 13 February 1969, ECR (1969) 3.

²⁸ See for instance Judgment of 14/12/1972, *Boehringer Mannheim v. 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*.

new competition Regulation 1/2003.²⁹ This Regulation provides that, beside the European Commission, also national competition authorities shall apply the European competition rules, including the enforcement rules (Article 35). The European Commission and the national authorities will form a network based on close cooperation. In practice, conflict of jurisdiction and problems with *ne bis in idem* should be avoided through best practices of 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 such. It is quite clear that the case law of the ECJ concerning international *ne bis in idem* in competition cases is not fully in line with the ECHR case law on the national *ne bis in idem* by precluding the double prosecution from the *ne bis in idem* principle and by accepting the accounting principle. Finally, the transnational *ne bis in idem* principle only has effect in the territory of the Union. This means that a company can be sanctioned twice for violating different competition rules, e.g. by the competition authorities in the US and in Europe.³⁰

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.³¹ 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 are obliged to impose administrative and criminal sanctions upon irregularities and fraud. Article 6 of Regulation 2988/95³² provides for the suspension of national administrative enforcement during criminal proceedings, but 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

²⁹ Regulation 1/2003, OJ L 001, 04/01/2003, p. 0001-0025, in force from 1 May 2004.

³⁰ Case T-223/00, *Kyowa Hakko Kogyo Co*, Judgment of 9 July 2003, ECR (2003).

³¹ Regulation 1605/2002, Articles 93-96, OJ L 248, 16/09/2002, p. 0001-0048 and Regulation 2342/2002, Article 133, OJ L 357, 31/12/2002, p. 0001-0071.

proceedings after the criminal proceedings can be precluded by general legal principles. The *ne bis in idem* principle should bar the reopening if it concerns the same persons and the same facts, but the Regulation does not mention this explicitly.

4.3.2 Transnational application in Europe's Area of Freedom, Security and Justice

European Justice Ministers were fully aware that the deepening and widening of the European integration also led to an increase of transborder crime and of transnational justice in Europe and that concurring prosecution and sanctioning would become an obstacle to justice integration. In the framework of the European Political Cooperation, before the coming into force of the Maastricht Treaty with the third pillar on Justice and Home Affairs, they elaborated the 1987 Convention between the Member States of the EC on Double Jeopardy, which deals with the *ne bis in idem* principle in a transnational setting in the EC. The Convention has been poorly ratified,³³ but its substance has been integrated in the 1990 Convention implementing the Schengen Agreement (hereinafter CISA), which for that reason can be qualified as the first multilateral convention establishing an international *ne bis in idem* principle as an individual right *erga omnes*.

The Schengen provisions served as a model for several *ne bis in idem* provisions in the EU instruments on Justice and Home Affairs.³⁴ The Convention on the Financial Protection of the European Communities and its several protocols contain several provisions on *ne bis in idem*.³⁵ So does the Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States of the European

³² Regulation 2988/95, OJ L 312, 23/12/1995, p. 0001-0004.

³³ The *ne bis in idem* Convention has been ratified by Denmark, France, Italy, the Netherlands and Portugal and is provisionally applied between them.

³⁴ H.H. Kühne, 'Ne bis in idem in den Schengener Vertragsstaaten', *J.Z.*, 1998, 876-880, W. Schomburg, 'Die Europäisierung des Verbots doppelter Strafverfolgung – Ein Zwischenbericht', *N.J.W.* 2000, 1833-1840 and C. Van den Wyngaert and G. Stessens, 'The international non bis in idem principle: Resolving some of the unanswered questions', *J.C.L.Q.*, 1999, 786-788.

³⁵ See Article 7 of the Convention, OJ 1996 C 313/3.

Union.³⁶ The Corpus Juris³⁷ on European Criminal Law does not provide for a specific transnational *ne bis in idem* provision, but in Article 17 deals with the problem in the framework of concurring incriminations, as far as double criminal sanctioning is concerned, and imposes the accounting principle where a criminal sanction is imposed subsequent to an administrative sanction.

The CISA has been an important landmark for the establishment of a multi-lateral-treaty-based, international principle of *ne bis in idem*. Although the CISA was very much linked with the internal market and the four freedoms, it was an intergovernmental instrument. With the coming into force of the Treaty of Amsterdam in May 1999, the EU was very much aware of the necessity to provide for a transnational *ne bis in idem* principle in the Area of Freedom, Security and Justice. Provisions in international treaties governing the principle were too different and the application of them in the Member States varied too much. Point 49(e) of the Action Plan of the Council and the Commission on the implementation of the Area of Freedom, Security and Justice³⁸ 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,³⁹ 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 through national case law that national courts had problems with the transactions and the application of the Schengen provisions on the transnational *ne bis in idem*. Meanwhile the relevant Schengen provisions were and are in force, however, no longer as provisions in a governmental setting, but as provisions integrated in the third-pillar provisions of the Area of Freedom, Security and Justice. That means that the Tampere Conclusions of

³⁶ OJ 1997 C 195/1, Article 10.

³⁷ M. 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.

³⁸ OJ C 19, 23.01.1999.

the special European Council⁴⁰ defining mutual recognition as the cornerstone of judicial cooperation in criminal matters also apply to the former Schengen provisions.

4.4 *Ne bis in idem, the ECJ and the Area of Freedom, Security and Justice*

In the joined cases *Gözütok and Brügge*, 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 concerning the validity and the scope of a leading principle of human rights, the *ne bis in idem* principle or the prohibition of double jeopardy in the EU/Schengen context. This was the first preliminary ruling on the Schengen acquis.⁴¹

4.4.1 Facts

Mr Gözütok, a Turkish national who had been living 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 of the fact that he accepted a so-called *transactie* proposed by the Dutch Public Prosecutor's Office, 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 serious offences for which the law prescribes sentences of imprisonment of more than six years – and for lesser offences. The right to prosecute lapses where the conditions are met’.

Mr Gözütok paid the sums of NLG 3 000 and NLG 750 in the framework of the *transactie*. The German authorities' attention was drawn to Mr Gözütok by the

³⁹ OJ C 12, 15.01.2001.

⁴⁰ Tampere Conclusions, 15 and 16 October 1999, <http://ue.eu.int>.

⁴¹ Cases C-187/01 and C-385/01, *Hüseyin Gözütok and Klaus Brügge*, Judgment of the Court of Justice of 11 February 2003, ECR 2003, I-5689.

notification of a German Bank of suspicious transactions to the German financial intelligence unit, set up in the framework of the EC obligations in connection with the fight against money laundering.⁴² The German authorities obtained further information concerning the alleged 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 in Germany convicted Mr Gözütok and sentenced him to a period of one year and five months' imprisonment, suspended on probation. Both the convicted and the Public Prosecutor's Office lodged appeals. The Regional Court of Aachen discontinued the criminal proceedings brought against Mr Gözütok on the ground *inter alia* that under Article 54 of the CISA the German prosecuting authorities are bound by the definitive discontinuance of the criminal proceedings by the Netherlands. In a second appeal by the Public Prosecutor's Office to the Higher Regional Court, the Court decided to stay proceedings and refer to the ECJ for a preliminary ruling on the basis of Article 35 EU.

Mr Brügge, a German national living in Germany, was charged by the Belgian prosecution authorities with having intentionally assaulted and wounded Mrs Leliaert in Belgium, a violation under several articles of the Belgian Criminal Code. Mr Brügge faced a double criminal investigation, one in Belgium and one in Germany. In the Belgian criminal proceedings, the District Court had to deal with both the criminal and civil aspects of the case, due to the fact that Mrs Leliaert, who had become ill and unable to work because of the assault, as a civil party claimed pecuniary and non-pecuniary damage. In the course of the proceedings at the District Court of Veurne in Belgium, the Public Prosecutor's Office in Bonn in Germany offered to Mr Brügge an out-of-court settlement in return for payment of DEM 1 000, in accordance with Paragraph 153a read together with the second sentence of Paragraph 153(1) of the German Code of Criminal Procedure. The District Court of Veurne decided to stay proceedings and refer to the ECJ for a preliminary ruling on the basis of Article 35 EU.

⁴² 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.

4.4.2 Legal background and the preliminary questions

In *Gözütok*, the German Higher Regional Court referred to the ECJ the following questions 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?’

In *Brügge*, the Belgian District Court referred to the ECJ the following question 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.

Articles 54 to 58 of the CISA on the application of the *ne bis in idem* rule are incorporated in Title VI of the Treaty on EU (third-pillar provisions) on the legal basis of Article 34 EU and 31 EU.⁴³ Article 54 provides:

‘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.’

⁴³ Council Decision 1999/436/EC of 20 May 1999, OJ L 176, 10/07/1999 p. 0017-0030.

Article 55 stipulates exceptions to the rule of *ne bis in idem*, but they must be formally laid down at the moment of signature or ratification. One of the possible exceptions is that the acts took place in whole or in part in the territory of the other Contracting Party. Another relevant provision in this context is Article 58, which stipulates that national provisions may go beyond the Schengen provisions on *ne bis in idem*, by affording broader protection. The Treaty of Amsterdam has extended the jurisdiction of the ECJ in third-pillar matters, *inter alia* to give rulings on the validity and interpretation of framework decisions and decisions as well as implementing measures. Member States must accept that jurisdiction in accordance with Article 35(2) EU and they can, according to Article 35(3) EU, when accepting, choose between granting the power to refer questions for a preliminary ruling either to any of its courts or tribunals or only to those courts or tribunals which give a final decision against which there is no further judicial remedy. Both Germany and Belgium have opted for the full range of courts and tribunals, and the questions referred for a preliminary ruling do not affect public order or internal security, which areas are excluded from the Court's jurisdiction (Article 35(5) EU).

4.4.3 Opinion of the Advocate General (AG) and interpretative answer of the ECJ

The Advocate General opted for a strict interpretation of Article 35(1) EU, which would preclude any view being given 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 Advocate General stated that the ECJ must disregard the terms in which the German Higher Regional Court formulated the first of its questions, and he 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 Advocate General qualified 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 the *ius puniendi* in a common area of freedom and justice. He was also 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. Penal settlements such as the Dutch *transactie* are not contractual, but an expression of criminal justice. They exist in many national legal orders, and are a form of administering justice that 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 penalizing measures. The rights of the victims are not affected, and they are not barred from claiming compensation. The phrasing of the Article 54 provision concerning the *res iudicata* is in the opinion of the Advocate General not homogeneous in the various language versions (finally disposed of, *rechtskräftig abgeurteilt*, *onherroepelijk vonnis*, *définitivement jugée*, *juzgada en sentencia firme...*). The Member States are not in agreement 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 for a more extensive interpretation, including out-of-court judicial settlements. The Advocate General emphasized 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 judgment and the other accepts an out-of-court settlement.

The Advocate General concluded:

‘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 Court of Justice not only followed the rephrasing of the preliminary questions by the Advocate General, but also subscribed to his main arguments. The discontinuation of criminal proceedings is due to a decision of the Public Prosecutor’s Office, and is part of the administration of criminal justice. The result of the procedure penalizes 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 considered the *ne bis in idem* principle as a principle having proper effect, independent from matters of procedure or form, such as 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 harmonization.

The arguments of Germany, Belgium and France that the wording and the general schema of Article 54, the relationship between Article 54 and the 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, did not convince the ECJ. The ECJ did not find any obstacle in the Articles 55 and 58, and considered the intentions of the Contracting Parties to be irrelevant, since they predate the integration of the Schengen acquis in the EU. With regard to the Belgian Government's argument about possible prejudice to the rights of the victims, the ECJ followed the view of the Advocate General, stressing that the victim's right to bring civil actions is not precluded by the application of the *ne bis in idem* principle.

For that reason the ECJ ruled that:

'The *ne bis in idem* principle, laid down in Article 54 of the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, signed on 19 June 1990 at Schengen, 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'.

4.5 *The ne bis in idem as an autonomous general principle of Union law*⁴⁴

The ECJ states explicitly that the area of freedom, security and justice implies mutual trust in each other's criminal justice systems, and that the validity of the *ne bis in idem* principle is not dependent upon further harmonization. The ECJ considers also that the intentions of the Contracting Schengen Parties are of no value anymore, since they predate the integration of the Schengen acquis in the EU. This is as such remarkable, since the Dutch proposal⁴⁵ at

⁴⁴ For other comments in literature see M. Rübenstahl & U. Krämer, *European Law Reporter* 4/2003, 177-185; K. Adomeit, *NJW*, 2003, 1162-1164; M. Fletcher, *The Modern Law Review*, 2003, 769-780; O. Plöckinger, *Österreichische Juristenzeitung*, vol 58, 2003, 98-101; N. Thwaites, *Revue de Droit de l'Union Européenne*, vol. 1, 2002, 295-298; J. Vogel, 'Europäisches *ne bis in idem*', - EuGH, *NJW*, 2003, 1173.

⁴⁵ As provided for under Article 68 par 3 of the Dutch Criminal Code.

the time of the conception of Article 54 to include out-of-court *transactie* settlements was rejected. The intention of the Contracting Parties to preclude *transacties* from the *ne bis in idem* principle was very clear. However, the integration of the Schengen provisions in the EU, based upon the decision of the IGC and ratified by the national authorities did not only change the conceptual framework of these provisions, but also the 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, had consequences for the meaning and effect of several national criminal provisions, not taking into account the intent of the national legislative power.

It is typical for an integrated legal order like the EC that the conceptual framework of European integration interferes with national sovereignty, also concerning cooperation and transnational aspects.⁴⁶ What happened in the integration of the market in the EC is now being repeated in the integration of justice in the EU. Rights and remedies for the market citizen are transformed into rights and remedies for the Union citizen. National decisions, including criminal justice decisions, can have an EU-wide effect in a new setting of European territoriality. The ECJ ruling on the *ne bis in idem* principle clearly shows that general principles of Union law can reshape the concept and substance of Europe's Area of Freedom, Security and Justice. 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 prosecution in more than one state. When a defendant in a single act violates the 'peace and dignity' of two sovereigns by breaking the laws of each, in the USA he will have committed two distinct offences⁴⁷ with two different standards to protect. In the EU there is but 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 has not solved all the problems of the *ne bis in idem* principle. As mentioned, the interpretation of final judgment is only one of the problem points. If the legislator does not intervene in due time,

⁴⁶ See e.g. Judgment of the Court of 2 February 1989. *Ian William Cowan v. Trésor public*. Case 186/87, ECR 1989, p. 00195.

⁴⁷ *Heath v. Alabama*, 474 U.S. 82 (1985).

the ECJ will certainly receive other references for preliminary rulings concerning the interpretation of the *ne bis in idem* principle. Questions that remain fully on the agenda are of course the problems concerning the definitions of *idem* and *bis* and the scope of the principle of *ne bis in idem*. In the joined cases discussed above the ECJ speaks of the discontinuance of '(...) 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', which is worded much wider than the formulation of the Advocate General who spoke of conditions with the nature of a penalty, a decision of guilt, and no prejudice to victims. More concretely, the question is thus 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 such deals may be connected to an out-of-court settlement in the form of a *transactie*. Another problem is the full application of the *ne bis in idem* rule if the first proceedings were held for the very purpose of shielding the person concerned from criminal responsibility. Under which conditions can the *ne bis in idem* principle be set aside and by whom?

In this 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*⁴⁸ with the aim of establishing common legal rules in order to ensure uniformity in both the interpretation of those rules and their practical implementation. The framework decision would replace the Articles 54-58 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 the appeal procedure is before a criminal court. Judgments also include any extrajudicial mediated settlements in a criminal matter and any decisions which have the status of *res judicata* under national law shall be considered as final. 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

⁴⁸ 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.

equally essential interests of that Member State or were committed by a civil servant of the Member State in breach of his official duties. Article 3 contains a consultation procedure and jurisdiction rules in order to avoid double prosecution. The Greek initiative can only be applauded, but unfortunately the scope of its proposal is too narrow. In fact, excluding punitive administrative sanctions if not appealable before a criminal court is quite absurd, also in the light of the ECHR case law, even though it does fit the German tradition of administrative criminal law (*Ordnungswidrigkeiten*). The draft also contains far too many exceptions to the *ne bis in idem* rule. Finally, the draft does not deal with the applicability to legal persons. The discussions in the Council are underway but prove quite difficult on several points, including on the issues at stake in the *Gözütok and Brügge* case.

With the ongoing fast elaboration of legal instruments in the field of JHA, both for reinforcing the efficiency of criminal justice in the European territory (the European arrest warrant, the European confiscation order, drafts for the European evidence warrant and the European search and seizure order) and for increasing the legal protection for the citizen (protection of the victims of crime, the Green Paper on the procedural safeguards for suspects), it is clear that the ECJ will be quite busy in the near future establishing guiding principles of criminal justice in the European judicial area in criminal matters. The *Gözütok and Brügge* judgment on *ne bis in idem* is only the beginning of the important role which the ECJ has to play in the area of European criminal justice. All this illustrates that there is a real need to sign and ratify the Constitution, including the Charter of Fundamental Rights (CFR)⁴⁹ as a binding legal text. The CFR refers to the ECHR as the minimum standard, and under the proposed Constitution the EU would also become party to the ECHR. The scope of Article 50 CFR, which appears as Article II-110 in the Constitutional Treaty of the Union,⁵⁰ dealing with *ne bis in idem* is fully transnational in the EU, but due the wording of the text its scope of application can be called disappointing: 'No one shall be liable to be tried or punished

⁴⁹ Proclaimed in Nice in December 2000, but not legally binding.

⁵⁰ Council of the EU, Charter of Fundamental Rights of the European Union – Explanations relating to the complete text of the Charter, December 2000, available at http://ue.eu.int/df/docs/en/EN_2001_1023.pdf and http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/oj/2004/c_310/c_31020041216en00410054.pdf.

again in criminal proceedings of an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law'. By insisting so much on criminal proceedings, this text is not even in line with the present case law of the ECHR. Moreover, the provision seems to deal only with final judgments.

For this reason the Max Planck Institute for Foreign and International Criminal Law set up an expert group to elaborate the so-called Freiburg Proposal on Concurrent Jurisdictions and the Prohibition on Multiple Prosecutions in the EU.⁵¹ The text deals with preventing multiple prosecutions in international cases by the imposition of forum/jurisdiction rules, the application of transnational *ne bis in idem* and finally, as a safety net, the application of the accounting principle. Concerning the transnational *ne bis in idem* rule, the expert group proposes a *ne bis in idem factum* right for natural and legal persons. The *ne bis in idem* rule should apply to all punitive procedures and sanctions, whether of an administrative or a criminal law nature, whether national or European. The proposal uses the term 'finally disposed of' instead of 'finally acquitted or convicted'. This terminology includes every decision taken by prosecution authorities, which terminates the proceedings in a way that makes reopening of the case subject to exceptional substantial circumstances. This definition includes, for example, the German or Dutch out-of-court settlements (*Einstellung gegen Auflagen, transactie*) and the French *ordonnance de non-lieu motivée en fait* as falling within the scope of the *ne bis in idem* principle.

This proposal provides an excellent set of provisions *de lege lata*, both for the legislator and for the judiciary, and both at the European and at the national level.

B. INTERPRETATION IN CONFORMITY WITH FRAMEWORK DECISIONS AND UNION LOYALTY

The Council has frequently been criticized for neglecting the due process aspects of criminal justice by giving too much attention to effective

⁵¹ <http://www.iuscrim.mpg.de/forsch/straf/projekte/nebisinidem.html>.

enforcement.⁵² In the Tampere meeting of the Heads of State on Justice and Home Affairs attention was also expressly given to the rights of parties to criminal proceedings, including victims. In 2001, the Council adopted a framework decision on the standing of victims in criminal proceedings⁵³ which required the Member States to approximate their laws and regulations to the extent necessary to attain the objective of affording victims a high level of protection.

Article 2 contains obligations concerning respect and recognition of victims in the criminal justice system:

‘1. Each Member State shall ensure that victims have a real and appropriate role in its criminal legal system. It shall continue to make every effort to ensure that victims are treated with due respect for the dignity of the individual during proceedings and shall recognize the rights and legitimate interests of victims with particular reference to criminal proceedings.

2. Each Member State shall ensure that victims who are particularly vulnerable can benefit from specific treatment best suited to their circumstances.’

Article 3 contains specific obligations concerning victims as witnesses:

‘Each Member State shall safeguard the possibility for victims to be heard during proceedings and to supply evidence.

Each Member State shall take appropriate measures to ensure that its authorities question victims only insofar as necessary for the purpose of criminal proceedings’.

Finally, Article 8(4) prescribes certain procedural measures of special protection:

‘Each Member State shall ensure that, where there is a need to protect victims - particularly those most vulnerable - from the effects of giving evidence in open court, victims may, be decision taken by the court, be entitled to testify in a manner which will enable this objective to be achieved, by any appropriate means compatible with its basic legal principles’.

⁵² See contribution by C. Brants.

⁵³ OJ L 82/1.

In the case *Criminal Procedure against Maria Pupino*⁵⁴ the criminal court of Florence referred to the ECJ for a preliminary ruling under Article 35 EU on the interpretation of the framework decision on the standing of victims in criminal proceedings, based upon Articles 31 and 34 EU. This was the first preliminary ruling on a framework decision.

The facts of the case were quite simple. Mrs Pupino, who worked as a teacher in a kindergarten, was charged for severely disciplining and injuring children. Eight children were victims of Mrs Pupino's abuse and had to testify during the trial. The Public Prosecutor had asked the court for permission to hear these children as witnesses prior to the trial in *in camera* proceedings. The defence had objected to this. As a rule, Italian criminal proceedings are based on the principle of immediacy, meaning that all evidence has to be presented orally to the court during the hearings. Article 392(1) of the Criminal Code, however, provides for a strict number of exceptions, especially in the case of sexual offences. The case at hand did not, however, concern sexual acts. The court in principle rejected the Public Prosecutor's request, but expressed doubts as to whether the Italian rules were in fact in conformity with the framework decision on the standing of victims in criminal proceedings, which requires that special protection is granted to all vulnerable victims. The court's questions concerned the possibility and the limits of interpreting Italian law in conformity with the framework decision.

At the time of writing, only the Opinion of AG J. Kokott has yet been published. First of all, she gives short shrift to the arguments of Sweden, Italy and the United Kingdom, stating that framework decisions are part of international public law and cannot contain the obligation for national courts, based on European Union law, to interpret national law in conformity with EU law. The AG is of the opinion that sufficient parallels can be drawn between Article 34(2b) and Article 249(3). Even if the EU Treaty does not provide a parallel provision to Article 10 EC, Member States still have an obligation of loyalty to the Union. The AG derives this from Article 1 EU and from Title VI of the EU Treaty. She accepts the reasoning of the abovementioned Member States

⁵⁴ Case C-105/03.

that the third pillar shows a lower degree of integration than the first pillar. However, she also underlines that Article 1 EU calls for an ever closer union among the peoples of Europe and that the Union shall be founded on the European Communities, supplemented by the policies and forms of cooperation established by the EU Treaty. In her vision this includes that the policies in the field of the third pillar are not only based on intergovernmental cooperation, but also on a common exercise of sovereignty by the Union, by which the *acquis communautaire* must also be further developed.

5. Conclusion

From the examination of the as yet limited case law it has in any event become clear that the Court of Justice is well able to draw the outlines of legal guarantees in the Area of Freedom, Security and Justice. Judicial acts which considerably limit the rights and freedoms of the citizen, such as is the case with arrest for the purpose of extradition, should be linked to a procedure before the Court of Justice which yields quick results. For this reason, it is recommended that the Statute of the Court of Justice is amended by providing for urgent proceedings and for specialized Court sections. The successor to the Tampere programme, the The Hague programme, has meanwhile also formulated an instruction for the European Commission in that sense which is to examine and elaborate the idea further in cooperation with the Court of Justice.

The Court of Justice deserves an opportunity to make its essential contribution to the harmonization of criminal law and criminal procedural law and to the further definition of constitutionality in transnational relations. Only in this way a foundation can be laid for mutual trust in each other's legal systems and legal acts, a mutual trust that is based on the quality of the administration of justice and on respect for the rule of law. This mutual trust is not simply assumed to exist, but needs to be earned on the basis of the quality of the dispensation of justice. For this reason, the key concept of mutual recognition cannot be based on inter-state non-inquiry or comity. Judicial authorities in the Member States must be able to scrutinize the lawfulness and legitimacy of judicial requests of other Member States. The ECJ must elaborate the

parameters for this review, by elaborating general principles of Union law in the field of transnational criminal procedure.

On the other hand, the Member States must grant the citizens of Europe the rights which they are entitled to and guarantee them Europe-wide. To hide behind outdated notions of sovereignty and intergovernmental structures which leave the citizen out in the cold is no longer defensible. For this reason, it is also regrettable that the future Constitutional Treaty has not completely eradicated the doctrine of the *actes de gouvernement*. In fact, the Constitutional Treaty has actually removed an even greater number of acts of enforcement bodies from the ECJ's jurisdiction. In Article III-377, it is said that:

'In exercising its powers regarding the provisions of Sections 4 and 5 of Chapter IV of Title III relating to the area of freedom, security and justice, the Court of Justice of the European Union shall have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security'.

However, Article III-283 of the Convention stated that:

'In exercising its competences regarding the provisions of Sections 4 and 5 of Chapter IV of Title III concerning to the area of freedom, security and justice, the Court of Justice shall have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security, where such action is a matter of national law' (*italics added*).

The wording of the Constitutional Treaty therefore not only rules out the judicial testing of acts of national enforcement agencies, but also of supra-national enforcement bodies. Given the growing powers of Europol and Eurojust and the possible expansion of the joint investigation teams and given the legal basis for a European Public Prosecutor this is extremely unfortunate.

Only if we recognize that the Union and the Member States exercise shared, common sovereignty, it will be possible to acknowledge that there is also room for shared, common European dispensation of criminal justice.

Based on the ECHR and the Charter of Fundamental Rights, the Court of Justice in cooperation with the national judicial authorities may arrive at a set of general Union principles of law which are directional in the regulation of the constitutional state at the Union level, coupled with transnational legal protection worthy of that name. Only then will the Union have succeeded in achieving the depth vis-à-vis the ECHR which it aspires to accomplish through its integration project.



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