

## The transnational *ne bis in idem* principle in the EU Mutual recognition and equivalent protection of human rights\*

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### 1. The *ne bis in idem* principle as a domestic general principle of law

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. It has also been established as an individual right in international human rights legal instruments. 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 the prohibition of double punishment.<sup>1</sup> 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 and as such is part of the principles of due law and fair trial. On the other hand respect for the *res judicata* (*pro veritate habitur*) of final judgments<sup>2</sup> is of importance for the legitimacy of the legal system and of the state.

Traditionally, the *ne bis in idem* principle is recognized by the State for application only within its own domestic legal order. A rich set of case law has meanwhile developed in the European States concerning the domestic *ne bis in idem* principle. Generally speaking, the principle applies only in the field of criminal law and to final judgments in criminal matters. This means that in many States double prosecution remains fully possible, as does the combination of administrative punitive sanctions with criminal sanctions. It is also possible in many States to combine criminal sanctions with out-of-court settlements. Not only is the reach of the principle limited, its application in the domestic legal orders of the States also still raises quite a few questions.<sup>3</sup> Much of the domestic case law deals with the definitions of *idem* and *bis*. Should the legal definition of the offences be considered as the basis of the definition of the term the same (*idem*), or rather the facts? Does the application of the *ne bis in idem* principle depend on the scope of the offence descriptions or on the legal values which they aim to protect? Is a distinction made between natural and legal persons for the application of the principle? It can safely be concluded that

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

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

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

national case law has not yet produced a common standard concerning the scope and the application of the *ne bis in idem* principle in the domestic legal orders.

Meanwhile the EU, since the coming into force of the Treaty of Amsterdam, has been actively realizing a common area of Freedom, Security and Justice. The classical inter-State cooperation in criminal matters has been replaced by enhanced judicial cooperation directly between the actors of the criminal justice system. Moreover, these now have to recognize each other's judicial decisions based on the principle of mutual recognition. As a result, essential aspects of the functioning of the criminal justice system are now taking place in a European area without internal borders, a transnational judicial area. By several framework decisions the mutual recognition principle has been elaborated for pre-trial judicial decisions, such as seizure, evidence gathering and arrest. Judicial decisions in one Member State have legal effect in the legal area of the EU. The most famous framework decision in this context must certainly be the European Arrest Warrant which replaces the classic extradition procedure. Mutual recognition of each other's arrest warrants not only leads to the quicker surrender of suspects within the EU, but also to the fact that legal principles such as the *ne bis in idem* principle have to be applied transnationally. This transnational application presumes that the scope and the application of the *ne bis in idem* principle in the EU rely on a common standard.

The main questions are therefore: how may we achieve such a common standard, what transnational function should it fulfil and what would be the content of this function? This article analyses (in Section 2) whether and to what extent the ECHR has contributed and may contribute to the development of such a common *ne bis in idem* standard in Europe. It is also examined whether the application of the *ne bis in idem* principle in classic inter-state judicial cooperation in criminal matters in the framework of the Council of Europe is able to make a contribution as well. The transnational function of the *ne bis in idem* principle is discussed in Sections 3 and 4. First it is analysed how this 'transnationalness' has developed in EC law and in the pre-Maastricht judicial integration. Then a detailed analysis is given of how the Court of Justice has further defined the principle in the framework of the area of Freedom, Security and Justice. Finally, this is tested in Section 5 against the meaning of the *ne bis in idem* principle in the framework decision on the European Arrest Warrant, as an example of the inherent tension between mutual recognition and the protection of human rights in transnational justice. In the concluding Section 6 a summary is given of the findings.

## **2. The *ne bis in idem* principle in international relations and as an international human right**

Are States willing to accept the operation of an international *ne bis in idem* principle between them? Very few countries recognize the validity of foreign judgments in criminal matters for execution or enforcement in their national legal order lacking a treaty basis. States consider their *ius puniendi* and the full exercise of it as essential to their sovereignty. Even the recognition of *res judicata* in respect of a foreign criminal judgment is problematic, certainly when it concerns territorial offences. Besides arising from self-interest, this may result from the fact that States do not always have sufficient confidence or trust in the way in which other States administer justice. Recognition of foreign *res judicata* means that prosecuting or punishing anew is no longer possible (negative effect) or that the decision has to be taken into account in the context of other

cases to be decided (positive effect). A refusal to recognize the validity of foreign judgments leads to multiple prosecution, which is certainly problematic for the individual, but can also cause problems in the international relations between states. Most common law legal systems actually do recognize the *res judicata* effect of foreign judgments, and of the civil law family 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.<sup>4</sup> However, the Netherlands stand quite alone in this respect.

There is no mandatory rule of international law (*ius cogens*) imposing a duty to respect the *ne bis in idem* principle between States. The application of the principle depends on the content of international treaties. We do find treaty-based *ne bis in idem* provisions, both in human rights treaties and 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 Rights<sup>5</sup> 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 have ratified Protocol no 7. Can we derive from the case law of the ECtHR a common standard? Most of the cases deal with one aspect of *ne bis in idem*, namely the definition of *idem*. After some contradictory judgments<sup>6</sup> on the application of Article 4 of Protocol 7, the ECtHR followed its judgment in the *Franz Fischer v. Austria* decision,<sup>7</sup> based on *idem factum*. However, in the case of *Göktan v. France*,<sup>8</sup> the Court again seemed to rely on the legal *idem*. Although the case law is limited, some conclusions can be derived from it. The ECtHR only deals with the national *ne bis in idem*, meaning the principle as it operates within the domestic legal orders of the Party States, and it does not deal with the international or transnational *ne bis in idem*. This is in line with the application of Art. 14(7) of the UN International Covenant on Civil and Political Rights.<sup>9</sup> 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

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4 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 et al. (eds.), *International Criminal Law in the Netherlands*, 1997, pp. 75-84.

5 European Commission on Human Rights, 13 July 1970, no. 4212/69, CDR 35, 151.

6 *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.

7 *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.

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

9 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.'

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.<sup>10</sup> Case law provides some important guidance here, but falls short of producing a solid common standard. Moreover, very few States have ratified Protocol 7.

The *ne bis in idem* principle is also important as a ground for refusing to cooperate in the framework of international treaties dealing with judicial cooperation 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* principle dealing with final judgments (*res judicata*), but also included final decisions of a procedural character. The former ground for refusal is mandatory, however, whereas the latter is only optional:

‘Extradition shall not be granted if a final judgement has been passed by the competent authorities of the requested Party upon the person claimed in respect of the offence or offences for which extradition is requested. Extradition may be refused if the competent authorities of the requested Party have decided either not to institute or to terminate proceedings in respect of the same offence or offences.’

Article 8 also provides an optional ground for *ne bis in idem* refusal in the case of *lis pendens*:

‘The requested Party may refuse to extradite the person claimed if the competent authorities of such Party are proceeding against him in respect of the offence or offences for which extradition is requested.’

Article 7 even concerns a prior phase, accepting the preponderance of sovereign interests:

‘The requested Party may refuse to extradite a person claimed for an offence which is regarded by its law as having been committed in whole or in part in its territory or in a place treated as its territory.’

The Extradition Convention deals with *ne bis in idem* in a classic intergovernmental setting between the requesting and requested State, but the additional Protocol of 15 October 1975 supplements Article 9 of the Convention with the following paragraphs 2 and 3 which also cover other Contracting Parties:

- ‘2. The extradition of a person against whom a final judgement has been rendered in a third State, Contracting Party to the Convention, for the offence or offences in respect of which the claim was made, shall not be granted;
- a) if the afore-mentioned judgment resulted in his acquittal;
  - b) the term of imprisonment or other measure to which he was sentenced:
    - I) has been completely enforced;

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<sup>10</sup> 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 recently been again restricted in *Hudson v. U.S.*, 522 U.S. 93 (1997); See also J. Vervaele, ‘La saisie et la confiscation à la suite d’atteintes punissables au droit aux Etats-Unis’, 1998 *Revue de Droit Pénal et de Criminologie*, pp. 974-1003.

- II) has been wholly, or with respect to the part not enforced, the subject of a pardon or an amnesty;
  - c) if the court convicted the offender without imposing a sanction.
3. This mandatory refusal ground can however be set aside (optional) by calling in exceptions based on territoriality principle, vital interest in jeopardy or the implication of own civil servants:
- a) if the offence in respect of which judgment has been rendered was committed against a person, an institution or any thing having public status in the requesting State;
  - b) if the person on whom judgement was passed had himself a public status in the requesting State;
  - c) if the offence in respect of which judgement was passed was committed completely or partly in the territory of the requesting State or in a place treated as its territory.'

*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, 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 provided for 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) as mandatory. However, both Conventions have a rather poor ratification rate and contain 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 very well ratified, it is optional, but some Contracting States did include it in their ratification declaration as a ground for refusal for cooperation requests. The Council of Europe Convention of 15 May 1972 on the transfer of Proceedings in Criminal Matters provides in Part V (Articles 35-37):

- Article 35.** 1. A person in respect of whom a final and enforceable criminal judgment has been rendered may for the same act neither be prosecuted nor sentenced nor subjected to enforcement of a sanction in another Contracting State:
- a) if he was acquitted;
  - b) if the sanction imposed:
    - i) has been completely enforced or is being enforced, or
    - ii) has been wholly, or with respect to the part not enforced, the subject of a pardon or an amnesty, or
    - iii) can no longer be enforced because of lapse of time;
  - c) if the court convicted the offender without imposing a sanction.
2. Nevertheless, a Contracting State shall not, unless it has itself requested the proceedings, be obliged to recognise the effect of *ne bis in idem* if the act which gave rise to the judgment was directed against either a person or an institution or any thing having public status in that State, or if the subject of the judgment had himself a public status in that State.

3. Furthermore, a Contracting State where the act was committed or considered as such according to the law of that State shall not be obliged to recognise the effect of *ne bis in idem* unless that State has itself requested the proceedings.

**Article 36.** If new proceedings are instituted against a person who in another Contracting State has been sentenced for the same act, then any period of deprivation of liberty arising from the sentence enforced shall be deducted from the sanction which may be imposed.

**Article 37.** This Part shall not prevent the application of wider domestic provisions relating to the effect of *ne bis in idem* attached to foreign criminal judgments.

In these Conventions the *ne bis in idem* principle has as its objective the avoidance of double punishment, not of double prosecution or investigation. That is the reason why we do not find *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 may arise in transnational settings because of the different interpretations of the principle as to the meaning of *idem*, *bis*, etc. The main questions here are whether the ECtHR can deal with these matters and whether individuals may claim the application of the *ne bis in idem* principle as a subjective right or even a human right? Does *ne bis in idem* serve 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? As we have seen, the principle operates *inter partes*, rather than *erga omnes*. However, the state-to-state approach has begun to be affected by the case law of the ECtHR.<sup>11</sup> In the *Soering* case,<sup>12</sup> the ECtHR decided on the application of Articles 3 and 6 ECHR to the 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.<sup>13</sup> 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 their rights. Further the respect of human rights is a joint responsibility of both States, and citizens have the right to an effective remedy in this field. This means that the extradition procedure not only affects State to State relations, but also the subjective rights of citizens. In the cases *Drozd v. France and Spain*<sup>14</sup> and *Iribarne Perex v. France*,<sup>15</sup> which both concerned the transnational execution of criminal convictions, the ECtHR

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11 See P. Garlick, ‘The European Arrest Warrant and the ECHR’ and N. Keijzer, ‘Extradition and Human Rights: a Dutch Perspective’, in R. Blekxtoon et al. (eds.), *Handbook on the European Arrest Warrant*, 2005, pp.167-194.

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

13 Para. 86.

14 ECtHR, 26 June 1992, *Drozd v. France and Spain*.

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

ruled that Contracting States are obliged to refuse cooperation if it emerges that the conviction is the result of a flagrant denial of justice.<sup>16</sup>

From the analysis above it is clear that the ECtHR has not yet elaborated a common standard concerning the scope and the application of the *ne bis in idem* principle. Concerning the application of human rights in interstate judicial cooperation, the ECtHR has imposed duties upon the States. Due to a lack of relevant case law, it remains unclear, however, whether the notion of flagrant violation of human rights also applies to a failure to respect the *ne bis in idem* principle as such.

In conclusion therefore state practice in the Member States and the case law of the ECtHR only give us limited guidance for the elaboration of a common transnational *ne bis in idem* standard in a regional integration setting.

### 3. Regional Integration in the EU and the transnational application of the *ne bis in idem* principle

The economic integration process in the framework of the EC stumbled upon the issue of transnational application of the *ne bis in idem* principle when dealing with punitive administrative sanctioning. This means that the principle played a role in EC law even before the coming into force of the Treaty of Maastricht.

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 had occasion to address the issue of *ne bis in idem* in the field of competition.<sup>17</sup> Already in 1969, the ECJ held in *Wilhelm v. Bundeskartellamt*<sup>18</sup> that double prosecution, once by the Commission and once by the national authorities, was in line with regulation 17/62<sup>19</sup> 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, if this would result in the imposition of two consecutive sanctions, a general requirement of natural justice demands that any previous punitive decisions be taken into account in determining any sanction which is to be imposed (*Anrechnungsprinzip*). It is now fixed case law of the ECJ to confirm the *ne bis in idem* principle as a general principle of Community law,<sup>20</sup> which means that it is not limited to criminal sanctions, but that it also applies in competition matters. However, the ECJ seems to limit the *ne bis in idem* principle to double punishment and still accepts the accounting principle. This problem has not been solved by the new competition regulation 1/2003.<sup>21</sup> This regulation provides that, besides the European Commission, national competition authorities will also apply European competition rules, including the rules concerning enforcement (Article 35). The European Commission and the national authorities will

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16 For further analysis see A. van Hoek et al., 'Transnational cooperation in criminal matters and the safeguarding of human rights', 2005 *Utrecht Law Review*, no. 2, <http://www.UtrechtLawReview.org>.

17 W. Wils, 'The principle of *ne bis in idem* in EC Antitrust Enforcement: a Legal and Economic Analysis', 2003 *World Competition*, no. 2.

18 Judgment of 13 February 1969, [1969] *ECR* 3.

19 Regulation no. 17/62, *OJ P* 013, 21.2.1962, p. 0204-0211, English special edition: Series 1 Chapter 1959-1962 p. 0087.

20 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*.

21 Regulation no. 1/2003, *OJ L* 001, 4.1.2003, p. 0001-0025, in force from 1 May 2004.

form a network based on close cooperation. In practice, conflicts of jurisdiction and problems regarding *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, which means that double prosecution is not excluded as such. It is quite clear that by excluding double prosecution from the *ne bis in idem* principle and by accepting the accounting principle the case law of the ECJ concerning international *ne bis in idem* in competition cases is not entirely in line with the ECtHR case law on the national *ne bis in idem* principle.

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.<sup>22</sup> The EC has also harmonized sanctioning regimes in the Member States. The package on the protection of the financial interest 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<sup>23</sup> 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. We can conclude that the EC has recognized the transnational *ne bis in idem* principle as a general principle of Community law, but accords to it a scope and application that lags behind even the minimal standard set by the ECtHR.

On the other hand, even before the integration of Justice matters in the EU, 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 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 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,<sup>24</sup> but its substance has been integrated into the CISA to such an extent that it may qualify with reason as the first multilateral convention establishing an international *ne bis in idem* principle as an individual right *erga omnes*.

**Article 54.** 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.

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22 Regulation no. 1605/2002, Arts. 93-96, *OJL* 248, 16/09/2002, p. 0001-0048 and Regulation 2342/2002, Art. 133, *OJL* 357, 31.12.2002, p. 0001-0071.

23 Regulation no. 2988/95, *OJL* 312, 23.12.1995, p. 0001-0004.

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

- Article 55.** 1. A Contracting Party may, when ratifying, accepting or approving this Convention, declare that it is not bound by Article 54 in one or more of the following cases:
- a) where the acts to which the foreign judgment relates took place in whole or in part in its own territory; in the latter case, however, this exception shall not apply if the acts took place in part in the territory of the Contracting Party where the judgment was delivered;
  - b) where the acts to which the foreign judgment relates constitute an offence against national security or other equally essential interests of the Contracting Party;
  - c) where the acts to which the foreign judgment relates were committed by officials of that Contracting Party in violation of the duties of their office.
2. A Contracting Party which has made a declaration regarding the exception referred to in paragraph 1(b) shall specify the categories of offences to which this exception may apply.
3. A Contracting Party may at any time withdraw a declaration relating to one or more of the exceptions referred to in paragraph 1.
4. The exceptions which were the subject of a declaration under paragraph 1 shall not apply where the Contracting Party concerned has, in connection with the same acts, requested the other Contracting Party to bring the prosecution or has granted extradition of the person concerned.

**Article 56.** If a further prosecution is brought in a Contracting Party against a person whose trial, in respect of the same acts, has been finally disposed of in another Contracting Party, any period of deprivation of liberty served in the latter Contracting Party arising from those acts shall be deducted from any penalty imposed. To the extent permitted by national law, penalties not involving deprivation of liberty shall also be taken into account.

- Article 57.** 1. Where a Contracting Party charges a person with an offence and the competent authorities of that Contracting Party have reason to believe that the charge relates to the same acts as those in respect of which the person's trial has been finally disposed of in another Contracting Party, those authorities shall, if they deem it necessary, request the relevant information from the competent authorities of the Contracting Party in whose territory judgment has already been delivered.
2. The information requested shall be provided as soon as possible and shall be taken into consideration as regards further action to be taken in the proceedings under way.
3. Each Contracting Party shall, when ratifying, accepting or approving this Convention, nominate the authorities authorised to request and receive the information provided for in this Article.

**Article 58.** The above provisions shall not preclude the application of broader national provisions on the *ne bis in idem* principle with regard to judicial decisions taken abroad.

The Schengen provisions have served as a model for several *ne bis in idem* provisions in the EU instruments on Justice and Home Affairs.<sup>25</sup> In this sense the Schengen Treaties have served as

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

a testing laboratory. The Convention on the Financial Protection of the European Communities and its several protocols contain several provisions on *ne bis in idem*,<sup>26</sup> as does the Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union.<sup>27</sup> The Corpus Juris<sup>28</sup> 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.

From the above analysis it becomes quite clear that integration - be it economic integration with consequences for law enforcement, or justice integration - and the establishment of common territorial areas automatically usher in the transnational aspect of the *ne bis in idem* principle.

#### **4. *Ne bis in idem*, the ECJ and the area of Freedom, Security and Justice**

##### **4.1. Introduction**

The CISA has been an important landmark for the establishment of a multilateral treaty-based international *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 Schengen provisions were integrated into the EU *acquis*. The *ne bis in idem* Schengen provision was integrated in the Third Pillar provisions of the area of Freedom, Security and Justice. The EU was very much aware of the necessity to legislate in more detail on the 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 their application in the Member States varies 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 Justice<sup>29</sup> 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,<sup>30</sup> 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.

Apart from the legislative perspective, the Treaty of Amsterdam also introduced the European Court of Justice as an important player in this field. The European Court of Justice had already established a full range of general principles of Community law, including in the area of criminal law and criminal procedure.<sup>31</sup> With the coming into force of the Third Pillar cooperation in Justice and Home Affairs (JHA) under the EU Treaty of Maastricht and the extended jurisdiction

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26 See Art. 7 of the Convention, *OJ* 1996 C 313/3.

27 *OJ* 1997 C 195/1, Art. 10.

28 M. Delmas-Marty et al. (eds.), *The Implementation of the Corpus Juris in the Member States*, vol. 1-4, 2000-2001.

29 *OJ* C 19, 23.1.1999.

30 *OJ* C 12, 15.1.2001.

31 See further Case 80/86, *Kolpinghuis*, [1987] *ECR* 3969. For further comments H. Sevenster, 'Criminal Law and EC Law', 1992 *CMLR*, pp. 29-70.

of the Court of Justice in Third Pillar issues under the EU Treaty of Amsterdam the ECJ has been given the opportunity to widen the scope of the general principles into new policy areas that touch more directly upon principles of due law and fundamental rights. In the first preliminary questions on the Schengen *acquis*<sup>32</sup> 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 on the validity and the scope of the *ne bis in idem* principle in the EU/Schengen context. National courts asked the ECJ to clarify the scope and application of the transnational *ne bis in idem* principle. As this was a landmark case, we will analyse it in detail below, focusing on the transnational dimension.

#### **4.2. The joined cases *Gözütok and Brügge*: Facts**

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 financial transaction 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 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.<sup>33</sup> 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 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 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, 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 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 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 became ill and unable to work because of the assault, as a civil party claimed pecuniary and non-pecuniary damages. In the course of the proceedings before the District Court of Veurne in Belgium, the Public Prosecutor's Office in Bonn in

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32 ECJ 11 February 2003, Cases C-187/01 and C-385/01, *Hüseyin Gözütok and Klaus Brügge*, [2003] ECR I-5689.

33 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, pp. 0077-0083.

Germany offered to 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 questions to the ECJ for a preliminary ruling on the basis of Article 35 EU Treaty.

#### **4.3. Legal background and the preliminary questions**

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?’ 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.<sup>34</sup> 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’. 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 its own territory. Another relevant article in this context is Article 58 that stipulates that national provisions may go beyond the Schengen provisions on *ne bis in idem*, by giving a 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 decisions. Member States must accept that jurisdiction in accordance with Article 35 (2) and they can, according to Article 35 (3) TEU, 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 (Article 35(5) TEU).

#### **4.4. Opinion of the Advocate General (AG)**

The AG sticks 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

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34 Council Decision 1999/436/EC of 20 May 1999, *OJL* 176, 10.7.1999, pp. 0017-0030.

regard to the discontinuance of the criminal action. For this reason the AG expresses that the ECJ must disregard the terms in which the German Higher Regional Court formulates the first of its questions. For that reason the AG reformulates 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 the *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. Penal settlements are not contractual, but 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 Article 54 provision concerning the *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.’

#### **4.5. The reasoning and interpretative answer of the Court<sup>35</sup> and de lege ferenda proposals**

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 administration 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, independent from matters of procedure or form, like 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 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 the intentions of the Contracting Parties as of no value, since they predate the integration of the Schengen *acquis* in 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 rules 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’.

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 further 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. This is as such remarkable, since the Dutch proposal<sup>36</sup> at the time of the conception of Article 54 to include out-of-court transaction settlements was rejected. The

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35 For other comments in literature see M. Rübenstahl et al., 2003 *European Law Reporter*, no. 4, pp. 177-185; K. Adomeit, 2003 *NJW*, pp. 1162-1164; M. Fletcher, 2003 *The Modern Law Review*, pp. 769-780; O. Plöckinger, 2003 *Österreichische Juristenzeitung*, pp. 98-101; N. Thwaites, 2002 *Revue de Droit de l’Union Européenne*, pp. 295-298; J. Vogel, ‘Europäisches *ne bis in idem*, - EuGH’, 2003 *NJW*, p. 1173.

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

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 did not only change 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 for an integrated legal order like the EC that the conceptual framework of integration interferes with national sovereignty, also in respect of cooperation and transnational aspects.<sup>37</sup> 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<sup>38</sup> 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 the interpretation of the term final judgment is only one of the problem points. If the legislator does not intervene in due time, the ECJ will certainly receive other requests for preliminary rulings on the interpretation of the *ne bis in idem* principle. Questions that remain fully on the table are of course the problem of the definitions of *idem* and *bis* and the scope of the *ne bis in idem* principle as a whole. The ECJ in the joined *ne bis in idem* cases used the words ‘(...) 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’, wording that is much wider than the formulation of 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?

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*<sup>39</sup> 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 CISA. The proposal defines criminal offences (Article 1) as offences *sensu strictu* and

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

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

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.

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 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 interest of that Member State or were committed by a civil servant of the Member State in breach of his official duties. Article 3 provides for a consultation procedure and jurisdiction rules in order to avoid double prosecution. The initiative certainly deserves to be welcomed, but its reach is rather too narrow. In fact, excluding punitive administrative sanctioning if not appealable before a criminal court is quite absurd, also in the light of the ECtHR case law, although it does fit in with 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 of the principle to legal persons. The discussions in the Council are underway but quite difficult on several points, including the issues at stake in the *Gözütok and Brüggge* case.

This ECJ judgment on *ne bis in idem* is just the start of an important role for the ECJ in the area of European criminal justice. All this illustrates that there is a real need to sign and ratify the draft Constitution, including the Charter of Fundamental Rights (CFR)<sup>40</sup> as a binding legal text. The CFR refers to the ECtHR as the minimal standard and the EU would also become a party to the ECtHR. The territorial scope of Article 50 CFR<sup>41</sup> dealing with *ne bis in idem* is fully transnational in the EU, but its substantive reach is disappointing due the wording of the text: ‘No one shall be liable to be tried or punished 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’.<sup>42</sup> By insisting so much on criminal proceedings, this text is not even in line with the current case law of the ECtHR. 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.<sup>43</sup> The text deals with the prevention of multiple prosecutions in international cases through 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 transnational *ne bis in idem*, the expert group proposes a *ne bis in idem factum* right for natural and legal persons. The *ne bis in idem* principle should apply to all punitive procedures and sanctions, whether they are of an administrative or a criminal nature, whether they are national or European. The draft 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 circumstances, as for instance the reopening of *res judicata* cases. This means for example that German or Dutch out-of-court settlements (*Einstellung gegen Auflagen, transactie*) and the French *ordonnance de non-lieu motivée en fait* are included in the definition

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40 Proclaimed in Nice on 7 December 2000, but not legally binding.

41 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](http://ue.eu.int/df/docs/en/EN_2001_1023.pdf)

42 Art. II-50 of the Draft Constitution for the EU.

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

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

## **5. Mutual recognition, *ne bis in idem* and equivalent protection: The European Arrest Warrant**

What does this ECJ preliminary ruling mean for the new set of mutual recognition instruments replacing the classic instruments of judicial cooperation in criminal matters, such as for instance the European Arrest Warrant replacing extradition? It is quite clear that the wave of mutual recognition proposals was mostly driven by thoughts of effectiveness, as was the original proposal of the European Commission<sup>44</sup> for the European Arrest Warrant, which contained a very limited set of provisions on the *ne bis in idem* principle. It is quite clear that in 2001 the importance of the principle in a transnational setting was still underestimated.

### **Art. 30 *ne bis in idem***

1. The executing judicial authority shall refuse to execute a European arrest warrant, if a judicial authority in the executing Member State has passed final judgement upon the person claimed in respect of the offence or offences for which the European arrest warrant has been issued.
2. The execution of a European arrest warrant may also be refused if the judicial authorities of the executing Member State have decided either not to institute or to terminate proceedings in respect of the same offence or offences.

However, as a result of the negotiations in the Council these provisions changed substantially when a distinction between final judgments, prosecution and pending proceedings was introduced. The major asset of the new rules is that, in recognizing *res judicata* as a bar to surrender, they consider final judgments and out-of-court settlements in all Member States of the EU to be on a par with those emanating from the requested State. In the case of final judgments the *ne bis in idem* principle leads to a mandatory ground for refusal. Whenever a final judgment has been passed in a Member State, all other states should abide by this decision. The executing authority will have to assess all prior judgments in respect of the act under scrutiny, irrespective of whether they derive from the issuing State, the executing State or another Member State. In fact, for the executing State it is much easier under the European Arrest Warrant regime to bar surrender procedures based on the *ne bis in idem* principle than it was under the extradition Convention of the Council of Europe, which is in line with the mutual trust principle.

Concerning prosecution, what is in fact meant here is the situation of out-of-court settlement. Article 4(3) reads that:

‘Where the judicial authorities of the executing Member State have decided either not to prosecute for the offence on which the European arrest warrant is based or to halt proceedings, or where a final judgement has been passed upon the requested person in a Member State, in respect of the same acts, which prevents further proceedings.’

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44 Document COM(2001) 522 final, Brussels, September 13th 2001, OJ C 332 E/305.

Non-execution in this case is optional, which means that cumulative proceedings, like in the case of *Krombach v. Bamberski*,<sup>45</sup> are still possible within the EU, which constitutes a weakening of the CISA provisions as interpreted by the ECJ. The only new aspect compared to the Extradition Convention is that this principle not only plays a role in relation to the issuing State, but in relation to all Member States, i.e. in the whole legal area. It is a pity that this has not been integrated as a mandatory ground for non-execution. Another point of debate could be whether the decision by the Prosecutor must be approved by a court. Furthermore, it is not at all clear who the judicial authorities are and which decisions are covered. Indeed, Article 6(3) states that Member States define who the competent judicial authorities are for the European Arrest Warrant. Article 4(3) refers to the same judicial authorities.

Finally, the European Arrest Warrant includes *lis pendens* proceedings. In line with Article 8 of the Extradition Convention, Article 4(2) defines pending criminal proceedings in the executing Member State as a ground for optional refusal:

‘Where the person who is the subject of the European arrest warrant is being prosecuted in the executing Member State for the same act as that on which the European arrest warrant is based.’

We can conclude that the final version of the framework decision on the European Arrest Warrant has improved substantially compared to the Commission draft when it comes to the protection offered by the transnational *ne bis in idem* principle. However, the EAW regime also allows for the optional application of the *ne bis in idem* principle in the case of out-of-court settlements. Still, the *ne bis in idem* principle has been largely spelled out in the text, which cannot be said of the duty to respect other human rights in a transnational setting: these must be at least flagrantly violated before they may bar the surrender procedure.<sup>46</sup> By contrast, for the principle of *ne bis in idem*, the ECJ has laid the foundation for its transnational application as a human right, which leads to equivalent protection in the common area of Freedom, Security and Justice.

## 6. Conclusion

As has emerged clearly from the analysis above, neither ECtHR practice, nor the application of the *ne bis in idem* principle in the framework of the multilateral treaties in criminal matters of the Council of Europe have led to a common *ne bis in idem* standard in Europe.

In the EU, the traditional *ne bis in idem* principle has developed from a domestic legal principle into a transnational human right. This process began as a result of Schengen integration and has deepened further in the framework of the common area of Freedom, Security and Justice. Classic inter-state cooperation in criminal matters has been replaced by enhanced judicial cooperation, directly between the actors of the criminal justice system. Moreover, these have to recognize each other's judicial decisions, based upon the principle of mutual recognition. Mutual recognition of, for example, each other's arrest warrants does not only lead to speedier surrender of suspects

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45 See Case-7/98, *Krombach v. Bamberski*, Judgment of the Full Court of 28 March 2000, [2000] ECR I-1395, annotated by A. van Hoek, 2001 *Common Market Law Review*, no. 4, pp. 1011-1027.

46 See Van Hoek et al., *supra* note 16, and Blekxtoon et al., *supra* note 11.

within the EU, but also to the duty of transnational application of legal principles such as the *ne bis in idem* principle. And this transnational operation presumes that the territorial scope and substantive application of the *ne bis in idem* principle within the EU is based on a common standard. This is the only way in which to guarantee equivalent protection. Essential aspects of the operation of the criminal justice system are thus functioning in an European area without internal borders, a transnational judicial area. Member States must be prepared to leave behind their classic, outdated views on sovereignty and accept a vision of shared sovereignty in the common judicial area. Transnational human rights are a substantial part of such a common judicial area.

Despite this, it has clearly emerged from the above analysis that the Union legislator is finding it enormously difficult to give shape and substance to transnational legal principles and this is also true in the case of the *ne bis in idem* principle. It is the ECJ which, through interpretation of the principles of the Community legal order, has to define the legal principles and determine their scope and application. The ECJ's preliminary ruling in cases C-187/01 and C-385/01, *Hüseyin Güzütok and Klaus Brügge*, has made clear that the ECJ is prepared to play this role, just as it has played it in the process of the integration of the Community. National courts, too, are joining in, as the Belgian Supreme Court has submitted a new preliminary question to the ECJ. At the moment of writing the Advocate General has just submitted his Opinion.<sup>47</sup>

Mutual recognition of each other's judicial decisions, such as for instance in the application of the European Arrest Warrant, requires common and equivalent protection of human rights in the area of Freedom, Security and Justice. Common standards of the Rule of Law, at least in line with the minimum standards developed by the ECtHR, are the *minimum minimorum* for mutual trust between States and for mutual trust between the citizens of the EU and thus for the legitimacy of the EU criminal policy as such.

For this reason, it is essential that all the necessary legal guarantees are built in into the new mutual recognition instruments (European evidence warrant, retention of data, etc.) and to allow the ECJ sufficient room to develop transnational legal principles in criminal matters within the EU. If the ECJ is to deal quickly and efficiently with these issues, a specialized chamber would not go amiss.

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47 Case C-436/04, *Léopold Henri van Esbroeck v. Public Prosecutor's Office*, Opinion of 20 October 2005.