3. The principle of *ne bis in idem*

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THE PRINCIPLE OF NE BIS IN IDEM

Martin WASMEIER *

1. The principle and its foundations in Union law
Ne bis in idem is a fundamental legal principle common to practically all national criminal justice orders in Europe, usually as a constitutional human right.¹ It is also known as the prohibition of double jeopardy. According to this principle, a person can not be prosecuted more than once for the same (criminal) behaviour. Its ratio is twofold: on the one hand, to offer judicial protection to persons against the State’s jus puniendi, once they have been subject to a prosecution (as part of the principles of fair trial and equity²), and on the other hand to ensure legal certainty and the respect of the res judicata.

Traditionally, in most States ne bis in idem applied solely at national level, although some EU Member States – mainly those building on a common law system, but also others such as the Netherlands and Spain – have recognised a res judicata effect or the validity of foreign judgments³. Even the relevant instruments of international law (e.g. Article 14(7) of the International Political Covenant on Civil and Political Rights⁴ and Article 4 of Protocol 7 to the European

² See the opinion of Advocate-General Ruiz-Jarabo Colomer in Case C-436/04, Van Esbroeck, para.19.
³ For instance, see G. Dannecker, “Die Garantie des Grundsatzes ‘ne bis in idem’ in Europa”, in G. Hirsch and others (eds.), Festschrift für Günter Kohlmann, Cologne 2003, pp. 593-615, at p.598; and J. Vervaele, supra note 1, p.102.

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Convention on Human Rights\(^5\) refer to *ne bis in idem* only within the domestic sphere\(^6\).

However, within the EU this principle has been shifted to the transnational level. The *Convention implementing the Schengen Agreement*\(^7\) (CISA) conceives *ne bis in idem* as applying among different (Member) States. Article 54 CISA stipulates that “a person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party”.

While the CISA was originally concluded as an international law instrument among some EU Member States it was later integrated into the framework of EU law, as part of the so-called Schengen *acquis*\(^8\). Articles 54 to 58 CISA on *ne bis in idem* are now binding and applicable throughout the EU (and even in certain non-EU countries)\(^9\). They are to be considered part of EU police and judicial cooperation in criminal matters, the Union’s “third pillar”\(^10\). In a more specific context, *ne bis in idem* is also referred to in other EU legal instruments, such as the European Arrest Warrant\(^11\) and the EU *Convention on the Protection of the*
European Communities’ Financial Interests. In addition and prior to the CISA, *ne bis in idem* has been referred to by the ECJ in matters of Community law, in particular regarding sanctions in competition law.

The principle has also been laid down in Article 50 of the *Charter of Fundamental Rights of the European Union*, stating that “no one shall be liable to be tried again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law”. Although the Charter is not currently does not legally bind the Member States, it can influence the interpretation of EU law.

*Ne bis in idem* is, thus, a key principle of EU criminal law, and also an outstanding example for the added value of EU law in comparison to international law, including the *European Convention on Human Rights*, since the EU has developed this principle from a domestic to a transnational legal principle and fundamental right. This development can be explained by a specific link between *ne bis in idem* and the freedom of movement within the EU, as highlighted in the relevant case law of the European Court of Justice (ECJ).

2. The ECJ’s General Guidelines for the Interpretation of *ne bis in idem*

The incorporation of the principle into the framework of EU law enabled the ECJ to pronounce itself on the interpretation by way of preliminary rulings according to Article 35 EU, and thus to ensure a consistent application of the principle in all Member States. Apart from answers to several specific questions, the Court has provided fundamental guidelines for the interpretation of the principle.

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15 The relevance of the Charter for the interpretation of EU law has been underlined in opinions by Advocates-General (see http://europa.eu.int/comm/justice_home/unit/charte/en/european-context-reference.html). Proclaimed in Nice in 2000, the Charter has been incorporated into Part II of the *Treaty establishing a Constitution for Europe* [2004] O.J. C310/1, which has not been ratified by all Member States.
16 *Protocol 7 to the European Convention of Human Rights*, supra note 5.
17 For a more detailed analysis see Wasmieier/Thwaites, The Development of *Ne bis in idem* into a transnational fundamental right, [2006] 31 European Law Review, p. 565-578.
First, the Court has continuously held that Articles 54-58 CISA are based on the concept of mutual recognition: in its landmark ruling on the cases Gözütok and Brügge\(^{18}\), it made clear that where further prosecution was (definitively) barred according to the national law of a Member State where a decision was taken, this shall apply throughout the Union\(^{19}\). The Court referred to the “necessary implication that the Member States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Member States even when the outcome would be different if its own national law were applied”, and derived this from the fact that neither Title VI EU nor Article 54 CISA made the latter provision “conditional upon harmonisation, or at least approximation, of the criminal laws of the Member States...”\(^{20}\).

Secondly, the ECJ affirms an intrinsic link between Article 54 CISA and the free movement of persons\(^{21}\). It regards ne bis in idem an essential part of an area of freedom, security and justice. The fundamental freedom of movement could be undermined if individuals had to face several prosecutions for the same behaviour within the Union. In its further case law, the ECJ confirmed and consolidated this line. In the Miraglia judgment, it clarified that free movement of persons is “assured in conjunction with appropriate measures with respect to (…) preventing and combating crime”.\(^{22}\) This means that the objective of providing citizens with a “high level of safety” (Article 29 EU) is equally to be taken into account. Freedom, justice and security as the main determinants on the interpretation of the principle, are to be reconciled and applied in a balanced manner.

In its further case law, the Court has coherently applied and developed this approach and thereby strengthened ne bis in idem as a fundamental individual right. Through a set of preliminary rulings according to Art. 35 EU, it has provided answers to many questions, which had been discussed controversially in various fora.

\(^{19}\) Id., para.30, 33, 34, and 40.
\(^{20}\) Id., para.32/33.
\(^{21}\) Id., para.35, 40.
3. Case law on specific elements of ne bis in idem

a) Which (types of) decisions bar further prosecution?
Several preliminary rulings deal with the term “finally disposed of” in Art. 54 CISA, in other words: with the type of decisions that trigger a *ne bis* effect. In cases *Gözütok* and *Brügge*, the Court held that Art. 54 CISA would not necessarily imply the *involvement of a court* or tribunal, as “matters of procedure and form do not impinge on the effects of the procedure”\(^{23}\). A decision by “an authority required to play a part in the administration of criminal justice in the national legal systems concerned” would suffice\(^{24}\). The Court concluded that the *ne bis in idem* principle “also applies to procedures whereby further prosecution is barred … 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.”

This is remarkable, since it expands to the limit of the wording in several languages\(^{25}\) and goes beyond the historic intentions of the parties to the CISA: at the time of conception of the provision, the Contracting Parties intended to exclude out-of-court settlements (“transactions”) from the application of the *ne bis in idem* principle, since a proposal to include them was ruled out\(^{26}\). The ECJ stated that such intentions of the parties were “no longer of value” as they predate the Treaty of Amsterdam’s integration of the Schengen *acquis* into the EU framework\(^{27}\).

In the following case (*Miraglia*), it became clear that the grounds for a decision may also play a role. The Court found that *ne bis in idem* applied not to “a decision of the judicial authorities of one Member State declaring a case to be closed, after the Public Prosecutor has decided not to pursue the prosecution on the sole ground that criminal proceedings have been started in another Member State against the same defendant and for the same acts, without any determination whatsoever as to the merits of the case”\(^{28}\). The reasoning in this case implies that *ne bis in idem* does not necessarily apply in all situations where

\(^{23}\) *Gözütok* and *Brügge*, *supra* note 18, para.31.

\(^{24}\) *Id.*, para.28.

\(^{25}\) For instance, see the French (“définitivement jugée”), German (“rechtsskräftig abgeurteilt”) or Dutch text (“onherroepelijk vonnis”).

\(^{26}\) J. Vervaele, *supra* note 1, pp.113-114; *Gözütok and Brügge*, *supra* note 18, para.42.

\(^{27}\) *Gözütok and Brügge*, *supra* note 18, para.46; J. Vervaele, *supra* note 1, p.113.

\(^{28}\) Case C-469/03, judgment of 10.03.2005, *supra* note 22, para.35.
national law bars further prosecution: its interpretation may not lead to results that would run contrary to the objectives of the principle and the Treaties (including the guarantee a high level of safety, Art. 29 EU). While it would be too rash to conclude that the Court considered the determination of the merits of a case a conditio sine qua non for a barring effect, the Miraglia judgment leaves room for reflection on decisions that are not based on such a determination, such as time lapse or absence of public interest.

The recent ruling in the Gasparini case makes clear that ne bis in idem applies to decisions "...by which the accused is acquitted finally because the prosecution of the offence is time barred." By the way, this also confirms that the principle applies to acquittals (and not only convictions and or decisions with a sanctioning character); a finding that clearly can be derived from the general guidelines of the ECJ case law outlined above, but was perhaps not obvious in some of the original language versions of Art. 54 CISA.

Furthermore, in its judgment on the case van Straaten, the ECJ ruled that the ne bis in idem "falls to be applied in respect of a decision of the judicial authorities of a Contracting State by which the accused is acquitted finally for lack of evidence", because otherwise the principles of legal certainty and the protection of legitimate expectations would be undermined and the right of free movement could be jeopardised. It also underlines that Art. 54 CISA "makes no reference to the content of the judgment", and – with a view to the Miraglia judgment – that an acquittal for lack of evidence is based on a determination as to the merits of the case.

b) Scope ratione tempore:
Another preliminary ruling was rendered on 9 March 2006 in the Van Esbroeck case, where one question presented to the Court dealt with the scope ratione temporis of Articles 54-58 CISA. Insofar, the Court concluded that ne bis in idem should apply to criminal proceedings brought in a Contracting State for acts which

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29 See also below on the van Straaten case (C-150/05, judgment of 28.9.2006), para 60.
30 On this, see Commission Staff Working Document, supra note 9, pp.55-56.
32 In Gözütok/Brügge (para.29), the Court had underlined the sanctioning character of the Prosecutor's settlement/decision, although it is not clear to what extent this was decisive.
33 See supra note 25.
35 Id., para 56 and 60.
a person had already been tried in another Contracting State (Norway) "even though the Convention ...[CISA] was not yet in force in the latter State at the time at which that person was convicted, in so far as the Convention was in force in the Contracting States in question at the time of the assessment by the court before which the second proceedings were brought (...)"36.

c) “Same acts” (idem):
In several judgments the Court had the opportunity to clarify what is meant by the "same acts", the "idem" component of the principle. The Van Esbroeck judgment states that the notion of “same acts” is to be construed as the "identity of the material acts understood as the existence of a set of facts which are inextricably linked together", and not as the identity of the legal qualification of these acts in the various Member States37 or, as expressed in the later ruling on the van Straaten case, "irrespective of the legal classification given to them or the legal interest protected"38.

To underpin this, the Court referred first to the language of the CISA, suggesting that it refers to the nature of the acts and not to their legal classification39. Indeed, the wording of Article 54 CISA is based on a factual approach to "idem" in the sense that it prohibits a second prosecution on the same facts rather than on the same offence: while the official English translation ("same acts") might leave some scope for interpretation, this is manifest in most of the other language versions40. The ECJ had already used the expression "same facts" in its previous case-law (Gözütok and Brügge, Miraglia)41. Such is also the formulation used by the European Communities Convention on Double Jeopardy of 198742.

Secondly, the ECJ confirmed this interpretation by comparing it with the different wording of other international instruments which rather refer to the legal

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37 Id., second finding of the judgment.
38 Van Straaten, supra note 34.
39 Van Esbroek, supra note 36, para.27.
40 Commission Staff Working Document, supra note 9, p.56, footnote 128, which refers to different authentic 1990 language versions of the CISA as follows “Dutch (“feiten”), French (“faits”) and German (“Tat”, which in the legal language refers to a factual conduct). The official English translation (...) uses the more flexible term “same acts”. The European Communities Convention on Double Jeopardy of 1987 also refers to “same acts”.
41 Gözütok and Brügge, supra note 23, para. 38; and Miraglia, supra note 18, para.32.
42 Supra note 7, Art.1.
classification of the acts\textsuperscript{43}, such as Article 4 of Protocol 7 to the European Convention on Human Rights where the term “offence” is used (although interestingly and despite this different basis/approach, it could be said that the European Court of Human Rights reached a comparable result by ruling that “\textit{idem}” applies to the “same essential elements”\textsuperscript{44}).

Once again, the Court took a mutual recognition perspective, observing that the identity of legal classification would be likely to vary from one State to another\textsuperscript{45}. It added that “a criterion based on the legal classification of the acts or on the protected legal interest might create as many barriers to freedom of movement within the Schengen territory as there are penal systems in the Contracting States. In those circumstances, the only relevant criterion for the application of Article 54 CISA is the identity of material acts, understood as the existence of a set of concrete circumstances which are inextricably linked together”\textsuperscript{46}.

Thus, the Court has brought an end to a long and controversial debate on the factual or legal nature of the \textit{idem} component\textsuperscript{47}, giving a clear preference for a factual approach. This case law has strengthened the character of \textit{ne bis in idem} as a fundamental right even further than it was envisaged in a previous Member State initiative for a framework decision (which spoke of “\textit{idem}” in terms of “a second criminal offence arising solely from the same, or substantially same, facts, irrespective of its legal character”)\textsuperscript{48}.

\textsuperscript{43} Van Esbroeck, supra note 36, para.28.

\textsuperscript{44} Case Franz Fischer v Austria [2001] E.C.H.R. (especially para.25, 29 and 31), and Case Sailer v Austria [2002] E.C.H.R. (especially para.24-25). See also Commission Staff Working Document, supra note 9, p.56, footnote 132; J. Vervaele, supra note 1, p.102 – the latter, however, also pointing to contradictory judgments from the European Court of Human Rights.

\textsuperscript{45} Van Esbroeck, supra note 36, para.30, 32 and 33.

\textsuperscript{46} Id., para.35-36.

\textsuperscript{47} See i.a. van den Wyngaert/Stessens, “The International \textit{Non bis in idem} Principle: Resolving some of the Unanswered Questions” [1999] 48 I.C.L.Q. 779, at pp.788-794, who had argued that “any general international \textit{non bis in idem} provision should, in principle, bar only new prosecutions for the same offence, not for the same facts. Even on a purely domestic level, an overly broad definition of the ‘same facts’ may result in unjust effects, in that prosecutions have to be declared inadmissible because a person has been prosecuted on the same facts but for a lesser charge”.

\textsuperscript{48} Initiative by the Hellenic Republic, [2003] O.J. C100/24, Art.1(e). The Advocate-General in \textit{Van Esbroeck}, supra note 36, para.49 (footnotes 22 and 24), also referred to a Belgian “circulaire” on the interpretation of Art.54 CISA (\textit{Circulaire interministérielle du 10 décembre 1998 sur l’incidence de la convention de Schengen en matière de contrôle...
The concept of facts "inextricably linked" was put into concrete terms with regard to illegal smuggling of drugs and other goods: the Court held that an illegal export of the same drugs from one State to another is to be considered identical with the import into the latter. In the *van Straaten* case, it went further, saying that "the quantities of the drug that are at issue ... or the persons alleged to have been party to the acts ... are not required to be identical". It also found that "the marketing of goods in another Member State, after their importation into the Member State where the accused was acquitted, ...may form part of the 'same acts' within the meaning of Art. 54 CISA". However, it should not be overlooked that in *Van Esbroeck*, the ECJ also underlined that the definitive assessment of what facts are to be considered identical should rest within the realm of the competent national courts.

It could be noted that the ECJ's approach differs from the wording of Article 50 of the EU Charter of Fundamental Rights, which refers to the "same offence". However, this provision only sets a minimum standard. The factual approach is fully in line with both the spirit of the Charter and with its Articles 52 and 53, according to which the EU is allowed to go beyond this minimum protection and offer a higher standard of protection and free movement. After all, a factual *idem* may generally provide a higher standard of protection to the prosecuted individual than a legal interpretation based on the concept of "same offence", as the latter would often allow for a second prosecution of the same behaviour.

d) Majority of offenders

In the *Gasparini* case, the Court was asked whether an acquittal of one of several offenders that are accused of having committed a criminal act together would bar prosecution of the remaining offenders. It replied that the *ne bis in idem* principle
"does not apply to persons other than those whose trial has been finally disposed of in a Contracting State". The question by the national Court only referred to an acquittal based on a time limit, but the language of the reply seems to suggest that this was a general principle.

4. Need for further measures on EU level?

The EU institutions had called for the principle of *ne bis in idem* to be further defined and to guarantee its uniform application throughout the Union EU. An initiative for a framework decision was presented by the Greece in 2003, which however did not lead to an agreement in Council. The case law has settled many, if not most of the formerly controversial issues, and further rulings are to be expected rather soon. Some questions still remain, but at least part of those might be answered by future case law.

Therefore, the need to supplement and/or replace the CISA provisions by an EU framework decision on *ne bis in idem* is no longer obvious. Such an instrument could be of added value if it were to remove or restrict the condition of enforcement in case of convictions ("...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"), which does not appear in Article 50 of the EU Charter of Fundamental Rights, and/or the possibility of the Contracting States to provide for exceptions from the principle (Art. 55 CISA). On the other hand, it is useful to have the principle laid down in a Convention instead of a framework decision, since according to Art. 34(2) b EU the latter would not entail direct effect.

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55 Gasparini, supra note 31, second finding.
56 Note, however, the first finding in van Straaten, supra note 34 (second indent).
59 Several cases are pending at the ECJ: C-288/05 Kretzinger, C-367/05 Kraaijenbrink, C-467/05 Dell'Orto.