BRIEFING PAPER

THE APPLICATION OF THE NE BIS IN IDEM PRINCIPLE IN THE AREA OF IMPLEMENTATION OF THIRD PILLAR INSTRUMENTS

Abstract:
The ne bis in idem or ‘double jeopardy’ principle is at the heart of current EU debates concerning the phenomenon of multiple prosecutions for transnational crime. Individuals and companies are increasingly moving across EU borders not only for lawful but also unlawful purposes. Ne bis in idem, a well-established principle within national criminal justice systems, now also operates in this context to prevent persons being tried for the same offence in more than one jurisdiction. Ne bis in idem was first enshrined as a ‘transnational human right’ in the Schengen Convention of 1990; it has since been confirmed by the European Court of Justice (ECJ) as part of EU law. The note reviews ECJ case law and analyses the extent of legal protection afforded by EU law. It also discusses the operation of ne bis in idem under European Arrest Warrant proceedings. The Commission’s recent Green Paper [COM (2005) 696 final] makes suggestions how to allocate jurisdiction in cases of conflict, proposing a mechanism which should reduce the exposure of persons to multiple prosecutions. Eurojust is already playing an important role in mediating between Member States who share jurisdiction; the Commission favours an expansion of its role. The approximation of ne bis in idem rules suffered a false start under the last Greek EU Presidency; the Commission is now also seeking views on whether these attempts should be revived. The note favours leaving the elaboration of ne bis in idem in its cross-border manifestation to the ECJ.
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The application of the *ne bis in idem* principle in the area of implementation of Third Pillar instruments

I. Introduction

This note reviews the status and function of the *ne bis in idem* principle in EU law and policy. The Commission’s recent Green Paper on ‘Conflicts of Jurisdiction and the Principle of *ne bis in idem* in Criminal Proceedings’¹ provides a recent reference point for the discussion. The Green Paper analyses *ne bis in idem* in light of the problems arising from multiple prosecutions of transnational crime.

Multiple prosecutions for the same facts are occurring with much greater frequency as a result of increased cross-border criminality (for example money laundering and trafficking in persons occurring in several jurisdictions), encouraged by open borders and technological advances². It is no coincidence that the transnational application of *ne bis in idem* appears in the Schengen context of abolition of internal border controls. National criminal law is also tending to extend its jurisdiction to certain offences, such as genocide, war crimes and crimes against humanity, causing more overlaps with other systems³.

Multiple prosecutions are harmful both to private and public interests. The individual or company is faced with the burden of concurrent proceedings in different jurisdictions while the prosecution services may waste resources and face problems of co-operation because of proceedings commenced in other (often neighboring) Member States. In its Green Paper, the Commission defends the fundamental nature of the *ne bis in idem* principle but at the same time challenges its sometimes ‘arbitrary’ consequences: the principle is said to give ‘preference to whichever jurisdiction can first take a final decision’⁴. As an indirect means of allocating jurisdiction it is said to leave much to chance. The Commission has therefore taken up the calls being made elsewhere for a new mechanism of allocating cross-border cases to an appropriate jurisdiction⁵.

In this paper we will first look at the operation of *ne bis in idem* in current EU law and policy, before discussing proposals to avoid conflicts of jurisdiction. The impact of *ne bis in idem* in European Arrest Warrant cases will also be discussed.

II. *Ne bis in idem*: a principle of transnational justice?

The *ne bis in idem* principle is well-established in Member States’ national systems of criminal justice⁶. In certain European Union countries, the principle is of constitutional rank⁷. In common law systems, the principle is better known as the rule against ‘double jeopardy’⁸.

The Seventh Protocol of the European Convention on Human Rights (ECHR) reflects the common understanding of the principle as a fundamental right which should be respected as part of a common European legal heritage⁹. As explained by the Law Commission of England and Wales, the Protocol was adopted to bring the Convention more closely into line with the United Nations International Covenant on Civil and Political Rights (ICCPR)¹⁰.

Both national systems and the ECHR, however, envisage application of this fundamental right only in the national context, i.e. within a single system of criminal justice. There is no principle of public

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² See for example the annual reports of Eurojust since 2002 (www.eurojust.eu.int). A current example of a case subject to concurrent proceedings is the investigation into the Prestige tanker disaster. Eurojust is facilitating discussions between French and Spanish authorities as to who is best suited to prosecute. See also IV. below.
⁴ Green Paper, 3.
⁵ Notably in the Freiburg proposal.
⁷ See for example Article 103 (3) of the German Basic Law (Grundgesetz).
⁹ Article 4 of the Protocol states that: ‘No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.’ (italics added).
¹⁰ See Law Commission (note 8 above), 3. The prohibition on double jeopardy in the ICCPR is in Article 14(7): “No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and the penal procedure of each country.”
international law which requires its application in criminal justice co-operation between states; it is not part of *jus cogens*.

Until the 1990s, the possible *transnational* dimension of the *ne bis in idem* principle was largely neglected or rejected. Although the then EC countries had signed a Convention on Double Jeopardy in 1987, it was never ratified. It was only with the advent of the Schengen Implementing Convention of 1990 that a successful attempt was made, initially by a smaller group of EC Member States, to grapple with the cross-border application of *ne bis in idem*.

**Article 54 of the Schengen Convention states:**

‘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.’

The Schengen states firmly committed themselves to apply in relation to judicial co-operation in criminal matters, subject to certain conditions and exceptions. The Schengen Convention marks an important milestone in terms of regional initiatives towards closer co-operation between criminal justice systems. The true significance of Article 54 is, however, only now becoming felt following incorporation of the Schengen Convention into EU law and its application across the EU as a whole, within an even more integrated criminal justice co-operation framework. We will now look at the place of *ne bis in idem* in this framework.

**III. Application of *ne bis in idem* in EU law**

1. *Ne bis in idem* as a fundamental right under EU law

Community law traditionally refers to fundamental rights as part of the ‘general principles’ of law which bind Community institutions and (to a certain extent) Member States. With the creation of the European Union, these rights also now apply to action under the ‘non-Community pillars’ of the Treaty, including the Third Pillar: Article 6 of the Treaty on European Union applies the general principles to actions of the Union.

The European Court of Justice had identified *ne bis in idem* as a general principle of Community law as early as the 1960s: its application in the field of competition law has been confirmed ever since.

One could therefore argue that, even in the absence of Article 54 of the Schengen Convention, a general principle of *ne bis in idem* would apply in relations between Member States’ criminal justice systems, at least post-Amsterdam. Apart from its inherent value as a fundamental right, the principle clearly also facilitates the process of ‘mutual trust of each other’s criminal justice systems’ which underlies mutual recognition, as the Court of Justice explained in the its judgment in C-187/01 and C-385/01 Gözütok and Brügge. The *ne bis in idem* principle was recognised by Advocate-General Colomer as a fundamental right in his Opinion in that case. Recent literature supports this interpretation.

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12 Cf. also Article 53 (1) of the Council of Europe Convention on the International Validity of Criminal Judgments of 28 May 1970 (ETS No. 70). Not all EU Member States have ratified this Strasbourg instrument. Vervaele, op. cit., refers to certain bilateral treaties in which the principle applies.
14 See Articles 55-58 of the Convention.
15 Ireland and the UK are in a special position where Schengen is concerned, as the Green Paper explains. The UK has now opted into the Schengen *acquis* in such a way that it clearly applies *ne bis in idem*: see for example Criminal Justice Act 2003, s. 76 (4).
16 See the cases referred to by the Court of First Instance of the EC at paragraph 85 of its judgement of 9 July 2003 in Case T-224/00 Archer Daniels Midland Co. and another v. Commission, published in [2003] European Court Reports II-2597.
18 A view to which he adheres in his more recent Opinion of 20 October 2005 in the pending Case C-436/04 Léopold Henri van Exbroeck v. Openbaar Ministerie. See further under III.4.
Article 50 of the Charter of Fundamental Rights of the EU would make such a fundamental right explicit.

2. Incorporation of Article 54 Schengen Convention in European Union law

The Amsterdam Treaty incorporates the Schengen Convention into the framework of EU law, giving its provisions a legal basis under either the ‘First Pillar’ (Community law) or the ‘Third Pillar’ (Title VI of the Treaty on European Union). Article 54 was accorded a legal basis in the Third Pillar, on the basis of Articles 31 and 34 of the Treaty on European Union.

The Amsterdam Treaty and the related Tampere conclusions have changed the legal and political context in which *ne bis in idem* operates: in particular, *ne bis in idem* must now be looked at in light of the EU’s programme of mutual recognition of judicial decisions and in the context of ever-closer co-operation in criminal justice matters under the Third Pillar. Mutual recognition is the ‘cornerstone’ of co-operation in criminal justice matters. In this context, *ne bis in idem* means that, in principle, the criminal courts of one Member State should not try cases which have already been decided in criminal proceedings in another Member State: *ne bis in idem* operates in such circumstances as a bar to trial.

Perhaps the most significant consequence of its incorporation into the EU legal order is that Article 54 is now subject to interpretation by the European Court of Justice which can decide on points referred by national courts. As we will now see, the Court’s jurisprudence is beginning to shape the meaning and application of the principle on an EU-wide level.

3. Interpretation of Article 54 Schengen Convention by the ECJ: current scope of *ne bis in idem* in EU law

The European Court of Justice (ECJ) has already decided two cases relating to Article 54. The first case, *Gözütok and Brügge*, joined references made by criminal courts in Germany and Belgium, respectively; the second case, *Miraglia*, concerned questions raised by an Italian court. In a third case, *Esbroeck*, the Advocate-General has issued his Opinion. It can be seen from these cases and others which are pending that the application of the *ne bis in idem* principle is very much a topic of current practical concern to judges and prosecuting authorities in EU jurisdictions: they are in need of guidance from Luxembourg.

*Gözütok and Brügge* was a decision of the full Court. Although presented only with the rather narrow question whether Article 54 applied to criminal procedures whereby further prosecution is barred (it answered in the affirmative), the Court used the opportunity presented by the case to give its full endorsement to EU policy in criminal justice matters.

The Court referred to the goal of Article 2 of the Treaty on European Union – ‘the establishment and maintenance of an area of freedom, security and justice in which the free movement of persons is assured.’ Article 54 served this policy objective by ensuring that ‘no-one is prosecuted on the same facts in several Member States on account of his having exercised his right to freedom of movement’. The words ‘finally disposed of’ should be interpreted broadly to apply not only to final judgments but also to ‘decisions definitively discontinuing prosecutions in a Member State’.

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20 This provision would be incorporated in EU law as Article II-110 of the Constitutional Treaty.
22 The legal effects of measures taken under Title VI of the Treaty on European Union is discussed by the Court of Justice in Case C-105/03 *Maria Pupino*, judgment of 16 June 2005.
24 In so far as the Member State concerned has made a declaration in favour of such jurisdiction for its national courts (see Article 35(2) of the Treaty on European Union).
25 See note 17 above.
26 Case C-469/03 *F. M. Miraglia*, judgment of 10 March 2005.
27 Case C-436/04, Opinion of Advocate General of 20 October 2005 (judgment pending).
28 See note 17 above.
29 See paragraph 38 of the judgment. This interpretation puts the individual in the forefront and is consistent with the idea of *ne bis in idem* as a general principle of EU law and a ‘transnational human right’, even if the Court itself does not use these terms (cf. Vervaele and Schomburg, op. cit., who do).
30 Paragraph 38.
The facts of the cases concerned two drugs prosecutions in which out-of-court settlements were reached between the prosecution and the defense without involvement of a court but in application of Dutch and German rules of criminal procedure. Such ‘consensual’ methods of disposing of relatively minor cases form part of criminal practice in an increasing number of jurisdictions. By deciding that ne bis in idem could apply to such cases the Court was therefore arguably moving in the same direction as national criminal policy 31. It also made clear, however, in a strong statement of principle, that different approaches to criminal law must be tolerated if the goals of EU policy under Title VI of the Treaty on European Union are to be achieved:

‘there is a 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.’32

The Miraglia33 judgment provides a gloss on the interpretation of Article 54 by the Court in Gözütok and Brügge34 by deciding that ne bis in idem does not apply to decisions taken without regard to the merits of the case. In this case, Dutch prosecutors closed their investigations in a drugs case when they heard that concurrent proceedings had been opened in Italy in respect of the same criminal acts. Ne bis in idem could not operate in such circumstances because it would prevent any substantive investigation of the facts and that would clearly be contrary to the aims of Title VI of the Treaty on European Union35.

4. Gaps in current law (and ways how to fill them)

Remaining gaps or uncertainties in the current law relating to ne bis in idem will be revealed by future proceedings before the European Court of Justice. The Court’s judgments in Gözütok and Brügge36 and Miraglia37 do not solve all the possible ‘bis’ issues, i.e. what type of judicial or other decision will be required to produce the bar to further proceedings38. The Court will soon have to decide whether to follow the Opinion of the Advocate-General in Esbroeck39, in a case concerning what exactly is meant by ‘same acts’, i.e. the ‘idem’ element of the principle.

The central debate on idem is whether ‘same acts’ should be understood in a legal sense, as acts constituting the same offence in two or more systems, or in a (broader) factual sense as ‘same facts’. The case concerned two separate acts of importation (into Norway40) and exportation (from Belgium) of the same drugs. The Advocate General, after reviewing the various language versions of Article 54, opted clearly for the broader factual interpretation. He also justifies this broader approach with reference to the EU policy context: if ne bis in idem was confined to acts qualified in the same way by legal systems, the individual could be subject to fresh prosecutions as soon as he or crossed the border.

When it decides Esbroeck41, the Court will therefore clarify further the meaning of Article 54. Further cases are pending42 and other open questions have been identified in the literature, notably in the study by the Max-Planck Institute for Foreign and International Criminal Law43. The Freiburg study proposes a tailor-made ne bis in idem statute for the European Union with clear definitions of what is meant by ‘person’, ‘prosecution’, ‘act’ and ‘finally disposed of’, all crucial terms for application of the principle. Overall, the study opts for a generous approach to ne bis in idem in the transnational context, expanding on the Gözütok and Brügge44 approach.

32 Paragraph 33.
33 See note 26 above.
34 See note 17 above.
35 See paragraph 34 of the Miraglia judgment (note 26 above).
36 See note 17 above.
37 See note 26 above.
38 Schomburg, op.cit., 844.
39 See note 27.
40 Norway has opted in to parts of the Schengen acquis and is in particular bound by the Article 54 provision (cf. Association Agreement with Iceland and Norway, OJ L 176, 10.7.1999, 36).
41 See note 27.
42 These again mainly concern the interpretation of ‘same acts’ in Article 54. A Spanish court has also asked the question whether time-bar in one Member State jurisdiction bars legal proceedings in another (see Case C-467/04 G. Francesco Gasperini, OJ C 6, 8.1.2005, p. 31). Note also the reference from the Bundesgerichtshof in the case of Jürgen Kretzinger, C-288/05, OJ C 257, 15.10.2005.
43 See note 3 above.
44 See note 17 above and Freiburg Proposal, 26.
A formal EU legislative instrument to deal with similar questions was proposed by Greece in 2003 but later abandoned pending further work on conflicts of jurisdiction. Some Member States believed the definitions of *ne bis in idem* proposed by the Greek initiative diverged too much from national models.

Like the Commission’s Green Paper, the Freiburg paper places *ne bis in idem* squarely in the framework of a new policy designed to avoid conflicts of jurisdiction. As the next section will illustrate, the avoidance of multiple prosecutions has become a pressing matter in current EU criminal policy debates; it is now being given priority attention.

**IV. *Ne bis in idem* and judicial co-operation under the Third Pillar: avoiding multiple prosecutions**

Application of the *ne bis in idem* as a fundamental right can of course frustrate prosecutions already commenced, causing the resources of generally hard-pressed police and prosecutors to be wasted. We might ask, however, whether there is really any need to quarrel with this idea? Fundamental rights are by nature ‘aimed’ at public authorities, who inevitably have to suffer the consequences if they fail to adhere to them.

The Commission, as already mentioned, does have a quarrel with the principle where it is said to have ‘arbitrary’ results. It is seeking ways of protecting the individual from multiple prosecutions without their having to resort to *ne bis in idem*. Indeed, one major weakness of the principle from the viewpoint of the defendant is that it does not as currently framed actually prevent multiple prosecutions.

Practice clearly shows concurrent proceedings being commenced in many cross-border situations, with concomitant distress for the individual and duplication and/or loss of work for prosecution and courts. Eurojust, the EU’s judicial co-operation agency, which has the power to request a Member State to desist from prosecuting if another is in a better position to do so, has also drawn attention to these problems. It has published Guidelines to assist itself and national prosecutors when faced with a conflict of jurisdiction.

The Commission’s Green Paper invites suggestions on a mechanism for the choice of jurisdiction when two or more Member States are competent. The paper sets out a suggestion for a three-stage procedure in such cases, culminating in a decision which allocates the case to a particular jurisdiction. This jurisdiction may be designated as the ‘leading’ Member State after certain discussions have taken place. Elements of mediation and of judicial review are built into this proposal, with important roles being foreseen for Eurojust and the European Court of Justice. Guidelines similar to those discussed by Eurojust are also proposed.

Were such a mechanism to be introduced, it would ideally result in limiting the need to rely on *ne bis in idem*. The paper suggests that the Commission may then also revive attempts to agree a more harmonised definition of the principle, presumably on the basis of its own legislative proposal.

**V. *Ne bis in idem* and the European Arrest Warrant**

There would seem to be no need for a harmonised *ne bis in idem*, provided the Court of Justice’s ‘filling of the gaps’ in Article 54 can continue in a way which is broadly acceptable to most Member States. Approximation would be fraught with potential difficulties, even if a legal basis could be inferred from the Treaty on European Union.

Nevertheless, the Commission and other EU institutions are concerned to ensure that *ne bis in idem* does not operate so as to frustrate cross-border co-operation in criminal matters. The Commission’s preliminary evaluation of the operation of the Warrant does not show this to be the case but it is

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46 Note the discussion of the proposal from a UK perspective in the 32nd report of the House of Commons Select Committee on European Scrutiny of 17 September 2003 (http://www.parliament.the-stationery-office.co.uk/).
47 See Article 6(a)(ii) and 7(a) (ii) of Council Decision of 28 February 2002 setting up Eurojust, OJ 63, 6.3.2002. Schomburg, op. cit., 838 describes these provisions as a ‘milestone’ towards avoiding *ne bis idem* scenarios.
48 Cf. Annex to Eurojust’s 2003 Annual Report: ‘Guidelines for deciding which jurisdiction should prosecute’. These guidelines are mainly intended to inform Eurojust when it exercises its powers.
49 Green Paper, 8-9.
50 See Article 31 (1) (d) of the Treaty on European Union (cf. the similar provisions of Article III-270(1) (b) of the Constitutional Treaty).
generally anxious to ensure that the number of possible obstacles to recognition of judicial decisions of other Member States is kept to a minimum.

*Ne bis in idem* is a ground for refusal of surrender of persons under the European Arrest Warrant legislation: under Article 3 (2), it operates as a mandatory ground in relation to final judgments made in any Member State (not only in state issuing the Warrant); under Article 4 (3), it constitutes an optional ground for non-surrender in relation to decisions taken in other Member States not to prosecute or to discontinue legal proceedings. Vervaele has rightly observed that Article 4 (3) is not consistent with the Court’s decision in *Gözütok and Brügge*\(^5^1\), which would bar surrender in such circumstances\(^5^2\).

The provisions of the Framework Decision concerning *ne bis in idem* at least have the merit of being clear and rather comprehensive, which cannot be said of certain other provisions of the Warrant\(^5^3\). Further clarification of the interaction between *ne bis in idem* and the European Arrest Warrant will be provided by the European Court of Justice when it decides the case recently referred to it by the Bundesgerichtshof\(^5^4\).

*Peter J. Cullen, 31.1.06.*

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51 Note 17 above.
52 Vervaele, op.cit., 117.