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## *Ne Bis In Idem*: Towards a Transnational Constitutional Principle in the EU?

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### 1. Introduction

Many areas of regulation and enforcement have been substantially affected by the increasing European integration process in the last few decades. The result is not only visible through the implementation, application and enforcement of EU policies in every Member State (the vertical dimension of integration), but also in the creation of common areas such as the customs union, the internal market and the area of freedom, security and justice (the horizontal dimension of integration). Thanks to the four freedoms of the internal market citizens can enjoy a whole set of basic economic and non-economic freedoms. Thanks to the Lisbon Treaty citizens can expect that the Union will offer them free movement, in conjunction with appropriate measures to prevent and combat crime (Article 3(2) TEU) and to offer security in a common area of freedom, security and justice. Both the vertical and horizontal dimension of European integration are part of a EU legal order (with European and national components) in which the rule of law and human rights standards do apply. The Lisbon Treaty has strengthened this in Article 6 TEU by recognizing the EU Charter of Fundamental Rights (CFREU) as a source of binding primary EU law.

When it comes to the enforcement of EU policies in the Member States (the vertical dimension) or the enforcement of EU policies in a transnational setting (the horizontal dimension) there is a double EU interest at stake: effective enforcement and compliance with the EU human rights standards.

With the growing impact of EU regulations at the domestic level and the increasing mobility of goods, persons, services and capital in the EU and the related increasing transnational dimension of domestic criminal justice activities, there is an increasing risk that a person might suffer double jeopardy or be prosecuted and/or be punished twice, at the national level (when enforcing EU policies) or at the EU level by several EU Member States or even by an EU Member State and the Commission, in a field like competition, where the Commission has punitive adjudicative jurisdiction.

In a setting of an integrated internal market and a common area of freedom, security and justice citizens and legal persons might expect equivalent human rights protection between the Member States of the EU and at the European level. They might also expect that this protection complies at least with the common binding standards of the European Convention on Human Rights (ECHR). Today, in the EU, do we have an equivalent transnational protection of *ne bis in idem* that applies both in the vertical and horizontal dimension of European integration? Is the domestic regulation of *ne bis in idem* in each EU Member State or is the *ne bis in idem* principle enshrined in public international law (human rights law)

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able to offer this equivalent protection? Or do we need a proper transnational *ne bis in idem* principle in the EU? If so, what are the modalities of this transnational principle in order to comply with equivalent protection for citizens and legal persons?

## 2. The rationale and scope of the domestic *ne bis in idem* principle

The *ne bis in idem* principle is a general principle of (criminal) law in many national legal orders, sometimes even codified as a constitutional right such as the clause relating to *ne bis in idem* (prohibiting dual punishment – *double jeopardy*) of the Fifth Amendment of the Constitution of the United States of America or Article 103 of the German Constitution. Historically the *ne bis in idem* principle only applies nationally and is limited to criminal justice; this means precluding application to punitive administrative enforcement. Recently, some states have widened the scope to punitive proceedings and penalties.

The rationale of the *ne bis in idem* principle is manifold. Traditionally it was very much linked to the sovereignty and legitimacy of the state and its legal system, as well as respect for the *res judicata* (*pro veritate habitur*) of final judgments.<sup>1</sup> The link with *res judicata* and the international recognition of criminal verdicts could of course also give international effect to the *ne bis in idem* principle. However, few countries recognize the validity of a foreign judgment in criminal matters for execution or enforcement in their national legal systems without this being founded on a treaty. Even the recognition of *res judicata* in respect of a foreign criminal judgment is problematic, certainly when it concerns territorial offences. The recognition of foreign *res judicata* means that the prospect of a new prosecution or punishment is no longer possible (the negative effect) or that the decision has to be taken into account in the context of judgements pending in other cases (the positive effect). The majority of common law legal systems do actually recognize the *res judicata* effect of foreign judgments. In civil law systems, the Netherlands has 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>2</sup> However, even the Netherlands excludes punitive administrative penalties from the scope of application.

In every single Member State the *ne bis in idem* principle raises many questions concerning both the *idem* and *bis* element of the principle. In order to consider the meaning of the same/*idem*, it may be asked whether the legal definition of the offences should be considered as the basis of the definition of the term the same (*idem*), or should it be the set of facts (*idem factum*)? Does it depend on the judicial rights protected by the legal provisions and their scope? Are natural and legal persons different with regard to the application of the principle? Is the reach of the principle limited to double punishment under criminal law or does it include other punitive sanctions that may be imposed under private law or administrative law? What is a firm and final sentence? Does it include settlements with the public prosecutor or with other judicial authorities? Must the sentence have been enforced or executed? In other words, there is no common and equivalent standard of *ne bis in idem* between the EU Member States. This can create a lack of equivalent protection for the citizen or legal person when it comes to the enforcement of EU law in the domestic legal order. Why would a EU citizen or legal person be punished twice with a punitive administrative fine and a criminal penalty for EU subsidy fraud in one EU Member State while he is protected against that type of double punishment in another EU Member State? Second, the domestic *ne bis in idem* principles only have domestic effect and cannot cover transnational situations in the EU. Third, very few EU Member States have a system in place by which to recognize the validity of foreign judgments in punitive matters so that it would bar double punishment. It thus becomes clear that the non-harmonised domestic *ne bis in idem* principle is not able to offer adequate and equivalent protection for citizens and legal persons, either at home, or in the horizontal internal market or the common area of freedom, security and justice.

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

2 For a commentary on the Dutch *ne bis in idem* in Art. 68 of the Criminal Code, see P. Baauw, 'Ne bis in idem', in B. Swart & A. Klip (eds.), *International Criminal Law in the Netherlands*, 1997, pp. 75-84.

In the last few centuries the *ne bis in idem* principle also mainly became a principle by which to offer judicial protection for the citizen against the *ius puniendi* of the state and, as such, it forms part of the principles of due process and a fair trial, in other words it was converted into a fundamental right protecting against cumulative criminal punishment.<sup>3</sup> This not only resulted in the elaboration of domestic constitutional *ne bis in idem* principles, but also in *ne bis in idem* provisions in public international law/human rights law (IHRL). Besides, nation states have been increasingly subscribing to bilateral and multilateral conventions on mutual legal assistance (MLA) in criminal matters. Can these human rights and MLA conventions offer adequate and equivalent protection for citizens and legal persons?

### 3. Public international law and *ne bis in idem*

As a starting point we must underline that there is no general rule of international law that imposes an international obligation to comply with *ne bis in idem*.<sup>4</sup> Its application is conventional and thus depends solely on the content of international treaties. We can find public international law treaty-based *ne bis in idem* provisions in three sources: international human rights law (IHRL), the law regulating international criminal tribunals and multilateral treaties dealing with judicial cooperation in criminal matters, also called mutual legal assistance (MLA).

#### 3.1. IHRL and *ne bis in idem*

The conversion of *ne bis in idem* into a domestic fundamental right protecting the citizen against the cumulative use of the *ius puniendi* by the state also found its way into IHRL after World War II. The *ne bis in idem* principle has been enshrined as an individual right in international human rights treaties, such as in Article 14(7) of the International Covenant on Civil and Political Rights of 19 December 1966.<sup>5</sup> We must however take into account that some states formulated reservations to the principle.<sup>6</sup>

The ECHR does not contain such a provision and the former European Commission of Human Rights<sup>7</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 Article 4 of the 7th Protocol to the ECHR,<sup>8</sup> but it is not a binding instrument for all EU Member States. Neither the Netherlands nor Germany has ratified this Protocol. The UK is the only member of the Council of Europe that did not even sign it. Moreover, countries like France and Luxembourg have formulated reservations when ratifying. Many EU countries also deposited limiting declarations at the moment of signature. It is clear that several EU countries,<sup>9</sup> like Austria, France, Germany, Italy and the Netherlands, have limited the scope of application of the principle by precluding its application to punitive penalties outside of the criminal code. Germany, for

3 See the excellent PhD thesis by J. Lelieur-Fischer, 'La règle ne bis in idem. Du principe de l'autorité de la chose jugée au principe d'unicité d'action répressive', *Université Panthéon-Sorbonne (Paris I)*, Paris, 2005 (not published).

4 Also underlined by the German Federal Constitutional Court, 2 BVerfG 15 December 2011, 2 BvR148/11, Para. 31.

5 Art. 14 (7) ICCPR: '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 penal procedure of each country.'

6 The Netherlands, for example, has formulated the following reservation:

'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.'

7 European Commission of Human Rights, 13 July 1970, appl.no. 4212/69, CDR 35, 151.

8 '1.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. 2.The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case. 3.No derogation from this Article shall be made under Article 15 of the Convention.'

9 See the overview of declarations and reservations at <<http://www.conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=117&CM=8&DF=11/01/2013&CL=ENG&VL=1>> (last visited 11 January 2013).

instance, has done this in line with Article 103 of its Constitution. The *ne bis in idem* principle has also been laid down in the Inter-American Convention on Human Rights in Article 8(4).<sup>10</sup>

What can we derive from the case law of both regional human right courts and from the UN Human Rights Committee? To start with the latter, the Human Rights Committee has<sup>11</sup> made it clear in its case law that Article 14(7) does not apply to foreign *res judicata*, in other words the UN *ne bis in idem* principle only has effect in the domestic legal order of each Member State. Also the regional human rights courts are in line with the IHRL jurisdiction and have given domestic legal effect to the IHRL *ne bis in idem* principles. That means that the persons concerned cannot claim the international or transnational effect of the principle under IHRL.

From the case law of the Inter-American Court on Human Rights it has also become clear that the *ne bis in idem* principle is not an absolute human right. The positive duty to investigate, prosecute and punish serious violations of human rights (that include core international crimes) can result in setting aside fraudulent *res judicata* in criminal matters, because of the symbolic punishment, or because of the way in which evidence was gathered during the investigation and presented in the indictment, or because of the way in which the trial court came to its verdict.<sup>12</sup> This is very much in line with the approach under the law regulating international criminal courts. Although Article 10 of the ICTY Statute and Article 20 of the Rome Statute of the ICC recognize that the *ne bis in idem* principle should apply in the combined jurisdiction of national and international criminal courts, both international criminal courts can activate their jurisdiction, even in the case of final national judgments, if the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility or the case was not diligently prosecuted.

This analysis has made clear that the IHRL *ne bis in idem* principle is unable to offer international or transnational protection for the principle. Has it possibly been able to harmonise, in a praetorian way, the domestic application of the principle? The case law of the Human Rights Committee on *ne bis in idem* is so limited that we can exclude this from the outset. From the case law of the European Court of Human Rights (ECtHR) we can deduce that it has not been easy for the Court to define in a clear way the rationale and the scope of the *ne bis in idem* principle. The Court has been asked in the majority of cases to deal with the definition of *idem*. After some contradictory judgements on the application of Article 4 of the Seventh Protocol, based either on *idem factum* in *Gradinger v Austria* or on the concept that the same conduct may constitute several offences in *Oliviera v Switzerland*,<sup>13</sup> in the case of *Franz Fischer v Austria*<sup>14</sup> the ECtHR elaborated an *idem factum* concept based on the 'essential elements' of the two offences, although in the case of *Göktan v France*<sup>15</sup> the Court once again seemed to place its trust in the legal *idem*. In recent years the Court has again relied on the *idem factum* concept based on the 'essential elements' of the offences, such as in the *Bachmaier v Austria* case,<sup>16</sup> the *Hauser-Sporn v Austria* case<sup>17</sup> and the *Garretta v France* case.<sup>18</sup> Very recently, in the case of *Zolotukhin v Russia*, the Grand Chamber<sup>19</sup> admitted that its case law lacked legal certainty and guidance and accepted the necessity of a harmonised interpretation. In *Zolotukhin v Russia* the ECtHR also confirmed its case law on the *bis* element of the principle. The Court defines the *bis* element as the commencement of a new prosecution,

10 'An accused person acquitted by a non appealable judgment shall not be subjected to a new trial for the same cause.'

11 The Human Rights Committee ruled that Article 14(7) does not apply to foreign *res judicata*, see UN Human Rights Committee 2 November 1987. See also its General Comment on Article 14 of the 1966 International Covenant on Civil and Political Rights in 2007 at point 57: 'This guarantee applies to criminal offences only and not to disciplinary measures that do not amount to a sanction for a criminal offence within the meaning of article 14 of the Covenant. Furthermore, it does not guarantee *ne bis in idem* with respect to the national jurisdictions of two or more States. This understanding should not, however, undermine efforts by States to prevent retrial for the same criminal offence through international conventions.'

12 *Loayza-Tamayo v Peru*, 17 September 1997; *Almonacid-Arellano v Chile*, 26 September 2006, Para. 154 and *La Cantuta v Peru*, 29 November 2006, Para. 153.

13 *Gradinger v Austria*, 23 October 1995, Series A no. 328-C and *Oliveira v Switzerland*, 30 July 1998, Reports of Judgments and Decisions 1998-V, p. 1990. See <<http://www.echr.coe.int>> for these decisions.

14 *Franz Fischer v Austria*, 29 May 2001, Series A no. 312 (C), confirmed in *W.F. v Austria*, 30 May 2002 and *Sailer v Austria*, 6 June 2002. The same approach was applied in *Sailer v Austria*, 6 June 2002.

15 *Göktan v France*, 2 July 2002. The same approach was applied in *Gauthier v France*, 24 June 2003 and *Ongun v Turkey*, October 2006.

16 *Bachmaier v Austria*, 2 September 2004.

17 *Hauser-Sporn v Austria*, 7 December 2006.

18 *Garretta v France*, 4 March 2008.

19 *Zolotukhin v Russia*, 10 February 2009.

where a prior acquittal or conviction has already acquired the force of *res judicata*.<sup>20</sup> This means that 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>21</sup> In the case of *Zolotukhin v Russia* the Court qualified the first administrative offence, by using the Engel criteria, as penal for the purposes of Article 4 of Protocol 7, mostly due to the nature of the offence and the severity of the penalty imposed.

On the harmonising effect at the domestic level the conclusion is thus mitigated. First, not all Member States of the EU have ratified the Protocol. Second, some have formulated reservations. This means from the very start that the effect is unequal between the Member States. Third, the case law of the ECtHR has not been abundant and is not, as is recognized by the Court itself, a scholarly example of clarity and guidance. However, the ECtHR has opted for a harmonising interpretation in its recent case law. The problem remains that this harmonising effect is legally not binding on all EU Member States.

To conclude, we can underline that the binding effect of the IHRL is limited to every single jurisdiction and that the effect of the IHRL *ne bis in idem* principles cannot be qualified as offering equivalent protection in the EU.

### 3.2. Mutual legal assistance (MLA) and EU mutual recognition (MR) in criminal matters

Within the framework of the Council of Europe efforts have been made since the 1950s to introduce a regional international *ne bis in idem* principle when it comes to MLA. This means that *ne bis in idem* can play a role when it comes to the extradition of a person or to the gathering of evidence abroad through coercive measures. However, 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*.

In the MLA conventional instruments the *ne bis in idem* principle is an important mandatory or optional ground for refusal. The *ne bis in idem* principle was included in the milestone multilateral Extradition Convention 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 judgment 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 a *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.’

<sup>20</sup> *Zolotukhin v Russia*, 10 February 2009, Para. 83.

<sup>21</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 US 435 (1989), has once again recently been restricted in *Hudson v U.S.*, 522 US 93 (1997). See also J.A.E. Vervaele, ‘La saisie et la confiscation à la suite d’atteintes punissables au droit aux Etats-Unis’, 2002 *Revue de Droit Pénal et de Criminologie*, pp. 974-1003.

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 Paragraphs 2 and 3 which also cover other Contracting Parties.<sup>22</sup>

In the 1959 Council of Europe Convention on Mutual Assistance in Criminal Matters, dealing with the gathering of evidence, there is no *ne bis in idem* provision included, either in the Additional Protocol of 1978 or that of 2001. Neither is this the case in the EU Convention of 2000 on Mutual Assistance in Criminal matters or its Additional Protocol of 2001. In other words European states are willing to accept *ne bis in idem* as a ground of refusal in the MLA when it comes to extradition (including the deprivation of liberty), but not for other investigative coercive measures.

*Ne bis in idem* is a mandatory ground of refusal under the 1970 Convention of the Council of Europe on the International Validity of Criminal Judgements (Articles 53-57) and under the 1972 Convention on the Transfer of Proceedings in Criminal Matters (Articles 35-37). However, both conventions have a rather low ratification rate and 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 has been more widely ratified, it is optional, but some Contracting States have included it in their ratification declaration as a ground for the refusal of cooperation requests.

With the coming into force of the Amsterdam Treaty on the European Union in 1998 the European Council introduced an ambitious mutual recognition programme with the aim of replacing the Council of Europe MLA instruments with proper MR instruments of the EU. The first flagship was the European arrest warrant (EAW), replacing the extradition regime. In the EAW a mandatory non-execution in case of *ne bis in idem* is included in Article 3(2):

‘If the executing judicial authority is informed that the requested person has been finally judged by a Member State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State.’

However, when there is no final judgment, but only prosecution or where the final judgment is from a third state, the *ne bis in idem* provision is optional in Article 4:

‘2. 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 (...)

5. if the executing judicial authority is informed that the requested person has been finally judged by a third State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing country.’

In the European evidence warrant (EEW), the mutual recognition regime which has replaced the mutual assistance system, a *ne bis in idem* provision has been introduced in Article 13(1)(a), but as an optional

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22 ‘2. The extradition of a person against whom a final judgment 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;

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 judgment was passed had himself a public status in the requesting State;

c) if the offence in respect of which judgment was passed was committed completely or partly in the territory of the requesting State or in a place treated as its territory.’

ground for non-execution. In the European Investigation Order (EIO)<sup>23</sup> in criminal matters, which is currently being negotiated and which should replace the EEW, it remains an optional ground for non-execution in Article 10(1)(e).

What can we conclude from this overview from MLA to MR in criminal matters when it comes to the application of *ne bis in idem*? First of all, it is clear that the principle only comes into play when competent authorities (states or judicial authorities) request MLA or order MR. In other words it is not a person's right but a ground of refusal (MLA) or a ground for non-execution (MR) between states (MLA) or between judicial authorities (MR). It bars cooperation between the parties involved and does not give a right to the subject. Second, only in a couple of situations is *ne bis in idem* a mandatory bar to cooperation; in quite a few situations it is optional or is even not foreseen. Third, the MLA-MR regime does not cover the whole field of punitive penalties. Most instruments do not include punitive penalties under administrative law enforcement. We can conclude that the regional cooperation framework in criminal matters, be it MLA or MR, does not provide for a transnational *ne bis in idem* application in the territories of the Council of Europe Member States or in the territories of the EU Member States in the sense that citizens or legal persons can derive a protective right not to be punished or prosecuted twice.

Overall it has also become clear that the so-called international *ne bis in idem* does not offer an international or transnational protection for the subject in question. De facto public international law only imposes obligations in the domestic legal order or conditions the cooperation between the domestic legal orders, without introducing a transnational regional or global right to *ne bis in idem* protection. This protection against double jeopardy has no international reach or transnational reach for the subject.

Does the process of European integration under the former European Community (EC) and the actual European Union (EU) offer us another panorama of needs and solutions?

## 4. European integration and *ne bis in idem*

### 4.1. *Ne bis in idem* in Community law

It comes as no surprise that the EC stumbled upon the issue of the transnational application of the *ne bis in idem* principle before the coming into force of the Treaty of Maastricht and the justice and home affairs policy. In the field of competition policy both the European Commission and the national competition authorities were competent authorities to impose punitive administrative sanctions.<sup>24</sup> In some countries the criminal courts also had jurisdiction in competition cases. The risk of double punitive penalties was thus more than real for the legal persons concerned. In 1969 the European Court of Justice (ECJ) already had an occasion to address the issue of *ne bis in idem* in the field of competition. The ECJ held in *Wilhelm v Bundeskartellamt*<sup>25</sup> that double prosecution, once by the Commission and once by the national authorities, was in line with Regulation 17/62<sup>26</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*). In the meantime it has become settled ECJ case law to confirm the *ne bis in idem* principle as a general principle of Community law<sup>27</sup> which means that it is not limited to criminal sanctions, but that it also applies in competition matters. However, in *Cement*<sup>28</sup> the ECJ made the application of the general principle of *ne bis in idem* in the area of EC competition law subject to a

23 <<http://register.consilium.europa.eu/pdf/en/11/st11/st11735.en11.pdf>> (last visited 30 May 2013).

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

25 Judgment of 13 February 1969, [1969] ECR 3.

26 Regulation no. 17/62, OJ P 013, 21.2.1962.

27 See for instance Case 7-72, Judgment of 14 December 1972, *Boehringer Mannheim v Commission* (Rec.1972, p. 1281) (DK1972/00323 GR1972-1973/00313 P 1972/00447 ES1972/00261 SVII/00061 FIII/00059) and Judgment of the Court of 15 October 2002, *Limburgse Vinyl Maatschappij NV (LVM)* (C-238/99 P), *DSM NV and DSM Kunststoffen BV* (C-244/99 P), *Montedison SpA* (C-245/99 P), *Elf Atochem SA* (C-247/99 P), *Degussa AG* (C-250/99 P), *Enichem SpA* (C-251/99 P), *Wacker-Chemie GmbH and Hoechst AG* (C-252/99 P) and *Imperial Chemical Industries plc (ICI)* (C-254/99 P) v *Commission of the European Communities*.

28 Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, *Aalborg Portland and Others v Commission*, [2004] ECR I-123 (*Cement*).

'threefold condition' of the 'identity of the facts, the unity of the offender and the unity of the legal interest protected'. This means that the threefold condition of the ECJ to define the *idem* element is not in line with the *idem factum* definition of the ECtHR as established recently in the *Zolotukhin* case.<sup>29</sup> The fact that the ECJ seems to limit the *ne bis in idem* principle to double punishment and still accepts the accounting principle instead of barring the second punishment is another point of conflict with the ECtHR case law. These problems have not been solved by the actual competition Regulation 1/2003 either.<sup>30</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 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.

In the field of competition we cannot speak of a fully elaborated transnational *ne bis in idem* principle either. The legislator remained silent and the ECJ has been limiting the rationale of the principle, both when it comes to the definition of *idem* and the definition of double punishment. There has been no legislative action on the harmonization of the application of *ne bis in idem* in the domestic application and enforcement of EU law, such as for instance in areas of EU policies in which punitive penalties have been prescribed, like for instance in the area of common agricultural and fisheries policies.

#### **4.2. The first basis for a regional transnational criminal *ne bis in idem* principle: the Schengen space<sup>31</sup>**

Things started to change with the increasing integration in the field of justice and home affairs after the coming into force of the Maastricht Treaty. *Ne bis in idem* clauses were included in several instruments, imposing upon Member States the duty to respect the principle within their national jurisdiction when dealing with aspects of justice and home affairs. The Convention on the protection of the European Communities' financial interests and its several protocols contain various provisions on *ne bis in idem*<sup>32</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>33</sup> These clauses aim at respect for *ne bis in idem* in every single jurisdiction of the EU Member States and does not aim at any transnational regulation of the principle.

In the 1980s, however, the European Justice Ministers of the former European Community (EC) were already fully aware that the deepening and widening of European integration would lead to an increase in cross-border crime and a need for transnational justice in Europe, going beyond the classic concepts of national jurisdiction. Within the framework of the European Political Cooperation,<sup>34</sup> before the coming into force of the Maastricht Treaty's third pillar on justice and home affairs, the 1987 Convention on double jeopardy was elaborated between the Member States of the EC. This Convention dealt with the *ne bis in idem* principle in a transnational setting in the EC. The Convention has however been poorly ratified,<sup>35</sup> but its substance has been integrated into Chapter 3 (Articles 54-58) of the intergovernmental 1990 Convention implementing the Schengen Agreement of 1985 (CISA). These Schengen agreements were the conventional legal basis for enhanced cooperation in the fields of justice and home affairs. However, they had been elaborated by a minority of the EC states and outside of the legal framework of the EC. Nevertheless, The CISA Convention can be qualified as the first multilateral convention that establishes an international *ne bis in idem* principle as an individual right *erga omnes*, be it limited to the regional Schengen area.

29 See Section 3.1 *supra*.

30 Regulation no. 1/2003, OJ L 001, 4.1.2003.

31 A. Weyembergh, 'Le principe ne bis in idem: pierre d'achoppement de l'espace pénal européen?', 2004 *Cahiers de droit européen*, pp. 337-375.

32 OJ C 313, 23.10.1996, Art. 7.

33 OJ C 195, 25.6.1997, Art. 10.

34 J.A.E.Vervaele, *Fraud against the Community. The need for European fraud legislation*, 1992, p. 345 and J.A.E. Vervaele & A. Klip (eds.), *European Cooperation between Tax, Customs and Judicial Authorities*, 2002.

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



The *ne bis in idem* principle is laid down in Article 54 CISA as follows:

‘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.’

From this reading it becomes clear that the application of *ne bis in idem* depends on an enforcement clause that refers to the effective application of the penalty in order to avoid impunity.

Article 55 further limits the reach of Article 54 by introducing the possibility for Schengen States to include reservations at the moment of approval or ratification. Reservations can be made in relation to 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 that 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.’

It is also clear that the Schengen *ne bis in idem* does not stand in the way of broader national protection, as Article 58 CISA provides that:

‘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 transnational Schengen *ne bis in idem* principle is an important improvement and clearly shows that the increasing justice integration cannot be based solely and decisively on effective enforcement considerations. However, CISA is an intergovernmental scheme without judicial supervision and is limited to the common territory of the Schengen States and the Schengen States can use, and indeed have used, Article 55 to limit the scope of the principle by introducing national territoriality clauses or broad interpretations of the essential interests of the national jurisdiction. Not all Schengen States were convinced that CISA was providing rights to citizens, as some of them refused to publish the text as a public source of legislation.

#### ***4.3. From a transnational Schengen principle to a transnational Union principle and a EU fundamental right***

What was politically still impossible at the intergovernmental conference leading to the Maastricht Treaty became finally a reality with the coming into force in 1999 of the Amsterdam Treaty, albeit that it took until the last meeting of the Heads of State in Amsterdam to push it through. The Schengen intergovernmental agreements of 1985 and 1990 and the related Schengen *acquis* were incorporated into EU Law through Protocol 19 annexed to the Treaty of Amsterdam on European Union (TEU).<sup>36</sup> Neither the Protocol, nor the Council Decision on the integration of the Schengen *acquis*<sup>37</sup> refer to the reservations made under Article 55 CISA. The result was that the Schengen *ne bis in idem* of Chapter 3 CISA became a transnational *ne bis in idem* principle for the Union in the area of justice and home affairs (third pillar), being part of the area of freedom, security and justice. Second, the EU Charter of Fundamental Rights (CFREU) also became a binding text, which means that the *ne bis in idem* provision

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36 <[http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/borders-and-visas/schengen-agreements/index\\_en.htm](http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/borders-and-visas/schengen-agreements/index_en.htm)> (last visited 31 May 2013).

37 Council Decision of 20 May 1999 (1999/436/EC).

of Article 50 CFREU became a binding fundamental right with a transnational reach in the EU. From the Amsterdam Treaty on the ECJ the ECJ was also entrusted with (limited) jurisdiction in the area.

Article 50 CFREU stipulates:

‘No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.’

Although the wording of the article is very classic and seems to refer only to criminal offences, it is clear that the text has to be interpreted in the light of the case law of the ECtHR. Article 52(3) CFREU states clearly that the meaning and the scope of the Charter rights will be the same as the corresponding rights in the Convention. This means *in concreto* that the application of the Article 6 ECHR criminal charge concept, and the related Engel criteria, to the definition of *ne bis in idem* results in an Article 50 CFREU *ne bis in idem* principle that does apply to double punishment stemming from punitive administrative penalties and criminal penalties. The fact that the ECHR *ne bis in idem* has a domestic application only and Article 50 CFREU an application within the scope of EU law (which can be domestic, transnational and/or at the European level) does not mean that we do not have a similar right with a similar function. Moreover, under Article 52(3) the EU can provide more extensive protection. That means that the ECJ case law providing for a wider protection than the ECtHR is perfectly compatible with Article 50 CFREU. This means that ECJ case law giving broader protection is fully in line with the Charter.

At the moment of the integration of the Schengen *ne bis in idem* into the Union, the EU and its Member States were not only convinced of the need for a transnational *ne bis in idem* principle in the area of freedom, security and justice, given the diversity of the principle in each jurisdiction of the Member States and its domestic reach, but stressed also the need for further legislation on the matter. In fact in the Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice<sup>38</sup> it is stated 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 Draft programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters,<sup>39</sup> the *ne bis in idem* principle is included among the immediate priorities of the EU. However, the EU Member States have been struggling and are still struggling until today with both aspects of the problem: What should be the rationale for and the reach of the *ne bis in idem* principle and what system should be put in place in order to settle conflicts of jurisdiction in criminal matters or to provide for mechanisms or criteria on which to make a deliberate choice of jurisdiction?<sup>40</sup> In 2003 Greece came up with a proposal for a framework decision on *ne bis in idem*<sup>41</sup> that had the aim of replacing Articles 54-58 of the CISA by new EU legal rules in order to ensure uniformity in both the interpretation of those rules and their practical implementation. First of all, it is surprising that the proposal aims at codifying in EU law the Schengen reservation exceptions as general exceptions to the principle. Second, the drafters of the proposal have opted for an approach to the *bis* element of the principle that is not in line with the case law<sup>42</sup> of the ECtHR. In fact, the proposal defines criminal offences as offences *sensu strictu*, thereby distinguishing them from administrative offences or breaches punished with an administrative fine on condition that they may be appealed before a criminal court. The proposal does prefer the German tradition of administrative criminal law (*Ordnungswidrigkeiten*) instead of applying the Article 6 Engel criteria on punitive sanctions. The initiative was discussed in the Council of Ministers, but the multitude

38 OJ C 19, 23.01.1999, point 49(e).

39 OJ C 12, 15.01.2001.

40 S. Gless, *Beweisrechtsgrundsätze einer grenzüberschreitenden Strafverfolgung*, 2006.

41 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 100, 26.4.2003, pp. 24-27.

42 M. Luchtman, ‘Choice of forum in an area of freedom, security and justice’, 2011 *Utrecht Law Review* 7, no. 1, pp. 74-101.

of divergent opinions between Member States rapidly brought to light the unviability of this legislative solution. No new legislative initiatives, neither from the Commission nor from the Member States, have been submitted to the Council. Concerning the avoidance of *ne bis in idem* problems by settling, in due time, conflicts of jurisdiction, in 2005 the European Commission drafted a Green Paper on conflicts of jurisdiction and the principle of *ne bis in idem* in criminal proceedings,<sup>43</sup> preparing the way for a framework decision on the matter. Finally the Commission did not come up with a proposal. In 2009 the Czech Presidency submitted a proposal for a framework decision on the prevention and settlement of conflicts of jurisdiction in criminal proceedings.<sup>44</sup> However, the content of the approved framework decision<sup>45</sup> does not really contain any prioritisation of jurisdiction or stringent criteria for centralised prosecutions. It is very much concentrated on information exchange and mediation between Member States concerning jurisdiction issues.

Once again, it fell to the European Court of Justice to assume its praetorian role and to fill the legal vacuum concerning many relevant legal points, related to the rationale and the scope of the principle, but also the transition from Schengen to the EU. In fact, at the very moment of the integration of Schengen into Union law several Schengen States had reservations in place. Finally, the relationship between the Charter *ne bis in idem* clause of Article 50 and the Schengen *ne bis in idem* clauses have to be clarified.

#### 4.4. The rationale and the scope of the transnational *ne bis in idem* principle based on Article 54 CISA<sup>46</sup>

From the joined cases of *Gözütok* and *Brügge*<sup>47</sup> onwards the national courts have referred constantly to the ECJ for preliminary rulings under Article 35 TEU on the interpretation of Article 54 of the CISA, raising interesting questions<sup>48</sup> on the rationale and scope of the *bis* element (*Gözütok* and *Brügge*, *Miraglia*,<sup>49</sup> *Van Straaten*,<sup>50</sup> *Turansky*<sup>51</sup>) and the related enforcement clause (*Klaus Bourquain*<sup>52</sup> and *Kretzinger*<sup>53</sup>) and on the rationale and scope of the *idem* element (*Van Esbroeck*,<sup>54</sup> *Van Straaten*,<sup>55</sup> *Gasparini*,<sup>56</sup> *Kretzinger*,<sup>57</sup> *Kraaijenbrink*<sup>58</sup> and *Gasparini*<sup>59</sup>).

Due to the extensive case law of the ECJ we can deduce that the ECJ has given an autonomous interpretation to the principle, setting aside the rationale of the Schengen legislator. The new EU context has changed the rationale, scope and function of the *ne bis in idem* principle as it became part of the scheme of mutual trust in the EU area of freedom, security and justice. Due to this case law we can speak of a real transnational principle, as its application did not depend on further legislation or substantive harmonisation. Following this approach the ECJ has opted for an extensive application of the principle by not limiting the *bis* situation to final judgments but including out of court settlements on the merits of the case and by opting for a factual *idem* interpretation and not limiting the *idem* to *de iure* definitions of legal qualifications or *res judicata*. However, the ECJ has elaborated its principle within the area of

43 COM(2005) 696 final and Commission Staff working document SEC(2005) 1767. See M. Wasmeier & N. Thwaites, 'The development of *ne bis in idem* into a transnational fundamental right in EU law: comments on recent developments', 2006 *European Law Review*, pp. 565-578.

44 Proposal for a Council Framework Decision on prevention and settlement of conflicts of jurisdiction in criminal proceedings, Council Document 5208/09, 20 January 2009 (hereinafter: original proposal on conflicts of jurisdiction). For the Explanatory Report, see Council Document 5208/09, ADD 2, Brussels, 20 January 2009, 5208/09, Copen 7.

45 Council Framework Decision of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings (2009/948/JHA).

46 A. Weyembergh, 'Le principe non bis in idem: une contribution essentielle de la CJUE', in Court of Justice of the European Union (ed.), *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law*, 2013, pp. 539-561.

47 Cases C-187/01 and C-385/01 (Request for a preliminary ruling from *Oberlandesgericht Köln* and *Rechtbank van eerste aanleg te Veurne*); Case C-187/01 *Hüseyin Gözütok* and Case C-385/01 *Klaus Brügge*, [2003] ECR I-5689.

48 K. Ligeti, 'Rules on the application of *ne bis in idem* in the EU', 2009 *eu crim*, no 1-2 pp. 37-43.

49 Case C-469/03, 10 March 2005.

50 Case C-150/05, 28 September 2006.

51 Case C-491/07, 22 December 2008.

52 Case C-297/07, 11 December 2008.

53 Case C-288/05, 18 July 2007.

54 Case C-436/04, 9 March 2006.

55 Case C-150/05, 28 September 2006.

56 Case C-467/04, 28 September 2006.

57 Case C-288/05, 18 July 2007.

58 Case C-367/05, 18 July 2007.

59 Case C-467/04, 28 September 2006.

freedom, security and justice only and has not attempted to elaborate a harmonised approach with the *ne bis in idem* principle in the internal market/competition policy. This means that we cannot speak of a transnational *ne bis in idem* principle of the Union for all policy areas, but that we still have to make a distinction between the area of freedom, security and justice on the one side and the internal market/competition policy on the other.

Nevertheless, the ECJ's case law has had a harmonising impact beyond the EU, as it did inspire the ECtHR on some modalities of the principle. The most striking example can be found in the case *Zolotukhin v Russia*, in which the Grand Chamber<sup>60</sup> has referred very extensively to relevant comparative international law sources, including the ECJ case law on *ne bis in idem* in the field of competition law and in the field of justice and home affairs as well as the case law of the US Supreme Court on double jeopardy. The Court also admits that: '(...) the body of case-law that has been accumulated throughout the history of application of Article 4 of Protocol No. 7 by the Court demonstrates the existence of several approaches to the question whether the offences for which an applicant was prosecuted were the same'.<sup>61</sup> The Court underlines the necessity of a harmonised interpretation of the *idem* element of the *ne bis in idem* principle, in the light of the variety of approaches in the case law of the Court in order to guarantee legal certainty, foreseeability and equality. The Court expressly opted for the *idem factum* approach: 'Article 4 of Protocol No. 7 must be understood as prohibiting the prosecution or trial of a second "offence" in so far as it arises from identical facts or facts which are substantially the same (...) The Court's inquiry should therefore focus on those facts which constitute a set of concrete factual circumstances involving the same defendant and inextricably linked together in time and space, the existence of which must be demonstrated in order to secure a conviction or institute criminal proceedings'.<sup>62</sup> The harmonised concept of *idem* by the ECtHR is fully inspired by the *idem* definition of the ECJ, as elaborated in the area of freedom, security and justice in the EU.

Thanks to the case law of the ECJ the *ne bis in idem* principle has become a living instrument of transnational protection in the common area of freedom, security and justice. However, due to the lack of binding criteria of choice of jurisdiction in criminal matters, the principle has also been converted into an improper mechanism for a preference of jurisdiction. The first jurisdiction that comes to a decision on the merit bars any further prosecution and punishment in the same case for the same person. As it stands there is no guarantee at all that the first jurisdiction is also the best placed jurisdiction, not only from the point of view of effective justice, but also from the point of view of the protection of the victim and even from the point of view of the suspect. In other words, the *ne bis in idem* principle cannot function properly in a common area without the coordination of jurisdiction and binding criteria on choice of jurisdiction and a proper allocation of cases in the common justice area.

Finally, the ECJ has not been able to clarify all the legal aspects of the principle and there remain some striking differences with the case law of the ECtHR. From the case law of the ECtHR, also confirmed in the case *Zolotukhin v Russia*, we can deduce that the ECtHR defines the *bis* element as the commencement of a new prosecution, where a prior acquittal or conviction has already acquired the force of *res judicata*.<sup>63</sup> In other words, in the Strasbourg case law the *ne bis in idem* principle is not limited to double punishment, but also includes double prosecution. 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. In the case *Zolotukhin v Russia*<sup>64</sup> the ECtHR qualified the first administrative offence, by using the Engel criteria, as penal for the purposes of Article 4 of Protocol 7, mostly due to the nature of the offence and the severity of the penalty imposed. We have already underlined that the case law of the ECJ, by accepting the accounting principle as compensation for double punishment,<sup>65</sup> is not in line with the case law of the ECtHR. There are however signs that the ECJ is aware of the problems and is willing to apply the ECtHR reasoning. Recently the ECJ has followed

60 *Zolotukhin v Russia*, 10 February 2009.

61 *Zolotukhin v Russia*, 10 February 2009, Para. 70.

62 *Zolotukhin v Russia*, 10 February 2009, Paras. 82 & 84.

63 *Zolotukhin v Russia*, 10 February 2009, Para. 83.

64 *Zolotukhin v Russia*, 10 February 2009, Paras. 52-57.

65 See Section 4.1, *supra*.

the ECtHR's reasoning in the *Bonda* case,<sup>66</sup> dealing with the accumulation of a criminal sanction and the administrative exclusion of a subsidy in the field of the common agricultural policy. The ECJ applied the Engel criteria to the *ne bis in idem* principle of Article 4 of Protocol 7 and came to the conclusion that the exclusion of a subsidy is not criminal/punitive in nature and does not therefore trigger the *ne bis in idem* principle in this case. This means, however, that in the future the ECJ could come to the conclusion that some punitive administrative sanctions cannot be cumulated with criminal sanctions in EU law as a result of the prohibition of double penalties, an interpretation that would be fully in line with that adopted by the ECtHR.

#### 4.5. The EU fundamental right to *ne bis in idem* in Article 50 CFREU: rationale, limitations and exceptions

##### 4.5.1. Applicability of Article 50 CFREU

Due to Article 51(1) CFREU the Charter applies to the institutions and bodies of the EU and to the Member States only when they are implementing EU law. Due to Article 6 TEU, the Charter has become binding as a primary source of EU law. However, the exact meaning of 'when they are implementing EU law' and thus of the scope of application of the Charter *ratione materiae* in the Member States remains open, as the ECJ has not yet expressed a definitive opinion on the matter.<sup>67</sup> In their interventions in cases before the ECJ, however, some Member States are advocating a narrow interpretation, by which 'a connection with EU law, acting in the scope of EU law or in the field of application of EU law', the actual criterion for the application of general principles of EU law, would not be enough to trigger the application of the Charter.

The discussion is important for our topic, as it affects the scope of application of Article 50 CFREU. Some interesting cases dealing with the enforcement of EU policies in the domestic legal order of the Member States and *ne bis in idem* issues have been submitted to the ECJ since the coming into force of the Lisbon Treaty.

In Case C-617/10, *Aklagaren v Hans Akerberg Fransson*, one of the legal points of interest is exactly the field of the material application of the CFREU. The Swedish tax authorities had accused Mr Fransson of VAT irregularities and a related failure to comply with information obligations and in 2007 they had fined him with administrative tax penalties. In 2009 Mr Fransson was prosecuted for the same facts and faced punishment of up to six years' imprisonment. The case was submitted by the Haparanda District Court to the ECJ for a preliminary ruling. In his opinion of 12 June 2012 Advocate General Cruz Villalón<sup>68</sup> elaborated upon the interpretation of Article 51(1) CFREU. What does it mean when it is stated that the Member States are bound by the provisions of the Charter 'only when they are implementing Union law?' The AG pointed rather to continuity with the existing case law on the application of general principles of Community/Union law, which means 'in the field of application of Union law'. This brought him to the following triad: scope-field of application-implementation. In his view, the competence of the Union to assume responsibility for guaranteeing the fundamental rights vis-à-vis the exercise of a public authority by the Member States, when they are implementing Union law, must be explained by reference to a specific interest of the Union in ensuring that the exercise of public authority accords with the interpretation of fundamental rights by the Union.<sup>69</sup> However, he is of the opinion that the mere fact that such an exercise of public authority, expressly the power of the State to impose penalties in this particular case, if ultimately based on a provision of Union law, is not, in itself, sufficient for a finding that there is a situation involving the implementation of Union law. The result of his reasoning is that the link is not sufficient to transfer the review of any constitutional guarantees applicable to the exercise of that power from the sphere of the responsibility of the Member States to that of the Union.<sup>70</sup> The premise for finding that the Union has an interest in assuming responsibility for guaranteeing the fundamental right concerned in this case is the degree of connection between Union law, which is in principle being

66 Case C-489/10, *Lukasz Marcin Bonda*, 5 June 2012.

67 See also J. Kokott & Ch. Sobotta, 'Die Charta der Grundrechte der Europäischen Union nach dem Inkrafttreten des Vertrags von Lissabon', 2010 *Europäische Grundrechte Zeitschrift*, pp. 265- 271.

68 Case C-617/10, *Aklagaren v Hans Akerberg Fransson*, Opinion of AG Cruz Villalón, 12 June 2012.

69 Case C-617/10, *Aklagaren v Hans Akerberg Fransson*, Opinion of AG Cruz Villalón, 12 June 2012, point 40.

70 Case C-617/10, *Aklagaren v Hans Akerberg Fransson*, Opinion of AG Cruz Villalón, 12 June 2012, points 40 & 54.

implemented, and the exercise of the public authority of the State. He considered the VAT Directive<sup>71</sup> to be an extremely weak link and not, in any event, a sufficient basis for a clearly identifiable interest on the part of the Union in assuming responsibility for guaranteeing that specific fundamental right vis-à-vis the Union.<sup>72</sup>

It is interesting to compare the opinion of Advocate General Cruz Villón with the one of Advocate General Kokott in the similar *Bonda* case.<sup>73</sup> In this Polish case *Bonda*, accused of an incorrect declaration under the EU agricultural subsidy scheme, was excluded by the administrative Agricultural Restructuring and Modernisation Agency from receiving a EU subsidy for several years and was subsequently convicted and given a suspended custodial sentence by the criminal district court. The appeal court decided, however, that the criminal proceedings against *Bonda* were inadmissible because of the *ne bis in idem* principle. After an appeal to the Supreme Court in the interest of the law, the Supreme Court referred to the ECJ for a preliminary ruling. In my view the *ne bis in idem* problem is quite similar in the *Bonda* case and *Fransson* case, as in both cases there is a risk of double punitive penalties (administrative and criminal) in one jurisdiction. Is there a different degree of connection with the implementation of EU law? In the case of *Bonda*, there is a Commission regulation that explicitly imposes the exclusion of subsidies as an administrative sanction. However, criminal enforcement is not specifically prescribed by Union law and is thus only imposed under the general enforcement obligations of the ECJ (*effet utile* and effective, proportionate and deterrent sanctions).<sup>74</sup> In the case of *Fransson* there is no explicit provision in the VAT Directive, but only a reference thereto in Article 273:

‘Member States may impose other obligations which they deem necessary to ensure the correct collection of VAT and to prevent evasion (...).’

In the case of VAT the Member States have in any case the duty to comply with the same enforcement obligations imposed by the ECJ, which means that this ‘may’ become a must and can include administrative and criminal penalties.

In the *Bonda* case AG Kokott clearly underlined that the *ne bis in idem* principle enjoys the status of a fundamental right of the EU under Article 50 CFREU and that this case is within the scope of the Charter,<sup>75</sup> whatever interpretation – restrictive or not – may be given to the material scope of the Charter. Despite several references by AG Kokott to Article 50 CFREU as an applicable human right, the ECJ completely neglected Article 50 CFREU in its analysis and reasoning. This is more than striking, as in both cases there is a substantial degree of connection with Union law. The scope and the interest are similar: an effective application and enforcement of the common agricultural policy and the common VAT regime. In case of the ineffective application of both, they potentially affect the budget of the Union. In other words, there is a direct link with the protection of the financial interest of the Union, which is one of the core interests of the Union, as laid down in Article 235 of the TFEU.

From the point of view of the alleged party, in both cases his fundamental right to *ne bis in idem* protection is at stake not only as part of an enforcement policy of a sovereign state, but also as the consequence of the policy and enforcement choices of a Member State in applying and enforcing EU obligations. In other words we are not speaking here of a purely internal case falling outside the scope of the application of EU law. When we are aiming at the effective and equivalent protection of the financial interests of the Union, it is logical that we are aiming at equivalent human rights protection at the same time, as provided for by and under the Charter. This is a sufficient reason to trigger the material application of the Charter and to trigger the jurisdiction of the Court to ensure uniform application through preliminary rulings.

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71 Council Directive 2006/112/EC, OJ L 347, 28.11.2006.

72 Case C-617/10, *Aklagaren v Hans Akerberg Fransson*, Opinion of AG Cruz Villalón, 12 June 2012, point 57.

73 Case C-489/10, *Lukasz Marcin Bonda*, Opinion of Advocate General Kokott, 15 December 2011, point 16.

74 Case 68/88, *Commission v Greece*, 21 September 1989.

75 Case C-489/10, *Lukasz Marcin Bonda*, Opinion of Advocate General Kokott, 15 December 2011, points 13 & 16.

In its judgment of 28 February 2013 in the *Aklagaren v Hans Akerberg Fransson* case the ECJ has excluded from the very start that Member States can act within the scope of EU law, but excluding the application of the Charter:

‘21. Since the fundamental rights guaranteed by the Charter must therefore be complied with where national legislation falls within the scope of European Union law, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter.’<sup>76</sup>

It is clear to the Court that that tax penalties and criminal proceedings for tax evasion, such as those to which the defendant in the main proceedings has been or is subject because the information concerning VAT that was provided was false, constitute the implementation of EU directives and of Article 325 TFEU and, therefore, of EU law. The mere fact that the national legislation was not formally enacted to transpose the directive is not an argument as it enforces an EU obligation: imposing effective penalties for conduct prejudicial to the financial interest of the EU.

Applied to the concrete case, the ECJ has underlined that the Charter does not preclude a Member State from imposing, for the same acts of non-compliance with declaration obligations in the field of VAT, a combination of tax penalties and criminal penalties. To assess whether tax penalties are criminal in nature the Engel criteria of the ECtHR, also clearly used in the *Bonda* case, are applicable. In this case, contrary to the case of *Bonda*,<sup>77</sup> the ECJ considered that it is for the referring court to determine, in the light of those criteria, whether the combining of tax penalties are punitive in character. When it is considered punitive, however, double punishment is barred by Article 50 CFREU.

With its judgment in the *Akerberg Fransson* case the ECJ has confirmed the autonomous interpretation of Article 50 CFREU, its application to the national enforcement of EU legislation and its applicability to all punitive sanctioning in line with the Engel criteria on punitive sanctions. In other words Member States that do limit *ne bis in idem*, when implementing and enforcing EU law, to criminal law *sensu strictu*, will have to widen their scope of protection in order to include punitive administrative sanctioning.

The *Akerberg Fransson* case is a national case of *ne bis in idem* application, but Article 50 CFREU has transnational effect. This means that Member States will have to face the transnational application of *ne bis in idem* for all punitive sanctioning in the EU when implementing and enforcing EU law.

#### 4.5.2. Limitations and exceptions to the *ne bis in idem* principle: claw-back clauses of national sovereignty?

Although Article 50 CFREU is a primary source of Union law, it does co-exist with Article 54 CISA, *ne bis in idem* clauses in the MLA and MR regimes, and Article 4 of Protocol 7 ECHR. Although these multiplicity of *ne bis in idem* clauses have different functions, they do not contribute to a comprehensive constitutional legal principle in the Union. Moreover, many of the *ne bis in idem* clauses outside of Article 50 CFREU have a restricted application because of certain exceptions, derogations or reservations. In the MLA and MR regimes the *ne bis in idem* clause cannot only be optional, but is also limited by exceptions if it is mandatory. The same exceptions are also derogations or reservations to Protocol 7 ECHR or Article 54 CISA. In practice some Member States have formulated restricted or no application at all of *ne bis in idem* in the following situations: offences that have been committed on national territory (territoriality clause); the preclusion of punitive administrative sanctions from the scope of application; the interests of national security or other related interests and/or offences committed by national civil servants.

Several national criminal courts have been obliged to deal with this legal patchwork, including the relationship between Article 50 CFREU and Article 54 CISA. In an interesting Italian case the judge of preliminary investigations of the Tribunal of Milan ruled on this matter.<sup>78</sup> In this case he had to decide

<sup>76</sup> <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62010CJ0617:EN:HTML>> (last visited 31 May 2013).

<sup>77</sup> In the *Bonda* case the administrative sanction was prescribed by the EU regulation and the referring court did ask for a ruling on the legal character of the sanction.

<sup>78</sup> *Tribunale di Milano, Ufficio del Giudice per le indagini preliminari*, N. 12396/92 RG N.R.-N. 3351/94 RG G.I.P., 6 July 2011.

on a committal procedure against two German suspects of a murder in Italy in 1989, for which they had already been sentenced to 5 years and 6 months imprisonment in Germany. After having served these German sentences and having used their EU right of freedom of movement, they were arrested and charged by the Italian prosecutorial authorities for the same facts. At the moment of ratifying the CISA provisions, Italy had used its prerogative to make a reservation<sup>79</sup> under Article 55 CISA, in order to bar the application of Article 54 CISA when the acts to which the foreign judgment relates took place in whole or in part in its own territory (the territoriality clause).<sup>80</sup>

The point of departure of the Italian judge was the Union interest in the freedom of movement within the area of freedom, security and justice. In his view Article 50 CFREU and Article 6 TEU that do not contain exceptions to the fundamental right and have direct and immediate application in the legal order of the Member States are *de iure* abrogated by the Schengen derogations. By applying his reasoning to the *ne bis in idem* principle of Article 50 CFREU and Article 6 TEU, he decided not to commit both suspects to trial.<sup>81</sup>

It is a pity that the Italian judge did not submit his questions to the ECJ for a preliminary ruling, at least concerning the validity of the CISA reservations after the integration of the Schengen acquis in the Union (given the fact that they were not mentioned in the Schengen Protocol to the Amsterdam Treaty and in the Council Decision on the Schengen integration), the applicability of Article 50 CFREU to the limitation on the freedom of movement and the consequences for the relationship with the CISA provisions on *ne bis in idem*. This can be seen as a missed opportunity to receive uniform answers from the ECJ.

The Greek Supreme Court<sup>82</sup> has ruled in the same sense as the Italian Milan Court judge. Greece had filed a reservation<sup>83</sup> according to Article 55 CISA to exempt *inter alia* drug trafficking offences from the application of the *ne bis in idem* rule. The Hellenic Supreme Court linked the *ne bis in idem* protection to the principle of the mutual recognition of court judgments and orders. The Court considered Article 50 CFREU to be a directly applicable provision that does not need further harmonisation to be triggered and it came to the conclusion that the reservations by Greece under Article 55 CISA had been repealed by the entry into force of the Treaty of Lisbon and the CFREU.

The German criminal courts have had to deal with cases in which a penalty had been imposed against a person, but not enforced or was in the process of being enforced. The enforcement clause is a substantial part of Article 54 CISA, but is not mentioned in Article 50 CFREU. The German District Court of Aachen<sup>84</sup> and the German Federal Court of Justice<sup>85</sup> decided that due to Article 52(1) CFREU the rights enshrined in the Charter can be restricted by laws that respect the essence of the Charter. In their view Article 54 CISA represents such a restriction, by which Article 50 CFREU only applies in accordance with Article 54 CISA. This interpretation has been confirmed by the German Federal Constitutional Court.<sup>86</sup> None of these courts have submitted a preliminary ruling to the ECJ, however.

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79 Laid down in Article 7 of the Italian *Legge n. 388 di 1993*.

80 Article 55(a) CISA.

81 See C. Amalfitano, 'Il principio del ne bis in idem tra CAAS e Carta dei diritti fondamentali dell'Unione Europea', *Cassazione Penale*, no. 11, 2012.

82 The Greek Supreme Court (*Areopag*) sitting as a full bench, Judgment No. 1/2011 of 9 June 2011.

83 Ratification Statute No. 2514/1997, OG A 140, 'The Hellenic Republic declares, in accordance with article 55 of the Convention Implementing the Schengen Agreement, that it shall not be bound by article 54 of the Convention in the following cases: 1. where the acts to which the foreign judgment relates took place in whole or in part in Greek territory. This exception shall not apply if the acts took place in part in the territory of the Contracting Party where the judgment was delivered; 2. where the acts to which the foreign judgment relates were committed by officials of Greece in violation of the duties of their office; 3. where the acts to which the foreign judgment relates constitute one of the following offenses under Greek law: a. offenses against the State (articles 134-137quinquies CC); b. acts of treason (articles 138-152 CC); c. offenses against political institutions and the Government (articles 157-160 CC); d. offenses against the President of the Republic (article 168 CC); e. offenses against military service and conscription (articles 202-206 CC); f. acts of piracy (article 215 of the Maritime Code); g. offenses against currency (articles 207-215 CC); h. illicit trafficking in narcotic drugs and psychotropic substances; i. offenses against antiquities and Greek cultural heritage; 4. where the acts to which the foreign judgment relates fall under international conventions signed and ratified by the Greek State.'

84 52 Ks 9/08- 'Boere', Decision of 8 December 2010. See C. Burchard & D. Brodowski, 'The Post-Lisbon principle of transnational ne bis in idem: on the relationship between article 50 Charter of Fundamental Rights and Article 54 Convention Implementing the Schengen Agreement', 2010 *New Journal of European Criminal law* 1, no. 3, pp. 310-327.

85 Decision of 25 October 2010 (BGH- 1 StR 57/10).

86 1 BVerfG 15 December 2011, 2 BvR 148/11 Para. No. 43.



The interpretation by the Hellenic Supreme Court and the Milan district court aim at the effective protection of the *ne bis in idem* right in a common area of freedom, security and justice, without any restrictions stemming from the intergovernmental cooperation regime under Schengen. They have opted for an autonomous application and interpretation of Article 50 CFREU. However, they have not dealt with the material scope of the Charter, as defined under Article 51(1) CFREU. What does it mean when Member States are only bound by the Charter when implementing EU law? Is the fact that restrictions to the *ne bis in idem* right affect the freedom of movement within the EU enough to trigger the application of the Charter?<sup>87</sup> At least the question should have been tackled and answered or should have been submitted to the ECJ for a preliminary ruling.

It think that they are right, however, when they consider that the reservations under the CISA, being reservations of sovereign states, and not restrictions decided by EU Member States, make little sense in the common area of freedom, security and justice and should be set aside.

The interpretation by the German Courts is problematic from other points of view, however. First of all, the restrictions on the rights have been made in an intergovernmental context, not in a common context of the area of freedom, security and justice. To which extent does the enforcement clause make sense in the area of freedom, security and justice? The clause is also not included in Article 4 of Protocol 7 ECHR. In any case restrictions to the right are only acceptable under Article 52(1) if they comply with four conditions: legality, respect for the essence of the right protected, necessity and proportionality.<sup>88</sup> Second, the interpretation by the German Courts limits the scope of Article 50 CFREU for the area of freedom, security and justice through Article 54 CISA. This means that the limitation is of no value for other EU areas, such as in the field of the internal market and competition policy. The result is a diverging application of Article 50 CFREU.

Although Article 4 of Protocol 7 ECHR has no transnational application as is the case with Article 50 CFREU, it can lead to conflicting situations for Member States, as Article 50 CFREU can also apply in domestic situations only. What happens if Member States have not ratified Protocol 7 ECHR or have formulated a reservation as to its application and are not willing to accept the application of the *ne bis in idem* principle to the *bis* combination of punitive administrative and criminal penalties? This is however how the principle has been filled in by the ECtHR and is thus the basic line of Article 50 CFREU. In my opinion Article 50 CFREU de facto sets aside the non-ratification of declarations or reservations, as long as the Charter applies in a domestic situation of the *ne bis in idem* right. In such a case all Member States should apply the substance of Article 50 CFREU, in line with Article 4 of Protocol 7 ECHR. It would be a strange situation that in a common area of freedom, security and justice national reservations could still prevail as a claw-back clause concerning a fundamental right of primary law.<sup>89</sup>

## 5. Conclusion

In the EU do we today have an equivalent transnational protection of *ne bis in idem* that applies both in the vertical and horizontal dimension of European integration? We have come to the conclusion that neither the domestic *ne bis in idem* principle, nor the public international law equivalent in human rights conventions or in MLA conventions can offer this protection.

Within the proper EU context we have a multiple set of *ne bis in idem* with a transnational character: a general principle of EU law in competition law; Article 54 CISA in the area of freedom, security and justice; provisions in MLA and MR instruments; and Article 50 CFREU. The ECJ has elaborated Article 54 CISA into a real transnational human rights principle. However, Article 54 CISA does not apply in all fields of EU policy and law, as it is limited to the area of freedom, security and justice and it remains unclear even in that area if the derogations and reservations of the former Schengen States are still of any legal value.

It would be logical if the *ne bis in idem* principle of primary EU law, Article 50 CFREU, would become the overall transnational *ne bis in idem* principle for all EU policies, both at the EU level and in the Member

87 See for instance, Case C-256/11, *Murat Dereci*, 15 November 2011.

88 Weyembergh, supra note 31, point 3.1.

89 A contrario, Case C-617/10, *Aklagaren v Hans Akerberg Fransson*, Opinion of AG Cruz Villalón, 12 June 2012.

States, when acting within the scope or field of application of EU law. However, it remains unclear, as it stands, whether the ECJ is willing to follow this interpretation and to use the Charter as an autonomous standard of applicable human rights in the Member States, when acting within the scope of Union law. It also remains unclear whether the ECJ is willing to elaborate a unified and comprehensive *ne bis in idem* principle at the EU level for all EU policies and law. The ECJ should follow the reasoning of AG Sharpston in the *Zambrano* case<sup>90</sup> by which she advocates applying the Charter in all fields of competence that have been conferred upon the EU (exclusive or shared). The applicability of EU fundamental rights would neither be dependent on the direct applicability of a specific Treaty provision nor on the adoption and implementation of EU secondary law.<sup>91</sup>

The divergent rationale and scope of the principle in the area of competition policy and criminal justice has been upheld by the ECJ. One may wonder if this is compatible with Article 50 CFREU. Does *ne bis in idem* have another function when enforcing competition rules in the internal market than in the area of freedom, security and justice? I doubt it. Moreover, in both situations *ne bis in idem* and choice of jurisdiction (allocation of cases) are intertwined. In both situations the EU legislator has competence to regulate on conflicts of jurisdiction. However, the ECJ has shown that it is aware of the need for consistency, at least in the area of justice and home affairs. Traditionally, as we have seen under 2.3, *ne bis in idem* can be a (mandatory or optional) ground of refusal or a ground for non-execution within the framework of MLA requests or MR orders. Article 54 CISA does not deal as such with MLA or MR, as the material scope of its application is not dependent on requests or orders. Recently, in the *Mantello* case,<sup>92</sup> the ECJ has clearly opted for a converging approach, linked to shared objectives in the area of freedom, security and justice:

‘In view of the shared objective of Article 54 of the CISA and Article 3(2) of the Framework decision, which is to ensure that a person is not prosecuted or tried more than once in respect of the same acts, it must be accepted that an interpretation of that concept given in the context of the CISA is equally valid for the purposes of the Framework Decision.’<sup>93</sup>

The result is *in concreto* that the *idem* definition based on *idem factum* is now the standard not only for CISA cases but also for MLA and MR cases and has also become the standard under Article 4 of Protocol 7 ECHR. It is thus clear that Article 50 CFREU can here rely on a common approach in the area of freedom, security and justice. However, the problem remains that this standard does not yet apply to Union policies outside of the area of freedom, security and justice such as the internal market and competition policy.

We do not only have a problem with the scope of application in the EU, but also with the rationale of the principle. In sovereign state interests it seems that in the area of freedom security still prevails over the fundamental rights of citizens and legal persons. The legal battle on the status and legal value of reservations to the CISA *ne bis in idem* and to Article 4 Protocol 7 ECHR in relation to Article 50 CFREU is a good example. Member States have to accept that the intergovernmental state-orientated approach, excluding the individual as a subject of rights, is no longer compatible with the basic concepts of the area of freedom, security and justice. The model of international cooperation between states in criminal matters has been replaced by a shared policy between the EU and Member States in dealing with transnational criminal justice. The individual has become a subject with rights and obligations in relation to transnational criminal justice in the area of freedom, security and justice.<sup>94</sup> The Article 54 CISA and Article 50 CFREU *ne bis in idem* principles do not depend on the harmonization of substantive procedural criminal law or on applicable schemes of MLA or MR cooperation. It is a fundamental right that is no longer connected to the respective jurisdictions of each Member State and thus creates subjective rights

90 Case C-34/09, *Zambrano*, 8 March 2011.

91 See E. Muir & A.P. van der Mei, ‘The “EU Citizenship Dimension” of the Area of Freedom, Security and Justice’, in M. Luchtman (ed.), *Choice of forum in cooperation against EU financial crime*, 2013, pp. 123-142.

92 Case C-261/09, *Gaetano Mantello*, 6 November 2010. See for comments on the case J. Ouwerkerk, ‘Case C-261/09, *Criminal proceedings against Gaetano Mantello*, Judgment of the Court of Justice (Grand Chamber) of 16 November 2010’, 2011 *CMLR* 48, no. 5, pp. 1687-1701.

93 Point 40.

94 A. Eser et al. (eds.), *The Individual as Subject of International Cooperation in Criminal Matters. A comparative Study*, 2002.

for EU citizens and legal persons in the Union. In transnational cases there is always a clear link with the freedom of movement of persons. That freedom can be restricted for proportionate and justified reasons in concrete cases. It is however unacceptable under EU law that a restrictive interpretation of the material scope of Article 50 CFREU would result in a structural limitation on the freedom of movement because of the risk of double jeopardy. The right to *ne bis in idem* can no longer depend in a single area of freedom, security and justice on sovereign claims of national jurisdiction based on national territoriality clauses. Claw-back provisions inspired by national sovereignty are undermining the basics of a common area.

The fundamental right to *ne bis in idem* is of course not absolute and can be restricted. The restrictions must however be clearly foreseeable and serve a legitimate aim in the area of freedom, security and justice in the EU. It is not enough that they serve that aim in the single jurisdiction of one Member State. For this reason the EU Member States must be compelled to set aside the reservations and to elaborate a common European scheme, and/or the ECJ has to clarify the legal situation from the common EU perspective.

The legal framework of the Treaties (TEU and TFEU) offers a good opportunity to elaborate a transnational constitutional *ne bis in idem* principle that can protect citizens and legal persons at the EU level and in Member States (both in the vertical and horizontal dimension). Given the increasing impact of EU regulation both in the jurisdictions of the Member States and in the transnational EU setting, there is a real need for such a transnational application.

We must however be aware of the fact that the rationale of a transnational *ne bis in idem* principle is not to prevent and settle conflicts of jurisdiction,<sup>95</sup> nor to allocate prosecution and adjudication in punitive proceedings in the EU. A proper EU system of prevention and choice of jurisdiction is necessary in the interest of justice, but also in the interest of citizens and legal persons, as it can avoid many problems of double prosecution and punishment.

Finally, the EU has embarked on the task of providing real transnational *ne bis in idem* protection within the common territory. When it comes to *ne bis in idem* problems between EU countries and third countries or outside the EU we fall back on the provisions in MLA treaties or in specific agreements (like in the competition field). In other words *ne bis in idem* protection is regionalizing in the EU, but not globalizing and so it is not yet a general principle of transnational criminal justice. ¶

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95 M. Luchtman, 'Transnational Law Enforcement in the European Union and the *ne bis in idem* principle', 2011 *Review of European Administrative Law* 4, pp. 5-29 and M. Luchtman (ed.), *Choice of forum in cooperation against EU financial crime*, 2013.