



FACULTY OF LAW
Lund University

Johannes Björk

Ne Bis in Idem in EU Law
Later Developments in the Case law of the ECJ

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Supervisor: Xavier Groussot

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Summary

There are many versions of *ne bis in idem* in EU law. They can be found not least in the main sources of human rights of the EU legal order: the general principles of EU law, the Charter of Fundamental Rights, the European Convention on the Protection of Human Rights and Fundamental Freedoms, but also in the Convention Implementing the Schengen Agreement and many other bodies of law. This essay addresses the notion that there is nevertheless a single, "core" understanding of *ne bis in idem* that governs the development of that norm in all areas of EU law.

This idea has been put forth in recent years against a background of the accelerating development of the "area of freedom, security and justice" and of human rights into central components of the supranational legal system of the EU. *Ne bis in idem* is central to the protection of the rights of the individual and as such essential to the bid of the EU to provide full protection for human rights. In addition, it is central to the structure of the modern nation-state in preserving the respect for *res judicata* and assuring the rule of law. In this relation, it also forms an important part of state sovereignty. These later circumstances both make the transplantation of national versions of *ne bis in idem* to the supranational level problematic.

At the centre of this essay is the development of *ne bis in idem* in the caselaw of the ECJ after the first of January 2009. That caselaw will be interpreted in the light of earlier jurisprudence from the ECJ and the ECtHR and the academic discourse on the subject. Focus has been laid on the issues addressed in the central empirical material, but an effort has been made also to discuss *ne bis in idem* as a concept and its importance to the extraordinary situation that the development of a supranational legal order provides.

Sammanfattning

I EU-rätten finns många versioner av *ne bis in idem*. De återfinns inte minst i huvudkällorna till mänskliga rättigheter i unionen: EU:s allmänna principer, stadgan om de mänskliga rättigheterna och Europakonventionen, men också i konventionen om tillämpning av Schengenavtalet och många andra regelverk. Denna uppsats berör frågan huruvida det ändå finns en enda, sammanhållen ”kärn”-förståelse av *ne bis in idem* som styr dess utveckling i alla EU-rättens fält.

Denna idé har förts fram under de senaste åren mot bakgrund av den accelererande utvecklingen av ett område med frihet, säkerhet och rättvisa och av mänskliga rättigheter till centrala komponenter i EU:s överstatliga rättsordning. *Ne bis in idem* är en centralt till för skyddet av individens rättigheter och är därför essentiell för EU:s ambition att erbjuda fullt skydd av mänskliga rättigheter. Dessutom fyller *ne bis in idem* en viktig roll i den moderna nationalstaten för att försäkra respekt för *res judicata* och i förlängningen för att upprätthålla nomokratin. Härvid utgör den även en central roll i den nationella suveräniteten. Båda dessa senare omständigheter gör transplantationen av nationella versioner av *ne bis in idem* till det överstatliga planet problematiskt.

Uppsatsen kommer att fokusera på utvecklingen av *ne bis in idem* i rättspraxis från EU-domstolen sedan den första januari 2009. Detta centrala material kommer att tolkas utifrån tidigare praxis från EU-domstolen och Europadomstolen samt utifrån den akademiska diskursen kring ämnet. Diskussionen kommer att koncentreras kring de faktorer som tas upp i det centrala materialet, men kommer också att försöka diskutera *ne bis in idem* som koncept och dess bredare roll i den speciella situation som utgörs av utvecklingen av en överstatlig rättsordning.

Preface

Working on this essay has been interesting, challenging and ultimately, enticing. I have learned much not only about the workings of law but also about myself, and it has been a valuable experience to bring into the future.

I am very thankful to the many people who have lit up the experience of my education. You are all truly special.

A special thanks to my supervisor, Professor Xavier Groussot, who has been very patient.

Johannes Björk

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Abbreviations

AFSJ	Area of freedom, security and justice
CFI	Court of First Instance of the European Union
CISA	Convention implementing the Schengen Agreement of 14 June 1985
CJEU	Court of Justice of the European Union
EAW	European Arrest Warrant
ECJ	European Court of Justice
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
FDEAW	Framework Decision on the European Arrest Warrant
GC	General Court of the European Union
ICCPR	International Covenant on Civil and Political Rights
SIS	Schengen Information System
TEU	Treaty on European Union

TFEU

Treaty on the Functioning of the European Union

1 Introduction

As the title suggests, this essay has taken as its subject matter the development of what is often referred to as the "principle" of *ne bis in idem* in the caselaw of the ECJ. This first section will introduce the research question, its origins, and the method of this essay.

1.1 Purpose

This is of course a graduate thesis within the Master of Laws programme at Lund University. Thus its aims are to be found in the course syllabus, some of the more pertinent points of which will be referred to here, so that they may inform the development of the essay.

Among the goals is of course first the acquisition of specialised knowledge of a particular field of law by independent research and to present and discuss the findings of such an inquiry in a clear, consistent and informed manner. Also, the student should show the ability to analyse and make balanced assessments of legal issues within the relevant field and to adopt an autonomous approach to the legal system.

Essentially, though, another aim is the demonstration of "knowledge of the disciplinary foundation and methods of the field". In relation to this, the observation should be made that discussions of legal method during the entirety of my education have been limited to passing remarks about "practical legal method" or "traditional legal dogmatic method"¹. Paradoxically, this method is simultaneously presented as the real substance of the education. At least in Sweden, this paradoxical situation within legal education, where legal method is rarely discussed explicitly but rather

¹ "Praktisk juridisk metod" eller "traditionell rättsdogmatisk metod"

approached indirectly through study of the sources of law and legal doctrine seems to be the norm.²

It might be contended that only practical knowledge is intended by the quotation from the syllabus, and that such knowledge is demonstrated by the practical performance of legal research, analysis and writing that an essay of this sort entails. But the choice has here been made to interpret the criteria rather differently, if for no other reason than that it is something that I myself want to be better acquainted with before finishing my education. For this reason, the discussions of method in this opening part of the essay are somewhat longer than what is perhaps the norm, but every effort will be made to ensure that they do not overshadow the other aims found in the syllabus.

1.2 Research Question

This essay began as a review of the caselaw of the ECJ and the ECtHR on the principle *ne bis in idem* since 2009. This subject matter was originally suggested to me by my supervisor, Xavier Groussot, and in hindsight it is easy to see why he thought it would be a meaningful field of inquiry.

Ne bis in idem, literally "not twice for the same thing", is a legal construct which, broadly speaking, prevents the duplication of proceedings and/or punishment addressing the same offence.³ As such, it is to be found in most if not all national legal systems of the world, where it is seen as an important guarantee for the protection of individual rights, equity, legal certainty and confidence in the judicial system.⁴

Unfortunately, while the level of abstraction used in the above paragraph is as accessible to the reader as it is comfortable for the writer and therefore suitable for an introductory section, it is impossible to sustain for long when

² Lehrberg pp. 17-18

³ Accardo & Louis 2011, p. 99

⁴ Stessens & van den Vyngaert 1999, p. 780

dealing with the *ne bis in idem* principle for as simple as it seems when viewed from a distance, as complex and manifold does it turn out to be when put under closer scrutiny.⁵

Thus, while it is easy to see that many national legal systems are infused with the *ne bis in idem* principle, different instances of the principle come in quite different forms and have quite different purposes. The same is true when considering the international versions of the principle, and, most important to this essay, the sources of the principle within the legal order of the EU. Together with this great variety of versions of the principle, the nigh on exceptionless limitation of its scope of application to situations within a single jurisdiction form a mosaic pattern of normativity. The most common explanation for this latter aspect of the principle is the counteracting interest of national sovereignty, most sensitive in the area of criminal law which forms the traditional sphere of *ne bis in idem*.⁶

Its paradoxical character, important function and conceptual complexity are certainly reasons enough to take an interest in *ne bis in idem*, but there are further reasons why *ne bis in idem* in EU law deserves thorough consideration to be found in its historical context, not least the fact that the state of European integration heightens the risk of double prosecution, but also in that there are suggestions that unprecedented developments in the international application of *ne bis in idem* are taking place within the EU.⁷

In 2009, the discourse on *ne bis in idem* in the EU had been intensifying for a decade or so. Barring a handful of important judgments from the CJEU scattered across the decades since the late sixties, *ne bis in idem* had been a marginalised topic in EU law until the end of the century, when the situation changed abruptly. This had to do with the development of the AFSJ and the integration by a protocol to the Treaty of Amsterdam of the Schengen *aquis*, which contains important provisions on *ne bis in idem*, into the legal order

⁵ Vervaele 2005, p. 100

⁶ de la Cuesta 2002, pp. 710-716

⁷ Vervaele 2013b, p. 211

of the EU. However, *ne bis in idem* has also been more frequently discussed in cases not affected by that rule in the last decade, as the caselaw of the ECJ shows.

Several circumstances in that year suggested that a change, perhaps even a turn of the tide in the role of the principle on the EU level was on its way. First, early in the year, the ECtHR delivered a judgment, *Zolotukhin*,⁸ that made a strong effort to bring together the quite straggly strands of its earlier caselaw on the principle into one authoritative interpretation. The signature of the Treaty of Lisbon later that year meant that the EU is now bound to accede to the ECHR and will thus in the future be bound by this understanding of *ne bis in idem*.

The Treaty of Lisbon also made the EU Charter of Fundamental Rights an integral part of the EU legal order which meant that a "new" provision on *ne bis in idem* in Article 50 of that document became binding law. In the hierarchy of norms in the Union, the CFR is on the same level as the treaties, and the ECJ has declared that it is viewed as the "principal basis" of human rights in the EU.⁹

Lastly, in that year the first (and as of yet the only) extensive study of the caselaw of the ECJ and the ECtHR on *ne bis in idem* was published, arguing in favour of the recognition of a unitary "core" understanding of the principle within the EU legal order, of which the various provisions are but "mere attempts" at codification.¹⁰ This suggestion, which will form the navel of this essay, had earlier been put forth by AG Sharpston in her opinion on *Gasparini*.¹¹

The argument of the AG was that the *sui generis* nature of the EU legal order and the lack of a common approach to *ne bis in idem* between the

⁸ *Sergey Zolotukhin v. Russia*, (Appl. No. 14939/03), Judgment of 10 February 2009

⁹ de Búrca & Craig 2011, p.362

¹⁰ van Bockel 2009, p. 27

¹¹ Opinion of AG Sharpston in Case C-467/04 *Gasparini and Others*, delivered on 15 June 2006

Member States makes it inevitable that the meaning of *ne bis in idem* in EU law should be given by the CJEU. Being a fundamental principle, it should have a solid core of which its specific applications (and, one assumes, iterations) form part. This core would ultimately fall back on a balancing of the values of freedom of movement and security.¹²

Van Bockel, author of the aforementioned doctoral thesis, supports this idea. He proposes that "*ne bis in idem* in EU law must be seen as a single and indivisible right which applies in the same way in every (punitive) area of Community and EU law, whilst fully taking into account the particular characteristics [*sic*] of each area of law".¹³

There is much more to be said about this idea of a "core understanding" of *ne bis in idem* within the EU legal order, but enough has now been said to allow the formulation of the research question of this essay, which will be the following: *To what degree does the development of the caselaw of the ECJ after 2009 support the notion that there is a core understanding of what ne bis in idem means in the EU legal order.*

1.3 Method, Material and Limitations

The empirical section of this essay consists of the central material, that is the caselaw of the ECJ after 2009 found in section 5, and of two sections supplying background, sections 3 and 4. These sections will introduce the areas of law to which *ne bis in idem* has been of the greatest relevance and the content of the main sources of the principle respectively. The three empirical sections have all been written using the traditional approach of black letter-law. In this regard, some limitations should be noted. First, the later caselaw of the ECtHR will not be analysed in any depth. This is mainly because of lack of space and time, but also because *Zolotukhin* provides us with a strong, authoritative statement of where the interpretation of *ne bis in*

¹² *Ibid*, paras. 78-84

¹³ van Bockel 2009, p. 27

idem stands with that court. Also, The caselaw of the ECJ on *ne bis in idem* has two main strands, one deriving from the interpretation of *ne bis in idem* as a general principle in EU law, the other from the Schengen *aquis*.¹⁴ These will be in focus in this essay, because they are the most rich in content. Other provisions on *ne bis in idem* will be mentioned and feature to some degree in the caselaw analysed, but they will fill a supporting function. The caselaw of the CFI/GC will not be included. Section 3 will provide a very brief and focused account of two areas of EU law which are of special relevance to this essay.

Before accounting for the empirical research, this essay will include a section where the concept of *ne bis in idem* is considered in the abstract in order to provide the necessary theoretical foundation for the following analysis, section 2. Unfortunately, just as it is generally agreed that *ne bis in idem* does not make part of the international legal order as a rule of custom or as a general principle, and just as there are hardly two versions of the principle to be found on the national level that have the exact same content, so are the different appearances which the principle takes in legal doctrine legion. Discussion on the principle in an international context is quite common, but the discourse has yet to construct any consistent, free-standing terminology with which to analyse the various versions of the principle.¹⁵ To be sure some terms, such as the ones used as analytical tools in this essay, are reasonably regularly appearing, but their meanings often have subtle differences not only on the level of their actual content, but also conceptually.

Because this is so, this essay will not accept any one theoretical approach as its own, but instead take a more hermeneutic approach, describing not any one conception of the principle but its various possible understandings. This section will be based on both legal and academic sources discussing *ne bis in idem*. It is not intended to provide a model of what *ne bis in idem* as such

¹⁴ Vervaele 2013b, p.227

¹⁵ Indeed, to provide such a model in the context of the EU is one of the aims of van Bockel's thesis. Van Bockel 2009, p. 6

is, since it is not the approach of this essay to argue the existence of natural law principles. Rather, this conceptual analysis is aimed at providing some necessary analytical fundamentals which can be used to further the understanding of the empirical material and to clarify some of the possible sources of confusion admitted by the concept of *ne bis in idem*. In addition, this section, which will follow the introduction, will serve as a bridge between the method and the main body of the essay. The aim of this section is to account for the theoretical reasoning underlying this essay rather than to put forth an argument in favour of a certain conception of legal reality. However, the subject matter of those considerations is *ne bis in idem* in the EU as conceptualised in doctrine and caselaw and thus the section will be of a character divided between methodology and empiricism. The reasoning in section 2 will be supported by references where possible, however, in parts the discussion will be a product of the accumulated consideration of the discourse on *ne bis in idem* and thus have as its basis the sources of this essay considered as a whole rather than any specific line of text.

In relation to the conceptual variations in considerations of *ne bis in idem*, this essay cannot give them all equal consideration. Since a rather well-defined body of caselaw forms the central material of this essay, the aspects of *ne bis in idem* which are dealt with in those cases will of course be in focus. However, this does not make the conceptual analysis redundant, since it will allow a deeper understanding of those issues and how they relate to *ne bis in idem* as a whole.

2 The Concept of *Ne Bis in Idem*

The proposition that no-one should be punished or prosecuted twice for the same cause has a certain common-sense appeal which makes it seem rather self-evident.¹⁶ Situated within a nexus of values including the protection of the rights of the individual, the authority of judgments (and indirectly of the judicial system as a whole) and the production of legal certainty it appears, at a glance, inextricably linked to the rule of law and to the modern state. Indeed, when considering the world map we find that the norm known in continental Europe as *ne bis in idem* is ubiquitous among the liberal-democratic legal systems of the world.¹⁷

However, upon gathering together a collection of specimen of *ne bis in idem* in law and in judicial and academic jurisprudence putting them under the microscope it easy to become somewhat dazzled by the seemingly endless variation with which one is confronted. What is it that the state cannot do twice? And to whom? And why? And when? And where? And what is it that must be "the same" in the two instances? These are all questions to which *ne bis in idem* can be conceived as giving quite different answers. So, while *ne bis in idem* certainly appears to be a key aspect of the modern rule of law, as the following discussion will show it does not take the form of a monolithic legal principle.¹⁸

Of course, these divergent impressions when considering the *ne bis in idem* on different levels of magnification do not mean that the idea of a common core to all different versions of *ne bis in idem* can be discarded without further consideration. Nevertheless, this paradoxical nature presents a

¹⁶ Conway 2003, p. 222

¹⁷ De la Cuesta 2002, pp. 707-708

¹⁸ Vervaele 2005, pp. 100-101

problem because while it is often easy to identify two provisions as versions of *ne bis in idem*, it is not easy, even when arguing from a clearly defined empirical material to come up with a definition of what *ne bis in idem* is in and of itself. To provide such a definition would of course go far beyond the scope of an essay of this kind, but it would also be wrong to proceed to try to point out regularities and divergencies in the caselaw of the ECJ on *ne bis in idem* with eyes closed to this problem. Therefore, this section will attempt to point out some of the conceptual variations and ambiguities of which *ne bis in idem* is capable before going on to define the central issues which will be set at the centre of the concluding analysis. The aim of this approach is to make clear the theoretical and contextual tectonics against which the *lege lata* issues can be properly evaluated, and to avoid as far as possible further confusion.

2.1 Ne Bis in Idem: Context and Rationale

First of all it must be noted that while this section concerns the *ne bis in idem* principle in the abstract rather than as resulting from any particular source of law, it is the present-day *legal* principle and nothing else that is the subject of this essay. This essay of course does not provide sufficient resources to consider in any depth what law is, and that is not what is intended by such a classification. Rather, what is meant is that *ne bis in idem* has been conceived and elaborated in the context of modern legal systems, and that today its various iterations, at least so far as they are of relevance to this essay, all form part of particular legal systems. Despite its authoritatively latin name, *ne bis in idem* is not an arcadian concept, but rather has been elaborated in close connection with the development of the modern legal system. While referring back to roman legal concepts, it is unwise to assume the connection to be direct, as the roman concept was probably quite different to the modern one. Thus, it is this *ne bis in idem* principle within modern systems of law, in the context of legal proceedings,

of formal and substantive legal norms and of the *Rechtsstaat* that is at the root of this essay.¹⁹

To point out that the traditional context of *ne bis in idem* and its rationale is the national legal system is important because the context of *ne bis in idem* is everchanging. Although the context of the modern nation-state has been the habitat of *ne bis in idem* for a long time, it is not inescapable. The *sui generis* nature of the legal order of the EU becomes quite apparent in the context of *ne bis in idem*, and a transposition of the principle to the transnational plane will of course be influenced by the tension between the two types of legal order. This tension will be in evidence in every section of this essay. Thus, while *ne bis in idem* is inextricably linked to the modern national legal order, it here figures in a completely new context in which nothing should be taken for granted.²⁰

The new context provided by the EU raises the question not only what *ne bis in idem* will look like in the Union legal order, but also what its function should be. Within the national context, *ne bis in idem* has been understood as performing various functions. Perhaps the first role which springs to mind in this day and age is the protection of the rights of the individual. This concept of course holds a very strong position in modern law. Within national jurisdictions, the role in the safeguarding of such individual rights carried out by the principle is widely recognised as essential.²¹ It is particularly strongly emphasised in Common Law jurisdictions, which are also more accepting of the *res judicata* of foreign judgments.²² Its inclusion in numerous human rights instruments also make evident this role.²³

¹⁹ Löff 2007, pp. 309-310

²⁰ van Bockel 2009, pp. 2-4

²¹ Bernard 2011, pp. 864-865

²² Stessens & van den Vyngaert, pp. 783-784

²³ Vervaele 2005, pp. 100-102

There are many mechanisms by which *ne bis in idem* can be seen to exercise this function. For example, it concentrates the punishing²⁴ experiences of the subject of criminal prosecution to a limited period. In addition to actual punishment, such experiences include the stress of being subjected to a trial, the social stigma, uncertainty in relation to the immediate and distant future *etc.* But there are also other, more abstract risks against which the individual can be inoculated by *ne bis in idem*, for example the increased risk of being found guilty though actually innocent,²⁵ and the risk of procedural mistakes on the part of the state.²⁶

This "Human Rights"-facet of *ne bis in idem* has been a strong force behind the modern development of the norm nationally and internationally. However, in a comparative perspective this strong emphasis on the role of an individual right is a relatively²⁷ new aspect.²⁸ In the civil law tradition, discussions on *ne bis in idem* have separated the dimension of protecting individual rights from its role as a guarantee for legal certainty, for the authority of judicial decisions and, in extension, of the courts and the legal system itself. According to this latter line of thought, *ne bis in idem* is simply a special case of the broader doctrine of *res judicata*,²⁹ which principle, through its role as a guardian of legal certainty and the *autorité de la chose jugée*, is a fundamental component of the rule of law and the modern state.³⁰

2.2 Ne Bis in Idem: General Issues

Keeping in mind the changing legal context in which *ne bis in idem* finds itself and the values which bear on it, it is time to point to some of the factors which allow such variability. The concepts elaborated on in this

²⁴ N.B. Punishment here intended in a very broad sense, including the necessarily taxing experience of trial itself, of social reactions, etc.

²⁵ Conway 2003, p. 222

²⁶ Wils 2003, p. 138

²⁷ That is, measured in centuries rather than millenia.

²⁸ Vervaele 2013, p. 213

²⁹ Conway 2003, p. 217

³⁰ Trechsel 2005, p. 383

section are not motivated by their role in the latest caselaw on *ne bis in idem* in ECJ caselaw, but by the fact that they are necessary aspects of any discussion on *ne bis in idem* which should be understood before proceeding.

We will begin by discussing the division of *ne bis in idem* into different elements. Many considerations in the doctrine set out from the wording of the relevant provision, but many also proceed from a more abstract construct of *ne bis in idem*, often in combination with a more literal approach.³¹ Perhaps the most common elements addressed in such discussions are *bis* and *idem*. The most common, *idem*, generally concerns the identity of judicial decisions in terms of its object.³² *Bis*, literally translated as "two times", indicates the forbidden repetition that is central to the *ne bis in idem*.³³

These concepts will be further discussed below, as they relate to or form part of the specific issues addressed by this essay. However, it should be noted in this context that the conceptualisation of *ne bis in idem* is capable of many variations that can be confusing. For example, many discussions on *ne bis in idem* also address the scope of the principle. Such constructs work by defining a given type of situation, say for example, situations where a legal entity and one of its representatives have both been sanctioned for the same cause or where the same person has been the subject of both criminal and administrative penalties for the same cause and asking: Will *ne bis in idem* apply in situations such as these? They approach the principle externally, trying to chart its limits rather than understand its inner logic.³⁴

Pointing to these possibilities of confusion between the elements of *ne bis in idem* is of course rather abstract, and might seem to be the work of the

³¹ See, for example, Vervaele 2005 for an example of the former, van Bockel 2009 and de la Cuesta 2002 for examples of a more theoretical approach, and Trechsel 2005 for a combination

³² Lelieur 2013, p. 205

³³ van Bockel 2009, pp. 45-46

³⁴ For examples of this, see for example van Bockel 2009, pp. 40-45 and Trechsel 2005, pp. 385-388

devil's advocate. It should also be noted that these purely abstract obscurities does not say anything about the consistency of the concept of *ne bis in idem* in EU law. However, there are many important points to doing so. First and foremost, it is necessary in order to be aware of these possible changes of meaning when proceeding to consider the sources of *ne bis in idem* in EU law. It also serves a purpose in that the very possibility of these different meanings suggests definitions of the elements of *ne bis in idem* do not seem to be given by their nature, but rather result from conventions within the particular legal discourse in which they appear.

The specific construct of *ne bis in idem* given in a specific legal context is of course influenced by the values introduced above which pertain to *ne bis in idem*. There are also two other issues which relate to the shape of *ne bis in idem* on a more general level that shall be introduced here. Both of them can be introduced through sharp dichotomies, namely the distinction between rules and principles introduced by Dworkin, and a distinction particular to *ne bis in idem* between emphases on punishment and prosecution respectively.

Dworkin famously distinguished between rules and principles as distinct legal standards. Rules are conceived of as operators of legal deduction that produce results in accordance with Aristotelian logic, where everything either is or is not. Principles, on the other hand, give legal guidance but do not supply definitive answers. Rather they give reasons that point in a specific direction and have a character of weight which is quite different from the rigidity of rules.³⁵

In the context of *ne bis in idem*, the Dworkian dimension is closely related to the second dichotomy mentioned above, that between punishment and prosecution. *Ne bis in idem* can be conceived of as prohibiting a second proceeding only if there has been an enforced conviction, and vice versa, as prohibiting only a second set of proceedings that carry a risk of a more

³⁵ Dworkin 1978, pp. 22-26

severe punishment for the individual, as only applicable within fields of law wherein the state exercises its *ius puniendi*, and in many other ways that take into account the punishment aspect in various ways. Alternatively, it can be understood as prohibiting double prosecution, period. Now, it would of course be difficult to define the concept of "prosecution" without that of "punishment", so this division is hardly a dichotomy but rather a dimension, but it is one apparent in many aspects of *ne bis in idem*.³⁶

Many commentators go so far as to suggest that these two dimensions when taken together actually reveal two different legal norms, a rule that prohibits repeated prosecution, and a principle that prohibits repeated prosecution. In German doctrine these are known as the *Erleidigungsprinzip* and the *Anrechnungsprinzip*.³⁷ However, this essay does not accept that this division is necessary, but will rather add the two dimension to its array of analytical tools.

2.3 Ne Bis in Idem: the Central Issues

This section will introduce the specific aspects of *ne bis in idem* which will be in focus during the rest of this essay. As will be apparent from the discussion above, there is no hegemonical model for analysis of *ne bis in idem*, but rather only a rudimentary conceptual and issue-based framework. In light of this, it has been deemed prudent in an essay of this type to adopt a somewhat superficial and promiscuous attitude to the concepts used. It would be preferable, of course, to be more specific, but the available material and the limits of the essay have made such an approach impossible.

2.3.1 Idem

Idem, literally "the same", signifies what a judgment is in respect of, what is its object, which must be the same in the two procedures for *ne bis in idem*

³⁶ Lelieur 2013, pp. 203

³⁷ van Bockel 2009, pp. 36-40

to apply. The issue is an age-old problem which is traditionally analysed by reference to two ideal types, one focusing on the historical facts underlying the judgment, the other on the legal classification used in the procedure.³⁸

However, upon closer examination this approach is unsustainable. The process of translating an underlying reality into legal concepts is an inseparable part of any legal system which can not be gone through without instilling the product with an inextricable legal quality. That is, the grounds of, for example, a aggravated assault can never be just the physical acts of moving your fists in such-and such a pattern, because the legal system works by slicing and joining together aspects of another reality into normative concepts, that is "conduct".³⁹

So, rather than a simple choice between a legal and a factual approach, the definition of *idem* is always an issue of balancing the influence of historical or physical facts and the legal understanding of those facts. This non-factual dimension allows for considerations of, for example, the intention of the accused, the type of law that addresses the conduct, and the territory in which it took place.⁴⁰

2.3.2 Finality

Many international instruments, including those that will be in focus in this essay, use some variation of the word 'final' to qualify the application of *ne bis in idem*.⁴¹ In respect of this concept, it should first be noted that it is one of the many ambiguous terms connected to *ne bis in idem*. That judgments shall be final in the sense that they shall prevent any subsequent procedure on the same matter and thereby any contradicting judgment, that is that they have *negative Rechtskraft*, is of course the *effect* of *ne bis in idem*. That is, finality is, in one sense, what is prescribed by *ne bis in idem* once certain

³⁸ Vervaele 2005, p. 101

³⁹ Trechsel, 2005 p. 393-394

⁴⁰ Van Bockel 2012, p. 332-333

⁴¹ See, for example, Article 4 of protocol 7 to the ECHR and Article 14 § 7 of the ICCPR

conditions are fulfilled. On the other hand many of the provisions mentioned above seem to make finality a *condition* for application of the principle.⁴² Certainly much doctrine as well as caselaw supports this view. However, the same concept cannot at the same time be both a condition for and the effect of *ne bis in idem*. Therefore, it would seem that the condition of finality has to mean something else than *negative Rechtskraft*.

In the context of a version of *ne bis in idem* with a scope extending across more than one jurisdiction however, a possible meaning of a condition of finality, which qualifies somewhat the conclusion of the above paragraph, is that it signifies the finality of a judgment within one of the constituent jurisdictions. In that case, finality as an effect would apply to one or more of the jurisdictions included in the scope of the principle. In this understanding, *ne bis in idem* would say, simply, that once a judgment has *negative Rechtskraft* in one jurisdiction, it shall reverberate throughout its jurisdictional scope.⁴³

On the other hand, it is just as possible in such a situation to define the condition of finality autonomously in one of the sources of law constituting the authority of the particular version of the principle. In such cases considerations of, for example, what types of judicial decisions can have finality, at what point in time they acquire it and secondary considerations as to the importance of for instance their content seem close at hand.⁴⁴

2.3.3 Material and Jurisdictional Scope

Ne bis in idem provisions, even those established in international instruments, have traditionally been limited in their scope to internal application within national jurisdictions. The irregular appearance of *ne bis in idem* from a comparative perspective is often given as the main reason for

⁴² For an example of this ambiguity see van Bockel 2009, p. 45-48

⁴³ Schomburg 2012, p. 314

⁴⁴ van den Wyngaert et. al. 1999, p. 797

a jurisdictional limitation of the principle in an international context. This variability, which should be apparent after reading this essay, is certainly problematic to the intrajurisdictional application of the principle. Perhaps more fundamental however is the unwillingness of states to compromise sovereignty in the field of criminal law, which is seen as essential to the authority and the effectiveness of the state. It is as a consequence of this rare for national jurisdictions to recognise foreign judgments as having the effects of *res judicata*. This is an aspect of the international order and justifications derived from the *ne bis in idem* principle on a national level are not common.⁴⁵

It is common, within national jurisdictions, to separate between the procedures and penalties of criminal law and penalties and procedures of an administrative nature. That is, penalties or procedures are organised by reference to the type of law that they are a part of. *Ne bis in idem* is generally construed as unable to translate between these different legal spheres. That is, causes from one of the spheres does not usually trigger *ne bis in idem* effects in the other. The principle can also be understood as applicable with different weight in different legal spheres.⁴⁶

The acceptability of such limitations in light of the EU rules on *ne bis in idem* will be considered below, where they will be sorted as the material and jurisdictional dimensions of *ne bis in idem*.

⁴⁵ Conway 2003, p.218

⁴⁶ Vervaele 2013, pp. 115-116

3 Preliminary Notes on the Context of *Ne Bis in Idem* in EU Law

Ne bis in idem has traditionally been construed as a principle of criminal law applicable within national jurisdictions.⁴⁷ In the context of EU law this poses something of a problem. The EU forms a new legal order for which direct comparisons with state jurisdictions are of limited relevance. This can be seen, specifically, in the difficulty to transpose the category of criminal law as such as well as many of its constituent elements to the supranational level.

So, in EU law, by necessity if *ne bis in idem* is to have any traction its material and jurisdictional limits must be reformulated. What does determine those borders will be discussed below, but this section will forego that discussion somewhat by introducing cursorily those areas of law in which the principle has appeared most prominently. To be sure, the somewhat anachronistical placement of this section is problematic. However, since this section does not form part of the core of the essay but rather provides some necessary background information it has been decided that it will be preferable to deal with before rather than after the sources of *ne bis in idem* in EU law. The necessarily preliminary and general nature of the link between the content of this section and the *ne bis in idem* principle should however be noted.

⁴⁷ Vervaele 2005, p. 100

3.1 "Criminal Law" in the EU

After a long and arduous journey, EU criminal law competences are now relatively neatly regulated in title V of the TFEU, more specifically, the procedural and substantive competences are given in articles 82 and 83 respectively.

Secondly, the concept of criminal law within the context of the EU incorporates a tension between European integration on one hand and state sovereignty on the other, which for a long time this issue was laying dormant within the framework of European integration in the EU context.⁴⁸ However, with the development of the Union into an "area of freedom, security and justice", and its merge with the internal market after the conclusion of the Lisbon Treaty, brings this conflict into relief.⁴⁹

Thirdly, perhaps the prime example of the emergence of this tension is the establishment of *mutual recognition* as the "cornerstone" of cooperation within the area of freedom, security and justice. Inspired by internal market principles, it means essentially that judicial decisions, including judgments, of one Member State shall be recognised and executed by another. Several instruments on judicial cooperation incorporating the principle of mutual recognition have been issued, beginning with the Framework Decision on the European Arrest Warrant, which is still perhaps the most famous example.⁵⁰ It has been supplemented by various other instruments and together they constitute a framework for judicial cooperation based on the mutual recognition principle. Most of these instruments contain *ne bis in idem* provisions as voluntary refusal grounds.

⁴⁸ Mitsilegas, 2009, p.56

⁴⁹ Klip, 2009 p. 19

⁵⁰ Mitsilegas 2009, pp. 116-122

In the context of the European Arrest Warrant, however, the relevant *ne bis in idem* provision obliges Member States to refuse cooperation.⁵¹

Lastly, while it has for a long time been assumed that the EU lacked competences in criminal law as such,⁵² the Union has instead relied on its competence to define offences and sanctions of a "non-criminal" nature to enforce its interests.⁵³ This is the case for example in the law of the environment and of public procurement, but the most notable example of this is found in the field of EU competition law.⁵⁴ In other areas of Union law, such as agricultural law, while their ultimate enforcement is left to the Member States, the Union nevertheless provides both the source and the substance of administrative penalties.⁵⁵

3.2 EU Competition law

Competition law became part of the legal order of what is now the EU by virtue of articles 85-90 of the original Treaty establishing the European Economic Community in 1958. Considering the fact that of the six founding Member States, two at that time had no national competition law at all and two had systems based on abuse control rather than straight-out prohibition of cartels and abuse of dominant position, the inclusion of the named provisions should be considered extraordinarily progressive.⁵⁶

In order to give effect to the treaty rules on competition, an implementing regulation⁵⁷ was adopted in 1962. For a number of reasons, the structure opted for was one of centralisation, with the Commission monopolising the competence to apply the treaty provisions on competition. Through a broad interpretation of the applicability of those provisions by the ECJ, the scope of community competition law developed to become very extensive. When

⁵¹ Ouwerkerk 2011, p. 1699

⁵² Asp 2012, pp. 37-38

⁵³ Herlin-Karnell, 2012b, p. 332

⁵⁴ Van Bockel 2009, p. 59

⁵⁵ Harding 2000, pp. 378-379

⁵⁶ Brammer 2009, pp. 7-8

⁵⁷ Council Regulation (EEC) No 17/62, OJ 13, 21.2.1962, p. 204-211

combined, these two facts meant that the commission in time became quite overburdened by its competence and in time it became clear that the situation was unsustainable.⁵⁸

Before turning to the reform of the earlier system, however, two aspects of that system should be noted. First, the rudimentary character of the framework on procedure in competition proceedings laid down in the abovementioned regulation along with the generally proactive stance of the Court of Justice at the time combined to form a particularly suitable environment for the development of community law in general and the principle of *ne bis in idem* in particular.⁵⁹

Secondly, and notably, the wide competence of the commission to sanction cartels did not mean that national competition law and NCAs were completely marginalised. In a seminal judgment, to which we will have reason to return when considering the sources of the *ne bis in idem* principle, the procedural division of competences between the national authorities and the EU was first set out.⁶⁰

In 2003, however, persistent calls for the reformation of the centralised system of enforcement of EU competition law finally led to a new regulation⁶¹ which replaced regulation 17/62. The new system of enforcement is one of parallel enforcement, where the Commission and national authorities all are competent to apply the treaty provisions on competition.⁶² However, it is still the ambition that each case should be handled by a single authority.⁶³ To this end, the regulation with complementing instruments set up a "European Competition Network" intended as an instrument for the allocation of cases between the different authorities. The rules set out in the relevant instruments are not binding but

⁵⁸ Slot 2004, p. 468.

⁵⁹ *Ibid*, p. 447

⁶⁰ Van Bockel 2009, p. 84

⁶¹ Council Regulation (EC) No 1/2003, OJ L 1, 4.1.2003, p. 1–25

⁶² *Ibid*, Arts. 4–6

⁶³ *Ibid*, recital 18

only set out the criteria that are to be applied in order to determine whether or not an authority is "well placed" to deal with a particular case. The presumption is that the first authority to come into contact with the case should continue to handle it. Apart from these guidelines the regulation provides no rules on the determination of jurisdiction between the authorities of different Member States.⁶⁴

There are also some noteworthy provisions on the relationship between the Commission and the national authorities. Article 11 (6) states that the competence of national authorities to apply the treaty provisions on competition shall be extinguished when the Commission chooses to initiate proceedings. In order to ensure the uniform application of Union law, Article 16 states that national authorities may not make decisions that would run counter to a decision already adopted or contemplated by the Commission. The new regulation also determines the relationship between national and union law on competition in its article 3. It states that national authorities should always apply the union provisions in parallel with national competition law. It also gives that enterprises that are considered not to restrict competition within the meaning of Article 81 cannot be deemed to do so by national authorities beyond the territory of that state.

⁶⁴ Van Bockel 2009, p. 95

4 Ne Bis in Idem in EU Law

This section will examine the legal bases of *ne bis in idem* in the EU. The authoritative sources of *ne bis in idem* in EU law are not as diverse as its interpretations, but they are nevertheless quite a few. However, two types of cases dominate the caselaw of the CJEU on the *ne bis in idem* principle and will also dominate this part of the essay. On the one hand, we have cases concerning *ne bis in idem* as a general principle or a fundamental right of EU law, now codified by article 50 of the CFR. On the other hand we have the caselaw on articles 54-57 of the CISA, which provisions have formed part of EU law since their incorporation at the time of the Amsterdam Treaty.

There are many other relevant provisions which should be mentioned, even if they will not be discussed in depth in this essay. As mentioned above, many mutual recognition instruments contain *ne bis in idem* provisions as optional grounds to refuse cooperation, and the FDEAW even includes it as an obligatory refusal ground. Outside the AFSJ, important provisions are found in the regulation⁶⁵ on the protection of the European Communities' financial interests containing general principles governing sectoral regulations, and in the EU convention⁶⁶ on corruption.

4.1 *Ne Bis In Idem* as a Fundamental Right in EU Law

Article 6 TEU provides the sources of fundamental rights in the EU. As mentioned above, the Union is now obliged to accede to the ECHR and in

⁶⁵ Council Regulation (EC, Euratom) No 2988/95, OJ L 312, 23.12.1995, p. 1–4

⁶⁶ Convention of 26 May 1997, OJ C195/2

the future the convention will be one of the direct sources of fundamental rights in the Union. For now, though, its influence remains indirect. Instead, the two main sources of fundamental rights are the CFR, which has the same legal value as the treaties, and the general principles of EU law, of which the ECHR together with the common constitutional traditions of the member states are the indirect source.

This section will consider *ne bis in idem* as a fundamental right of EU law. In accordance with the limitations set out above, the common constitutional traditions of the Member States will not be considered here. Rather, the consideration of the general principle will focus on the ECHR version and the role of the general principle in the caselaw of the CJEU. Before moving on to consider those sources, the general principles of EU law, the CFR and their internal relationship will be considered.

4.1.1 Article 50 of the CFR and the General Principles of EU law

The concept of general principles of EU law of course precedes the CFR by several decades. The early years of European integration saw the development by the union courts of a system of grounds of review of union and Member State action derived from the administrative law traditions of the member states.⁶⁷ In parallel, motivated essentially by concerns about the consequences of the doctrine of the supremacy of EU law for the legitimacy of the Union *vis-a-vis* the Member States as well as internationally fundamental rights, as constructed from the ECHR and the common constitutional traditions of the Member States developed as part of the general principles.⁶⁸

⁶⁷ Craig et.al. 2011, pp. 109-110

⁶⁸ de Búrca 2011, pp. 477-480

As will be elaborated on below, *ne bis in idem* has figured in the caselaw of the CJEU since the late sixties and is now habitually referred to as such a "General Principle" and a "Fundamental Right".⁶⁹

The EU now of course has its own binding catalogue of rights in the CFR. However, when interpreting the CFR, due account must be taken to the other sources of law within the EU. Most notably, those rights that correspond to rights guaranteed by the ECHR shall be given the same meaning as the latter.⁷⁰ In addition the preamble to the CFR affirms that the rights of the Charter result from the same sources as the General Principles of EU law, in addition to the caselaw of the CJEU and the ECtHR and the social charters adopted by the Union and by the Council of Europe.

Apart from this the treaties remain silent on the subject of the relationship between the CFR and the general principles of EU law as a source of fundamental rights. The issue has thereby been left to the courts which have also, thus far, remained relatively reticent. Absent any "hard case" that forces the issue, the tendency seems to be to treat the CFR less as an exclusive source of fundamental rights than one provision among many.⁷¹

The version of *ne bis in idem* found in the CFR reads as follows:

Article 50

Right not to be tried or punished twice in criminal proceedings for the same criminal offence

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.

⁶⁹ See e.g. Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij* [2002] ECR I-8375, para. 59 and Case C-289/04 P *Showa Denko v Commission* [2006] ECR I-5859, para. 50

⁷⁰ CFR Art. 52, para. 3

⁷¹ Hofmann et.al. 2013, pp. 74-76

On the face of it, it would seem that the charter version only applies to criminal proceedings, but that it applies both to the cumulation of proceedings and punishment. The definition of "finality" seems to be limited to acquittal or conviction.

The preamble to the CFR also states that the CJEU, when interpreting the rights contained in the charter, shall have "due regard to the explanations prepared under the authority of the Praesidium of the Convention which drafted the Charter and updated under the responsibility of the Praesidium of the European Convention."

Those explanations⁷² clarify two points about the Charter version of *ne bis in idem*. First, as regards the territorial application, this version is not limited to internal situations but applies also between the jurisdiction of two or more Member States. In its intranational application, the Charter version corresponds to the ECHR version. Second, as concerns the material applicability, the "rule prohibiting cumulation refers to cumulation of two penalties of the same kind, that is to say criminal-law penalties."

Below, we will consider in greater detail the two sources of *ne bis in idem* that are of the greatest relevance to this essay, that is the ECHR version and its interpretation by the ECtHR and the caselaw of the CJEU.

4.1.2 Article 4 of Protocol 7 to the ECHR

The relationship between the ECHR and the protection of human rights in the EU is close. No deeper penetration of the intricacies of that relationship is possible here. Suffice it to say that the ECHR has been a main source of inspiration for the fundamental rights of the EU for a long time, and now by force of the Lisbon Treaty forms a minimum standard for fundamental

⁷² Available from http://www.europarl.europa.eu/charter/convent49_en.htm, 20/12/13

rights in the EU.⁷³ Within the foreseeable future the EU will become part to the convention, if not its protocols.⁷⁴

The *ne bis in idem* principle was not included at the time of drafting of the ECHR. However, it has since been included in the seventh protocol to that convention, specifically in its article four which states:

Article 4 – Right not to be tried or punished twice

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.

As is evident from the wording⁷⁵ of the provision, this version of the *ne bis in idem* principle does not apply to transnational situations at all. Therefore its importance for the development of the principle on a transnational level is only indirect.

The Explanatory Report to the protocol clarifies that while the offence in itself is not classified as criminal in the text of the article, this is only because such language is made redundant by the earlier mention of "criminal proceedings" and "penal procedure", which sufficiently clarifies that the article is only applicable to a criminal context. For further clarification, it adds that the article does not prevent the same person on account of the same acts being subjected also to action of a different character.⁷⁶

The explanatory report also elaborates on the requirement of finality by referring back to the explanatory report of another convention, the European

⁷³ Art. 6 TEU & art. 52 para. 3 CFR

⁷⁴ Art. 6 para. 2 TEU

⁷⁵ "under the jurisdiction of the same state"

⁷⁶ Explanatory Report to Protocol No. 7 to the ECHR, paras 28 & 32

Convention on the International Validity of Criminal Judgments. According to that text the requirement of finality demands that "according to the traditional expression, [the decision] has acquired the force of *res judicata*." It is also made clear that it is the national legal system which is to provide the relevant definition of that term.⁷⁷

In this connection, it is also worth noting that the protocol 7 version of the *ne bis in idem* principle has not been universally accepted by the Member States of the European Union. While the protocol entered into effect in 1988, four Member States have not yet ratified the protocol at all,⁷⁸ and four more have by various legal means assured that the provision only applies to offences classified as criminal under their respective national laws.⁷⁹

4.1.2.1 The caselaw of the ECtHR

Unsurprisingly, considering the clear wording of the provision, the transnational application of the protocol 7 version of *ne bis in idem* has not been prominent in the caselaw of the ECtHR. All other areas of investigation of this essay are however recurring problems in the caselaw. While the stance of the ECtHR has not been perfectly consistent on these points, a relatively recent case from the Grand Chamber of the ECtHR, *Zolotukhin v Russia*,⁸⁰ clarified to a great extent the meaning of the version of the *ne bis in idem* principle contained in Protocol 7 and therefore constitutes an exemplary starting point for consideration of the principle as construed by the Strasbourg court.

The events that form the embryo of the case took place on 4 January 2002 in a local police station in Russia, where Mr Zolotukhin had been brought for interrogation concerning an issue irrelevant to the present case. Thereafter,

⁷⁷ *Ibid*, paras 22 & 29

⁷⁸ Chart of Signatures and Ratifications to Protocol 7 of the ECHR found at <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=117&CM=8&DF=20/12/2013&CL=ENG> on 20/12/13

⁷⁹ Vervaele 2013, p. 115

⁸⁰ *Sergey Zolotukhin v. Russia*, (Appl. No. 14939/03), Judgment of 10 February 2009

in an office where he was being held, in the office of the head of the police station and in a car in which he was being taken to the local district court he verbally assaulted several officials with varying degrees of severity and repeatedly tried to escape using mild force. The episode ended with the applicant being brought before said court, where he was sentenced under the Russian Code of Administrative Offences to three days' detention on the grounds that he had "sworn in a public place and did not respond to reprimands."⁸¹

Less than a month later, Mr. Zolotukhin was indicted under the national Criminal Code. The grounds of this prosecution were the events of 4 January, here more elaborately recounted and sorted under three specific counts of the Code. For his actions in the second office and in the car, the applicant was found guilty. On the first count, concerning the events that had taken place in the first office, he was acquitted. The judgment in this part mentions the fact that Mr. Zolotukhin had already been tried and punished under the Administrative Offences Code, but this does not appear to be the main reason for the acquittal.⁸²

The court in approaching the case divides it into three titles, specifically whether the first set of proceedings were criminal in nature, whether the two relevant offences were the same, and whether there had been a duplication of proceedings. In the headings introducing the two latter issues, the terms *idem* and *bis* respectively are added in brackets at the end. This formal approach was to be repeated in several of the following more substantial judgements on the principle,⁸³ although in some the two latter issues were handled together.⁸⁴

⁸¹ *Zolotukhin v. Russia*, paras 12-19

⁸² *Ibid*, paras 21-24

⁸³ E.g. *Maresti v. Croatia*, (Appl. No. 55759/07), Judgment of 25 June 2009 and *Tomasovic v. Croatia*, (Appl. No. 53785/09), Judgment of 18 October 2011

⁸⁴ *Ruotsalainen v. Finland*, (Application no. 13079/03), Judgment of 16 June 2009 and *Asadbeyli and Others v. Azerbaijan*, (Applications nos. 3653/05, 14729/05, 20908/05, 26242/05, 36083/05 and 16519/06), Judgment of 11 December 2012

Concerning the first issue, the court held that the definition of "criminal proceedings" in Article 4 of Protocol 7 must to some degree be independent from the classification in the legal systems of the Contracting States, since otherwise the object and purpose of the Convention would be compromised.⁸⁵ The earlier caselaw cited suggests that what this "otherwise" signifies is an order under which the application of the provision to a type of situations within a Contracting State would be determined by the sovereign will of that state through national categorisations.⁸⁶ The imperiled aim one assumes is that found in the preamble to the Convention of "securing the universal and effective recognition and observance of the Rights therein declared."

The court also held in *Zolotukhin* that the application of Article 4 of Protocol 7 should be determined by the same general considerations as the corresponding concepts used in the Convention provisions on fair trial and *nulla poene sine lege* in Articles 6 and 7.⁸⁷ Little explicit rational justification for this later axiom can be found in the earlier caselaw of the court, despite its frequent reiteration. The only sentence offering any such justification is the statement in *Göktan v. France* that the meaning of the term "cannot differ from one provision to another."⁸⁸

The court asserts that the law applicable to the determination of criminal nature is consequentially the set of criteria elaborated in earlier caselaw on the aforementioned provisions commonly referred to as the *Engel*-criteria (after the case wherein they were first articulated). They are: the classification under national law, the nature of the offence, and the degree of severity of the penalty liable to be incurred. The first criteria is not decisive and indeed is often treated rather cursory in the caselaw, leading to the

⁸⁵ *Zolotukhin v. Russia*, para 52

⁸⁶ *Storbråten v. Norway*, (Appl. No. 12277/04), Decision of 1 February 2004, referring to *Öztürk v. Germany*, (Appl. No. 8544/79), Judgment of 21 February 1984

⁸⁷ *Zolotukhin v. Russia*, para 52

⁸⁸ *Göktan v. France*, (Appl. No. 33402/96), Judgment of 2 July 2002

primary importance of the latter two. These can, but need not necessarily, be applied cumulatively.⁸⁹

The claim that "established caselaw" designates the *Engel*-criteria as applicable should perhaps be taken as an example of the assertive tone of the judgment at hand on formal issues. In fact earlier jurisprudence on Article 4 of Protocol 7 implies rather strongly that another, more inclusive set of criteria are the law when it comes to establishing the criminal nature of proceedings for the application of the *ne bis in idem* principle.⁹⁰

In its application of the *Engel*-criteria, *Zolotukhin* is rather typical, citing case law where it has earlier found the classification of an offence as an administrative one under the Russian system has been misleading, thereby establishing the element of doubt which means that the other two criteria will be decisive. Concerning the second criteria, the court finds that the purpose of the provision is to protect values and further objectives that are strongly related to criminal law. This along with the indeterminate address of the provision points towards inclusion in the convention definition of criminal charge. There is no requirement of any specific gravity of the offence. As concerns the third criteria, this is determined by reference to the maximum penalty liable to be imposed. The actual penalty incurred is not irrelevant, but it leaves the persuasive authority of the abstract penal value of the provision intact. When loss of liberty is a possibility or an actuality, there is a strong presumption in favour of a criminal nature. In the case at hand therefore, both the second and the third criteria pointed in the same direction and the court accordingly concludes that the "administrative" proceedings conducted against Mr Zolotukhin were in fact to be regarded as criminal within the meaning of the convention.⁹¹

⁸⁹ *Zolotukhin v. Russia*, para 53

⁹⁰ See, for example *Nilsson v. Sweden*, (Appl. No. 73661/01), Decision of 13 December 2005 and *Haarvig v. Norway*, (Appl. No. 11187/05), Decision of 11 December 2007 in addition to the aforementioned *Storbråten v. Norway*

⁹¹ *Zolotukhin v. Russia*, paras 53-57

Turning to the question of what sort of identity is required between the two sets of proceedings for their combination to be incompatible with the *ne bis in idem* principle, in other words what constitutes *idem* for the purposes of the principle, the court gave perhaps the most important precedent of the case.

Recognising that its earlier jurisprudence had treated the issue in several different ways,⁹² and that this was detrimental to the value of legal certainty, the court proceeds to designate the future approach, namely that the issue of *idem* should be solved by reference to the "facts which constitute a set of concrete factual circumstances inextricably linked together in time and space, the existence of which must be demonstrated in order to secure a conviction or institute criminal proceedings."

This is justified, in essence, by reference to the comparatively higher level of protection and legal certainty afforded the holder of the right by such an interpretation. Such an approach is warranted by the aim of the Convention and the value of effective enforcement of the rights found therein.⁹³

The citation of an array of international instruments incorporating the principle shows the universalist tendency of the court, however, despite the less-than-uniform findings of such an analysis, the court explicitly uses the approach based on the material acts as established in the case law of the CJEU on 54 CISA as the starting-point and the conclusion of its reasoning in this part. It should be noted, however, that the court also refers to the Inter-American Court of human rights, a fact that perhaps suggests that the courts approval of the facts-based approach rather than the relation between the two European courts formed the basis for the outcome.⁹⁴

The last title, "whether or not there had been a duplication of proceedings", addresses the relevance of several different issues for determining whether or

⁹² *Ibid*, para 70

⁹³ *Ibid*, para 78-84

⁹⁴ *Ibid*, para 79

not a set of proceedings conducted against an individual are to be recognised as sufficiently serious to warrant application of the *ne bis in idem* principle.

Most important for the purposes of this essay, the first point addressed under this title is that of finality. On this issue the court has been consistent over the years. As mentioned above, the meaning of finality is elaborated in the Explanatory Report to Protocol 7 and in *Zolotukhin* the court reiterated a strong line of jurisprudence that conjoins the concept of finality with that of *res judicata*. That status is traditionally reached at the time when ordinary remedies are no longer available or have been exhausted or when they have not been used by the parties before their expiration. Extraordinary remedies are not relevant to the determination of finality.⁹⁵ Earlier case law also supports the notion that such evaluation must be made with reference to national law.⁹⁶ However, there are indications that the material content of judgments has some importance in the determination of finality, as in an earlier decision on admissibility, a plea relying on article 4 of protocol 7 was rejected because the discontinuance of proceedings by a public prosecutor did not "amount" to an acquittal or conviction.⁹⁷

The ECtHR does not interpret the phrase "finally acquitted or convicted in accordance with the law and penal procedure of that State" in Article 4P7 as referring to any criterium for determination of the material extent of *ne bis in idem*, but as an indication that finality shall be assessed with reference to the framework provided by national procedural law.⁹⁸ This does not mean, however, that the court has opted simply to underwrite national definitions of finality. Rather, the assessment shall be made in view of the "traditional" expression of *res judicata*, something which the court defines as the absence of ordinary appeals.⁹⁹

⁹⁵ *Ibid*, paras 107-108

⁹⁶ See *Storbråten v. Norway* cited above, and *Nikitin v. Russia* (Appl. No. 50178/99), Judgment of 20 July 2004

⁹⁷ *Smirnova and Smirnova v. Russia*, (Appl.nos. 46133/99 and 48183/99), Decision of 3 October 2002

⁹⁸ *Storbråten v. Norway*, (Appl. No. 12277/04), Decision of 1 February 2004

⁹⁹ *Nikitin v. Russia* (Appl. No. 50178/99), Judgment of 20 July 2004

The other two sub-headings sorted under this last title have to do with the consequences of the fact that the applicant was acquitted of one of the charges in the second set of proceedings.

First, the court handles the issue of whether the fact that Mr Zolotukhin had actually been partly acquitted meant that in this part there had been no duplication of proceedings. The court reiterated, again in quite assertive language, the precedent from its earlier case law¹⁰⁰ that the Convention provides three levels of protection: the rights not to be punished, not to be tried and not to be liable to be tried twice. The wording of the Article was used to support this conclusion. The combination of the words "punished" and "tried", it is said, would be redundant unless they were each given an independent meaning. Consequentially, the mere fact that Mr Zolotukhin had been prosecuted on basis of the same acts meant that there had been a breach of the *ne bis in idem* principle.¹⁰¹

This facet of the case clarifies, to some degree, an issue that has earlier been quite muddled in the case law of the court. One line of case law emphasises the incompatibility of consecutive prosecutions.¹⁰² The argument based on the wording of the article is a common justification for this approach and it has been supported by reference to the CFR and the ICCPR.¹⁰³

However, there have also been indications that the imposition of successive *penalties* is the relevant requisite for application of the principle. In a case from 1998, the court supported its finding that the consecutive prosecution of separate offences originating in the same act is allowed by Article 4 of Protocol 7 by noting that such procedure is not contrary to the principle

¹⁰⁰ *Nikitin v. Russia*, para. 36; *Franz Fischer v. Austria*, (Application no. 37950/97), Judgment of 29 May 2001, para. 29

¹⁰¹ *Zolotukhin v. Russia*, paras 110-111

¹⁰² See *Gradinger v. Austria*, (Application no. 15963/90) Judgment of 23 October 1995, para. 53; *Franz Fischer v. Austria*, para. 29

¹⁰³ *Zigarella v. Italy*, (Application no. 48154/99), Decision of 3 October 2002

”especially where ... the penalties are not cumulative.”¹⁰⁴ This case resurfaced again in 2005 when the court reiterated it, adding that the repetitive aspect of prosecution *or* punishment is central to the legal problem addressed by Article 4 of Protocol 7.¹⁰⁵

Returning to the last section of the *Zolotukhin* judgment, the court also confirmed that there are exceptional cases where, though there has been a breach of the principle, the status of the applicant as a victim could be extinguished. Specifically, this would be the case where an institution in one of the Contracting States has brought proceedings without knowledge of the existence of a previous judgment and has taken measures to prevent a breach of the principle upon gaining access to this information.¹⁰⁶

4.1.3 CJEU Case law on *ne bis in idem* as a Fundamental Right

Even before the paradigm shift in the jurisprudence of the Court of Justice on general principles, legal arguments based on the *ne bis in idem* principle were invoked and to a certain degree, accepted by the CJEU. One respected commentator writes that European integration ”stumbled upon” the issue of *ne bis in idem*.¹⁰⁷

This section will consider the case law which has since developed. It will begin by considering the material dimension, which will also serve to identify the different areas of law in which the principle has been discussed. From there, it will move on to consider the link between the principle, jurisdiction and territory, which forms a particularly muddled issue in the

¹⁰⁴ *Oliveira v. Switzerland*, (Application no. 25711/94), Judgment of 30 July 1998, para. 27

¹⁰⁵ *Nikitin v. Russia*, para. 35

¹⁰⁶ *Zolotukhin v. Russia*, paras. 113-115

¹⁰⁷ Vervaele 2005, p. 106

case law. After considering these specific issues, it will consider further the meaning of *Idem* and *Bis* in the case law.

4.1.3.1 Material Applicability

From the general part above we can recollect that *ne bis in idem* has traditionally worked as a criminal law principle, limited within national jurisdictions to the field there recognised as criminal law. In the context of EU law on the other hand, the concept of "criminal law" cannot serve the purpose of delineating the proper material scope of *ne bis in idem*. Contrary to what one would perhaps expect, this has not meant that *ne bis in idem* as a general principle has been without relevance in the EU legal order. Actually, it has been applied by the CJEU since the late sixties.

How does this equate? Well, as discussed above, situations where the structure of EU Law approximates certain aspects of criminal law to such a degree as would suggest the applicability of *ne bis in idem* have been a part of EU law since long before the Lisbon Treaty, and this has caused applicants and national courts to raise issues of *ne bis in idem* before the CJEU with varying degrees of success and sensibility. In response to such arguments, the CJEU has reacted variously: with silence, with caution, and upon rare occasion with acceptance and endorsement. But it has not been completely deaf to such considerations, and so, it is now obvious that *ne bis in idem* as a general principle has *some* extent in the legal order of the EU and consequentially that the material dimension at least has not been understood so severely as to reduce the scope of the principle to nil.

However, while the principle has been discussed in a variety of areas of EU law there has not been much substantial consideration of the material dimension as such. The considerations that have caused the CJEU to consider the material dimension satisfied in some cases have not been clearly laid out in the case law. Definitely, nothing resembling a rule like

that of the *Engel* criteria had been developed in the CJEU case law by 2009.¹⁰⁸

However, while there is no apparent *method* whereby the CJEU considers the material dimension, an account of the various types of cases in which the principle has appeared is indeed possible and capable of providing if not some small intimation of the material nature of the general principle of *ne bis in idem* then at least useful background to the further discussion of its various other aspects.

In attempting to construct such a typology of cases concerning *ne bis in idem*, what immediately becomes apparent is the overwhelming dominance of the field of competition law. In fact, while the jurisprudence derived from other areas is invariably limited to a single, a few, or a handful of cases, the discussion of *ne bis in idem* in competition law has been ongoing since the argument first appeared in *Walt Wilhelm* in 1969. Since then, the applicability of the principle to that field has been implicitly confirmed many times before, in *LVM*, it was explicitly confirmed.¹⁰⁹ Interestingly, within the legal order of the EU, competition proceedings are indubitably considered to be not of a criminal nature.¹¹⁰

Why the field of competition law is so dominant this essay shall not presume to say, but the uneven landscape of the case law inevitably has the effect of elevating EU competition law to a place of high importance for the role of the *ne bis in idem* principle in the EU. The field of competition law will therefore dominate the discussion to follow.

While EU Competition law is the dominant field of application of *ne bis in idem* as a fundamental right outside the scope of the CISA provisions, the cases from areas of law other than that of competition law are important to

¹⁰⁸ Van Bockel 2009, p. 157

¹⁰⁹ Van Bockel 2009, p. 44

¹¹⁰ Council Regulation (EC) No 1/2003 of 16 December 2002, OJ L 1, 4.1.2003, p. 1–25, art. 23, para. 5

forming an understanding of the material scope of the principle and many will also figure to some degree in the discussion to follow.

In *Gutmann*, the first case on *ne bis in idem* before the CJEU, the principle resulted in the quashing of a staff disciplinary measure adopted by the commission of the EAEC because of the failure of the commission to produce sufficient facts to enable distinction between the grounds of the decision and "all other earlier or later grounds of complaint." The applicability of the principle is not discussed, but the argument is treated seriously and indeed, determined the outcome of the case.¹¹¹

In *Maizena*,¹¹² a case concerning the forfeiture of securities under an agricultural support scheme, two other fundamental criminal law principles (*nulla poena sine lege* and *in dubio pro reo*) were deemed inapplicable because neither of the sanctions involved were of a criminal law nature.¹¹³ The accounting principle on the other hand (referred to in the case as *non bis in idem*) "must be considered from the point of view of the principle of proportionality." However, the forfeiture of two securities triggered by the same event cannot be considered disproportionate where the two securities have different purposes.¹¹⁴

Ne bis in idem has also been discussed in a small number of infringement proceedings against Member States. In this context, the court has mentioned that the issue of whether the material dimension forbids application of *ne bis in idem* is unresolved and suggested that that issue would have to be determined in order for the *ne bis in idem* principle to come into effect.¹¹⁵

Invariably, though, the court has dismissed these cases by reference to other aspects of *ne bis in idem*. The most common approach is to refer to some

¹¹¹ *Gutmann*, para

¹¹² Case 137/85 *Maizena Gesellschaft mbH v. BALM* [1987] ECR 4587

¹¹³ *Ibid*, paras 11-14

¹¹⁴ *Ibid*, paras 21-23

¹¹⁵ See Case C-526/08 *Commission v Luxembourg* [2010] ECR I-6151, paras. 29-36; Case C-416/02 *Commission v Spain* [2005] ECR I-7487, para. 65

fatal difference. Sometimes, this difference relates quite closely to the narrow definition of *idem* given above. In *Italy v Commission*, the court states that the two repeated proceedings at stake relate to different provisions of the infringed Directive and therefore to the infringements of different obligations.¹¹⁶ In *Commission v Luxembourg* it limited itself to noting that the "matters of fact and law involved" were not identical.¹¹⁷ Various other grounds for dismissal of the argument *ne bis in idem* have also been used, most based on the concept of difference: the subjective scope or identity,¹¹⁸ the lack of finality of the other set of proceedings and,¹¹⁹ interestingly, the circumstance that the two penalties involved had different functions.¹²⁰

So, to sum up, clearly the *ne bis in idem* general principle of EU law does not materially follow the contours of the category "criminal law" in the same but must be wider. With that said, neither the method nor the extent of the material limitations on the principle have been clearly laid out.

4.1.3.2 Transnational applicability

Article 50 of the CFR now states that the element that triggers that provision is a first acquittal or conviction "within the union". However, when we consider the case law of the CJEU on the jurisdictional dimension of the General Principle *ne bis in idem*, another, more complicated picture appears. The account of this aspect of the principle will take us deeper into the territory of *ne bis in idem* application in the field of competition law. We will begin with the first time the principle appeared in the context of competition proceedings.

*Walt Wilhelm*¹²¹ was to fundamentally influence the understanding of *ne bis*

¹¹⁶ Case C-127/99 *Commission v Italy* [2001] ECR I-8305, para. 28

¹¹⁷ Para. 36 of that judgment

¹¹⁸ Case C-157/06 *Commission v Italy* [2008] ECR I-7313, paras. 19-20

¹¹⁹ Para. 65 of that judgment

¹²⁰ Case C-304/02 *Commission v France* [2005] ECR I-6263, para 84

¹²¹ Case 14/68 *Wilhelm and Others* [1969] ECR 1

in idem in competition proceedings. As mentioned above, the administrative structure of the field was poorly defined in legislation, for which reason many essential issues of procedure were left to the CJEU. *Walt Wilhelm* concerned one such issue, namely the acceptability of the parallel application of union law by the Commission and national law by national authorities to the same anti-competitive conduct.

In its reply, the court focused more on the procedural framework provided by regulation 17/62 than the notion of fundamental rights,¹²² which at this time was still held at arms length by the court,¹²³ and the term *ne bis in idem* was not used in the answer.

The acceptability of parallel application was found, rather, to follow from the special system of the sharing of jurisdiction between the Community and the Member States with regard to cartels, and so long as the relationship between national and community law has not been further regulated, no means of avoiding the possibility of parallel proceedings is to be found in the general principles of Community law.¹²⁴ Essential to this reasoning was the idea that Community and National law "consider cartels from different points of view" and "pursue different ends". While the community provision regard cartels in the light of obstacles which may result for trade between Member States, each body of national legislation proceeds on the basis of the considerations peculiar to it and considers cartels only in that context. This "implies" that parallel procedures are, in principle, acceptable.¹²⁵ In addition, regulation 17/62 did not regulate the relationship between national law and community law, nor the competence of national authorities to apply national law. The regulation did include a provision authorising the Council to do this, but this competence had not at the time been exercised, which was taken as a further indication for the acceptability of parallel

¹²² Van Bockel 2009, p. 132

¹²³ Craig & de Búrca, p. 364

¹²⁴ Case 14/68 *Wilhelm and Others* [1969] ECR 1, para. 11

¹²⁵ *Ibid*, para 3

proceedings.¹²⁶

The possibility of concurrent sanctions does not change this. If, however, the possibility of two procedures being conducted separately were to lead to the imposition of consecutive sanctions, a “general requirement of natural justice” demands that any previous punitive decision must be taken into account in determining any sanction which is to be imposed.¹²⁷

The only limitation imposed by EU law on the application by national authorities of national competition law is that it may not compromise the effective application of EU law. The governing principle emphasised in the judgment is not *ne bis in idem*, but the principle of the supremacy of EU law.¹²⁸

Although it was heavily imbibed with the particularities of its time and has been subject to modification, *Walt Wilhelm* in 2009 still enjoyed a very strong position in the jurisprudence of the CJEU, and many of its essential precedents had been preserved.¹²⁹ Chief among those is the acceptability of parallel proceedings on the community and national levels which as we have seen is supported by the argument that community and national laws “pursue different ends” or “consider cartels from different points of view”. This argumentation is not very clear, and the different doctrinal strands on and in the stance of the CJEU on parallel proceedings has been quite variable through the years.

Nevertheless, *Walt Wilhelm* had effectively set the scene for three decades of competition law enforcement in the EU. Apart from a judgment from -72 concerning the applicability of the accounting principle to situations involving non-member states, to which we will return shortly, no other case on *ne bis in idem* in competition proceedings reached the ECJ until the turn

¹²⁶ *Ibid*, para 4

¹²⁷ *Ibid*, para 11

¹²⁸ *Ibid*, paras 5-9

¹²⁹ Accardo & Louis 2011, p. 102

of the milleniae, in the midst of fundamental changes in the field of competition law, of human rights in the EU, and of the *ne bis in idem* principle.

The first case of relevance in this context from the "new wave" of case law on *ne bis in idem* was the *Aalborg* case.¹³⁰ In that case, the court began its consideration of the principle by the following formulation formulation. "[T]he application of [the *ne bis in idem* principle] is subject to the threefold condition of identity of the facts, unity of offender and unity of the legal interest protected. Under that principle, therefore, the same person cannot be sanctioned more than once for a single unlawful course of conduct designed to protect the same legal asset."¹³¹

Sorting out the subjective identity, what remains of the "threefold condition" is the identity of the facts (on which point the case was resolved)¹³² but also a last criteria, that of the legal interest protected. Not much more is said in the judgment itself, so we must look at the underlying opinion to get a better understanding of what this criteria means.

The opinion on the case was authored by AG Colomer,¹³³ who only a few months before had written the first opinion on the principle in the context of the CISA.¹³⁴ The inclusion of the criteria of the "legal interest protected" is supported by citation of *Walt Wilhelm* and *Maizena*, and is suggested to ultimately rest on the idea that *ius puniendi* is defined by certain underlying interests.¹³⁵ Colomer understands *Walt Wilhelm* as a situation where non-application of *ne bis in idem* was motivated exactly by this lack of identity of purpose. However, the Advocate General is of the opinion that this argument is not sustainable because the national and community legal orders do, in fact, protect the same legal interest. The territorial extent of the infringement does not affect its nature of being able to influence the

¹³⁰ 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

¹³¹ *Ibid.*, para 338

¹³² *Ibid.*, paras 339-340

¹³³ Opinion of AG Ruiz-Jarabo Colomer in 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*, delivered on 11 February 2003

¹³⁴ Opinion of AG Ruiz-Jarabo Colomer in Joined Cases C-187/01 and C-385/01 *Gözütok & Brügge*, delivered on 19 September 2002

¹³⁵ See footnote 130, paras 170-171

common market, but only its intensity.¹³⁶

While the Advocate General obviously sought to explain the meaning of *Walt Wilhelm* by reference to the criteria of the "legal interest" it is difficult to know to what extent the court by its inclusion of the threefold criteria in the issuing judgment wished to underwrite this approach. It would seem that at the very least the Court agreed that a teleological perspective on the punitive provisions applied had some relevance to the determination of the applicability of *ne bis in idem*. Its opinions on the consequences of such a criteria for the system of parallel application however (unlike those of the AG) remained obscure.

In a later case, *Showa Denko*,¹³⁷ wherein the court faced and resolved the issue whether *Walt Wilhelm* meant that "natural justice" required the application of the accounting principle in situations concerning the EU and non-Member States, the negative answer was justified by the argument that the Commissions assessments when applying the community provisions on competition "may" be very different from those made by authorities in third countries because of the different legal interests protected. On the other hand, the situation would be "completely different" where only community and member-state law is involved.¹³⁸

4.1.3.3 Further considerations of IDEM

Exactly how the above discussion on the territorial application of *ne bis in idem* as a fundamental right relates to the concept of *Idem* will be further discussed below. In this section *Idem* will be considered in itself.

Boehringer, the first case on *ne bis in idem* following *Walt Wilhelm*, concerned the submission that penalties imposed in the United States should be taken into account when sanctioning anti-competitive conduct in the

¹³⁶ *Ibid*, paras 175-179

¹³⁷ Case C-289/04 P *Showa Denko v Commission* [2006] ECR I-5859

¹³⁸ *Idem*, para 53-56

Community.¹³⁹ The court avoided answering whether such an obligation exists in the abstract by stating that in the specific case it did not. The instrument used to this effect was *idem*. Essentially, it was held that the actions complained of by the sanctioning authorities were not identical because, even if they originated in the same set of agreements, they “differ[ed] essentially as regards both their object and their geographical emphasis.” The actions penalised can not consist in a cartel agreement in itself but in its application and effects.¹⁴⁰

Similarly, in *Aalborg*, the targeting of two different agreements forming part of the same cartel but with different technical objectives was found to preclude application of *ne bis in idem*.¹⁴¹

In *Italy v Commission*, concerning infringement proceedings against the Italian government for failing to take a number of measures against the pollution of water prescribed by a community directive there was held to be no violation of *ne bis in idem* on the sole ground that the two decisions at issue were based on obligations arising from different provisions of the infringed directive.¹⁴²

4.1.3.4 Finality

There has only been one case discussing the issue of finality in the context of *ne bis in idem* as a general principle of EU law. That case, *LVM*, was the first case after a decades-long hiatus in case law on *ne bis in idem* within the field of competition law. In finding that an annulment on procedural grounds of a sanction imposed by the Commission did not entail applicability of *ne bis in idem*, the Court argued that there must have been a qualitative assessment of the issue whether an offence has actually been

¹³⁹ Case C-7/72 *Boehringer Mannheim v Commission* [1972] ECR 1281, paras. 1-2

¹⁴⁰ *Ibid*, paras. 3-6

¹⁴¹ 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, paras. 339-340

¹⁴² Case C-127/99 *Commission v Italy* [2001] ECR I-8305, para. 46

committed in order for *ne bis in idem* to be applicable. Since an annulment does not fulfill that criteria, it can not be considered an acquittal for the purposes of *ne bis in idem*. It was underlined in *LVM* that *ne bis in idem* as a fundamental principle was also “enshrined” in protocol 7 to the ECHR.¹⁴³

4.2 Articles 54-57 of the Schengen Convention

The Convention implementing the Schengen Agreement (CISA), which was signed in 1990, was meant to clarify and effectuate the more policy-oriented provisions of the Schengen Agreement, which in turn had been signed just five years earlier. As is made clear by the respective preambles to the Schengen Agreement and the CISA, the main objective of those documents is to further the sake of European integration by the abolition of border checks. The conclusion of the Schengen texts was a way of moving ahead with European integration for the more integration-minded Member States.¹⁴⁴

Such a radical remodelling of the internal judicial infrastructure between the original Contracting Parties was of course not unproblematic. Concerns about increased criminality accompanied integrational zeal in the conclusion of the Shengen documents and motivated the inclusion of an array of countervailing measures in the Convention.¹⁴⁵ The lion’s share of the Convention is therefore dedicated to, for example, police and judicial cooperation as well as several substantive provisions,¹⁴⁶ and was to be held together by the creation of a shared system for the transferral of information in between the contracting states the Shengen Information System (SIS).¹⁴⁷

¹⁴³ Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij* [2002] ECR I-8375, paras. 59-63

¹⁴⁴ Chalmers et.al. 2010, p. 24

¹⁴⁵ Stessens & van den Wyngaert 1999, p. 787

¹⁴⁶ Title III, Chapters 1,2, and, for example, 4

¹⁴⁷ Mitsilegas 2009, pp. 6-9

Of the greatest relevance for this essay, the CISA also contained the language of an ill-fated convention that had failed to lift-off just a few years before under the auspices of the European Political Cooperation. That was its provisions on *ne bis in idem* in articles 54-57.¹⁴⁸ The scope and substance of those provisions will in relevant parts be considered below, but it is necessary at this point to clarify their place in the EU today, for while the Schengen *aquis*, at it has come to be known, was originally concluded outside the framework of the EC, today it forms part of the EU legal order by virtue of a protocol to the Amsterdam treaty. As such, it is binding upon all the Member States save Ireland as well as Norway, Iceland, Switzerland and Liechtenstein.¹⁴⁹

4.2.1 Content

The CISA version of *ne bis in idem* has been lauded as "the most developed" of the EU versions of the principle,¹⁵⁰ and indeed it stretches across five paragraphs and has several characteristics that set it apart from other written versions of the principle.

The core of the CISA norms on *ne bis in idem* can be found in the first part of Article 54, which sets out the prohibition of double prosecution. What is most salient about this provision is that its territorial application is limited to transnational situations. This inter-state applicability is unique among international sources of the principle.¹⁵¹ However, it should be noted that the obligation is not of an *erga omnes* character, but only *inter partes*.¹⁵² That is, situations where a third party or the Union itself has penalised an individual are exempt from its scope of application.

¹⁴⁸ Peers 2011, p. 835

¹⁴⁹ *Ibid*, pp. 36-37

¹⁵⁰ De la Cuesta 2002, p. 49

¹⁵¹ Conway 2003, p. 221

¹⁵² van Bockel 2009, p. 10

The CISA explicitly distinguishes between the prohibition of double prosecution and the accounting principle. The first is found in Article 54, while the latter is set out separately in Article 56. The accounting principle here figures as essentially a subsidiary rule which is applied in those cases where double prosecution has come about despite the main rule in Article 54. Indeed, there is no shortage of exceptions to that provision. Along with the general reservation that in cases where a penalty has been imposed, it has also been enforced contained in the second part of the first paragraph, the Convention provides for an extensive possibility to derogate from the rules a number of circumstances listed in Article 55, which has been used by nine Member States.¹⁵³

The wording and of Articles 54 and 56 CISA carries heavy criminal law connotations. It speaks of a "trial" and a second "prosecution". The drafting history and the context of the provisions also suggest their limitation to a criminal context. However, as we have seen, the definition of criminal law in the EU is not clear-cut. The interest of the uniform application of Union law obviously argues in favour of an autonomous interpretation of the material application of the principle, but in the absence of preliminary questions on this point, the law remains unclear.¹⁵⁴

4.2.2 CJEU Case law on the CISA Provisions

4.2.2.1 *Idem*

The first case on the concept of *Idem* in the context of the CISA was *Van Esbroeck*. It concerned the problem whether the importation of drugs into one member state and their exportation from another may be covered by the concept.¹⁵⁵

¹⁵³ Peers 2011, p. 838

¹⁵⁴ van Bockel 2009, pp. 146-147; Peers 2011, pp. 842-843

¹⁵⁵ Case C-436/04 *Van Esbroeck* [2006] ECR I-2333, para. 25

The court held that the divergent legal classifications and legal interests protected in different Member States does not exclude application of *ne bis in idem*. Rather, *idem* should be understood as the "identity of the material acts, understood in the sense of the existence of a set of concrete circumstances which are inextricably linked together in time, in space and by their subject-matter."¹⁵⁶ The determination of what exactly constitutes the material acts in any specific case is however for the national courts to decide. The court limits its assessment to the statement that the circumstances at hand may in principle constitute *Idem* in accordance with this definition.¹⁵⁷

In *Van Esbroeck*, this interpretation of *Idem* was justified by reference to the wording of the CISA, which in contrast with other international versions¹⁵⁸ of *ne bis in idem* uses the words "the same acts", not "the same offence".¹⁵⁹ Teleologically the court stated that the ultimate purpose of the provision, which is to ensure that the exercise of free movement is not compromised by the possibility of double prosecution or legal uncertainty thereto can not be effectively protected by a definition relying on the legal classification of the offence.¹⁶⁰ The CISA provisions on *ne bis in idem* is not dependent on any harmonisation of national laws, but implies mutual trust and recognition between the Member States, which further supports the conclusion that differing legal classifications do not hinder application of *ne bis in idem* between the states.¹⁶¹

The precedent established in *Van Esbroeck* and its justification has been stable in the following case law,¹⁶² and as we have seen has inspired the harmonised ECtHR approach to the concept of *Idem*. Interestingly it has

¹⁵⁶ *Ibid*, paras. 31-32, 36

¹⁵⁷ *Ibid*, paras. 37-38

¹⁵⁸ without transnational scope

¹⁵⁹ Case C-436/04 *Van Esbroeck* [2006] ECR I-2333, paras. 27-28

¹⁶⁰ *Ibid*, paras. 33-35

¹⁶¹ *Ibid*, paras. 29-31

¹⁶² Case C-150/05 *van Straaten* [2006] ECR I-9327, Case C-467/04 *Gasparini and Others* [2006] ECR I-9199, Case C-288/05 *Kretzinger* [2007] ECR I-6441 and Case C-367/05 *Kraaijenbrink* [2007] ECR I-6619

been specified that a subjective link in the form of a criminal intention is not enough to establish identity of the material acts.¹⁶³

4.2.2.2 Finality

The first judgment on *ne bis in idem* in the context of the CISA was *Gözütok & Brügge*, where the main issue was the position of out-of-court settlements in the scheme of the principle. More specifically, it clarified whether or not they triggered the principle (whether they had sufficient *finality* or satisfied the identity aspect of *bis*). As mentioned above, the relevant language in the provision is the phrase “finally disposed of”.¹⁶⁴

In *Gözütok & Brügge*, the court noted three important characteristics of the national out-of court settlements at issue. First, the decision to accept such a settlement and to discontinue further proceedings, while not involving a court, is nevertheless taken by an authority which is part of the criminal justice system. Secondly, the settlement penalises unlawful conduct. Third, they are a definitive bar to further proceedings under national law.¹⁶⁵

The court rallies many arguments in support of its finding that out-of-court settlements, thus characterised, do satisfy the conditions for application of *ne bis in idem*. Most centrally, the court cites the purpose of the provisions, that of securing freedom of movement and ultimately of realising the “area of freedom, security and justice”. That objective cannot be served unless the mutual trust between the criminal justice systems implied by the fact that the CISA makes no reference to any need of approximation of laws is hinged solely on the criteria for finality defined by the member state where the settlement was reached.¹⁶⁶

¹⁶³ *Kraaijenbrink*, para. 36

¹⁶⁴ Peers 2011, p. 842

¹⁶⁵ Joined Cases C-187/01 and C-385/01 *Gözütok & Brügge* [2003] ECR I-1345, paras. 27-29

¹⁶⁶ *Ibid*, paras. 30-35

So in *Gözütok & Brügge*, the grand plan of European integration thus motivated an interpretation of the CISA provisions which effectively establishes mutual recognition between the Member States. In a later judgment, the same teleological approach was used to limit the application of the principle by reference to the criteria of finality. In that case, *Miraglia*, finality was found not to attach to a judicial decision declaring a case closed on the sole ground that proceedings have already been initiated in another Member State without any consideration on the merits of the case. This decision was motivated by essentially the same language used in *Gözütok & Brügge*, that is the interest of establishing an “Area of freedom, security and justice.”¹⁶⁷

The trend of focusing on the type of decision in considering the issue of finality continued in three following cases. On the same day in 2006, two judgments concerning the finality of acquittals on account of lack of evidence and a time-bar respectively were issued.¹⁶⁸ Perhaps unsurprisingly, the two judgments mirrored each other in their considerations. The acceptance of finality in both cases were motivated similarly to the above cases, namely by the objectives of freedom of movement and legal certainty and the mutual trust between member states.¹⁶⁹ One of the cases focused on the formulation from *Miraglia* that there had been no consideration on the merits of the case, noting that an acquittal on account of lack of evidence can be considered such but also stating that it was not necessary to decide exactly how decisive a role that criteria should play under other circumstances.¹⁷⁰

Finally, in *Turansky*, concerning the decision of local police to suspend further proceedings the court focused on the fact that such a decision was not, under national law, a bar to further proceedings. In such circumstances,

¹⁶⁷ Case C-469/03 *Miraglia* [2005] ECR I-2009 paras. 30-35

¹⁶⁸ Case C-150/05 *van Straaten* [2006] ECR I-9327 and Case C-467/04 *Gasparini and Others* [2006] ECR I-9199

¹⁶⁹ *Gasparini* paras. 27-30 and *van Straaten* paras. 57-59

¹⁷⁰ *van Straaten*, para. 60

the decision can not in principle be considered a trigger of the *ne bis in idem* principle. Again, it was noted that such an interpretation is compatible, at least, with the objective of the CISA which is not to protect a suspect from having to submit to subsequent investigations.¹⁷¹ Essentially, it was here held in clear language that it is national law which determines finality.¹⁷²

¹⁷¹ Case C-491/07 *Turansky* [2008] ECR I-11039, paras. 39-41

¹⁷² *Ibid*, paras. 34-36

5 Later Developments of *ne bis in idem* in the Case law of the CJEU

5.1 Mantello

The case at hand addressed Article 3(2) of the Framework Decision on the European Arrest Warrant.¹⁷³ German authorities became aware through the SIS of the existence of an Arrest Warrant issued by an Italian *Tribunale* concerning Mr Mantello, who they proceeded to arrest. The grounds cited in that arrest warrant were, firstly, having participated in cocaine trafficking within a criminal organisation, and secondly, unlawfully having handled narcotic drugs. Both offences were purported to have been continuously committed for more than 18 months.¹⁷⁴ However, the accused had priorly been convicted on one specific count of unlawful possession of narcotic drugs with intent of resale committed towards the end of that period. The referring court now in essence wanted to know whether such a prior conviction could mean that execution of the arrest warrant would be prohibited under the *ne bis in idem*-rule of the framework decision.¹⁷⁵

Specifically, the court posed two questions. Firstly, which legal system should govern the interpretation of the concept of the "same acts" for the purposes of the framework decision: that of one of the involved Member States, or that of the Union. Secondly, could the earlier conviction in combination with the fact that the investigating authorities at that time had sufficient evidence to prosecute also for the offence of participating in a

¹⁷³Council Framework Decision 2002/584/JHA, OJ 2002 L 190, p. 1-20

¹⁷⁴Case C-261/09 *Mantello* [2010] ECR I-11477, paras 16-18

¹⁷⁵*Ibid*, para 22

criminal organisation, but chose not to do so, mean that a second set of proceedings would be prohibited also in relation to this offence, by the *ne bis in idem* principle as incorporated in the Framework Decision.¹⁷⁶

In answering the first of these questions, the court found that against the background of the principle of mutual recognition and in the absence of explicit reference to national law in the relevant provision, the interest of uniform application of union law calls for an autonomous interpretation of the term.¹⁷⁷

As for the content of the concept for the purposes of the Framework Decision, the court, supporting its decision with the similarities in wording and purpose between the two provisions, remarked that the meaning given to the term should be that which has been given in the jurisprudence on 54 CISA.¹⁷⁸ As related above, this is the interpretation adopted by the ECtHR in *Zolotukhin*. However, in *Mantello* no explicit mention of the case law of the European Court was made.

However, the court proceeds to reinterpret the questions posed by the national court. It considers that they "relate more to the concept of 'finally judged' than to that of 'same acts'." Actually, what needs to be answered is whether the fact that Italian authorities had sufficient evidence at the time of the concluded proceedings to prosecute also for the offences referred to in the Arrest Warrant but withheld that evidence meant that the finality of the resulting judgment extended also to those offences.¹⁷⁹

In relation to that issue, the court finds that under the Framework Decision, the finality of a judgment is determined by the law of the Member State where it was given.¹⁸⁰ That statement is preceded by citation of language

¹⁷⁶ *Ibid*, para 30

¹⁷⁷ *Ibid*, paras 35-38

¹⁷⁸ *Ibid*, paras 39-40

¹⁷⁹ *Ibid*, paras 43 - 44

¹⁸⁰ *Ibid*, para 46

which has previously operated to provide a finding of finality for the purposes of 54 CISA.¹⁸¹

As is obvious from the text of the case itself, *Mantello* in its substance concerned the issues of finality and identity. However, while not explicitly mentioned, another issue that is relevant for the purposes of this essay was also decided in that case. Several Member States had intervened in the proceedings putting forward the argument that Article 3 (2) of the Framework Decision is not applicable to situations where the Arrest Warrant and the potential final judgment originate in the same Member State.¹⁸²

The issuing authority, it was held, is under an obligation to respect the *ne bis in idem* principle as a general principle of law, and is also the institution in the best position to ensure that the principle is not violated. Therefore, allowing the executing Member State to review the legality of the Arrest Warrant in light of the *ne bis in idem* principle would be contrary to the principle of mutual recognition.¹⁸³ It was also claimed that Article 3(2), like 54 CISA, only applies in transnational situations.¹⁸⁴

While the Advocate General envisioned a shared competence between the involved Member States, the Court of Justice does not mention this issue at all in its judgment. Since Article 3(2) is applied to the circumstances of *Mantello*, however, the silence of the court on this point strongly implies the general applicability of that article.

¹⁸¹ *Ibid*, para 45

¹⁸² Opinion of AG Bot in Case C-261/09 *Mantello*, delivered on 7 September 2010

¹⁸³ *Ibid*, para 72

¹⁸⁴ *Ibid*, para 75

5.2 Beneo-Orafti, Bonda, and Åkerberg

The three cases introduced in this part have been collected under a single heading, because insofar as this essay is concerned, they discuss the same issue, that is the material applicability of *ne bis in idem*.

The company at the centre of the first of the three cases, *Beneo-Orafti*, had produced inulin syrup in excess of its allocated amount under the common organisation of the sugar market. On this ground, it now faced several different measures, including a levy of 500 € for each tonne in excess of the given amount, the recovery of aid granted for the production, and a "penalty" of 30% of the recovered sum.¹⁸⁵

The court began its treatment of the issue by noting that *ne bis in idem* is enshrined in 50 CFR, *inter alia*.¹⁸⁶ Following this, the court considered the measures in light of the regulation on the protection of the EC's financial interests, and found that, under the provisions of that document, only one of them could be considered a "penalty". Therefore, *ne bis in idem* could not be applied. Specifically, the court argued that the recovery of aid could not be considered a penalty because Article 4 of the regulation states that any irregularity shall lead to the withdrawal of a wrongly obtained advantage, which shall not be considered a penalty. In relation to the levy, which amounted to a total of roughly 13 878 500 €, the court stated that since the underlying acts could not be considered an infringement of EU law, and because such was necessary for the imposition of administrative penalties, it could not be considered a penalty.¹⁸⁷

Bonda originated in the submission of false information in an application for income support under the Common Agricultural Policy. By force of provisions on penalties in the regulation specifying the rules applicable to

¹⁸⁵ Case C-150/10 *Beneo-Orafti* [2011] ECR I-6843, paras. 32-33

¹⁸⁶ *Ibid*, para. 68

¹⁸⁷ *Ibid*, paras. 69-74

the specific payment scheme, national authorities decided to limit the applicant's access to the aid scheme for the current as well as the following three years. Subsequently, the applicant was the subject of criminal prosecution by the Member State on the basis of the same act.¹⁸⁸

These later proceedings eventually resulted in the Supreme Court of Poland asking the CJEU for a preliminary ruling on the nature of the penalty that had been imposed on the defendant under the regulation. The court felt such interpretation was necessary in order to enable it to decide the relevance for the case of a national rule incorporating the *ne bis in idem* principle. The national court stated that it was because of national adherence to the ECHR that such assessment of the penalty was necessary.¹⁸⁹

The answer of the court proceeds in two steps. It begins by determining the nature of the penalties under EU Law by recalling a line of case law wherein similar provisions of the Common Agricultural Policy have been deemed non-criminal in nature, and goes on to list the arguments put forth to support that view. In essence, those grounds are the following: First, that rules like the one applied in the concluded proceedings are directed against the prevalence of "irregularities" which are contrary to the financial interests of the union as a whole. And secondly, that they are exclusively directed towards economic operators who have submitted themselves to the rules of the aid scheme by their own volition.¹⁹⁰

The second part of the answer relates the *Engel* criteria and their relevance to the present case. For the purposes of the first criterion it is said that EU law must in this context be what is meant by "national law". On the point of the second criterion, it is concluded, by reference to the argument related above concerning the purpose of the penalties and to their limited impact on the applicants person, that they cannot by force of that criterion be considered criminal in nature. The latter part of that argument is repeated in

¹⁸⁸ Case C-489/10 *Bonda* [2012] ECR I-0000, paras. 17-19

¹⁸⁹ *Ibid.*, paras. 23-25

¹⁹⁰ *Ibid.*, paras. 28-35

finding that neither the third Engel criterion justifies any other conclusion than that the penalties are not of a criminal nature. The findings of the court in this part are summarised in stating that the administrative nature established in the earlier part of the judgment ”is not called into question by an examination of [relevant ECtHR case-law].”¹⁹¹

Åkerberg concerned an economic operator who first had fines imposed on him to the amount of 112 219 by the Swedish tax authority for providing false information in his tax returns two years in a row, thereby enabling the withholding of more than SEK 600 000 (just below 70 000 €) in tax payments for those years, and subsequently¹⁹² was indicted at Haparanda District Court on a charge based on the same acts, exposing him to a liability to imprisonment of up to six years.¹⁹³

Controversy within the Swedish judicial system surrounding the *ne bis in idem* principle caused a district court in Sweden to refer a number of interesting questions to the CJEU. Among the issues raised by those questions were whether the accumulation of tax penalties and criminal proceedings like that allowed for under Swedish law is compatible with the *ne bis in idem* principle as incorporated in Article 50 of the Charter.¹⁹⁴

In its answer the court limits itself to defining the issue on which the compatibility of repeated proceedings based on the same fact in the case at hand hinges, namely the meaning of the term ”criminal proceedings” and specifically, whether tax penalties should be considered to fall within that category. Recalling that the union recognises the concept of administrative penalties as distinguished from criminal ones and that in tax matters the member states have the freedom to shape their national system of penalties

¹⁹¹ *Ibid*, paras. 36-44

¹⁹² Swedish law provides for the possibility to sanction the act of providing false information during the taxation process by a special administrative pecuniary penalty of 40% of the withheld amount (”tax surcharge”) as well as a possible maximum criminal penalty of two or six years, depending on the classification of the offence. See Law 1990:324 on tax assessment, Ch. 5 para. 1 and Law 1971:69 on tax offences, paras. 2, 4

¹⁹³ Case C-617/10 *Åkerberg Fransson* [2013] ECR I-0000, paras. 12-13

¹⁹⁴ *Åkerberg*, para 15

as they see fit, the court concludes that a system that utilises both tax and criminal penalties to enforce the collection of taxes is not as such incompatible with Article 50, but rather, an evaluation of the particular type of tax penalties must be made. Such an evaluation should apparently be made by reference to what the court now calls the "relevant" criteria, namely the familiar *Engel*-criteria that in the *Bonda* case were held more at arms length. However, the court considers that it is for the national courts to determine the actual nature of the national tax penalties.¹⁹⁵

5.3 Toshiba

In its relevant parts *Toshiba* addresses the implications of the *ne bis in idem* principle for the field of EU competition law as reformed by regulation 1/2003. At the center of the case was a cartel which had lasted for a significant period before its conclusion on a date less than two weeks after the accession of the Czech republic to the Union. The participating companies were fined by the Commission in a decision taken on the 24 January 2007. Before the initiation of the proceedings that resulted in that decision, the Commission informed the Czech competition authorities that those proceedings would in all likelihood be limited to the actions and effects of the cartel within the territory of the Union *before* the date of accession because of the difficulty in calculating a fine for such a small part of the infringement.¹⁹⁶

Thereafter, national Czech authorities initiated proceedings against the same companies for the effects produced in the Czech territory by the cartel before the accession date. Like those of the Commission, these proceedings resulted in fines being imposed on the participants of the cartel.¹⁹⁷

¹⁹⁵ *Ibid*, paras. 34-36

¹⁹⁶ Case C-17/10 *Toshiba and others* [2012] ECR I-0000, paras. 20-24

¹⁹⁷ *Ibid*, paras. 25-28

Subsequently the case was brought before the national courts, which eventually led to the referral of two questions to the CJEU. The second question, which is the one which is of relevance to this essay, concerned the eventual limiting effects on the practice of parallel procedures established by the *Walt Wilhelm* case four decades earlier of the "new" regulation on competition mentioned above on the one hand, and the *ne bis in idem* principle on the other. The question is divided in two, and in answering it the court approaches it in two separate steps, as two separate legal issues arising from two separate norms. On the one hand, there is the new procedural rules of regulation No 1/2003 and their impact on the division of competences between the National Competition Authorities and the Commission. On the other we have the *ne bis in idem* principle and the limits it imposes on the application of national law by the national authorities.¹⁹⁸

As to the first issue, the court finds that the practice of parallel application as established in *Walt Wilhelm* and its chief justification in the claim that the national and union norms approach anti-competitive conduct from different perspectives "has not been changed by the enactment of Regulation No 1/2003."¹⁹⁹ This conclusion is supported in the main by reference to the drafting history of the regulation, which in its initial version would have reserved situations with international elements as the exclusive domain of EU law but was later changed. Another pertinent argument was Article 16 (2) of the regulation, which states that national authorities cannot contradict commission decisions concerning the same situation. This, the argument was, would be meaningless unless parallel proceedings were allowed.²⁰⁰

The second issue is subsumed under *ne bis in idem* as expressed in *PVC* and *Aalborg*. The court determines that the threefold condition is not satisfied by reference to the "identity of facts". The behaviour referred to in Article 81 of the EC treaty, it is argued, must be determined with reference to its

¹⁹⁸ *Ibid.*, paras. 68-69, 93

¹⁹⁹ *Ibid.*, paras. 81-82

²⁰⁰ *Ibid.*, paras. 83-87

temporal and spatial limitations. In the case at hand, the documentation provided sufficient evidence that the commission decision and that of the national authority concerned different consequences of the cartel.

6 Analysis and Conclusions

6.1 Idem

In the context of the CISA, *idem* has been defined as "identity of the material acts, [...] a set of concrete circumstances which are inextricably linked together in time, in space and by their subject-matter". This relatively factual approach has been stable in the handful of cases on the issue and has gained significant ground since its original elaboration in 2006. In *Zolotukhin* it was used by the ECtHR in the refurbishing of its case law on the issue, and it has also expanded within the AFSJ to be applied within the context of the EAW, as is shown clearly by *Mantello*. In line with the same reasoning, it is probable that the definition will also be applied in the interpretation on the various other instruments on judicial cooperation.

In contrast, *ne bis in idem* as a general principle of EU law is subject to the "threefold condition" first established in *Aalborg* and recently confirmed by *Toshiba*. Whether this condition is intended as a definition of *idem* in the context or whether that issue is covered by the "identity of the facts" is as of yet unclear. The condition obviously does not cover all aspects of *ne bis in idem*, for example not what constitutes a final judgment, so it would seem to be limited to issues of the repetitive identity. However, the exact conceptualisation of the issues of *ne bis in idem* here appears as fundamentally different from that of the ECtHR and the AFSJ approach.

The more factual approach taken by in the context of the AFSJ and adopted by the ECtHR has been lauded in much doctrine because of its relative clarity and the high degree of protection it allows the individual. However, while its rationale as given by the ECtHR focuses exclusively on the role of *ne bis in idem* as a protector of the rights of the individual, in the context of CJEU case law on the CISA something is clearly different. While the rights of the individual are discernible in the justification given to the

interpretation of *idem* by the ECJ, they are seen as flowing from the right to freedom of movement, which has as much to do with the functioning of the internal market as with the rights of the individual. In addition, the motivation given for the factual interpretation of *ne bis in idem* in the CISA context also includes the mutual trust and recognition "implied" by 54 CISA, which is of course also furthered by the factual interpretation of *idem*. In comparison to the ECtHR reasoning, that of the ECJ appears highly motivated by arguments to do with the structure of EU law rather than the rights of the individual.

But, in *Mantello*, the application of the CISA definition of *idem* also in the context of the EAW was justified by reference to the common purpose of the two versions of *ne bis in idem*. Interestingly, the purpose of the EAW provision, as given by the court in *Mantello*, is subtly different to that given in the case law on the CISA provisions in that the reference to the protection of the freedom of movement has disappeared. In *Mantello* it is instead the free-standing prevention of double prosecution which is given as the objective of both the CISA and EAW provisions.

This perhaps reflects the specific context of the EAW, which lies further away from the grand scheme of the internal market than the Schengen provisions. Be that as it may, it is noteworthy that the court in its motivation of the principle moves away from the fundamentally economic approach of earlier CISA case law. Whether the court sees as the main motivation of *ne bis in idem* the protection of the individual or of the authority of judgments is not clear from *Mantello*, but the disappearance of the reference to the freedom of movement could perhaps be the embryo of a change of focus to the more fundamental roles of *ne bis in idem* in EU law. In this light, it is surprising that the court made no mention whatsoever of 50 CFR.

In light of these developments in the context of the AFSJ it is perhaps surprising that *Toshiba* shows a much less rigid approach to the definition of *idem*, seemingly motivated primarily by the effective enforcement of EU

and national competition laws rather than the traditional rationales behind *ne bis in idem*, the protection of the individual and the authority of judicial decisions, or the need for conceptual consistency.

This is apparent not least in the interpretation given by the CJEU to the questions asked by the referring court. The second question posed by the latter authority, which is of relevance here, is divided into two sub-questions. The intended question seems to be the following: What are the consequences of the relevant provisions of regulation 2003/1 *and ne bis in idem* as incorporated in the CFR and as a general principle of EU law when the Commission makes a decision to bring competition proceedings for the competence of national authorities to a) deal with the same conduct and b) apply national law to the same conduct.

The CJEU interprets the reference for a preliminary reference differently. It separates the regulation provisions from the *ne bis in idem* principle, construing the issue proposed by the national court as concerning two separate issues. First, the delimitation of powers between the Commission and national competition authorities in the context of competition proceedings, something which is related to the provisions of regulation 2003/1. Secondly, the consequences of *ne bis in idem* for the capacity of NCA:s to apply national competition law.

This reformulation of the question, which seems to clash with the intent of the national court, shows clearly how the CJEU imposes on the issue a perspective in which *ne bis in idem* is involved only in evaluation of the effects of the system for enforcement of competition law in the union, rather than a fundamental norm superior to the provisions of regulation 2003/1 which should be involved in the interpretation of the system of that regulation rather than only its effects.

Having looked at the justifications of the interpretation of *idem*, let us consider the actual content of that element in the case law. Here, it should

first be remembered that within the context of a legal system it is impossible to take an entirely factual approach to the identity of judicial decisions because anything recognised by the legal system must by necessity itself to some extent be legal. There is a process of translation involved when the legal system interacts with other realities, and any definition of *idem* would necessarily form part of the system's understanding of its object. From this perspective the reference to the "inextricable link in space, time and subject matter" should perhaps not be seen as a definition of *idem* that is independent from the legal classification of the offence in the sense that it is scientifically determinable,²⁰¹ but rather as a shift of focus within the spectrum of objective and formal considerations allowed by this framework.

As a clarifying example, please consider the following two situations.

Adams wants Brown and Cooper dead. For this purpose, he buys a bottle of poison, enough to kill two men. He invites Brown and Cooper to a soup dinner the same night. Adams prepares a bowl of food and sets a smaller one aside for himself, claiming he has an allergy to a specific ingredient. He then adds the poison from the bottle to the communal soup-bowl to be shared by Brown and Cooper. He puts the poisoned soup-bowl on the table in front of Brown and Cooper. They help themselves to the poisoned soup and die.

Now, compare the above example to the following. Adams wants Brown and Cooper dead. For this purpose, he buys two bottles of poison, each enough to kill one man, but not two. He invites Brown and Cooper to a soup dinner the same night. Adams prepares three portions of soup, and pours a bottle of poison each into two of them. He puts a bowl of poisoned soup each before Brown and Cooper. They both eat their soup and die.

²⁰¹ Presumably, natural science uses more specified criteria than an "inextricable link in time and space and in terms of subject matter" to delineate unity.

We might be inclined to hold something like the following opinion after having read the above examples. Under the definition of *idem* given in the context of the CISA, it would be impossible to prosecute Adams consecutively for the respective murders of Brown and Cooper in the first situation, because the material acts (that is, serving them poisoned soup) are inextricably linked in time, space and by their subject matter. However, in the second situation, it would be possible, since there is no inextricable link between the murders of Brown and Cooper. That is, having poured poison in the bowl meant for Brown, it would not be impossible for Adams to abstain from putting poison in the second bowl.

However, criminalisation usually entails identifying conduct by means of its effect rather than its purely physical side. Thus, the offence of murder in legislation is not defined by the physical acts constituting it, but forms a normative concept at the core of which lies a consequence, the death of a person, rather than a specified act. It is only from this source that considerations of causation in the physical world flow. Thus, while in the first example above there is certainly a very tangible confluence of multiple offences in a single course of conduct it is still the *offence* which allows us to identify the physical act. So it would be possible to consider as separate material acts the serving of poisoned soup to Brown and to Cooper even in the first case, even though the soup was served in the same bowl, since it is ultimately the separate deaths of Brown and Cooper that allow us to identify any aspects of the physical reality as relevant.

So in addition to the component of *idem* that signifies a position on a spectrum running between the ideal types of the physical world and the legal definition of an offence, there is also an essential component of drawing boundaries between phenomena, of slicing reality into relevant parts. In relation to this component, referring to an "inextricable link in time and space" is not saying much, since strictly speaking in the physical world such a link exists between all phenomena, from the big bang to any punch or pouring. Thus, even under a relatively factual interpretation, the stuff that

can form an *idem* is still by its nature highly legal material, and courts will still have to determine the limits of these components, that is, what their extent is, and in this the slicing and cubing of reality provided by legal classifications is still essential.

In this perspective, it becomes apparent that the ideal types of the natural and legal conduct are not alternatives, but both constitute essential ingredients in any legal definition of the identity of judgments. That is not to say that the traditional terms are meaningless. However, they seem to reflect the values underlying *ne bis in idem* rather than ontological principles. That is, the legal unity of conduct puts the weight of *ne bis in idem* on the organisation of the legal system in the sense that it forces the legal system to adhere to the principle of legality. The natural unity of conduct rather focuses on equity and the right of the individual and puts the legal system to a higher standard.

To be sure, the above discussion can easily seem a bit far-fetched. It would certainly seem counter-intuitive to consider the serving of a single bowl of poisoned soup as two different acts defined by the different mouths they eventually went into, since it is intuitive to define a criminal act by its intent, which in the above examples would seem to be "Killing Brown and Cooper". However, consider *Toshiba*. In that case, it was argued that since the conduct at issue was identified by its object or effect, it is justified to divide the conduct by reference to the division of those aims and consequences in spatial and temporal spheres. Certainly, this approach seems incompatible with the approach taken in the context of the CISA because it addresses the underlying acts from the other end of the spectrum, from their legal classification. However, that is not to say that the same outcome could not have been motivated also by arguments addressing first and foremost the "natural acts", since the conceptualisation of those acts would always have to be justified by reference to a particular offence. So, even if *Toshiba* had adopted an approach similar to that used in the context

of the AFSJ, the same result could have been reached by separation of the soup consisting of the actual, natural conduct of the involved companies.

In this aspect *Mantello* sheds little light. It can be assumed from that judgment that the CJEU agrees with the national court that the grounds of the Italian judgment and of the arrest warrant do not constitute *idem*. The former judgment of course must be considered final, therefore, the consideration of whether there was a separate finality pertaining to the grounds of the arrest warrant would have been superfluous unless the grounds of the arrest warrant were not included in the earlier judgment.

Since there seems to have been enough grounds available to indict for the second, wider offence even without inclusion of the facts underlying the earlier judgment, it seems reasonable that the disappearance of one possible constituent element through the earlier judgment should not in principle extend to all acts of which it could have made part if those offences might just as well form offences in their own right. However, it would have been interesting to hear what the ECJ has to say about the relationship between offences that are stretched out in time and space and their constituent parts in light of the factual interpretation of *idem*.

6.2 Finality

In the definition of the concept of finality among the sources considered in this essay, there are clear tensions running along two dimensions. One of these concerns the degree to which national definitions of the concept should be accepted, and vice versa to what degree it should be autonomously defined. The other dimension has to do with the substantive conditions for the acceptance of finality, and has in the main concerned the availability of appeals on the one hand and on the other the content of the judicial decision which triggers the principle.

Please note also the ambiguity inherent in the concept of finality allows for quite a bit of confusion. The possibility to interpret the term as referring to both a condition for and the effect of the *ne bis in idem* principle means that other considerations, such as for example any of the above mentioned specific issues, that are conditions for *ne bis in idem* to come into effect could be interpreted not as independent concepts but as components of the condition of finality.

LVM, the only case on finality from the ECJ outside the scope of the CISA concerns the finality of a commission decision. Therefore, the case does not of course provide much information on the relationship between national and union law, and it is unclear what the approach would be in a case involving finality on the national level. It can however tell us something about the meaning given to finality when the *ne bis in idem* principle operates in isolation on the union level.

In determining the finality of a commission decision to annul a previous penalising decision, the focus was on the issue of whether or not there had been any consideration of the substance of the case. Thus, it was argued that *ne bis in idem* depends upon a qualitative assessment of whether or not a particular offence has been committed and "merely" forbids a second such assessment linked to the imposition of a penalty. Therefore, the inapplicability of *ne bis in idem* to an annulment could be motivated by two circumstances, namely that because there had been no ruling on the substance of the alleged facts the decision could not be regarded as an acquittal, and that the eventual penalties of future proceedings would not be accumulated with those of the annulled proceedings.

This approach has been quite stable in the case law of the ECtHR. In relation to this, it might seem strange that the considerations of *LVM* were preceded by the confirmation that *ne bis in idem* is a fundamental principle in EU law "also enshrined" in Article 4P7, and a general statement about its application in the field of competition law. Here, the finality component is

defined as "[having] been penalised or declared not liable by a previous *unappealable* decision (emphasis added)". In relation to these statements it seems quite odd that the substantive consideration of the issue focuses on the content of the decision instead of the availability of appeals.

However, it should be noted that also in the ECtHR case law, incongruously, an early decision on admissibility from the ECtHR found that a decision to annul an earlier conviction, while it was a "final" decision, did not trigger *ne bis in idem* because it did not "amount to either conviction or an acquittal." One suspects that the use of the word "final" here is intended to signify something else than finality, presumably "the last". Still, the use of the expression "amount to" suggests that the standard for acceptance of finality are decisions resulting from consideration of the substance of the case.

In the context of CISA the concept of finality, like that of *idem* has been defined in relation to the goal of freedom of movement. That objective has established the rule that judicial decisions that definitely bar further proceedings under national law must be accepted as final also in transnational situations. (G&B, Tur) This means that at least insofar as finality as a condition for the application of *ne bis in idem* is concerned, the recognition of foreign *res judicata* has actually been imposed on the Member States by the ECJ. However, the objectives of the AFSJ have also motivated the limitation of *ne bis in idem* by reference to a lack of substantive consideration, and it is conceivable that this constitutes another criteria for the acceptance of finality under the CISA. (Mir, Tur)

Mantello unfortunately does not tell us much about the concept of finality in EU law other than that its interpretation seems to be consistent throughout the AFSJ. Also of course we learn that the mere fact that judicial authorities were in possession of evidence relating to particular acts at the time of the prosecution of a non-*idem* does not mean that the finality attaching to that prosecution extends also to the circumstances supported by the evidence.

Unfortunately, on a conceptual level *Mantello* muddies the waters. The original question posed by the German court was whether the unlawful importation of drugs of which Mantello had been convicted and participation in an organisation with the purpose of illicit trafficking in such drugs constituted *idem*, especially with consideration of the fact that the investigating authorities were in possession of information that strongly supported such participation but refrained from submitting it and accusations of the latter offence for tactical reasons.

Now, it seems clear that, in light of earlier case law on the issue, the answer insofar as *idem* is concerned should have been that the two acts could in principle constitute an *idem*, but that the determination of that issue in the specific case was for the referring court to make. The extent of Mr Mantello's alleged "participation" could have been limited to the events in respect of which judgment had already been passed. On the other hand, it might just as easily be true that the involvement included entirely different acts which were not materially identical with those underlying the earlier judgment.

In reality, the ECJ chose to take a completely different direction. Instead of giving its reasoning in principle on the relation in light of the AFSJ definition of *idem* between continuing offences and their constituent parts, the court accepts the assessment of the German court that the natural acts were not the same. This is all very well and in line with earlier case law. However, the ECJ goes on to reinterpret the referred question in an unfortunate way.

Claiming that the question "relates more to the concept of 'finally judged' than that of 'same acts'", the court reinterprets the issue as having to do with finality, i.e. whether the judgment is final in respect of the acts which were not prosecuted nor included in the proceedings, solely on the base that the investigating authorities were in possession of evidence pertaining to them.

The court solves this issue by reference to the stable case law establishing that since the judgment is not considered final in respect of those acts on the national level, neither can they be considered such on the EU level.

However, please note that there has been a subtle shift here from the issue whether there is finality, that is whether a judicial decision constitutes a bar to further proceedings on the national level, to the issue of *in respect of what* there is finality. It is the former of these issues to which earlier case law on finality pertains, not the latter, which is of course the element of *idem*. Thus, *Mantello*, through this subtle change in meaning, actually indicates that in the future, *idem* might, through this mechanism, be determined by national law.

6.3 Transnational and Material Applicability

It would seem to be clear from the wording of the two main provisions on *ne bis in idem* in EU law that the application of neither principle is limited to purely intranational situations. Rather, the CISA applies *only* in transnational situations, and article 50 CFR applies "within the union". According to this latter wording, it would also seem that article 50 CFR also applies to purely internal situations within the scope of EU law, as demonstrated by *Åkerberg*.

Thus it would seem, in principle, that the traditional pattern of purely intranational *ne bis in idem* application is being replaced on the EU level by application based on the scope of EU law. That is, in place of earlier limitations of the principle based on national jurisdiction, the legal community of the EU is expanding.

However, in practice the picture looks quite different. While in the context of the AFSJ the court has consistently applied *ne bis in idem* transnationally, as *Toshiba* demonstrates, it is still possible to limit the transnational

application of *ne bis in idem* by reference to the *idem* element. Also, the ECJ has not distanced itself from the criteria of identity of the legal interest protected, which could form another basis of transnational limitations.

On the material side, *Beneo-Orafti*, *Bonda* and lastly *Åkerberg* together show a clear trend towards adoption of the *Engel*-criteria from the case law of the ECtHR in determining the material applicability of *ne bis in idem*. In fact, from *Åkerberg* it seems that the *Engel*-criteria are now considered the only relevant parameters for determination of "criminal nature". This is in stark contrast to the earlier two judgments.

In *Beneo-Orafti*, while the court mentioned 50 CFR, the inapplicability of *ne bis in idem* was motivated by provisions in Regulation 2988/95. This is problematic both from a formal and substantive perspective. Formally, it seems as if 50 CFR is mentioned simply to give better credibility to the arguments of the court, while the actual rules applied are those of the regulation. Of course, that regulation is hierarchically inferior to 50 CFR and should be informed by the content of that provisions, rather than the other way around. Substantially, it should first be noted that the judgment is clearly self-contradictory. One measure is not considered a penalty because it is a withdrawal of a wrongly obtained advantage, something which according to the regulation is not considered a penalty and which is caused by "any irregularity". The other measure is not considered a penalty because the behaviour that justifies it can not be considered an "irregularity", which is the same as an "infringement of EU law". However, the out-of-quota production clearly cannot both be and not be an irregularity. In addition, while the considerations are similar to the *Engel* criteria, regarding one measure the court focuses entirely on the nature of the penalty, in the other entirely on the nature of the offence.

In *Bonda*, the non-criminal nature of the relevant measures were again determined by the provisions of regulation 2988/95. The *ne bis in idem* provision of that regulation was also mentioned, but *not* 50 CFR. However,

the *Engel*-criteria were mentioned, as a second test of criminal nature, which did not "call into question" the results of the consideration in the light of the Union provisions.

In *Åkerberg*, the situation is entirely different. Here the "relevant" criteria used for determination of criminal nature are the *Engel* criteria. True, the connection between the national provisions and EU law was much weaker than for example in *Bonda*, and perhaps this is the reason why no mention of other criteria under EU law were mentioned in *Åkerberg*. However, the trend seems to be to accept the applicability of the *Engel*-criteria as applicable under 50 CFR.

While it should be noted that no mention was made of 50 CFR in *Bonda*, the trend in material applicability would seem to be to subordinate EU definitions of the material extent of *ne bis in idem* to that given by the ECtHR. In *Åkerberg* this is clearly tied to 50 CFR. Also, the court leaves the determination of the circumstances of the case to national courts, which are of course in their own right bound to respect the case law of the ECtHR.

6.4 The Whole Picture - Conclusions

In my opinion something that must be considered entirely clear when considering earlier and new case law from the ECJ on *ne bis in idem* is that there is no conceptual consistency imposed on that norm by the EU legal system as a whole. *Mantello* either confuses or simply fuses the relatively consistent concept of *Idem* developed in the context of the AFSJ. *Toshiba* seems to apply an entirely different version of *idem* than that elaborated within the AFSJ, which also has the effect of limiting the transnational application of the principle. In addition, this function could still be fulfilled by the criteria of the "protected legal interest". This would seem to go against the general trend of replacing traditional intranational application of

ne bis in idem with an application spatially determined by the scope of EU law.

So *ne bis in idem* is not in its application conceptually consistent. That of course begs the question why this is so. One possible explanation is that *ne bis in idem* quite simply is not, in itself a specific rule or principle, but rather consists in the underlying values it pertains to and a rudimentary conceptual organisation around the concept of repetition. In this case, the differing applications of the principle could be explained by the argument that it is simply not the same rule or principle being applied, but rather a company of norms that are somehow inspired by or incorporate a "core" of *ne bis in idem*. However, this argument would not be very convincing in so far as *ne bis in idem* should be considered a positive norm that makes up part of the EU legal system, but rather would have to point to some other sphere where the norm exists. This of course brings up the everlasting dichotomy between positive and natural law, to which the idea of a "core" conception of *ne bis in idem* seems to pertain.

Another possible explanation for the very different application of *ne bis in idem* in different areas of EU law is that, while they are applications of the same norm, the application of that norm is affected by the area of law in which it applies. Under such an approach, the less severe application of the *idem* element in the context of competition proceedings could be motivated by the fact that the penalties within that area of law are not directed towards individuals but towards legal entities, and that therefore the value of the rights of the individual are not as relevant.

However, it must be concluded that, taking in consideration all of the divergencies above, no one core conception of *ne bis in idem* in terms of its elements or their respective contents is immediately apparent from the case law of the ECJ, and it would thus seem that any argumentation towards such a "core" would have to be considered either as being of a *de lege ferenda* nature or limit the definition of the content of that core quite narrowly.

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