NE BIS IN IDEM AND CONFLICTS OF JURISDICTION IN THE EUROPEAN AREA OF LIBERTY, SECURITY AND JUSTICE

Clara TRACOGNA*

Abstract

The paper offers a survey on European Court of Justice preliminary ruling decisions on art. 54 of the Convention Implementing the Schengen Agreement, which introduces the non bis in idem principle in the European Union area. After discussing which is the rationale of the non bis in idem principle, the study will focus on the meaning of idem factum and final decision, in order to understand which national decisions forbid a second trial in another Member State on the same fact towards the same person. The essay will then present the 2005 Commission Green Paper on ne bis in idem and conflicts of jurisdiction and the 2009/948/JHA Framework Decision on the prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings, that Member States are expected to implement before 15th June 2012.

Keywords: *ne bis in idem principle; idem factum; final decision; conflicts of jurisdiction; allocating cases to a specific Member State.*

Introduction

– *Ne bis in idem* principle and rules on conflicts of jurisdiction express a single aim: as a matter of fact, prevent the risk of two ore more parallel proceedings on the same fact towards the same person displays a way to protect person's freedom.

In other words, limit multiple prosecutions and prevent repetition of a trial arrived at its final decision responds to legal order consistency requirements as well as to persons' liberty rights.

The need to protect liberty rights and their stability has been expressed long time ago in rules allocating jurisdiction among judicial bodies and solving both positive and negative conflicts of jurisdiction. However, while *ne bis in idem* is a well known principle both in civil and in common law Countries, for long time European Institutions didn't pay much attention to the transnational application of *ne bis in idem* nor to the arrangement of shared rules on mutual recognition of foreign decisions and on the allocation of jurisdiction among Member States.

Ne bis in idem principle, together with rules preventing conflicts of jurisdiction, have to comply with the mandatory prosecution principle, which is an expression of the Sovereignty that States hardly give up.

Free movement rights together with disappearance of borders in the European Area have a direct impact in the implementation of the activity of international criminal organizations. Several States in which crimes, or part of them, are committed are potentially interested in prosecuting criminal acts that affect their national security: however, multiple prosecutions and multiple trials exhaust Member States' resources and hamper victims' and defendants' rights as well as eyewitnesses' participation to the related trial.

* PhD in Criminal Procedure (University of Padova), Assistent Lecturer (University of Udine), Attorney-at-Law. (Email address: clara.tracogna@unipd.it; clara.tracogna@tin.it.)

Prohibition of a second judgment on the same fact towards the same person appeared first in the 1987 Convention between European Community Member States on double jeopardy: those provisions entered then in Title III, Chapter III of the European Convention on the Implementation of the Schengen Agreement (CISA), which is entirely dedicated to the application of *ne bis in idem* principle. The introduction of these rules in a Convention whose first aim was to pull down borders shows the tight link between *ne bis in idem* and freedom of movement within the European area. As a matter of fact, the European Court of Justice, in its preliminary ruling decisions, ruled that art. 54 of the European Convention on the Application of the Schengen Agreement, providing the European *ne bis in idem* principle, introduces a corollary to the freedom of movement in a "negative" meaning: the right to move from one State to another shouldn't have negative consequences, i.e. multiple prosecutions towards the same person for the same act.

According to art. 82, § 1, lett. *b* of the Treaty on the functioning of the European Union, the Union is competent in preventing and solving conflicts of jurisdiction among Member States. However, few and no widely applied rules excepted, rules on prevention and resolution of conflicts of jurisdiction were lacking: a first step was taken with the 2005 «Green Paper on Conflicts of jurisdiction and the Principle of *ne bis in idem* in Criminal Proceedings» published by the European Commission. Due to the Green Paper, art. 54 CISA is not a sufficient warrant: for example, recognizing a *non bis in idem* effect to the final decision first ruled in one Member State leads to the practice "first come, first served", on which basis the State that first passes a final decision stops any further proceeding elsewhere, even when a second State appears to be, for instance, closer to the fact and its evidences. Moreover, a forum shopping technique could be used by National judicial authorities: for example, when coordinating investigations, the State *mieux placée* to prosecute crimes is chosen during coordination meetings in a case by case way, affecting any previous certainty about the competent judge. Eventually, there are still some exceptions to *ne bis in idem* in art. 54 CISA that should be changed or reduced.

The outcome of the consultations opened with the Green Paper is the 2009/948/JHA «Framework Decision on the prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings», that Member States are expected to implement before 15th June 2012. The Framework Decision introduces a consultation procedure in order to choose, among Member States equally entitled, which is the best national judicial Authority to prosecute crimes. Indeed, the wording of art. 54 CISA hasn't been changed and is therefore still in force. However, the forthcoming implementation of the Framework Decision raises several problems of consistency with national principles (i.e. mandatory prosecution principle) and with defense rights, because nor the defendant nor his lawyer are involved in the procedure at the end of which the jurisdiction is allocated.

1. Rationale of *ne bis in idem* principle at national, international and European level - The *bis de eadem re ne sit actio* rule comes from Roman Law and passed into present national systems: prohibition of multiple prosecutions on the same fact towards the same person is often codified in legislation and acknowledged as a general principle of law at Courts[1].

[1] In Roman law, see M.T. CICERO, *Laelius, de amicitia*, Chapter 22, § 5: «praeposteris enim utimur consiliis et acta agimus, quod vetamur vetere proverbio», that recalls the Latin saying «acta agere»; M.F. QUINTILIANUS, *Institutio oratoria*, Liber VII, Chapter 6, § 4: «Solet et illud quaeri, quo referatur quod scriptum est: "bis de eadem re ne sit actio": id est, hoc "bis" ad actorem an actionem. Haec ex iure obscure»; E.D. ULPIANUS, *Digestum*, Liber 48, Titulum 2, (*de accusationibus*), Lex 7, § 2: «Iisdem criminibus quibus quis liberatus est, non debet praeses pati eundem accusari»; Emperors Diocletianus and Massimilianus' Constitution to the Codex Iustinianus, Liber 9, Titulum 2, lex 9: «Qui de crimine publico in accusationem deductus est, ab alio super eodem crimine deferri non potest». For a historical view of the *ne bis in idem* rule, see V. ANDRIOLI, *Il principio del* ne bis in idem *e la dottrina*

At least three rationales support the principle in a national framework.

The first is linked to the certainty principle, intended both in subjective and objective way. The first perspective emphasizes the aim to protect the individual: in particular, this is a well known principle in common law criminal justice systems, where the double jeopardy rule admits the use of the "power to stay the proceedings", which occurs when the prosecution is interrupted according to fair trial rules. As a matter of fact, multiple prosecutions on the same fact which has been subject to a previous final decision is a significant example of abuse of process[2]. However, the fact that the *non bis in idem* rule is applied both in case of conviction and acquittal decisions proves that there is a broader concept of certainty as well as a pragmatic approach: the main aim is to avoid the possibility to start multiple criminal trials by means of a certain chronological expiry, which is represented by the final judicial decision.

The second rationale is based on the fact that a "criminal claim" can be used only once by the State and that power is then extinguished[3].

The third rationale embodies the respect for judicial decisions given in the past. Once the fact has been finally ascertained, the outcome of the decision should be respected by other magistrates in order to avoid conflicts among judgments on the same fact and against the same person: respect for trials and its proceedings as well as for the judiciary would be undermined if the fact could be questioned by multiple proceedings.

Both the first and the third rationale seem to be valid also from an international perspective, while the second is less convincing, as the refusal to take criminal proceedings after another State has already prosecuted the fact corresponds to a renounce of part of national sovereignty, especially in cases that affect several national public interests (i.e. security).

In general, however, an international *non bis in idem* rule is not binding as a general principle of international law. Even art. 14 § 7 of the International Covenant on Civil and Political Rights and art. 4 § 1 of the 7th Protocol to the European Convention on Human Rights acknowledges the principle only from a domestic perspective.

This means that, unless the rule is foreseen in an international convention, the prohibition to prosecute a person already acquitted or convicted for the same fact in a previous trial is binding only for judges who are part of the same national system: without a specific rule, judicial authorities are not generally bound by decisions taken in another State on the same fact committed by the same person.

---

del processo (1941), in ID., *Scritti giuridici*, vol. I, *Teoria generale del Processo. Procedura civile*, Giuffrè, Milan, 2007, p. 42 ss.; L. CORDÌ, *Il principio del* ne bis in idem *nella dimensione internazionale: profili generali e prospettive di valorizzazione nello spazio europeo di sicurezza, libertà e giustizia*, in *Ind. pen.*, 2007, p. 761 ss.; G. CORNIL, *Une conjecture sur l'origine de la maxime* bis de eadem re ne sit actio, in *Studi in onore di Pietro Bonfante nel XL anno d'insegnamento*, vol. III, Treves, Milan, 1930, p. 35 ss.; E. HIRTZ, *De l'autorité de la chose jugée (en general en droit romain; en matière pénale en droit française)*, These, Strasbourg, 1870, p. 21 ss. As for the history of the principle in common law Countries, see R. SLOVENKO, *The Law on Double Jeopardy*, in *Tulane Law Review*, 1955-1956, p. 409 ss.; M.L. FRIEDLAND, *Double Jeopardy*, Clarendon Press, Oxford, 1969, p. 5 ss.; J. HUNTER, *The Development of the Rule against Double Jeopardy*, *Journal of Legal History*, 1984, p. 3 ss.; J.A. SIGLER, *A History of Double Jeopardy*, in *The American Journal of Legal History*, 1963, p. 283 ss.; G.C. THOMAS III, *Double Jeopardy. The History, the Law*, New York University Press, New York, 1998, p. 71 ss.; M.A. DAWSON, *Popular sovereignty, Double Jeopardy, and the Dual Sovereignty Doctrine*, in *The Yale Law Journal*, 1992, vol. 102, p. 281 ss.

[2] See E.M. CATALANO, *L'abuso del processo*, Giuffrè, Milan, 2004, p. 124 ss.; A.L.-T. CHOO, *Abuse of process and judicial stays in criminal proceedings*, Clarendon Press, Oxford, 1993, p. 16 ss.; D. CORKER-D. YOUNG-M. SUMMERS, *Abuse of Process in Criminal Proceedings*, Butterworths, London, 2003, p. 183 ss.; C. WELLS, *Abuse of process, a practical approach*, LAG, London, 2006, p. 204 ss.

[3] See J.L. DE LA CUESTA-A. ESER, *Concurrent National and International Criminal Jurisdiction and The Principle "Ne Bis In Idem"*, in *Rev. int. de droit pénal*, 2001, p. 756 ss.

When analyzing in which cases a foreign final decision is relevant in another State, one could see that, first of all, the large amount of European Union Member States doesn't recognize a *ne bis in idem* effect to decisions passed in another State. The only exception is given by The Netherlands, that attaches to foreign judgments a weight that is equivalent to the effects that spread out from a domestic final decision: art. 68 of the Dutch Penal Code contains a general *non bis in idem* provision, regardless the Country where the crime was committed[4].

Secondly, the *res iudicata* effect is generally respected when it comes to exercise extraterritorial jurisdiction, which means that a State is, by its own national laws, allowed to prosecute a fact committed in another State. This happens when the prosecution of a crime is based on principles different from territoriality, such as the nationality principle (in respect of the indicted person's or the victim's nationality), the defense principle (which responds to the interest in granting public State security) or the universality principle (which entitles to apply domestic law to all persons, regardless their nationality and the place where the crime was committed, and generally responding to a solidarity need to prosecute serious crimes, i.e. genocide)[5].

Thirdly, foreign decisions could be considered also in judicial cooperation procedures: in this case, *non bis in idem* is invoked as a ground to refuse cooperation[6]. In some bilateral or multilateral international conventions, the refusal of cooperation appears as mandatory or optional. Moreover, even if conventions are silent on the point, some States made a declaration stating that they are entitled to refuse cooperation in case it would result in a breach of the *non bis in idem* rule[7]. The rationale of these provisions lies in the fact that a concrete mutual trust between States is required for a real cooperation and, by the time those conventions were approved, the abovementioned mutual trust was still lacking: this is proved by the fact that these conventions has never been implemented by the Parties who signed it.

Since most European Countries legislation doesn't always grant a *res iudicata* effect to foreign decisions, European Institutions' main aim was to approve a multilateral treaty with the purpose to avoid the risk that a person could be hampered by double jeopardy after having already served a sentence for the same fact in another State.

---

[4] In some States final decision can produce the following effects: when jurisdiction is related to a fact committed in a Foreign Country in which the accused person has already been punished, the possibility to prosecute for a second time the accused depends on the authorization given by a representative of the Government (i.e. a Ministry) or the Head of the State (in some cases, the King): art. 11, par. 2, of the Italian criminal code; chap. 1, par. 3, sentence 1 of the Swedish criminal code. In other Countries, the public prosecutor is entitled to stop its activity (art. 153, lett. *b* German criminal code; art. 34 Austrian criminal code); other States forbid the prosecution in case of acquittal, execution of the sentence, invalidation of the crime by prescription, pardon granted by the State (art. 13, par. 1, 17th April 1878 Belgian Law; art. 113-9, French criminal code) or in case of a final aquittal decision (art. 10, par 3, Danish criminal code).

[5] See C. AMALFITANO, *Conflitti di giurisdizione e riconoscimento delle decisioni penali nell'Unione Europea*, Giuffrè, Milan, 2006, p. 1 ss.; P. GAETA, *L'esercizio della potestà punitiva degli Stati Membri dell'U.E. tra universalità e territorialità della giurisdizione*, Conference on "Il principio del "ne bis in idem" in ambito europeo: prevenzione e composizione dei conflitti di giurisdizione" (Rome, 19-21 settembre 2005), in *www.csm.it*., p. 1 ss.

[6] See O. DEN HOLLANDER, *Caught Between National and Supranational Values: Limitations to Judicial Cooperation in Criminal Matters as Part or the Area of Freedom, Security and Justice within the European Union*, in *International Community Law Review*, 2008, p. 51 ss.; C. VAN DEN WYNGAERT-G. STESSENS, *The international* non bis in idem *principle: resolving some of the unanswered questions*, in *Int. and Comp. Law Quarterly*, 1999, p. 779 ss.

[7] Examples of mandatory refusal could be found in art. 9 of the 1957 European Convention on Extradition, art. 53 of the 1970 Convention on the International Validity of Criminal Judgements and art. 35 of the 1972 European Convention on the Transfer of Proceedings in Criminal Matters. An example of non mandatory refusal to cooperate is art. 18 of the 1990 European Convention on Laundering, Search, Seizure and Confiscation of the Proceeds for Crime.

The first step is the 16th March 1984 European Parliament Resolution, in which it has been stated that national laws which entitle judicial authorities to prosecute a person already judged in another State «in light of the EEC Treaty and the freedoms it enshrines, and particularly the freedom of movement of persons, […] clearly present serious problems».

Following the Resolution purposes, the European Convention among Member States on double jeopardy was signed in Bruxelles on 25th May 1987. To a large extent, this Convention copied the 1970 European Convention on the International Validity of Criminal Judgments and the 1972 European Convention on the Transfer of Proceedings in Criminal Matters provisions on *ne bis in idem*: the only difference is that *ne bis in idem* effect is binding *erga omnes* and not only *inter partes*. Preamble of the Convention mentions the need to improve cooperation, on the basis of mutual trust between Member States, which is the main requirement to the acknowledgement of *ne bis in idem* effect to other Member States' judicial decisions. Mutual trust, which is the cornerstone in judicial cooperation since 2000 Tampere Council, has been in fact mentioned for the first time in this Convention: regardless any harmonization in criminal laws among Member States, prohibit multiple prosecutions towards the same person for the same facts proves the existence of broad mutual trust in the respective national criminal procedure systems[8].

The further step towards the introduction of a European *ne bis in idem* principle has been the 1990 European Convention Implementing the Schengen Agreement (CISA): artt. 54 to 58 of the 1990 CISA are similar to 1987 Convention provisions, but, as a plus, they are binding for all Member States. Referring to these articles, both United Kingdom and Ireland used the opt-in clause. As for the Member States which joined the European Union in 2004 and 2007, implementation of artt. 54 to 58 CISA was a condition to join the European Union[9].

As a result, a person finally judged in one Contracting Party may not be prosecuted in another Contracting Party for the same fact, provided that, if the person has been sentenced, the penalty has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party.

The following articles introduce other provision: a) some exceptions to the principle (art. 55 CISA); b) the deduction principle, in light of which any period served for the same facts shall be deducted from any sentence in the former Contracting party in case *ne bis in idem* cannot be applied (art. 56 CISA); c) the duty to exchange information between States on the existence of a previous final judgment (art. 57 CISA); d) the application of more favourable national provisions is never hampered.

The last step is embodied by art. 50 of the 2000 Nice Charter on Fundamental Rights of the European Union, which provides the right not to be tried or punished twice in criminal proceedings for the same criminal offence, stating that «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».

---

[8] N. GALANTINI, *L'evoluzione del principio* ne bis in idem *europeo tra norme convenzionali e norme interne di attuazione*, Conference on "Il principio del "ne bis in idem" in ambito europeo: prevenzione e composizione dei conflitti di giurisdizione" (Rome, 19-21 sept. 2005), in *www.csm.it*.; EAD., *Evoluzione del principio* ne bis in idem *europeo tra norme convenzionali e norme interne di attuazione*, in *Dir. pen. proc.*, 2005, p. 1567 ss.; A. MANGIARACINA, *Verso l'affermazione del* ne bis in idem *nello "spazio giudiziario europeo"*, in *Leg. pen.*, 2006, p. 631 ss.; M. PAGLIA, *Il* ne bis in idem *in ambito internazionale e comunitario*, in *ForoEuropa*, 2003(3), p. 1 ss.; J.A.E. VERVAELE, *The transnational* ne bis in idem *principle in the EU. Mutual recognition and equivalent protection of human rights*, in *Utrecht Law Review*, 2005, p. 100 ss.; M. WASMEIER-N. THWAITES, *The development of* ne bis in idem *into a transnational fundamental right in EU law: comments on recent developments*, in *Eur. Law Rev.*, 2006, 565 ss.; A. WEYEMBERGH, *Le principe* ne bis in idem*: pierre d'achoppement de l'espace pénal européen?*, in *Cahiers droit eur.*, 2004, p. 343 ss.

[9] As for States that joined the EU in 2004, see *O.J.*, L 236, 23rd March 2003, p. 33 ss. As for Romania and Bulgaria, see *O.J.*, L 157, 21st June 2005, p. 203 ss. As for Iceland and Norway, see Council Decison 1999/439/EC, 17th May 1999, in *O.J.*, L 176, 10th July 1999, p. 35. As Swiss, see *O.J.*, L 53, 27th February 2008, p. 1 ss.

Having no regard to the State or jurisdiction that passed the first decision, art. 50 of the Nice Charter realizes the main way to protect individual's right not to be tried twice in the European Area: insofar, *ne bis in idem* is a general principle acknowledged in the European Area and its rationale is the aim to prevent double prosecution as an attempt to individual liberty[10].

2. *Ne bis in idem* principle in light of European Court of Justice jurisprudence: *idem factum*. - For long time the European Court of Justice (ECJ) denied its competence in the interpretation of artt. 54-58 CISA: only the 1997 Amsterdam EU Treaty stated that, as far as concerns *ne bis in idem*, artt. 54-58 CISA find their legal basis in art. 35 of the EU Treaty[11]. So far, there are eleven preliminary rulings passed by the ECJ. Decisions focused both on the meaning of *idem factum* and on the definition of final decision, that is a decision which has the effect to stay any other following proceedings on the same fact towards the same person.

Before defining the concept of *idem factum*, the interpreter should consider that Spanish, German, French, English, Italian and Dutch CISA version are similar and lead to a material definition of the concept[12].

As a matter of fact, when interpreting the meaning of *idem factum*, one can choose among three possibilities: a) consider the legal definition; b) consider the protected interest; c) consider material acts. In Van Esbroeck case, the Court rejected two of these perspectives: as there is no harmonization of national criminal laws among Member States, criteria based on the legal definition of the charge or on the protected legal interest might hamper freedom of movement within the Schengen territory as there could be as many legal definitions and legal interests as the different penal system in force in each Member State[13]. In fact, this would result in a direct conflict with the main objective of the CISA, which is the freedom of movement: leaving the possibility of further imprisonments would result in a sword of

[10] See jurisprudence opinions in First Intance Tribunal decision, 3rd May 2002, T-177/01, Jégo-Quéré, in *Reccueil*, 2002, p. II-2365 ss., §§ 42 and 47; ECJ decision, 27th June 2006, C-540/03, European Parliament v. Council, in *Reccueil*, 2006, p. I-5769 ss.; ECJ decision, 13th March 2007, C-432/05, Unibet, in *Reccueil*, 2007, p. I-2271; ECJ decision, 3rd May 2007, C-303/05, Advocaten voor de Wereld, in *Reccueil*, p. I- 3633 ss.; ECJ decision, 11th December 2007, C-438/05, Viking, in *Reccueil*, p. I-1079 ss.; ECJ decision, 18th December 2007, C-341/05, Laval, in *Reccueil*, p. I-11767 ss.; ECJ decision, 14th February 2008, C-244/06, Dynamic Medien, in *Reccueil*, 2008, p. I-505 ss.; Advocat general conclusion's, in case C-173/99, *BETCU*, in *Reccueil*, 2001, p. I-4881 ss. See also, ECHR decision, 11th July 2002, n. 28957/95, Christine Goodwin v. United Kingdom, in http://www.giurcost.org/casi_scelti/CEDU/CEDU11-07-02.htm.

[11] See A. ADINOLFI, *Commento all'art. 68 del Trattato sull'Unione europea*, in F. Pocar (dir.), *Commentario breve ai Trattati della Comunità e dell'Unione europea*, Cedam, Padova, 2001, p. 317 ss.; C. CURTI GIALDINO, *Schengen e il terzo pilastro: il controllo giurisdizionale secondo il Trattato di Amsterdam*, in *Rivista di Diritto Europeo*, 1998, p. 41 ss.; L. GAROFALO, *Sulla competenza a titolo pregiudiziale della Corte di giustizia secondo l'art. 68 del Trattato CE*, in *Il Diritto dell'Unione europea*, 2000, p. 805 ss.; L. SALAZAR, *Il principio del* ne bis in idem *all'attenzione della Corte di Lussemburgo (I)*, in *Dir. pen. e proc.*, 2003, p. 908 s.; G.L. TOSATO, *Atti giuridici vincolanti e competenze della Corte comunitaria nell'ambito del "Terzo pilastro"*, in *L'Italia e la politica internazionale*, IAI - ISPI, Bologna, 2000, p. 331 ss.

[12] The exact words used are: «por los mismos hechos», «wegen derselben Tat», «pour les mêmes faits», «for the same acts», «per i medesimi fatti» e «wegens dezelfde feiten».

[13] In the case at issue, a Belgian citizen was sentenced in by the Norwegian Court of Bergen to five years imprisonment for illegally importing narcotic drugs to Norway. After serving part of the sentence, he was released and taken to Belgium, where a second prosecution started for illegal export outside Belgium of the same narcotic drug. For an overview of former cases, see S. BRAMMERTZ, *Trafic de stupefiants et valeur internationale des jugements répressifs à la lumière de Schengen*, in *Revue de droit pénal et de criminologie*, 1996, p. 1063 ss.

Damocles pending on the individuals which is not consistent with the protection of individuals' dignity[14].

Seen from the perspective of mutual recognition and freedom of movement, the ECJ offered its autonomous and independent interpretation of *idem factum*: the only relevant aspects are material acts, understood in the sense of the existence of a set of concrete circumstances which are inextricably linked together. The definitive assessment in that regard belongs to the competent national court, which is charged to determine whether material acts at issue constitute a set of facts which are inextricably linked together in time, in space and by their subject-matter.

As soon as criteria have been chosen, another question rises: which law should be used to define which are the "same acts"? The Member State which decided first? The Member State which started a second prosecution on the same facts? Or is it possible to determine the existence of "same acts" according to autonomous interpretation, based on the law of the European Union?

The Court stated that the concept of "same acts" shouldn't be different in each member State. In light of the need for uniform application of EU law, since no provision makes reference to the national *idem factum* meaning, an autonomous and uniform interpretation within the European Union should be provided[15].

In following decisions, the Court ruled that a lack of complete identity of the material facts doesn't prevent *ne bis in idem* effect: the place where the crime is committed may be broad, or its execution may stretch over a long period of time. In order to help the national judge, the Court of Justice stated that punishable acts consisting in exporting and importing the same illegal goods are covered by the notion of "same acts" within the meaning of art. 54 CISA.

The material perspective for the definition of *idem factum* appears to be the best in order to pursue the aim of freedom of movement and mutual recognition of foreign decisions. However, several problems are still to be solved: as a matter of fact, at the moment it's not clear what a material fact is, and whether the interpreter should look at the whole offences or at single material acts. The following example explains the problem: having robbed a bank, a person stoles a car to make his way out of the country, even though he has no driving license. Should the case be considered as two separate facts, requiring two prosecutions, or as a set of offences that justify a single prosecution? The set of offences theory offers a way for the development of a European concept of material act, but it possibly leads to some unsatisfactory results. For instance, if, after committing a robbery in State A, the perpetrator fled to State B, where judicial authority sentenced him for driving without license regardless the robbery, even though the robbery was known, then, in light of the set of offences theory, State A judges would arrive to the conclusion that the ruling passed by State B judges forbids a prosecution in State A[16].

---

[14] See Advocate general D. Ruiz-Jarabo Colomer's conclusions in ECJ, 9th March 2006, C-436/04, Leopold Henri Van Esbroeck, in *Reccueil*, 2006, p. I-2333ss., §§ 41 ss. See also K. LIGETI, *Rules on the Application of* ne bis in idem *in the EU. Is Further Legislative Action Required?*, in *Eucrim*, 2009 (1-2), p. 39; M. WASMEIER-N. THWAITES, *The development of* ne bis in idem *into a transnational fundamental right in EU law: comments on recent developments*, in *Eur. Law Rev.*, 2006, 572 ss.

[15] See ECJ decision, 16th November 2010, C-261/09, Mantello, in http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009J0261:IT:HTML.

[16] In a comparative perspective, see U.S. Supreme Court, 4th January1932, 284 U.S., 299, Blockburger v. United States, in *http://caselaw.lp.findlaw.com/scripts/ getcase.pl?navby=CASE&court=US&vol=284&page=299*, stating in particular that «each of the offenses created requires proof of a different element. The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not». See also M. EL ZEIDY, *The Doctrine of Double Jeopardy in International*

So far, however, a more precise definition of *idem factum* provided by the European Institutions would be useful: as a matter of fact, even if a shared meaning of material act would overcome the problem of differences among Member States and be more appropriate for specific as well as sensitive cases for practical difficulties such as those encountered in the examples given, still it would leave some unanswered questions, such as: a) if a person is sentenced for a little amount of drug imported, what about a second trial for a bigger amount of drugs import part of the same drugs haul?[17]; b) what about offences connected to a crime whose punishment has been served?; c) how should a material act be defined?

As for the last question, the Greek Draft Framework Decision on conflicts of jurisdiction is useful for the definition of "act": the identity of acts should be referred to the same circumstances or circumstances that are similar in substance. As a matter of fact, "circumstance" is a term with a broader meaning than "act" and prevents running into difficulties outlined above.

Finally, such a broad definition of *idem factum* could also be interpreted as a step towards the creation of a European definition of essential elements of the fact (conduct, event, cause-effect relations), that would be considered as a whole with provisions of several European Union Framework Decisions and Conventions providing mandatory criminal punishments for certain crimes and acknowledging jurisdiction to each Member State in order to prosecute such conducts. There would be a link between art. 54 CISA and these provisions: art. 54 CISA appears as a multi-function instrument to promote mutual recognition (in this case, among definitions of *idem factum*) as well as judicial cooperation among Member States and freedom of movement.

3. *Ne bis in idem* principle in light of European Court of Justice jurisprudence: final decision. - The wording of art. 54 CISA concerning which types of decisions could bar further prosecution is not homogeneous and leads to different interpretations in the different official languages of the EU Member States: while «finally disposed» in English, «rechtskraftig abgeurteilt» in German, «dèfinitivement jugée» in French, «onherroepelijk vonnis» in Dutch doesn't request formally a decision passed by a judge, the Italian wordings «sentenza definitiva» apparently need a decision passed by a judge[18].

Moreover, even within Member States the definition of decisions producing *ne bis in idem* effect triggers academic debate: while acquittals and convictions produce a *res iudicata* effect, several problems raise when it comes to consider if *ne bis in idem* should be considered in a material way, which means that when a decision definitely bars further prosecution at the national level, then the same effect should be acknowledged also in another State[19].

Criminal and Human Rights Law, in *Mediterranean Journal of Human Rights*, 2002, p. 196, where the Author states that «offences are the same if the relevant elements of one are identical to, or included in, the same elements of another. More generally, a greater offence is treated as the same as any logically lesser-included offence with some but not all of the formal elements of the greater offence: *Blockburger* treats two offences as different if and only if each requires an element the other does not». See also B. VAN BOCKEL*, Case Law*, in *Common Market Law Review*, 2008, p. 238 s.

[17] See General Advocate E. Sharpston conclusions in ECJ decision, 17th July 2007, C-367/05, Norma Kraijenbrink, in *Reccueil*, 2007, p. I-6619 ss., § 36.

[18] Cfr. E. SELVAGGI, *La procedura giudiziaria che estingue l'azione penale esclude il nuovo giudizio di un altro Stato europeo*, in Guida *dir.*, 2006 (9), p. 108; J.A.E. VERVAELE, *The transnational* ne bis in idem *principle in the EU. Mutual recognition and equivalent protection of human rights*, cit., p. 112 s.

[19] K. LIGETI, *Rules on the Application of* ne bis in idem *in the EU. Is Further Legislative Action Required?*, cit., p. 39 ss.

The first ruling coming from the European Court of Justice on art. 54 CISA was related to out of court settlements such as plea bargaining and guilty plea: the Court held that art. 54 CISA doesn't require a decision taken by a judge. Therefore, it proposed a very broad interpretation of "final decision", stating that «a decision of an authority required to play a part in the administration of criminal justice in the national legal system concerned» is sufficient to trigger *ne bis in idem* effect if the accused undertakes «to perform certain obligations prescribed by the public prosecutor [which] penalises the unlawful conduct allegedly committed by the accused person herself»[20].

As a matter of fact, any agreement between public prosecutor and defendant is similar to punishments, as they both respond to retributive as well as to prevention aim: the person who is admitted to this procedure could be considered as one serving a sentence.

Moreover, deciding not to acknowledge *res iudicata* effect to these decisions would result into a failure of plea bargaining proceedings. These instruments are meant to lower the number of cases pending at courts and are accepted in each Member State, except for Greece[21]: if these decisions wouldn't produce *ne bis in idem* effect overall the European Union, then they would be less attractive to defendants. Of course, this outcome wouldn't be consistent with the main aim of art. 54 CISA, which is meant to grant freedom of movement within the European Union[22].

So, ECJ accepted a broad interpretation of "finally disposed". However, it also suggested that when the public prosecutor decides not to pursue proceedings because a trial is pending in another Member State towards the same defendant for the same acts, regardless any decision on the merits of the case, a *res iudicata* effect isn't acknowledged.

As a matter of fact, ECJ stated that analysis of the merits of the case is not a requirement for *ne bis in idem* effect: it rather confirmed previous rulings in order to exclude interpretations non consistent with EU Treaty provisions. Freedom of movement within European Union has two sides: from one side it is an expression of individuals' liberty; from the other side it requires that EU Institutions grant security. This means that a broad interpretation of art. 54 CISA shouldn't result in immunity for a person who could take advantage of a decision based on procedural grounds, especially a decision that halts the proceedings in one State because in another State there

---

[20] See ECJ decision, 11th February 2003, C-187/01, Hüsein Gözütok, and C-385/01, Klaus Brügge, in *Reccueil*, 2003, p. I-1345 ss. For comments on the decision, see. V. BAZZOCCHI, *Ancora sui casi Gözütok e Brügge: la Corte di Giustizia ed il principio del* ne bis in idem, in *Quad. cost.*, 2004, p. 169 ss.; A. CALIGIURI, *L'applicazione del principio* ne bis in idem *in diritto comunitario: a margine della sentenza Gözütok e Brügge*, in *Riv. dir. int. priv. e proc.*, 2003, p. 867 ss.; D. DEL VESCOVO, *Il principio del* ne bis in idem *nella giuriprudenza della Corte di giustizia europea*, in *Dir. pen. e proc.*, 2009, p. 1413 ss. ; M. FLETCHER, *Some Developments to the* ne bis in idem *Principle in the European Union:* Criminal Proceedings Against Hüseyn Gözütok and Klaus Brügge, in *The Modern Law Rev.*, 2003, p. 769 ss.; M. PAGLIA, *Il* ne bis in idem *in ambito internazionale e comunitario*, cit., p. 1 ss.; T. RAFARACI, Ne bis in idem *e conflitti di giurisdizione in materia penale nello spazio di libertà, sicurezza e giustizia dell'Unione europea*, in *Riv. dir. proc.*, 2007, p. 625 ss.; L. SALAZAR, *Il principio del* ne bis in idem *all'attenzione della Corte di Lussemburgo (I)*, cit., p. 906 ss.; ID., *Il principio del* ne bis in idem *all'attenzione della Corte di Lussemburgo (II)*, in *Dir. pen. e proc.*, 2003, p. 1040 ss.; J.A.E. VERVAELE, *Case Law*, in *Common Market Law Review*, 2004, p. 795 ss.; ID., *The transnational* ne bis in idem *principle in the EU. Mutual recognition and equivalent protection of human rights*, cit., p. 100 ss.

[21] See C.M. BRADLEY (ed.), *Criminal Procedure. A Worldwide Study*, Carolina Academic Press, 2007; F. TULKENS (revised by Y. Cartuyvels and I. Wattier), *Negotiated justice*, in M. Delmas-Marty and J.R. Spencer (eds.), *European Criminal Procedures*, Cambridge University Press, Cambridge, 2002, p. 641 ss.; B. PAVIŠIĆ (ed.), *Transition of Criminal Procedure Systems*, vol. II, Pravni fakultet Sveučilišta, Rijeka, 2004.

[22] See Advocate General D. Ruiz-Jarabo Colomer conclusions in trials C-187/01, Hüsein Gözütok, e C-385/01, Klaus Brügge, in *Reccueil*, 2003, p. I-1345 ss., §§ 112 ss. and M. WASMEIER-N. THWAITES, *The development of* ne bis in idem *into a transnational fundamental right in EU law: comments on recent developments*, cit., p. 568 ss.

is an on-going trial: in this case, no State would ever arrive at the end of the trial, even if in the second State there were, for instance, grounds (i.e. evidences) to sentence the indicted person.

This ruling was confirmed by two decisions; in the first, ECJ stated that *res iudicata* effect comes also from judicial authorities decisions acquitting the accused person for lack of evidence: to let a judicial authority of another Member State start a new trial would undermine the principle of legal certainty as well as freedom of movement[23]. In the second decision, the Court applied the principle in cases in which the indicted person is finally acquitted because the crime is time-barred: in this case the Advocate General argued that such decisions shouldn't produce *ne bis in idem* effect because there is no decision on merits and because rules on time-barring are different in every Member State. However, the Court confirmed that decision on merits is not a requirement for *ne bis in idem* effect, also because art. 54 CISA doesn't require harmonization of neither procedural nor time-barring rules[24].

Moreover, a decision taken by police authorities cannot produce *ne bis in idem* effect: it should rather be considered the effect produced within the Member State. If the decision bars another prosecution at the national level, then the decision will produce the same effect in other Member States[25].

As far as regards convictions, they produce *ne bis in idem* effect only if the convicted person has served the sentence, is at present serving it or in case the conviction can no longer be enforced: the aim is to avoid that persons who fled from justice moving to another country take advantage of the first final conviction although it has never been served[26]. However, the interpreter has to bear in mind that the ECJ stated that *ne bis in idem* effect comes also from probation measures. Probation decision may be regarded as a conviction that is in force, or is actually in the process of being enforced. The Court confirmed that, since a suspended custodial sentence penalizes the unlawful conduct of a convicted person, it has to be considered as a punishment under art. 54 CISA: it is in fact still possible to enforce it if during the probation period the sentenced person

[23] ECJ decision, 28th September 2006, C-150/05, Jan Leo Van Straaten c. Staat der Nederlanden and Republiek Italië and General Advocate D. Ruiz-Jarabo Colomer's conclusions in *Reccueil*, 2006, p. I-9327 ss., §§ 69 ss. See comments to the decision B. VAN BOCKEL, *Case Law*, cit., p. 228 s.; G. DE AMICIS, *Il principio del* "ne bis in idem" *europeo nell'interpretazione della Corte di giustizia*, in *Cass. pen*., 2009, p. 3172 s.; D. DEL VESCOVO, *Il principio del* ne bis in idem *nella giuriprudenza della Corte di giustizia europea*, cit., p. 1419; K. LIGETI, *Rules on the Application of* ne bis in idem *in the EU. Is Further Legislative Action Required?*, cit., p. 40.

[24] See ECJ decision, 28th September 2006, C-467/04, Giuseppe Francesco Gasparini and others, in *Reccueil*, 2006, p. I-9199 ss.; M. BARGIS, *Costituzione europea e cooperazione giudiziaria in materia penale*, in *Riv. it. dir. e proc. pen.*, 2005, p. 144 ss.; A. GAITO, *Un processo penale verso il modello europeo*, in Id. (ed., in collaboration with F. Giunchedi), *Procedura penale e garanzie europee*, Utet, Turin, 2006, p. 1 ss.; F. GIUNCHEDI, *Linee evolutive del giusto processo europeo*, *ivi*, p. 15 ss.; V. GREVI, *Principi e garanzie del "giusto processo" penale nel quadro europeo*, in L. Lanfranchi (a cura di), *La Costituzione europea tra Stati nazionali e globalizzazione*, Istituto della Enciclopedia Italiana fondata da Giovanni Treccani, Rome, 2004, p. 89 ss.; ID., *Linee di cooperazione giudiziaria in materia penale nella Costituzione europea*, in E. Dolcini-C.E. Paliero (ed.), *Studi in onore di Giorgio Marinucci*, vol. III, Giuffrè, Milan, 2006, p. 2783 ss.; O. MAZZA, *La libertà personale nella Costituzione europea*, in M.G. Coppetta (ed.), *Profili del processo penale nella Costituzione europea*, Giappichelli, Turin, 2005, p. 45 ss.; M. PISANI, *Il «processo penale europeo»: problemi e prospettive*, in *Riv. dir. proc.*, 2004, p. 653 ss.

[25] ECJ decision, 22nd December 2008, C-491/07, Vladimir Turanský, in *Reccueil*, 2008, p. I-11039 ss. See comments on the decision in D. DEL VESCOVO, *Il principio del* ne bis in idem *nella giuriprudenza della Corte di giustizia europea*, cit., p. 1422 s.; K. LIGETI, *Rules on the Application of* ne bis in idem *in the EU. Is Further Legislative Action Required?*, cit., p. 40. For Slovakia criminal procedure rules, see V. MATHERN-V. ĆEĆOT, *Slovacchia*, in B. Pavišić and D. Bertaccini (eds.), *Le altre procedure penali. Transizioni dei sistemi processuali penali*, Giappichelli, Turin, 2002, p. 335 ss.

[26] See ECJ decision, 18th July 2007, C-288/5, Jürgen Kretzinger, in *Reccueil*, 2007, p. I-6441 ss.

doesn't respect or fulfill the requirements and conditions mentioned in the judicial decision approving the probation period. On the other hand, procedural coercive measures, such as police custody, pre-trial measures and detention on remand fall outside the aim of the *ne bis in idem* principle because related to procedural and security issues[27].

Other problems rise in relation to *in absentia* trials: in the "Bourquain case" a man was sentenced to death in France for a murder committed when he was soldier in Algeria with the French troops. He then moved to Germany, where a prosecution by local authorities started for the same fact because the victim was a German soldier. At that time, the French decision couldn't be enforced for three main reasons: a) the French Parliament had approved a general amnesty for crimes committed in the overseas territories; b) the penalty was time-barred; c) sentence to death had been forbidden in the meanwhile. ECJ, involved in the case, held that, in order to produce *ne bis in idem effect*, penalty imposed by the sentencing State should be enforced at least on the date it was imposed: art. 54 CISA refers to criminal proceedings held in a Member State towards an indicted person whose trial for the same acts was finally disposed in another Member State, even though, under the law of the State in which he was first convicted, the sentence could never be directly enforced[28].

Moreover, the Court stated that *res iudicata* effect could be acknowledged to decisions taken *in absentia*. First of all, national rules on *res iudicata* effect are consistent with art. 6 European Convention on Human Rights as long as the person sentenced *in absentia* can obtain a new trial in respect of both law issues. Furthermore, even when there is no possibility of a re-trial, *in absentia* trials may be compatible with art. 6 European Convention on Human Rights, namely when the accused was aware of the summons: States consider the failure of the accused to appear as implicit waiver, and thus carry out a trial *in absentia*[29]. In addition, the interpreter

---

[27] See General Advocat E. Sharpston in proceedings C-288/5, Jürgen Kretzinger, cit., §§ 49 ss. See also G. DE AMICIS, *Il principio del* "ne bis in idem" *europeo nell'interpretazione della Corte di giustizia*, cit., p. 3174 s.; D. DEL VESCOVO, *Il principio del* ne bis in idem *nella giuriprudenza della Corte di giustizia europea*, cit., p. 1420. In order to harmonize the special subject of probatory measures, the European Council approved on 27th November 2008 the Framework decision 2008/947/JHA, which is published in *O.J.*, L 337, 12th December 2008, p. 102 ss. on which see first comments by H. KUCZYNSKA, *Mutual Recognition of Judicial Decisions in Criminal Matters with Regard to Probation Measures and Alternative Sanctions*, in *EuCrim*, 2009, p. 43 ss.

[28] See ECJ decision, 11th December 2008, C-297/07, Klaus Bourquain, in *Reccueil*, 2008, p. I-9425 ss. See also S. BRAMMER, *Case law*, in *Common Market Law Review*, 2009, p. 1685 ss.; M. CASTELLANETA, *Interpretazione estensiva nell'area Schengen delle garanzie da osservare nel processo penale*, in *Guida dir.*, 2009 (2), p. 104 ss.; G. DE AMICIS, Ne bis in idem *e sentenza contumaciale. Osservazioni*, in *Cass. pen*., 2009, p. 1296 ss.; ID., *Il principio del* "ne bis in idem" *europeo nell'interpretazione della Corte di giustizia*, *loc. cit.*; A. MANGIARACINA, *Sentenze contumaciali e cooperazione giudiziaria*, in *Dir. pen. e proc.*, 2009, p. 120 ss.; G. NEGRI, *Condanne in un solo Paese. Anche la sanzione non eseguita vale come precedente*, in *Il Sole 24 Ore*, 12 dicembre 2008, p. 39; F. SIRACUSANO, *Reciproco riconoscimento delle decisioni giudiziarie, procedure di consegna e processo* in absentia, in *Riv. it. dir. e proc. pen.*, 2010, p. 115 ss.

[29] See ECHR decision,12th February 1985, Colozza v. Italia; ECHR decision, 18th May 2004, Sejdovic v. Italia; ECHR decision, 10th November 2004, Somogy v. Italia, all published in http://cmiskp.echr.coe.int. For comments by Scholars, see E. APRILE, *La tutela dei diritti fondamentali e le nuove garanzie del processo penale*, in E. APRILE-F. SPIEZIA, *Cooperazione giudiziaria penale nell'Unione europea prima e dopo il Trattato di Lisbona*, Ipsoa, Milan, 2009, p. 157 ss.; S.-J. SUMMERS, *Fair Trials. The European Criminal Procedure Tradition and the European Court of Human Rights,* Hart Publishing, Oxford, 2007, p. 113 ss.; M. DEGANELLO, *Procedimento in absentia: sulla 'tratta' Strasburgo-Roma una 'perenne incompiuta'*, in R. Gambini-M. Salvadori (a cura di), *Convenzione Europea sui diritti dell'uomo: processo penale e garanzie*, ESI, Naples, 2009, p. 79 ss.; B. MILANI, *Il processo contumaciale tra garanzie europee e prospettive di riforma*, in *Cass. pen.,* 2009, p. 2180 ss.; G. UBERTIS, *Corte europea dei diritti dell'uomo e «processo equo»: riflessi sul processo penale italiano*, in *Riv. dir. proc.,* 2009, p. 33 ss.; F. CAPRIOLI, *"Giusto processo" e rito degli irreperibili*, in *Leg. pen.,* 2004, p. 586 ss.; C. DELL'AGLI, *Il fuggevole interesse della Corte costituzionale al principio* ne absens damnetur, in *Dir. pen. e proc.,* 2010, p. 244 ss.; P. PROFITI, *La Corte italiana e il*

should bear in mind art. 5, n. 1 of the Framework decision on the European arrest warrant (2002/586/JHA): when asked to surrender a person sentenced *in absentia*, the refugee State can decide to surrender the person under the condition that the accused has the right to a new trial in the same State if he was not aware of the first trial. So, *ne bis in idem* effect should be acknowledged also to decisions *in absentia*, without prejudice for the possibility of a retrial in the State whose authorities first sentenced the surrender: in fact, this has to be considered not as a second trial, but as a retrial[30].

De iure condito, a more complete definition of "finally disposed" would be useful: first of all, the suggestion is to consider that *ne bis in idem* effect should be acknowledged only to decisions that produce *res iudicata* effect in the Member State whose authorities passed those decisions; secondly, it is also necessary to clarify that the principle applies only to decisions held by the members of the judiciary (both judges or prosecutors, police officers excluded); thirdly, a new description of "enforced punishment" would be useful: as there are several European instruments that assure the enforcement of the decision[31], then the appropriate choice would be to change the requirement of enforcement into an exception for the impossibility of enforcing the sentence. The principle would apply despite non-enforcement of a foreign sentence, except in case the enforcement would be impossible. The first example is given when the first sentence cannot be enforced in the State where the individual fled and, at the same time, also surrender is forbidden. A second example is given in the event of failure to enforce a foreign sentence passed in proceedings that violate defense rights grant by the European Convention on Human Rights: as a matter of fact, in such cases, rather than enforcing the sentence, it should be possible to start a new prosecution[32].

4. From the Green Paper to the 2009 Framework Decision on conflicts of jurisdiction – The overall jurisprudence on art. 54 CISA has set some rules that are independent from the national criminal laws in force in the Member States. However, if at national level *ne bis in idem* principle is an *extrema ratio* in case rules on jurisdiction and competence are not respected, at the European level no rules on the distribution of jurisdiction have been approved. This means that the only guarantee against double prosecution is art. 54 CISA and that it is applied on the basis of the "first come, first served" rule, which means that the first decision bars a second prosecution against the same person on the same facts. However, this is not a satisfactory rule because it is related to mere chance and is also inadequate in certain situations (i.e. if the State deciding first is not the State of the *locus commissi delicti* so that gathering evidences could be difficult)[33].

---

processo in contumacia: i riflessi della giurisprudenza di Strasburgo, in *Europeanrights.eu*, http://www.europeanrights.eu/index.php?funzione=S&op=5&id=381.

[30] See G. DE AMICIS, *Il principio del* "ne bis in idem" *europeo nell'interpretazione della Corte di giustizia*, cit., p. 3170.

[31] I.e., Council Framework decision 2002/586/JHA on the European arrest warrant, in *O.J.*, L 190, 18th July 2002, p. 20 ss.; Council Framework decision 2005/214/JHA on the application of the principle of mutual recognition to financial penalties, in *O.J.*, L 76, 22nd March 2005, p. 16 ss.; Council Framework decision 2008/909/JHA on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, in *O.J.*, L 327, 5th December 2008, p. 27 ss.

[32] See J. LELIEUR-FISCHER, *La règle ne bis in idem. Du principe de l'autorité de la chose jugée au principe d'unicité d'action répressive. Etude à la lumière des droits français, allemand et européen*, Thesis, Paris I, 2005, p. 544 ss.; EAD., *Comments on the Green Paper on Conflicts of Jurisdiction and the principle of ne bis in idem in criminal proceedings*, p. 28 ss.

[33] See C. AMALFITANO, *Conflitti di giurisdizione e riconoscimento delle decisioni penali nell'Unione europea*, cit., p. 231 ss; N. GALANTINI, *Il principio del "*ne bis in idem*" internazionale nel processo penale*, Giuffrè, Milan, 1984, p. 84 ss.; J.P. PIERINI, *Territorialità europea, conflitti di giurisdizione e* ne bis in idem, in

The first attempt to introduce a complete set of rules is the Freiburg Proposal on Conflicts of Jurisdiction and *ne bis in idem* principle. The proposal comes from Scholars whose draft was first presented at the 2004 AIDP Conference in Beijing[34]; it concentrates on three main issues: a) a set of rules to solve conflicts of jurisdiction by means of coordination among Member States; b) the definition of *ne bis in idem* principle; c) the so-called "consideration" principle, through which, when it is neither possible to allocate jurisdiction nor to recall the *extrema ratio* of art 54 CISA, it is stated that the punishment first served has to be reduced from the original punishment to which the defendant has been sentenced[35].

Coordination among jurisdictions should be organized in two steps: a) exchange of information; b) agreement on concentrating jurisdiction among one Member State, that should take into consideration the place where the crime has been committed (*locus commissi delicti*), the accused's nationality, his residence; victim's nationality; the place where evidences can be gathered; the place where the enforcement of the sentence will be more suitable. This criteria should be considered as a whole: in fact, the Proposal doesn't provide a rank. However, in case criteria are not respected or in case States cannot find an agreement, the proposal suggests to introduce the possibility to involve the European Court of Justice. Moreover, the Proposal provides for a definition of *idem factum* and "finally disposed", almost predicting the European Court of Justice decisions on the interpretation of art. 54 CISA.

Except for the proposal, some positive rules should be mentioned: for instance, the Convention on the protection of European Communities' financial interest and the Framework Decision on combating terrorism and Framework Decision on attacks against information systems. Those Decisions introduced some rules suggesting a coordination among Member States in order to solve conflicts of jurisdiction. However, the only effective example of coordination in order to prevent conflicts of jurisdiction is given by the Eurojust experience. Eurojust was established as a result of a decision taken by the European Council of Tampere, held in October 1999. In order to strengthen the fight against serious organised crime, the European Council agreed that a unit (Eurojust) should be set up and composed of national prosecutors, magistrates, or police officers of equivalent competence, detached from each Member State according to their own legal systems. Since 2000, Eurojust has grown tremendously and so have its operational tasks and involvement in European judicial cooperation. This is why more powers and a revised set of rules became necessary. In July 2008, the French Presidency approved the new Decision on the Strengthening of Eurojust, which was voted in December 2008 and published on 4th June 2009[36].

T. Rafaraci (cur.), *L'area di libertà sicurezza e giustizia: alla ricerca di un equilibrio fra priorità repressive ed esigenze di garanzia*, Giuffrè, Milan, 2007, p. 118 ss T. RAFARACI, Ne bis in idem *e conflitti di giurisdizione in materia penale nello spazio di libertà, sicurezza e giustizia dell'Unione europea*, in *Riv. dir. proc.*, 2007, p. 634 ss.

[34] See *Draft Resolution for Concurrent National and International Criminal Jurisdiction and the Principle "Ne Bis In Idem"*, passed in Berlin, 4th June 2003, in *Rev. int. de droit pénal*, 2002-3, p. 1179 ss.

[35] See A. Biehler-R. Kniebüler-J. Lelieur-Fisher-S. Stein, *Freiburg Proposal on Concurrent Jurisdictions and the Prohibition of Multiple Prosecutions in the European Union*, passed in Berlin in October 2003, published in *Rev. int. de droit pén.*, 2002, p. 1195 ss.

[36] Eurojust has been founded by the Council Decision 2002/187/JHA passed on 28th February 2002. Later on, Council Decision 2009/426/JHA passed on 4th June 2009, changed the 2002 Decision implementing Eurojust powers. Referring to Eurojust coordination powers in criminal proceedings, see G. DE AMICIS, Ne bis in idem*, giurisdizioni concorrenti e divieto di azioni multiple nell'U.E.: il ruolo dell'*Eurojust, in *Cass. pen.*, 2006, p. 1176 ss.; M.L. DI BITONTO, *La composizione dei conflitti di giurisdizione in seno ad* Eurojust, in *Cass. pen.*, 2010, p. 2896 ss.; M. PANZAVOLTA, *Il giudice naturale nell'ordinamento europeo: presente e futuro*, in M.G. Coppetta (a cura di), *Profili del processo penale nella Costituzione europea*, Giappichelli, Turin, 2005, p. 107 ss.; ID., Eurojust:

The new Decision's purpose is to enhance the operational capabilities of Eurojust, increase the exchange of information between the interested parties, facilitate and strengthen cooperation between national authorities and Eurojust, as well as strengthen and establish relationships with partners and third States.

As stated in art. 82, § 1, letter c of the EU Treaty, Eurojust is in charge of the implementation of judicial cooperation, including resolution of conflicts of jurisdiction and close cooperation with the European Judicial Network. This is the main reason why, in 2003, Eurojust approved a set of rules with some criteria that should be used to solve conflicts of jurisdiction: this rules, however, have no binding effect and are not mandatory for the States applying for Eurojust's assistance in cases involving several EU Member States. Moreover, there's no hierarchy among this rules and persons interested are not involved: the result is a forum shopping effect that happens within Eurojust at a pre-trial stage. This causes some concern, because Eurojust, due to its composition, is more likely a Prosecution body than an impartial organization: first of all, Eurojust' National Members are usually appointed among Public prosecutors; secondly, the main activity of Eurojust is to assist National authorities mainly during preliminary investigations. This means that the choice of the place where the trial should be based is on the Public prosecutors' representatives, thus breaching the rule that judges shouldn't be chosen by one of the parties involved in the trial and should instead be provided according to rules already in force at the time the crime is committed.

In any case, Eurojust Agency is not ranked in a higher position than its members: thus, it cannot force the national representatives to respect neither the criteria approved in 2003 nor the outcome of the meeting in which the States involved have chosen the best place for prosecution[37].

Moreover, Eurojust activity is subject to the principles ruling the prosecution in each State: the abovementioned scheme, where there is no binding rule for the States, can efficiently work only in Countries where the prosecution of a crime is not mandatory and responds to the opportunity principle.

From the abovementioned experiences, during the Greek Presidency of the European Union Council, Greece submitted a draft Framework Decision proposal on *ne bis in idem principle* and the resolution of conflicts of jurisdiction[38]. The Greek draft was very close to the Freiburg Proposal, however it was not discussed further first of all because the States were not too

---

il braccio giudiziario dell'Unione, ivi, p. 169 ss. On Eurojust, see G.C. CASELLI – G. DE AMICIS, *La natura giudiziaria di Eurojust e le sua attuazione nell'ordinamento interno*, in *Dirittoegiustizi@* del 5 luglio 2003; G. DE AMICIS, *Riflessioni su Eurojust*, in *Cass. pen*., 2002, p. 3606 ss.; F. DE LEO, *Da Eurojust al pubblico ministero europeo*, in *Cass. pen*., 2003, p. 1432 ss.; ID., *Quale legge per Eurojust?*, in *Quest. giust*., 2003, p. 197 ss.; L. SALAZAR, *Eurojust: una prima realizzazione della decisione del Consiglio europeo di Tampere*, in *Doc. giust.*, 2000, c. 1342 ss.; ID., *Lo statuto ed i poteri giudiziari dei membri nazionali di Eurojust*, Conference on "L'attuazione di Eurojust; forme e modelli di coordinamento delle indagini comuni sulla prospettiva della libera circolazione delle autorità giudiziarie", (Rome, 11-15 ottobre 2004), in *www.csm.it*; T.M. SCHALKEN, *Euro Justice: A Historic Initiative*, in *European Journal of Crime, Criminal Law and Criminal Justice*, 1998, p. 298 ss.

[37] The *guide-lines*, attached to the 2004 Annual Report, are published in http://www.eurojust.europa.eu/press_releases/annual_reports/2004/Annual_Report_2004_EN.pdf.

[38] The Greek Draft proposal is published in *O.J.*, C 100, 26th Aprile 2003, p. 24 ss. For comments, see C. AMALFITANO, *Conflitti di giurisdizione e riconoscimento delle decisioni penali nell'Unione Europea*, cit., p. 231 ss.; EAD., *La risoluzione dei conflitti di giurisdizione in materia penale nell'Unione europea*, in *Dir. pen. e proc.*, 2009, p. 1293 ss.; O. DEN HOLLANDER, *Caught Between National and Supranational Values: Limitations to Judicial Cooperation in Criminal Matters as Part or the Area of Freedom, Security and Justice within the European Union*, in *International Community Law Review*, 2008, p. 51 ss.; A. MANGIARACINA, *Verso l'affermazione del* ne bis in idem *nello "spazio giudiziario europeo"*, cit., p. 631 ss.

enthusiastic about it, and, secondly, because the Commission was working on a broader project that has been published on 23rd December 2005, that is the «Green Paper on Conflicts of jurisdiction and the Principle of *ne bis in idem* in Criminal Proceedings». The Green Paper starts from the importance to introduce a system of exchange of information in order to know decisions on jurisdiction within each member State; moreover, each State should provide the possibility to give up the proceedings in favour of the State that is considered the best place for prosecution[39].

The Green Paper provides three stages: a) exchange of information between authorities about pending proceedings; b) briefing among States involved; c) agreement in order to solve the conflict. The Green Paper also suggests the need to involve the indicted person in this procedure in order to grant defence rights as well as the opportunity to acknowledge to the Court of Justice the competence to decide, in case of conflicts among Member States, which is the State whose judge should decide on the case.

The Green Paper offers a list of criteria to suggest the choice among several Member States: it is similar to the one provided by the Greek Proposal and the Freiburg Group, even as far as regards the lack of hierarchy among different criteria. *Ne bis in idem* principle has little space in the last pages of the Green Paper: the main rationale is the fact that while conflicts of jurisdiction is a new subject and deserves long discussions; moreover *ne bis idem* is a well known principle and several suggestions has been given by the ECJ. In the end, *ne bis in idem* is an *extrema ratio* when the rules on jurisdiction exist and are properly applied.

The outcome of the Green Paper is the 30th November 2009 «Council Framework Decision 2009/948/JHA on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings»[40]. Despite the original aims, the official version of the Framework Decisions is shorter and less detailed than the Drafts: this is also because the Institution's commitment was to approve the Framework Decision before the Lisbon Treaty entered into force, in order not to loose all the work done until that moment. However, the result is that what has been deleted from the articles of the Framework Decision in order to avoid long discussions among Member States is now mentioned in the Premises, that, however, are not binding. Moreover, even if the title of the Framework Decision refers to "prevention" of conflicts, there are no rules on prevention: as a

[39] See doc. COM(2005) 696 def., in http://eur-lex.europa.eu/LexUriServ/site/it/com/2005/com2005_0696en01.pdf; Commission Staff Working Document – Annex to the Green Paper On Conflicts of Jurisdiction and the Principle of *ne bis in idem* in Criminal Proceedings, doc. SEC(2005) 1767, in http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SEC:2005:1767:FIN:EN:HTML. For comments, see M. FLETCHER, *The problem of multiple criminal prosecutions: building an effective EU response*, in *Yearbook of European Law*, University of Glasgow, 2007, p. 33 ss.; A. PERDUCA, *Parte il monitoraggio della Commissione sull'applicazione del «ne bis in idem»*, in *Dir. Comunitario e Internazionale* (suppl. a *Guida dir.*), 2006 (2), p. 84 s.; T. RAFARACI, Ne bis in idem *e conflitti di giurisdizione in materia penale nello spazio di libertà, sicurezza e giustizia dell'Unione europea*, cit., p. 637 ss.; ID., *Procedural Safeguards and the Principle of Ne Bis In Idem in the European Union*, in M.C. Bassiouni-V. Militello-H. Satzger (eds.), *European Cooperation in Penal Matters: Issues and Perspectives*, Cedam, Padova, 2008, p. 396 ss.; M. WASMEIER-N. THWAITES, *The development of* ne bis in idem *into a transnational fundamental right in EU law: comments on recent developments*, cit., p. 575 ss.

[40] The Framework Decision 2009/948/JHA is published in *O.J.*, L 328, 15th December 2009, p. 42 ss. For first comments, see C. AMALFITANO, *La risoluzione dei conflitti di giurisdizione in materia penale nell'Unione europea*, cit., p. 1294 ss.; E. CALVANESE-G. DE AMICIS, *La decisione quadro del Consiglio dell'U.E. in tema di prevenzione e risoluzione dei conflitti di giurisdizione*, in *Cass. pen.*, 2010, p. 3599 ss.; M. LUCHTMAN, *Choice of forum in an area of freedom, security and justice*, in *Utrecht Law Rev.*, 2011, p. 74 ss.; S. PEERS, *The proposed Framework Decision on conflict of jurisdiction in criminal proceedings: Manipulating the right to a fair trial?*, in http://www.statewatch.org/analyses/no-76-conflict-of-jurisdiction.pdf.; B. PIATTOLI, *Ne bis in idem, alt ai conflitti Ue. Le linee guida targate Bruxelles*, *Dir. e giust.*, 2006 (20), p. 120 ss.

matter of fact, the Framework Decision provides only rules aimed at resolution of conflicts by means of mandatory exchange of information and consultations among Member States potentially competent to prosecute the committed crime.

The Framework Decision provides that when a competent authority in a Member State has reasonable grounds to believe that parallel criminal proceedings are being conducted in another Member State in respect of the same facts involving the same person, which could lead to the final disposal of those proceedings in two or more Member States, it should contact the competent authority of that other Member State. The question whether or not reasonable grounds exist should be examined solely by the contacting authority. Thus, a competent authority which has been contacted by a competent authority of another Member State should have a general obligation to reply to the request submitted. The contacting authority is encouraged to set a deadline within which the contacted authority should respond, if possible. The Framework Decision also provides a set of minimum information that should be provided by the contacted authority.

The main part of the Framework Decision is represented by the consultation proceedings, which is mandatory. In case it has not been possible to reach consensus, the matter shall, where appropriate, be referred to Eurojust by any competent authority of the Member States involved, but only in the fields in which Eurojust is entitled to decide under Article 4, § 1, of the Eurojust Decision. If during consultations consensus has been reached on the concentration of the criminal proceedings in one Member State, the competent authority of that Member State shall inform the respective competent authority (or authorities) of the other Member State (or States) about the outcome of the proceedings.

However, the Framework Decision lacks of several important provisions. The overall impression is that European Institutions were somehow in a hurry when they decided to pass the final draft instead of waiting the Lisbon Treaty to enter into force. The many issues neglected leave the discussion open and transfers to the States the task to deal with delicate aspects.

First of all, there is no definition of "significant link", that is the link between the parallel proceedings conducted in different States, so that is not possible to control whether it is necessary to start consultation proceedings; secondly, there is no time limit to the proceedings. Both these two aspects are on the States' will.

Thirdly, there is no list of criteria to use when choosing the best place for prosecution: the only reference to criteria used by Eurojust (which are not binding and are the outcome of experience by the European Agency) is mentioned only in the Premises. However, there is no hierarchy and the Council itself suggests the case by case approach, even accepting the mix of two or more criteria: moreover, the Framework Decision doesn't require justification of the grounds related to the choice of the best place for prosecution.

Fourthly, the Framework Decision doesn't provide a definition of *idem factum* or final decision, referring directly to art. 54 CISA in the interpretation given by ECJ.

Moreover, the outcome of the consultation proceedings is not mandatory and the Framework Decision provides no intruments to enforce it.

Finally, the main delicate issue is the involvement of the defendant and his lawyer in the proceedings: the Framework Decision doesn't provide any possibility to contest the final decision on jurisdiction and this results in a breach of defence rights.

At a glimpse, Framework Decision effectiveness is based on the States' will and lacks of provisions on several issues: this could also be the rationale of the present delay in the implementation by the Member States, considered that the dead-line is scheduled on 15th June 2012.

The positive aspect is that the Framework Decision 2009/948/JHA represents an important step towards coordination among Member States equally competent in crime prosecution: nevertheless, it leaves all the unsolved issues to the will of the State.

Thus, further steps in order to assure similar solutions among Member States are needed and they should be provided by a new European law on prevention of conflicts of jurisdiction and not only on instruments to be used when the parallel proceedings already exist in different Member States and the individual rights', as explained above, have already been somehow breached by double or multiple prosecution.