# *NE BIS IN IDEM* – A PRINCIPLE OF PARAMOUNT IMPORTANCE IN THE EUROPEAN UNION AREA OF FREEDOM, SECURITY AND JUSTICE

**Oana-Andreea PÎRNUȚĂ***, **Alina-Adriana ARSENI***

*"Transilvania" University, Brasov, Romania

***Abstract***: *The 'ne bis in idem' rule is a general principle of criminal law and also an internationally acknowledged human right, according to which no one is to be prosecuted or punished twice for the same offence. The present paper highlights the interpretation and application of the principle in the context of the European Union acquis, including the relevant case law developed by the European Court of Justice. Thus, out of the multitude of aspects involving this principle, the paper will mainly touch upon the following pieces of legislation: Articles 54 to 58 of the Convention implementing the Schengen Agreement, Article 50 of the Charter of Fundamental Rights of the European Union, the Green Paper on Conflicts of Jurisdiction and the Principle of 'Ne Bis in Idem' in Criminal Proceedings as well as the Council Framework Decision 2009/948/JHA on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings.*

***Keywords***: *ne bis in idem, res judicata, human rights, European Union law, European Court of Justice.*

## 1. INTRODUCTION

The sources of the *ne (non) bis in idem* principle can be traced back to Greek, Roman, and Biblical times (Conway, 2003:217-244). The substance of the principle is twofold, consisting, by and large, of the following aspects: '*nemo debet bis vexari pro una et eadem causa* (no one should have to face more than one prosecution for the same offence) and *nemo debet bis puniri pro uno delicto* (no one should be punished twice for the same offence)' (Vervaele, 2005:100-118).

The aim of this principle is, as it has been affirmed (Chiriță, 2007:430), to assure all parties involved in a finalised criminal trial that the situation shall not be placed again under discussion, thus safeguarding the security of legal relations in criminal matters.

The rationale of the *ne bis in idem* principle has in view not only the interest of the litigant, but also the general interest, since the ruling is invested with an indisputable authority (Renucci, 2009:527).

As it is outlined in the Opinion of Advocate General Ruiz-Jarabo Colomer, delivered on 8 June 2006, pertaining to the *Van Straaten* case (C-150/05) resolved by the Court of Justice of the European Union (ECJ), 'the *ne bis in idem* principle is a fundamental right of citizens, linked to the right to due process and a fair trial; it is also a structural requirement of the legal system and its lawfulness is founded on respect for *res judicata*' (par. 57). In other words, '(…) respect for the *res judicata* (*pro veritate habitur*) of final judgments is of importance for the legitimacy of the legal system and of the state' (Vervaele, 2005:100-118). The *res iudicata* rule refers to matters which have already been conclusively decided by a court and are, thus, presumed – by means of an absolute legal presumption – to reflect the truth.

In the American law, the prohibition to re-try a person for the same offence is called 'double jeopardy'.

The *ne bis in idem* principle has been recognised within numerous legal instruments,

both at international level (for instance, Article 14 par. 7 of the *International Covenant on Civil and Political Rights*, adopted by the UN General Assembly in 1966) and at regional level (besides the provisions adopted within the European Union, which will be presented in the following sections, see the instruments adopted within the Council of Europe, namely Article 4 of *Protocol No. 7* to the *European Convention of Human Rights*, Strasbourg, 1984, and also Part V, Articles 35-37, of the *European Convention on the Transfer of Proceedings in Criminal Matters*, Strasbourg, 1972).

This multitude of legal sources may convey the general impression of fragmentation, thus preventing a consistent interpretation and application (Van Bockel, 2010:12); however, the effort to clarify all the implications of this highly important principle appears to be a constant, especially for the European Union common area of Freedom, Security, and Justice.

## 2. THE *NE BIS IN IDEM* PRINCIPLE ENSHRINED IN THE EUROPEAN UNION LAW

The coming into effect of the *Treaty of Amsterdam* (May 1999) has marked the integration of the Schengen provisions into the *acquis*, the *ne bis in idem* principle being included into the Third Pillar referring to the area of Freedom, Security, and Justice (Vervaele, 2005:100-118).

Title III, Chapter 3 (Articles 54 to 58) of the *Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders*, signed on 19 June 1990, deals with the application of the principle under discussion. Article 54 of the Convention states the following: 'A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party'.

The subsequent article stipulates the exceptions from this principle. Thus, a Contracting Party is not bound by Article 54 in one or more of the following cases: 'the acts to which the foreign judgment relates took place in whole or in part in its own territory; in the latter case, however, this exception shall not apply if the acts took place in part in the territory of the Contracting Party where the judgment was delivered'; 'the acts to which the foreign judgment relates constitute an offence against national security or other equally essential interests of that Contracting Party', or 'the acts to which the foreign judgment relates were committed by officials of that Contracting Party in violation of the duties of their office'.

The provisions comprised in Article 56 of the *Schengen Convention* refer to the deduction of the previous sentence: 'If a further prosecution is brought in a Contracting Party against a person whose trial, in respect of the same acts, has been finally disposed of in another Contracting Party, any period of deprivation of liberty served in the latter Contracting Party arising from those acts shall be deducted from any penalty imposed. To the extent permitted by national law, penalties not involving deprivation of liberty shall also be taken into account'.

Article 57 of the same *Convention* regulates the process of information sharing, according to which, when a Contracting Party charges a person with an offence and its competent authorities have reason to believe that the charge relates to the same acts as those in respect of which the person's trial has been finally disposed of in another Contracting Party, those authorities shall, if they deem it necessary, request the relevant information from the competent authorities of the Contracting Party in whose territory the judgment has already been delivered. The information requested shall be provided as soon as possible and shall be taken into consideration as regards further action to be taken in the proceedings under way.

Finally, Article 58 stipulates that the provisions outlined above 'shall not preclude

the application of broader national provisions on the *ne bis in idem* principle with regard to judicial decisions taken abroad'.

The *ne bis in idem* principle is also provided for in Article 7 of the *Convention on the Protection of the European Communities' Financial Interests* and Article 10 of the *Convention on the fight against corruption*.

The *Charter of Fundamental Rights of the European Union* (2010/C 83/01) has enshrined the right not to be tried or punished twice in criminal proceedings for the same criminal offence in Article 50, stating the following: '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'.

The *Explanations* relating to the Charter (2007/C 303/02) make reference to the provisions encapsulated in Article 4 of *Protocol No. 7* to the *Convention for the Protection of Human Rights and Fundamental Freedoms* or, in short, the *European Convention of Human Rights* (ECHR). As stated in the document mentioned above, 'in accordance with Article 50, the *non bis in idem* rule applies not only within the jurisdiction of one State but also between the jurisdictions of several Member States. That corresponds to the acquis in Union law (…)'.

As far as the former situation is concerned, i.e. the application of the principle within the same Member State, the guaranteed right has the same meaning and the same scope as the corresponding right in the ECHR. For this reason, in order to convey a comprehensive image, it is necessary that the provisions of Article 4 of Protocol No. 7 to the *Convention* be presented in brief.

The aforementioned Article provides for the following: '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' [our emphasis].

The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case' (par. 2). As mentioned in the *Explanatory Report* of Protocol No. 7 to the *Convention*, 'the phrase "new or newly discovered facts" includes new means of proof relating to previously existing facts. Furthermore, this article does not prevent a reopening of the proceedings in favor of the convicted person and any other changing of the judgment to the benefit of the convicted person' (par. 31).

The final paragraph states that 'no derogation from this Article shall be made under Article 15 of the Convention', namely in time of war or other public emergency threatening the life of the nation, which means that it has an absolute nature.

Article 4 applies exclusively to trial and conviction of a person in criminal proceedings and so, it 'does not prevent him from being made subject, for the same act, to action of a different character (for example, disciplinary action in the case of an official) as well as to criminal proceedings', according to par. 32 of the aforementioned *Explanatory Report*.

## 3. THE *NE BIS IN IDEM* PRINCIPLE IN THE CASE LAW OF THE EUROPEAN COURT OF JUSTICE

Together with the entry into force of the EU *Treaty of Maastricht* in 1993, which introduced cooperation within the Third Pillar, namely Justice and Home Affairs (JHA), and of the aforementioned *Treaty of Amsterdam*, the European Court of Justice – which had already established a series of principles belonging to Community law, the area of criminal law and criminal procedure included – has been given a wider jurisdiction, having the possibility of developing general principles in new domains, such as fundamental rights (Vervaele, 2005:100-118).

The Court of Justice of the European Union has ruled on the application of the *ne bis in idem* principle in criminal matters for the first time in 2003, in the Joined Cases *Gözütok and Brügge* (C-187/01 and C-385/01), since

then this area being 'the most consistent' of the European judicial authority; at the same time, the present judgment is the first in the interpretation of the 1990 *Schengen Convention* (Gorunescu, 2010:99-116).

In this case, the Court has extended the interpretation of the expression 'finally disposed' in Article 54 of the *Schengen Convention* to 'procedures whereby further prosecution is barred, such as the procedures at issue in the main actions, by which the Public Prosecutor of a Member State discontinues criminal proceedings brought in that State, without the involvement of a court, once the accused has fulfilled certain obligations and, in particular, has paid a certain sum of money determined by the Public Prosecutor'.

The Opinion of Advocate General Ruiz-Jarabo Colomer, delivered on 19 September 2002, relating to the joined cases of *Gözütok and Brügge*, is extremely relevant as it gives more general explanations regarding the issues brought about the *ne bis in idem* principle. 'This rule of law, in order to protect identical legal rights and in respect of the same unlawful conduct, prevents a person from being subject to more than one penalising procedure and, possibly, being punished repeatedly, in so far as that duplication of procedures and penalties involves the unacceptable repetition of the exercise of the *ius puniendi*', states the Advocate General in par. 48.

The principle rests on two pillars, namely legal certainty and equity (par. 49). As far as legal certainty is concerned, it 'requires that decisions adopted by the public authorities, once definitive and final, cannot be challenged *sine die*' (par. 119).

Hence, as outlined in par. 122-124, in order to fulfill the objective of establishing an area of Freedom, Security, and Justice in an integrated Europe, the effectiveness of foreign decisions must be guaranteed between the Member States, which certainly requires enhanced cooperation, mutual trust and mutual recognition of judgments in a genuine 'common market of fundamental rights'.

In the *Kraaijenbrink* case (C-367/05, 18 July 2007), the Court decided that the relevant criterion for the purposes of the application of Article 54 of the *Schengen Convention* is 'identity of the material acts, understood as the existence of a set of facts which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected; (…) it is for that national court to assess whether the degree of identity and connection between all the facts to be compared is such that it is possible, in the light of the said relevant abovementioned criterion, to find that they are "the same acts" within the meaning of Article 54 of the *Convention implementing the Schengen Agreement*'.

The Opinion of Advocate General Colomer, delivered in the *Van Straaten* case (C-150/05), comprises a majestic observation: 'even when one State may not deal with a matter in the same or even a similar way as another, the result will be accepted as equivalent because it reflects the same principles and values. In a project as ambitious as the European Union, the States must trust in the adequacy of their partners' rules and also trust that they apply them correctly, accepting their consequences, even though they may produce different outcomes; that concept implies taking those outcomes into consideration, one corollary of which is the *ne bis in idem* principle' (par. 62).

Other frequently cited cases in which the European Court of Justice approached the *ne bis in idem* principle are the following: *Miraglia*, C-469/03, 10 March 2005; *Gasparini*, C-467/04, 28 September 2006; *Bourquain*, C-297/07, 11 December 2008; *Turanský*, C-491/07, 22 December 2008, and so on.

## 4. THE GREEN PAPER ON CONFLICTS OF JURISDICTION AND THE PRINCIPLE OF *NE BIS IN IDEM* IN CRIMINAL PROCEEDINGS

The intention of the *Green Paper on Conflicts of Jurisdiction and the Principle of 'Ne Bis in Idem' in Criminal Proceedings* [COM (2005) 696 final], presented by the Commission, was 'to launch a wide-ranging consultation of interested parties on issues of conflicts of jurisdiction in criminal matters, including the principle of *ne bis in idem*'.

As shown in the background considerations of the Green Paper, the internationalization of crime is likely to determine positive conflicts of jurisdiction due to the fact that several Member States have criminal jurisdiction to prosecute the same case. There are, as the Green Paper identifies, several drawbacks of multiple prosecutions: they 'are detrimental to the rights and interests of individuals and can lead to duplication of activities. Defendants, victims and witnesses may have to be summoned for hearings in several countries. Most notably, repeated proceedings entail a multiplication of restrictions on their rights and interests, e.g. of free movement. They increase psychological burdens and the costs and complexity of legal representation'. And, of course, these difficulties are unsuited for the EU area of Freedom, Security, and Justice.

The necessity to establish an efficient system for attributing cases to an appropriate jurisdiction is made clear: without such a mechanism, '*ne bis in idem* can lead to accidental or even arbitrary results: by giving preference to whichever jurisdiction can first take a final decision, its effects amount to a "first come first served" principle'.

The mechanism which the Commission has in view is tripartite, made up of the following steps: identification and information of 'interested parties', consultation/ discussion, and dispute settlement/ mediation.

The debate regarding the *ne bis in idem* principle refers to the need to clarify certain elements and definitions (as, for instance, the types of decisions which can have a *ne bis in idem* effect, and/ or what is to be understood under *idem* or 'same facts'), the application of the principle – considering that cross-border enforcement now takes place through the mutual recognition EU instruments – as well as the necessity to preserve the current possibilities for derogations from it.

## 5. COUNCIL FRAMEWORK DECISION 2009/948/JHA

As it is known, since the coming into force of the *Treaty of Amsterdam*, decisions and framework decisions have replaced joint actions in the field of police and judicial cooperation in criminal matters. A framework decision is binding on the Member States solely as to the result that is to be accomplished, leaving the choice of form and methods to the national authorities.

The *Council Framework Decision 2009/948/JHA on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings* was adopted on 30 November 2009 (published in the *Official Journal of the European Union* L 328/42, 15.12.2009) and is due to be implemented by the Member States by 15 June 2012.

The aim of this Framework Decision is, as stated in point 3 of the Preamble, 'to prevent situations where the same person is subject to parallel criminal proceedings in different Member States in respect of the same facts, which might lead to the final disposal of those proceedings in two or more Member States', at the same time attempting to prevent the infringement of the *ne bis in idem* principle, as set out in Article 54 of the *Convention implementing the Schengen Agreement*, as interpreted by the European Court of Justice.

The Framework Decision emphasizes the need for direct consultations between competent authorities of the Member States in order to reach a consensus and, thus, avoid the adverse consequences arising from parallel proceedings and also the waste of time and resources. The direct consultations can be carried out with the assistance of Eurojust.

Direct contact between competent authorities should be seen as the main principle of cooperation under the present Framework Decision.

The exchange of information between competent authorities should imply a minimum set of information, especially relating to the identification of the person concerned and to the nature and stage of the parallel proceedings, which should be mandatory.

The contacted authority has the general obligation to reply to the request submitted by the contacting authority, respecting, if possible, the deadline imposed by the latter. There should be special consideration given to the situation of a person deprived of liberty throughout the procedure of taking contact.

Since the provisions under this Framework Decision are meant to prevent unnecessary parallel criminal proceedings which could result in an infringement of the principle of *ne bis in idem*, its application should not generate a conflict of exercise of jurisdiction which would not occur otherwise. For this reason, 'in the common area of freedom, security and justice, the principle of mandatory prosecution, governing the law of procedure in several Member States, should be understood and applied in a way that it is deemed to be fulfilled when any Member State ensures the criminal prosecution of a particular criminal offence' (point 12 of the Preamble).

In order to eliminate unnecessary red tape, in situations where more flexible instruments or arrangements exist between Member States, the Framework Decision allows them to prevail.

## 6. CONCLUSIONS

All things considered, the safeguarding of the *ne bis in idem* principle proves essential in the common Area of Freedom, Security, and Justice, in which key concepts such as enhanced cooperation, mutual recognition of judicial decisions, mutual trust, and safeguarding the fundamental human rights, need to express a common standard of criminal justice.

Future work should correlate the EU provisions with the legal instruments developed within the Council of Europe and the dynamic case law of the European Court of Human Rights in order to obtain a panoramic view of the *ne bis in idem* principle as it is interpreted and applied in the European context.

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