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Ne Bis In Idem Profiles **in EU Criminal Law**

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*Al mio caro nonno,
eterno esempio di dignità ed onestà*

*To my darling grandfather,
eternal example of dignity and honesty*

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<http://www.law.ox.ac.uk/published/OSCOLA_2006_citing_international_law.pdf>

¹ Oxford University Standard for Citation of Legal Authorities

² *ibid.*

List of abbreviations

AA	Accession Agreement (to the ECHR)
AIDP	Association Internationale de Droit Pénal
AFSJ	Area of Freedom, Security and Justice
AG	Advocate General
CAP	Common Agricultural Policy
CFR	Charter of Fundamental Rights of the European Union (Nice, 2000)
CISA	Convention Implementing the Schengen Agreement (1990)
COE	Council of Europe
EAW	European Arrest Warrant
EC	European Community
ECHR	European Convention on Human Rights (Rome, 1950)
ECtHR	European Court of Human Rights
ECJ	European Court of Justice
EP	European Parliament
EU	European Union
FD	Framework Decision
GP	Green Paper
IAPL	International Association of Penal Law
ICCPR	International Covenant on Civil and Political Rights (1966)
JHA	Justice and Home Affairs
MSs	Member States

OJ	Official Journal
TEU	Treaty of the European Union (Lisbon, 2009)
TFEU	Treaty on the Functioning of the European Union (Lisbon, 2009)
VAT	Value Added Tax

Introduction

Many and the most knowledgeable writers have given their say on the principle of European *ne bis in idem*, often by comprehensive treatises that go even beyond the criminal law area. Therefore, using the same approach within a Master thesis would have been nearly pretentious. Instead, a ‘less ambitious’ purpose is seemed to better suit the current location. The following three chapters will respectively face three selected perspectives of the *ne bis in idem* itself.

Although all the Chapters are generally intended to show how the European actors have taken action in order to extend the existing texts and partly to shape new ones, each of them is actually understood as a single monograph. Whilst enclosed in the same writing, the three parts are not conceived as an evolution of one another, rather as autonomous pieces. That is also the reason why the dissertation has no general conclusions. Giving an overall finding, indeed, was not the aim.

The principle of *ne bis in idem* is ultimately a norm of common sense. In essence, the rule is that the same individual should not face two or even more criminal proceedings for having committed the same material fact. Non-legal experts would ask themselves why so many academics do research on such an easy-understanding rule. If it is not questioned at the domestic level, at EU level and *a fortiori* at international level, it runs against the States’ sovereignty demands. In order to comply with the rule, States shall either waive their jurisdiction or adjudicate it on the basis of a supranational duty. It is common knowledge how States are generally reluctant to be interfered with their criminal policies.

Nonetheless, the double jeopardy rules is in fact incorporated into several frameworks: Council of Europe Conventions¹, EU instruments², the Schengen

¹ Anne Weyembergh, ‘La Jurisprudence de la CJ Relative au Principe *Ne Bis In Idem*: une Contribution Essentielle à la Reconnaissance Mutuelle en Matière Pénale’ in *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-Law* (Asser Press 2013) 539, 540-1.

Agreement³, beyond other international instruments⁴. On the one hand, such a copious occurrence may testify the States' recognition of a sacrosanct principle. However, the other side of the coin is that the multiplicity of sources, especially where contemporarily applicable and where not linked by connection tools, leads to extreme fragmentation⁵ as well as to legal uncertainty. Historically, decisional law, which usually plays the role of settling complicate legal issues, was not consistent⁶.

The first selected profile is that of the conflicts of jurisdiction. Since Europe has become a borderless area, trans-border crimes increased, and criminal proceedings against the offenders accordingly multiplied. While the fight against crime was strengthened, no efforts had been made for contain proliferation of double proceedings.

EU action in this regard simply did not exist until 2009, except for soft law documents. The latter has proved that there was awareness about the problem, but still political consensus has been never enough to go straight to the objective, namely having a binding system for settling jurisdictional conflicts. The Framework Decision is not decisive on such a point, but it postponed the moment when it will be tackled.

The second Chapter deepens what has been just touched on few lines above. It analyses the main sources of EU law on the *ne bis in idem* principle, also by the crucial angle of the judiciary, that seated in Strasbourg as well as in Luxembourg.

The third part is probably the most interesting, given the recent case law and its implications at domestic level. Most of the Member States' criminal systems rely on administrative sanctions as a deflative instrument. However,

² *ibid.*

³ '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' (CISA) [2000] OJ L239/19.

⁴ Weyembergh (n1).

⁵ Silvia Buzzelli, 'Procedimenti Paralleli', Spazio di Giustizia, Unione Europea: il Contesto Normativo e gli Aspetti Problematici [2012] Archivio Penale 1, 6

⁶ Case C-467/04 *Gasparini* [2006] ECR I-9199, Opinion of AG Sharpston, paras 61-3.

non-criminal penalties are at times added to criminal ones, so establishing two channels of punishment. The ECJ as well as the ECtHR had the chance to rule about this arrangement and to affirm in which circumstances it does violate the *ne bis in idem* rule. It is also worth observing the progressive and mutual approach between the Courts, aware of the forthcoming EU's accession to the ECHR.

In essence, it is hard-stating that there is a transnational common standard as to the *ne bis in idem* principle. Some tangles are still to be solved. Nonetheless, Courts are probably doing what States are not ready to put on writing.

Chapter I

The Ne Bis In Idem as an a posteriori instrument: necessity of a regulation on conflicts of jurisdiction

Among all its *rationales*¹, the *ne bis in idem* principle may be also regarded as a human right. Since it regulates the States' *ius punendi* forcing them not to prosecute or punish twice the same person for the same fact, *ne bis in idem* shields individuals from eventual abuses and arbitrary acts. Giving its central importance, it is no coincidence that some human rights instruments provide for it, even if with some limitations. For example, both the ICCPR and the ECHR include a *ne bis in idem* provision².

Nonetheless, the human right nature of the double jeopardy principle (as common law defines it³) runs the risk of being so just on paper. Indeed, where a conflict among two or more jurisdictions rises because several States consider themselves respectively the most competent, a set of rules establishing a priority on the best-placed jurisdiction is necessary. Otherwise, the 'first come, first served' effect occurs⁴. In other words, where there are no criteria for settling jurisdiction, the *ne bis in idem* principle acts as 'an improper

¹ *Ex multis*: Willem Bas Van Bockel, *The Ne Bis In Idem Principle in EU Law* (Kluwer Law International BV 2010) 25; for an interesting point of view, see also Katalin Ligeti, 'Rules on the Application of *Ne Bis In Idem* in the EU: Is Further Legislative Action Required?' (2009) 1-2 EuCrim 37, 37 that stresses the economic reasons for avoiding a proceedings duplication.

² International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art 14 para 7 and 7th Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR), art 4.

³ Van Bockel (n 1) 2-3.

⁴ Martin Wasmeier and Nadine Thwaites, 'The development of *Ne Bis In Idem* into a transnational fundamental right in EU Law: Comments on Recent Developments' [2006] European Law Review 565, 576.

mechanism for a preference of jurisdiction'⁵. In fact, the jurisdiction that firstly prosecutes is not necessarily the best-placed jurisdiction. For this reason the *ne bis in idem* principle should be the last chance to balance States' interest in prosecuting with the individuals' right not to face a double proceeding for the same (allegedly) committed fact.

That is what usually happens within national systems. There, a complex mechanism of competence repartition among several national authorities is laid down. As a result, when an offence has been committed there are special rules by mean of which jurisdiction may be attributed to an authority rather than to another. Only where such rules have not worked out, the "exit clause" starts playing its role⁶.

The scenario is not the same within the EU Law. As the AG Sharpston stated in her Opinion on the recent case *M*, '[a]t present, there are no agreed EU-wide rules on the allocation of criminal jurisdiction'⁷. Although article 82 paragraph 1 letter b) TFEU⁸ enables the legislature to take measures on 'prevent[ion] and settle[ment of] conflicts of jurisdiction between Member States', no decisive acts have been adopted so far.

Nonetheless, a European action should be still on the agenda. As the Commission has found in its Green Paper⁹, a European measure aimed to avoid parallel prosecutions within the EU would bring about at least three advantages¹⁰. First of all, it would strengthen and make procedural safeguards homogeneous, whereas the EU agenda has not always been focused on them, but rather on security exigencies. Secondly, it would enhance national

⁵ John AE Vervaele, '*Ne Bis In Idem*: Towards a Transnational Constitutional Principle in the EU?' (2013) 9 (4) Utrecht Law Review 211, 222.

⁶ Tommaso Rafaraci, '*Ne Bis In Idem* e Conflitti di Giurisdizione in Materia Penale nello Spazio di Libertà, Sicurezza e Giustizia dell'Unione Europea' [2007] Rivista di Diritto Processuale 621, 635.

⁷ Case C-398/12 *M* [2014] OJ C253/7, Opinion of AG Sharpston, para 51.

⁸ Consolidated Version of the Treaty on the Functioning of the European Union (TFEU) [2012] OJ C326/47, art 82 para 1 lett b.

⁹ Commission, 'Green Paper on Conflicts of Jurisdiction and the Principle of *ne bis in idem* in Criminal Proceedings (Green Paper)' COM(2005) 696 final.

¹⁰ Maria Fletcher, 'The Problem of Multiple Criminal Prosecutions: Building an Effective EU Response' [2007] Yearbook of European Law 33, 39-40.

investigation systems, making them faster and no time wasting. Third and crucial, the proliferation of multiple prosecutions *de facto* marks the mutual recognition principle death and, more significantly, the lack of mutual trust between MSs. According to the mutual trust concept, no matter which State adjudicates jurisdiction, no matter if proceedings outcomes could be different under States' different regulations: it just needs one State to prosecute, whatever it is within the EU single area¹¹. An AFSJ pretending to be single should be governed by its own rules on such a crucial question.

In summary, the application of the *ne bis in idem* rule and the regulation of jurisdictional conflicts are interdependent¹²: the *ne bis in idem* cannot prevent conflicts of jurisdiction, but logically follows from the failure of their settlement failure. Besides, the EU cannot hold its piercing hands on this issue anymore.

1. Why are there positive conflicts of jurisdiction within the EU?

Before considering how the European Union has dealt with jurisdictional conflicts, the reasons why they arise should be analysed.

First of all, a clarification on the technical meaning of both positive and negative conflict is required, as the scope of application of some instruments at times is limited to just the positive conflicts. Certainly, where no Member States adjudicate jurisdiction over a case there is a negative conflict of jurisdiction, whereas a positive conflict of jurisdiction occurs where two or more Member State do so. So far, the problem was quite easy-solving. Nonetheless, it is more critical classifying cases where *in abstracto* two or more Member States have jurisdiction over a case, but *in concreto* none of them has expressed the will to exercise it. Therefore, in such cases, no States

¹¹ André Klip, *European Criminal Law* (Intersentia 2009) 430-1.

¹² Olivia Den Hollander, 'Caught Between National and Supranational Values: Limitations to Judicial Cooperation in Criminal Matters as Part of the Area of Freedom, Security and Justice within the European Union' (2008) 10 *International Community Law Review* 51, 63.

will *de facto* prosecute the alleged offence. Though it may appear a negative conflict of jurisdiction, it is actually meant as a *genus* of the *species* positive conflict of jurisdiction¹³. Hence, technically speaking, a negative conflict occurs when even in theory no MSs have jurisdiction over a case according to their national rules. In cases like that, the priority is avoiding impunity.

Then, after the elucidation above, the question posed in the title needs now to be answered.

The first reason why multiple prosecutions may occur within different States is merely up to the national legal orders. In establishing rules on exercising jurisdiction States may consider relevant not only the *locus commissi delicti*, but also other elements. For example, they could believe that the offender and victim's nationality are worthy too. As a result, if an offence has been committed in State A, but the offender is a State B's national, both States A and B may exercise their jurisdiction over the case on the basis of their national rules. It is largely evident that whether such a regulation was in force in every European MS, hundreds of cross-prosecutions all over the EU might come about¹⁴.

This scenario has been even worsened since some international instruments have set up the principle of extra-territoriality with the view of strengthening the fight against most serious crimes and avoiding dramatic effects of negative conflicts of jurisdiction¹⁵. As a result, national authorities

¹³ Chiara Amalfitano, 'La Risoluzione dei Conflitti di Giurisdizione in Materia Penale nell'Unione Europea' [2009] Diritto Penale e Processo 1293,1295; for a confirmation, please see Council of the EU, 'Initiative of the Czech Republic, the Republic of Poland, the Republic of Slovenia, the Slovak Republic and of the Kingdom of Sweden for a Council Framework Decision 2009/.../JHA on prevention and settlement of conflicts of jurisdiction in criminal proceedings' (Initiative of the Czech Republic) [2009] OJ C 39/2, Recital n 6.

¹⁴ *A contrario* Van Bockel (n 1) 37-8.

¹⁵ For a complete overview over the universal jurisdiction issues, see Amnesty International, 'Universal Jurisdiction: The Duty of States to Enact and Implement Legislation' <http://web.amnesty.org/web/web.nsf/pages/legal_memorandum> accessed 19 November 2014; see also Gaetano De Amicis and Ersilia Calvanese, 'La decisione quadro in tema di prevenzione e risoluzione dei conflitti di giurisdizione nell'UE' [2011] Europeanrights.eu 2 <<http://www.europeanrights.eu/index.php?funzione=S&op=5&id=396>> accessed 19 November 2014.

have universal competence on a selected list of offences¹⁶. It means that ‘every State (...) [may] claim (...) jurisdiction over offences, even if those offences have no direct effect on the asserting State, therefore demanding no nexus between the State assuming jurisdiction and the offence itself’¹⁷. In brief, the international community has felt the need for enhancing the fight against crimes like torture and genocide, making them “*dovunque e da chiunque*”¹⁸ (whenever and by whosoever) indictable. The Rome Statute¹⁹ itself ‘entitle[s] States to have universal jurisdiction (...), although jurisdiction to prosecute would be given to the International Criminal Court’²⁰. In the afore mentioned cases, we are dealing with political crimes and it is rather likely that undemocratic regimes — that in most cases commit those crimes — refuse to prosecute in order to defend themselves. Differently, cybercrimes are confronted with a new concept of territory, namely no States’ territory, yet Internet and the network. The 2001 Budapest COE Convention²¹ — the most relevant legal document on this matter, even if regional — has tried to face this new challenge, but the result is unsatisfactory²². If on the one hand it has posed precise criminality duties over State Parties²³, from a procedural law point of view, it relies on States’ political will to cooperate at international level²⁴.

¹⁶ Armando A. Cottim, ‘Cybercrime, Cyberterrorism and Jurisdiction: An Analysis of Article 22 of the COE Convention on Cybercrime’ (2010) 2(3) European Journal of Legal Studies 7 <<http://www.ejls.eu/6/78UK.pdf>> accessed 19 November 2014.

¹⁷ *ibid* citing Christopher L. Blakesley, ‘Jurisdictional Issues and Conflicts of Jurisdiction’ in Mahmoud Cherif Bassiouni (ed), *Legal Responses to International Terrorism: U.S. Procedural Aspects* (Martinus Nijhoff Publishers, 1988) 139, 141.

¹⁸ De Amicis and Calvanese (n 15) 2.

¹⁹ Rome Statute of the International Criminal Court (adopted 17 July 1998 entered into force 1 July 2002) 2187 UNTS 38544 (Rome Statute).

²⁰ Cottim (n 16) 23.

²¹ Convention on Cybercrime (adopted 23 November 2001, entered into force in 2004) 41 ILM 282 (2002) (Budapest Convention).

²² Cottim (n 16) 23. The EU itself called upon MSs to ratify the Convention and ‘improve judicial cooperation in cyber crime cases’. It also recognised its own limits: ‘The Union should also clarify the rules on jurisdiction and the legal framework applicable to cyberspace within the Union (...)’. See European Council, The Stockholm Programme — An Open and Secure Europe Serving and Protecting Citizens [2010] OJ C 115/22-3.

²³ Budapest Convention ch 2 s 1.

²⁴ Cottim (n 16) 17.

The effect of broadening the national courts' jurisdiction beyond their boundaries has also originated with some European instruments that call upon MSs to make certain facts indictable²⁵. Basically, with such documents the EU (before 1992, the EC) asks MSs to 'establish (...) jurisdiction, so far as permitted by international law, with regard to the offences'²⁶ indicated within the same document and in relation to which the EU prescribes the principle of extra-territoriality²⁷. It is self-evident that this approach has to be coordinated with a possible system for preventing and settling jurisdictional conflicts. Indeed, the EU action may be considered contradictory in this regard: it requests MSs to update their criminal codes and to prosecute those new offences disregarding the place where they have been committed²⁸; on the contrary, bearing in mind potential outcomes of cross-prosecutions and cross-judgments, it has tried somehow to stem their flow.

Then, generally speaking, on the one hand the extraterritoriality principle has stricken the internationalisation of criminal behaviours back; on the other, the outbreak of jurisdictional conflicts may be potentially dangerous unless rules for preventing those conflicts are not jointly provided for.

Concerns about multiple prosecutions conducted by several States for the same fact are even more actual considering the increased migratory flows all over the world. Globalisation phenomenon has made much easier for people to move from a country to another for whatsoever reason, eg tourism, study, work, business and so on. Unfortunately, there have been people profiting from the broad change for establishing or enlarging — already existing — criminal associations and making them operate with several contact points. Buzzelli reasoned as follows:

²⁵ Chiara Amalfitano, *Conflitti di giurisdizione e riconoscimento delle decisioni penali nell'Unione Europea* (Giuffrè 2006) 277-8.

²⁶ For an in-depth list see Steve Peers, *EU Justice and home Affaires Law* (OUP 2011) 824-5.

²⁷ *ibid* 816-7.

²⁸ Hans-Holger Herrnfeld, 'Mechanisms for Settling Conflicts of Jurisdiction' in Michiel JJP Luchtman (ed), *Choice of Forum in Cooperation Against EU Financial Crimes: Freedom, Security and Justice and the Protection of Specific EU-Interests* (Eleven International Publishing 2013) 185, 185.

La dimensione internazionale non coincide, comunque, con lo smantellamento del livello organizzativo locale, mantenendo ovunque i gruppi criminali ‘mobili’ o ‘itineranti’ le loro fitte diramazioni e i punti di contatto cittadini; (...) . Invece, quel che muta, in maniera considerevole, è la natura dei reati. I comportamenti delittuosi (...) non sono localizzati in termini geografici precisi (...) .²⁹

Hence, criminal groups have extended their action range to the entire world without stopping at national borders. On the other hand, this ‘delocalisation’ reveals all its flaws, included that ‘regulatory asymmetry’³⁰ that may lead to impunity. Indeed, countries where a more favourable treatment is provided for or which do not generally tend to cooperate with other States are of course preferred by offenders³¹. This mechanism is often called *forum shopping* and occurs in a context where States did not agree on a general system for jurisdiction allocation, on a mutual recognition of judicial acts or even on some other forms of cooperation.

If what has been said so far is generally true, it takes particular relevance especially in the EU’s AFSJ. Indeed, in an area where persons, goods and capital movement and circulation are free, cross-border crimes occur by definition much frequently. Maybe bearing in mind the waste of both human and financial resources that cross-prosecutions bring forth, MSs agreed on a

²⁹ However, the international dimension does not correspond with the local organisational level breakup, ‘mobile’ or ‘itinerant’ criminal groups keeping everywhere their thick branches and local contact points; (...). Instead, what significantly mutates is the nature of the offences. Criminal behaviours (...) are not localised in accurate geographical terms, (...). (self-translated)

Silvia Buzzelli, ‘Procedimenti Paralleli’, Spazio di Giustizia, Unione Europea: il Contesto Normativo e gli Aspetti Problematici [2012] Archivio Penale 1, 12 citing Council of the EU, Press Release 16918/10 of the 3051st JHA Council meeting held in Bruxelles 2nd and 3rd December 2010
 <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/118183.pdf> 14.

³⁰ Silvia Buzzelli, ‘Procedimenti Paralleli’, Spazio di Giustizia, Unione Europea: il Contesto Normativo e gli Aspetti Problematici [2012] Archivio Penale 1, 13.

³¹ *ibid.*

legal basis for the EU to take measures preventing conflicts of jurisdiction³², and the Lisbon Treaty kept it on course³³. Even if you consider the matter on a reverse perspective, things do not change: the freedom of movement itself is undermined whether an individual fear to travel through Europe feeling ‘subjects of being prosecuted, tried, and punished repeatedly in several Schengen-states’³⁴. Despite announcements and good intentions, at present fight against crimes and jurisdiction allocation do not balance out within the EU. As a confirmation, MSs have made a stand against Eurojust empowering. Even though improvements have recently been adopted³⁵ and in spite of its tasks, Eurojust has still no binding powers. How this interferes with the body’s activity has been well explained by the Head of its Legal Service:

Practice shows that although in the majority of cases, the problem can be solved without the need for a binding decision, in some other cases such binding power could have prevented the conflict from arising and would have facilitated both the exchange of information and the gathering of evidence.³⁶

Hence, the EU has set up conditions for making conflicts of jurisdiction arise, but it is still far from taking decisive measures for preventing them. It is struggling to leave the international law logic, by virtue of which ‘there is no set of common rules (...) to determine which state has jurisdiction over a crime’³⁷.

³² Consolidated Version of the Treaty of the European Union [2002] OJ C 325/5 (Amsterdam Treaty), art 31 para 1 lett d.

³³ TFEU, art 82 para 1 lett b.

³⁴ Van Bockel (n 1) 21.

³⁵ Council Decision 2009/426/JHA on the strengthening of Eurojust and amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime (Eurojust amending Decision) [2009] OJ L 138/14.

³⁶ Catherine Deboyser, ‘Eurojust’s Role in the Matter of Choice of Forum’ in Luchtman (ed), (n 28) 101, 108.

³⁷ Fletcher (n 10) 34.

2. EU acts on prevention (and settling) of conflicts of jurisdiction

However, action has been taken somehow.

Since the EU has just recently taken a binding measure – ie a FD, a historical approach is, from the authoress's point of view, the best way to present the topic. From soft-law instruments skipping finally to the FD, the steps taken or not by the EU will be analysed. It will be then clear how non-legislative measures may 'have a legal content or impact'³⁸, especially in a field – as the criminal – where MSs strongly try to defend their national sovereignty.

Moreover, considering the topic dealt with, also the Treaties historical evolution and the consequences involved³⁹ are to be kept in mind.

a. Soft-law measures

i. Communication on Mutual Recognition of Final Decisions in Criminal Matters (2000)

The first document which is worth considering is a Commission Communication on Mutual Recognition launched in 2000⁴⁰. Just after the Tampere meeting — that asked both the Council and the Commission for adopting measures on mutual recognition⁴¹, the EC document, as regards to conflicts of jurisdiction, takes a picture of the current situation. Also, it

³⁸ Maria Fletcher and Robin Lööf, *European Criminal Law and Justice* (with Bill öilmore, Elgar European Law 2008) 131.

³⁹ Peers (n 26) 9-71.

⁴⁰ Commission, 'Communication from the Commission to the Council and the European Parliament on Mutual Recognition of Final Decisions in Criminal Matters' COM (2000) 495 final.

⁴¹ European Council, 'Presidency Conclusions of the Tampere European Council' 15-16 October 1999, para 37.

explains how a defective system of jurisdiction allocation may adversely interfere with the mutual recognition principle.

The Commission proves to be perfectly aware of potential multiplication of cases originated by MSs' international duties to establish the universality principle. At the same time, it finds the EU lacks in 'rule of *lis pendens*' as well as in a 'ranking between the grounds of jurisdiction', so relying on just random provisions setting up incentives to cooperate⁴².

The first and easiest stopgap envisaged by the Commission is a 'register of pending cases' with the aim of facilitating mutual information about records and files and this way preventing conflicts of jurisdiction. Nonetheless, the Commission did not think that it could suffice. In fact, in the absence of criteria for jurisdiction distribution both positive and negative conflicts would amount to derogations from mutual recognition principle, in essentials making it vain.

Walking this path, the EU's executive power figured out both a vertical and a horizontal system⁴³, and considered the pros and cons of creating a detailed set of rules. Firstly, it brought into focus the possibility of a European body, ie ECJ, Eurojust or other *ad hoc* body, deciding over which States should be the more competent according with jurisdictional criteria. Apart from problems linked to the nature of such a body, the central issue would be how strictly these criteria should be drawn down and consequently how much discretion should be given to that body. On the one hand, there is a 'restrictive' model supplying strict criteria by virtue of which the selected body should allocate jurisdiction. The Commission opted in favour of such an approach, since it does not leave any margin of appreciation. Consequently, MSs may be sceptic, but just as to the interpretation given in a particular case. In contrast, a system where guidelines are laid down, but where the body has still its own discretion may attract strong criticism from MSs⁴⁴.

⁴² COM (2000) 495 final, para 13.

⁴³ Actually, these two options are not necessarily alternative.

⁴⁴ COM (2000) 495 final, para 13.1.

The second possibility, eg the horizontal system, consists in the introduction of EU rules⁴⁵ on exclusive jurisdiction applying to both positive and negative conflicts, so leaving apart the EU body's involvement. Hence, which vantages should they bring? The Commission stressed out that, where clear rules are commonly established, it is easiest for MSs to waive their jurisdiction. Indeed, they would make overcome the dual criminality requirement, from a substantial criminal law point of view, and the differences between opportunity and legality principle, from a procedural criminal law point view. Moreover, a system so structured would have one more advantage: it would let MSs set their criminal law rules up, so enjoying their claimed sovereignty. In addition, providing a rigid and clear list of criteria would prevent both defendant and prosecutors from selecting a jurisdiction for its, respectively, clemency or rigour.

Envisaging a self-standing system, the European Commission made a room for a remedy mechanism in case of interpretation doubts. Situations where rules may be bivalent *in concreto*, might be solved by the ECJ, Eurojust or other body, which would be the fastest. Actually, as regards to the first two bodies, they would not be asked to do something different from what they currently do⁴⁶. Besides advantages, the Commission also foresaw some negative reactions. Some MSs are under the international obligation to assume jurisdiction in certain cases. As a result, a European system calling them upon for waiving it would make them breach those duties. Thus, a system that tends to effectiveness should take into account such further issues, and the relative proposals should take them into account. Another Commission's concern was the expectable length of negotiation time. Bearing in mind that even at present there is no EU system binding MSs to waive or adjudicate jurisdiction, what may be now on the bench, was in 2000 likely inconceivable. Today it may be observed that at the time the Commission maybe walked too many steps

⁴⁵ In 2000, only third pillar instruments could be envisaged for criminal matters.

⁴⁶ For the Eurojust's objectives see Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime [2002] OJ L 63/1; instead, for the ECJ's jurisdiction see TFEU, art 267.

forward, since even the 9/11 did not boost the JHA development so far.⁴⁷ A demonstration of what has just been stated is the Programme of measures to implement the principle of mutual recognition of decisions in criminal matters, drafted by the Council in 2001⁴⁸: there is no trace of a structured system for preventing jurisdiction. Instead, two other measures were proposed: the first based on cooperation and on the future tasks of Eurojust; the second on the possibility of creating an efficient information system among MSs.

ii. Greek Presidency Proposal (2003)

Just after two days from the ECJ's *Gözütok and Brügge* ruling⁴⁹, the Greek government decided to take action on the *ne bis in idem* principle. In the wake of the Tampere European Council meeting in 1999⁵⁰ and the consequent 'Programme of measures'⁵¹, the Greek Presidency submitted a Proposal for a Framework Decision⁵², whose aim is expressly to replace the regulation on the *ne bis in idem* provided for by the Schengen Agreement⁵³ with a new one⁵⁴. This goal corresponds, in fact, with measure number 1 of the Programme afore mentioned. Furthermore, the proposed FD tends 'to reduce the range of exceptions (...) present (particularly) in article 55 of the'⁵⁵ CISA.

⁴⁷ COM (2000) 495 final, para 13.2.

⁴⁸ Council of the EU, 'Programme of measures to implement the principle of mutual recognition of decisions in criminal matters' [2001] OJ C-12/10, measures 11-12.

⁴⁹ Joined Cases C-187/01 and C-385/01 *Gözütok and Brügge* [2003] ECR I-1345.

⁵⁰ European Council, 'Presidency Conclusions of the Tampere European Council' 15-16 October 1999, para 37.

⁵¹ Council of the EU, 'Programme of measures to implement the principle of mutual recognition of decisions in criminal matters' [2001] OJ C12/10.

⁵² Council of the EU, 'Initiative of the Hellenic Republic with a view to adopting a Council Framework Decision concerning the application of the "ne bis in idem" principle' (Initiative of the Hellenic Republic) [2003] OJ C 100/24.

⁵³ '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' (CISA) [2000] OJ L239/19, artt 54-57.

⁵⁴ Initiative of the Hellenic Republic, art 9; Vervaele (n 5) 220.

⁵⁵ Tommaso Rafaraci, 'Procedural Safeguards and the Principle of *Ne Bis In Idem* in the EU' in Bassiouni MC Militello V and Satzger H (eds), *European Cooperation in Criminal Matters* (CEDAM 2008) 363, 394; the CISA regulation will be deeply assessed in Chapter II.

As far as we concern, what is significant within the Proposal is the definition of *lis pendens* and a ‘draft’ of a system of jurisdiction allocation. By virtue of article 1 — which lists all the relevant definitions — letter d),

‘*lis pendens*’ shall mean: a case where, in respect of a criminal offence, a criminal prosecution has already been brought against a person, without a judgment having been delivered and where the case is already pending before a court.

Honestly speaking, it is nothing different from what anyone could have expected from the definition of ‘pending case’. Nonetheless, having written it down may have been relevant in the light of the *Pupino* judgement⁵⁶, which afterwards broadened the spectrum of Framework Decisions interpretation⁵⁷.

The second interesting element is the attempt to set up a system for the allocation of jurisdiction among competent MSs⁵⁸. According to the Proposal, where a number of MSs are entitled to exercise their jurisdiction over the same fact, they shall enter into consultation with the aim to decide which one has the best-placed jurisdiction. The State ‘better guarantee[ing] the proper administration of justice’⁵⁹ is that of the *locus commissi delicti*, of the offender’s nationality or residence, of the victims’ origin and/or of the place where the offender was found. Once MSs reach an agreement on which jurisdiction shall be preferred, the pending cases in the other MSs shall be suspended and the State of the preferred forum shall be ‘immediately’⁶⁰ informed of that. However, if ‘for any reason’⁶¹ a final decision is not given, the State of the preferred forum should inform the MSs where cases had been previously suspended.

⁵⁶ Case C-105/03 *Pupino* [2005] ECR I-7879.

⁵⁷ Peers, (n 26) 29–30.

⁵⁸ For a clearer and faster explanation of this system, please see Appendix DOC 1, p 103.

⁵⁹ Initiative of the Hellenic Republic, art 3 (a).

⁶⁰ *ibid* (c).

⁶¹ *ibid*.

Well, in spite of the symbolic relevance of having set such mechanism, there are some gaps. First, the document leaves out how the MSs may learn about an existing conflict of jurisdiction. Although some may think it is a detail, it is actually the premise of the entire system provided for. Secondly, it raises some points. Are the criteria set in Article 3 exhaustive? Are they hierarchically listed? Some authors⁶² think they are not. However, these are just examples of questions the Proposal did not answer⁶³. Moreover, it loses sight of essential procedural safeguards. In particular, disregarding that every MS has its own regulation, it does not establish any time limit on them for holding, neither for deciding whether to resume jurisdiction after the case has been suspended⁶⁴.

Since the Initiative of the Greek Presidency finally did not take further steps, at present its attempt is practically abortive. Likely, MSs were reluctant to accept binding rules and, in spite of negotiations, the agreement was not found within the Council⁶⁵. In addition, the announcement of a Commission Green Paper on the topic definitely stopped the Greek Proposal's *iter*⁶⁶.

iii. Freiburg Proposal (2003)

As already supported above, the *ne bis in idem* principle may be considered as an *extrema ratio* operating when a system for jurisdiction adjudication — if present — fails. This was exactly what a research group of fellows at the Max Planck Institute for Foreign and International Criminal

⁶² Amalfitano (n 25) 275-8.

⁶³ For further critics, see *ibid* 283-9.

⁶⁴ JUSTICE <www.justice.org.uk>, 'Implementing the ne bis in idem principle in the EU' (May 2003) <http://www.asser.nl/upload/eurowarrant-webroot/documents/cms_eaw_12_1_nebisinidemjustice.pdf> accessed 20 August 2014.

⁶⁵ De Amicis and Calvanese, (n 15) 6; Clara Tracogna, 'Ne Bis In Idem and Conflicts of Jurisdiction in the European Area of Liberty, Security and Justice' (2011) 2 (XVIII) LESIJ 55, 68-9; Vervaele, (n 5) 221-2.

⁶⁶ Peers, (n 26) 829; Tracogna, (n 65) 69; Council of the EU, Press Release 11161/04 of the 2600th JHA Council meeting held in Bruxelles 19 July 2004 <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/81504.pdf> 15.

Law⁶⁷ kept in mind. With a view to the XVIIth International Congress of the International Association of Penal Law (IAPL)⁶⁸, they drafted a Proposal on Concurrent Jurisdictions and the Prohibition of Multiple Prosecutions in the European Union⁶⁹. They figured out a sole system where prevention of jurisdictional conflict and the principle of *ne bis in idem* are merged in the view of the same goal, ie limiting the effects of multiple prosecutions as early as possible. Hence, they suggested a three-stage approach where subsequent stages take place in case the previous did not work out. In essentials, the scheme revolves around a spontaneous settlement of conflicts, for it fosters the exchange of information among the interested authorities⁷⁰.

The first step of the system calls for a preventive mechanism for conflicts among jurisdictions. A MS prosecuting a certain case shall alert the competent authorities of other MSs where ‘a prosecution [of the same case] has been or could be initiated’⁷¹. Then, the notified MSs shall express their interest in prosecuting within 3 months. Next, within a further 3 months, all the involved MSs shall enter into consultations and take a decision on which of them ‘will better guarantee the proper administration of justice’⁷². A new element should instantly be noted: deadlines. It has already been asserted above that some criticised the Hellenic Initiative because of its lack of a harmonized time limit by which MSs would have reached their findings⁷³. Well, here a first reply to that demand may be found. Indeed, in the absence of a common time lapse,

⁶⁷ <<https://www.mpicc.de/en/home.cfm>> accessed 19 November 2014.

⁶⁸ For the complete list of Congresses organised by the IAPL/AIDP, see <http://www.penal.org/?page=mainaidp&id_rubrique=13&id_article=17> accessed 19 November 2014.

⁶⁹ Anke Biehler Roland Kniebühler Juliette Lelieur-Fischer and Sibyl Stein (eds), ‘Freiburg Proposal on Concurrent Jurisdictions and the Prohibition of Multiple Prosecutions in the European Union’ (Freiburg Proposal) (Max-Planck-Institut für ausländisches und internationales Strafrecht Freiburg im Breisgau, Br., November 2003) <<http://www.mpicc.de/shared/data/pdf/fa-ne-bis-in-idem.pdf>>.

⁷⁰ For a clearer and faster explanation of this system, please see Appendix DOC 1, p 101.

⁷¹ *ibid* §1 (1).

⁷² *ibid* §1 (3).

⁷³ JUSTICE <www.justice.org.uk>, ‘Implementing the ne bis in idem principle in the EU’ (May 2003) <http://www.asser.nl/upload/euowarrant-webroot/documents/cms_eaw_12_1_nebisinidemjustice.pdf> accessed 20 August 2014.

every MS should rely on their own regulations that are likely divergent. In short, the legal certainty would go missing, despite being a fundamental value not only for the defendant, but also for the entire society.

Furthermore, paying also attention to procedural safeguards, the Proposal provides for a judicial review of MSs' decision at the instance of the accused. Indeed, as we may read in the Commentary, 'the right to judicial review is essential as a counterbalance to the system of self-coordination by the prosecution authorities'⁷⁴. In particular, the Freiburg group thought the ECJ (the former Court of Justice of the European Communities) would be the best body to be given this task. In addition, the intervention of the ECJ was envisaged for making up for the decision about the forum MS. Well, the special role attributed to the ECJ cannot be ignored. It is largely incontestable that by virtue of the Proposal the ECJ would assume an apical position in jurisdictional conflicts management. In fact, defendants, given the opportunity to fight over the forum, will likely take this chance. Nonetheless, such ECJ's new function is as interesting as complicated to be achieved. The drafters of the Proposal themselves were aware that it would require an 'enlargement of the [ECJ's] competencies'⁷⁵, so a Treaty modification that implies complex political issues. Thanks to its 'independence' and 'transparency', the researchers gave the ECJ such a role at the expense of eg Eurojust: the Freiburg group considers it not 'the best placed to guarantee the rights of the suspect'⁷⁶. It is quite undisputed in doctrine that such a review activity should rest with a judicial body, rather than a political one: a jurisdictional control, rather than an arbitrate is required⁷⁷.

Another key issue remains how to select the MS that 'will better guarantee the proper administration of justice'⁷⁸. For this purpose, the Proposal

⁷⁴ Freiburg Proposal, 15.

⁷⁵ *ibid* 15; the same concern was expressed by Daniel Flore and Serge De Biolley, 'Des organes juridictionnels en matière pénale pour l'Union européenne' *Cahiers de Droit Européen* [2003] 597, 614.

⁷⁶ *ibid* 16.

⁷⁷ Flore and De Biolley (n 75).

⁷⁸ Freiburg Proposal, §1 (1).

suggests a list of criteria that should guide the MSs' decision. Even though not exhaustive yet merely indicative⁷⁹, the list is still longer than that envisaged by the Greek Initiative⁸⁰. In addition to what the latter suggested, the Proposal sets out criterion of the 'location of evidence'⁸¹; of the 'appropriate place for executing the sanction'⁸²; last of all, it considers 'other fundamental interests of a MS'⁸³. Even if the list is 'intended to be complete' and MSs cannot 'neglect' it, they may introduce a new criterion whether it is felt relevant in the prosecuting cases⁸⁴. Of course, such a derogation is supposed to be exceptional, but its potentially negative effects may be even strengthened by the open clause. In fact, MSs may justify their substantial disregard for the common criteria, adducing fundamental national interests. The Commentary tried to give some examples of what could be the content of such interests: the MS's 'independence, the integrity of its territory, its internal and external security, its democratic organisation, its means of defence and its diplomatic service as well as the safeguard of the environment and natural resources'⁸⁵. Therefore, the Proposal does accept an extensive interpretation of the 'fundamental interest' clause⁸⁶. This aspect of the document is actually what drew the most of the criticism. Indeed, some are concerned about a clause that can easily supply an alibi for those MSs not willing to waive their punitive powers⁸⁷. Moreover, these criteria are even not intended to be hierarchical⁸⁸. Even though aware of such *vulnus*, the Freiburg group followed the logic of 'the lesser of two evils, the lesser evil'. In order to reduce exceptions to the *ne bis in idem* and prevent

⁷⁹ *ibid* 14.

⁸⁰ Initiative of the Hellenic Republic, art 3 (a).

⁸¹ Freiburg Proposal, §1 (3) (d).

⁸² Freiburg Proposal, §1 (3) (e).

⁸³ Freiburg Proposal, §1 (3) (g).

⁸⁴ *ibid* 14.

⁸⁵ *ibid* 14-5.

⁸⁶ *ibid* 15.

⁸⁷ Pier Paolo Paulesu, '*Ne Bis In Idem* e Conflitti di Giurisdizione' in Roberto E Kostoris, *Manuale di Procedura Penale Europea* (Giuffrè 2014) 343, 361.

⁸⁸ Freiburg Proposal, 14; Paulesu, (n 87) 361.

those derogations from block the principle practicality, the Freiburg project anticipated the consideration of those national interests in the first stage of cooperation, where on principle there could be still room for discussion and negotiations.

Notwithstanding, the Proposal went somehow ahead, by taking also into account the event when MSs did not reach an agreement on the forum and two proceedings were being brought. Consequently, in a case where the same person has to serve two decisions for the same fact, the *ne bis in idem*⁸⁹ prevents this absurd outcome. Granted the reasoning on the ‘fundamental interest’ clause, just an exception is provided for: the principle does not apply if ‘the first proceeding was held for the purpose of shielding the person concerned from criminal responsibility’⁹⁰. Replacing a system where MSs may overcome the *ne bis in idem* by mean of a unilateral declaration, the Proposal politically ‘blackmails’ MSs: if a State intends to ignore the foreign proceeding, it should accuse its European relative of having unfairly conducted it. In essence, the Freiburg initiative, as already said, aims to anticipate in early stage problems that in a further one might become unsolvable and, consequently, would violate individuals’ rights.

The third and last step planned by the Proposal takes into consideration the most undesirable hypothesis: the failure even of the second stage. Where an agreement on the best-placed jurisdiction has not been reached, the principle of *ne bis in idem* has not been applied and one sentence has already been totally or partially served, then the project asks MS enforcing the second judgment for deducting the served period from the oncoming. This is the so-called ‘accounting principle’⁹¹ or principle of ‘taking into account’⁹².

In conclusion, two more considerations are required.

⁸⁹ *ibid* §6.

⁹⁰ *ibid* §9.

⁹¹ *ibid* §11 (1).

⁹² John AE Vervaele, ‘Fundamental Rights in the European Space for Freedom, Security and Justice: the Praetorian *ne bis in idem* Principle of the Court of Justice’ in Erkki J Hollo (ed), *National Law and Europeanisation* (Suomalainen Lakimiesyhdistys ry 2009).

First, the Freiburg Proposal fundamentally envisaged a horizontal system, based on spontaneous cooperation among MSs. However, by empowering the ECJ of those functions seen above, they vertically integrated the system. In order to counterbalance eventual abuses or predominating national matters, a supervising organ has been provided for. In summary, the Freiburg project may be considered as a mixed system, where its vertical components are understood as buffers saving the mechanism when it is going to fail.

Second, regarding the content of the Proposal, it tends to prevent positive conflicts both *in concreto* and *in abstracto*⁹³. As to the latter, two provisions are relevant. The first is that of the ECJ's competence of supplying an agreement in case MSs were not able to⁹⁴. The second, instead, is titled 'Renunciation of proceedings'⁹⁵ and takes into account the event of no final decision delivered by the forum MS. In such a case, the Proposal puts forward again a cooperative activity on the basis of which the 'Member State whose forum was preferred (...) shall without delay inform the competent authorities of the other Member States having jurisdiction'. Both clauses prevent the system from coming to a stop.

To conclude, a further norm is worthy. Being an autonomous *corpus*, the Proposal also considers the possibility of a conflict between at least one MS and a European organ. The regulation remains the same, but the subjects are not just States. The provision is relevant and worth mentioning, especially relating to competition law. Nonetheless, as marginal relating to our topic, it was just touched on.

⁹³ For the definition of both, please see p 3.

⁹⁴ Freiburg Proposal, §3; the provision has already been discussed above.

⁹⁵ *ibid* §4.

iv. Commission Green Paper (2005)

Green Papers are documents published by the European Commission to stimulate discussion on given topics at European level. They invite the relevant parties (bodies or individuals) to participate in a consultation process and debate on the basis of the proposals they put forward. Green Papers may give rise to legislative developments that are then outlined in White Papers.⁹⁶

The quotation above shows how the official website of the European Union describes the GP instrument. Therefore, considering its nature, a real and definite Proposal as those discussed above has not to be expected. Green Papers, instead, put forward legislative perspectives, but in a very general way. With the aim to raise discussions and investigate political consensus, a GP envisages different options to achieve a goal or even several goals and the divergent effects of each⁹⁷.

What is true for the EU Law in general becomes dramatically true for the former third pillar matters, where ‘it is vital that pre-legislative debate and scrutiny is robust’⁹⁸. As Fletcher proficiently illustrates⁹⁹, there are two reasons why that sentence is actual. First of all, the European Commission may not be content with just the least consensus it needs, but has to reach the further one. Reactions to the issued GP may give a real picture of what MSs are ready for. Such an assessment allows the Commission itself to lower or extend its aim in putting forward the relevant legislative proposal, and realistically expect the purposed result.

In particular, here the GP on conflicts of jurisdiction and the principle of *ne bis in idem* in criminal proceedings¹⁰⁰ will be discussed. It is actually much

⁹⁶ <http://europa.eu/legislation_summaries/glossary/green_paper_en.htm>.

⁹⁷ Jean Pradel Geert Cortens and Gert Vermeulen, *Droit Pénal Européen* (3rd edn, Dalloz 2009) 533.

⁹⁸ Fletcher (n 10) 53.

⁹⁹ *ibid* 53-4.

¹⁰⁰ COM(2005) 696 final.

focused on creating a mechanism for the choice of jurisdiction rather than on the *ne bis in idem* principle. Indeed, the double jeopardy rule does not prevent damage caused by a flawed system of jurisdiction allocation. In fact, it occurs later and it tries to contain what an effective system of conflict prevention should have avoided. Therefore, looking at the mechanism for the choice of jurisdiction instead of the *ne bis in idem* principle is a practical example of what the proverb ‘prevention is better than cure’ should suggest.

Furthermore, the reasons why an EU approach of such a matter is justified have been already explored above¹⁰¹; likewise, the Commission found the principle of subsidiarity satisfied.

The Commission project pinpoints two important prerequisites to the whole system¹⁰². Firstly, the GP assumes a functioning system of information exchange between MSs. It leaves open the possibility of establishing either an optional or binding exchange mechanism. In addition, it infers that all the national competent authorities have the power to waive their jurisdiction, even if they would have had to prosecute in cases where no other MSs had the jurisdiction too. More, they should have the power to halt the criminal proceedings already initiated, if another forum is preferred. Such an arrangement would be already enough to rise a huge problem. The power to waive jurisdiction — when the competent authorities actually have it — may be contrary to national legal orders or even their Constitutions¹⁰³. The so-called legality principle¹⁰⁴ should be directly addressed with a special provision considering derogation in such circumstances. After all, it should be considered satisfied in a single AFSJ, where whosoever prosecutes is uninteresting¹⁰⁵.

The GP firstly provides for a step aimed to the exchange of information between the competent authorities of the MSs¹⁰⁶. When a State has already

¹⁰¹ p 2-3.

¹⁰² COM(2005) 696 final, 4.

¹⁰³ Fletcher, (n 10) n 34.

¹⁰⁴ For an overview on the legality an opportunity principle and their relevance within the EU, please see Klip, (n 11) 250-4.

¹⁰⁵ *ibid.*

¹⁰⁶ COM(2005) 696 final, 4-5.

initiated a prosecution or it is going to do so, it is supposed to inform the other MSs, those interested. As far as the project concerns, the interest in prosecution occurs when a case has ‘significant links to another MS’¹⁰⁷. The notified State shall reply in due time to the ‘initiating State’¹⁰⁸, but the Commission did not specify whether this period should be predetermined or discretionary. However, whether it is predetermined, there should also be a ‘system’ that ‘allow[s] for reactions outside the deadline on an exceptional basis’¹⁰⁹. As far as other MSs do not express their interest in prosecuting, the initiating MS may go ahead and prosecute.

Otherwise, a consultation/discussion phase shall be opened by the interested MSs¹¹⁰. Its purpose is paving the way to an early consensus on which State should exercise jurisdiction. Indeed, the Commission did not support ‘a duty to enter into discussions’; instead, it believes that MSs are able to reach an agreement on their own volition without being forced to do so. At most, ‘they could ask for the assistance of Eurojust and/or other Union mechanisms of assistance’¹¹¹, eg the European Judicial Network. Notwithstanding, according to their national laws, some of the MSs could need a written agreement, in order to be sure that a further discussion will not take place and to be able to halt existing proceedings. Therefore, in the GP framework they may fix their accord and may make it binding. In such an event, an EU model agreement may be drafted as well as a common denunciation method may be found.

Whether the second step did not lead to an arrangement, the Commission figured out a real dispute settlement mechanism¹¹². The key player of such a phase is a mediator that shall guide a ‘structured dialogue’¹¹³ among the interested parties. In order to do so, the Commission figured out a centralised

¹⁰⁷ *ibid.*

¹⁰⁸ *ibid.*

¹⁰⁹ *ibid.*

¹¹⁰ *ibid* 5.

¹¹¹ *ibid.*

¹¹² *ibid* 5-6.

¹¹³ *ibid* 5.

mediation in a European organ's hands: it thought about Eurojust or even about the creation of a new body 'composed of senior national prosecutors and/or judges'¹¹⁴. In any case, this body, either Eurojust or a new one, should be referred to by any interested MS or should automatically make the scene after the elapsing of a certain period provided in step 2.

While in step 2 unclear and cloudy reasons guide the consensus reach, the forum chosen during the step 3 should be identified on the basis of objective¹¹⁵ criteria. A list should be provided for by a future EU instrument, and it might contain not only those criteria to be taken into account, but also — if need be — those not to be taken into account. Nonetheless, the Commission considered those referring elements to be 'applied and weighted in a rather flexible case-by-case approach, ie the competent authorities would need to have a considerable scope of discretion'¹¹⁶. Thus, the GP rejects a fixed list of criteria, yet it puts forward some of those considered to be included in a future EU instrument. In particular, these criteria are:

territoriality, [those] (...) related to the suspect or defendant, victims' interests, [those] related to State interests, and certain other[s] (...) related to efficiency and rapidity of the proceedings.¹¹⁷

The GP considers also the possibility of either ordering criteria into a hierarchy or approaching them more flexibly. No matter which of the two options is selected, the Commission found necessary establishing at least a 'general guiding principle for jurisdiction allocation'¹¹⁸. For instance, it suggests some principles regarding the defendant's interests, eg reasonableness and/or due process. As a partial conclusion, it may be affirmed that the Commission tried to arrange the softest possible system: it suggests a list of

¹¹⁴ *ibid.*

¹¹⁵ *ibid* 8.

¹¹⁶ *ibid* 7-8.

¹¹⁷ *ibid* 8.

¹¹⁸ *ibid.*

criteria but it is neither exhaustive nor hierarchical. MSs are free to graduate criteria however they rank their own interests. The only external limit should be a ‘fair administration of justice’¹¹⁹, a comprehensive as well as a vague concept.

Whether an agreement among MSs is achieved, the same outcomes as in step 2 are possible. Hence, MSs may choose to either spontaneously stop initiated proceedings or prevent to initiate a new one; alternatively, they may sign a binding agreement on which of them is the preferred forum. Otherwise, whether such an agreement has not been reached, ‘the *ne bis in idem* principle would come “back” into play’¹²⁰.

Speculating all the possible options, the Green Paper also proposes an eventual, but debatable fourth step¹²¹. Before activating the *ne bis in idem*, yet after the failure of step 3 too, the Commission even envisaged a binding decision taken by an EU body. With regard to this issue, Fletcher noted:

Arguably, only a binding EU decision on case allocation by an EU judicial body (such as the European Court of Justice or a new preliminary chamber thereof) would fully circumvent the risk of a breach of the *ne bis in idem* principle and also avoid problems of divergence and inconsistency that might arise where this role is carried out by *national* judicial bodies.¹²²

Nonetheless, the Commission itself, being more realistic than the Freiburg group, understood the complexity and difficulties linked to such an arrangement. It thought of a new body to be established, since mediating and taking binding decisions may not coexist in the same body. More, a system for judicial review would be ineluctable.

At present, neither national courts, nor the ECJ would have the power to challenge a binding decision taken by an EU body. Nevertheless, while

¹¹⁹ *ibid.*

¹²⁰ *ibid* 6.

¹²¹ *ibid.*

¹²² Fletcher (n 10) 53.

national courts may not inspect the activity of an EU body, the ECJ's powers may be enlarged¹²³. On the other hand, when 'no binding agreements [took] place [, judicial review] could possibly be left to the discretion of the Member States and their national laws'¹²⁴.

Furthermore, the GP distinguishes between the possibility to challenge a decision at the pre-trial stage and later in the trial phase. In the pre-trial stage, the individuals¹²⁵ role is usually limited¹²⁶. Still, they should be informed about the preferred forum, and possibly be involved in the decision-making process. Since it may undermine the individuals' position as well as the investigation evolution, national courts are empowered to control whether such a risk occurs, and, whereas it happens, the concerned persons may be informed 'at the latest when an indictment is being sent before a court'¹²⁷. Otherwise, the competent authorities shall be requested to 'promptly' give the relevant information. A further review in the trial phase¹²⁸ is also provided for, but still relied on national courts. Their yardstick shall not be the choice of forum as a whole; instead, they shall control 'whether the principles of reasonableness and the due process have been respected'¹²⁹. It may be a reductive check, but there is who thinks that

By definition, the reasonableness of any case allocation decision cannot be limited to the interests of the legal order of one single Member State. Loyal cooperation implies that the interests of the other stakeholders are also taken into account.¹³⁰

¹²³ COM(2005) 696 final, 7.

¹²⁴ *ibid* 6.

¹²⁵ Individuals mean both victims and witnesses.

¹²⁶ COM(2005) 696 final, 6.

¹²⁷ *ibid*.

¹²⁸ 'and/or at an intermediary phase', *ibid*.

¹²⁹ *ibid*.

¹³⁰ Michiel JJP Luchtman, Choice of Forum in an Area of Freedom, Security and Justice (2011) 7 (1) Utrecht Law Review 74, 94-5.

In such a framework, the ECJ keeps just its competence for the preliminary rulings¹³¹. In essentials, this system of judicial review is the sole part concerning procedural safeguards and the role of defence. It is rather evident it cannot suffice¹³². In particular, it has been noted that strict time limits for actions would have ensured not only a ‘fair administration of justice’, but also individual’s rights. In addition, only the step 4 would guarantee the case allocation and a system not subject to different national regulations, the latter being fundamental in order to equally treat all the parties involved.

During the proceedings, ‘new findings’¹³³ may change the situation and what was the best-placed jurisdiction may not be the same anymore. For cases like these, the Commission created the so-called priority rule alongside the system for jurisdiction allocation. According to that rule, at the moment of sending of an accusation a ‘leading’¹³⁴ MS shall be compulsorily appointed and onwards proceedings shall be concentrated in it. In contrast, the other interested MSs shall ‘halt their proceedings and refrain from initiating new ones’¹³⁵. The aim of such a rule is to adjudicate jurisdiction only when the evidence framework is complete and when the burdens begin to weigh on individuals. Instead, its purpose is not to let MSs overlap the allocation system. Therefore, the Commission put forward some precautions. The accusation may not be sent before a nation court if the allocation mechanism described above has not been fulfilled. Moreover, if this clause is not respected, another MS may ask for the halting of such a court proceeding. In any case, EU and international instruments of assistance remains operative, and MSs ‘should afford assistance even pro-actively’¹³⁶.

¹³¹ Rafaraci (n 55) 398.

¹³² Fletcher, (n 10) 53; ECBA (European Criminal Bar Association), ‘Response by ECBA to the Green Paper and the Working Paper on Conflicts of Jurisdiction and the Principle of *Ne Bis In Idem* in Criminal Proceedings presented by the European Commission’ (28 March 2006) 2-4 <<http://www.ecba.org/extdocserv/jurisdictionnebisinidemresponsefinal.PDF>> accessed 3 September 2014.

¹³³ COM(2005) 696 final, 7.

¹³⁴ *ibid.*

¹³⁵ *ibid.*

¹³⁶ *ibid.*

In conclusion, the Green Paper suggests a rather innovative approach¹³⁷ to the problem of multiple prosecutions. Still, its analysis is completely unhooked from any empirical data, and — in fact — it is not combined with an ‘impact assessment’ or a ‘formal costs-benefits’¹³⁸. Maybe because the MSs did not express their enthusiasm about the GP’s ideas, the Commission did not follow up its proposals and even a White Paper was not put forward¹³⁹.

b. A turning point? Considerations on the 2009 Framework Decision.

In 2009, the Czech Presidency came out with a Proposal for a Framework Decision on prevention and settlement of conflicts of jurisdiction in criminal proceedings¹⁴⁰. It rose from the ashes of the Greek Initiative as well as of the Commission’s Green Paper¹⁴¹. At that point, respectively in 2003 and 2005, time was not ripe. Indeed, a Framework Decision regulating conflicts of jurisdiction was awaited by the end of 2006¹⁴², but finally it was not put forward¹⁴³.

¹³⁷ De Amicis and Calvanese (n 15) 7.

¹³⁸ ECBA (European Criminal Bar Association), ‘Response by ECBA to the Green Paper and the Working Paper on Conflicts of Jurisdiction and the Principle of *Ne Bis In Idem* in Criminal Proceedings presented by the European Commission’ (28 March 2006) para 2.1 <<http://www.ecba.org/extdocserv/jurisdictionnebisinidemresponsefinal.PDF>> accessed 3 September 2014; Standing Committee of Experts on International Immigration, Refugee and Criminal Law, ‘Views of the Standing Committee on the European Commission’s Green Paper and the Working Paper on Conflicts of Jurisdiction and the Principle of *Ne Bis In Idem* in Criminal Proceedings’ (30 March 2006) Statewatch, 2 <<http://www.statewatch.org/news/2006/apr/meijers-committee-reaction-ne-bis-in-idem-Greenpaper.pdf>> accessed 3 September 2014.

¹³⁹ Peers (n 26) 830.

¹⁴⁰ Council of the EU, ‘Initiative of the Czech Republic, the Republic of Poland, the Republic of Slovenia, the Slovak Republic and of the Kingdom of Sweden for a Council Framework Decision 2009/.../JHA on prevention and settlement of conflicts of jurisdiction in criminal proceedings’ (Initiative of the Czech Republic) [2009] OJ C 39/2

¹⁴¹ Tracogna (n 65) 69.

¹⁴² Den Hollader (n 12) 53; Wasmeier and Thwaites (n 4) 578.

¹⁴³ Vervaele (n 5) 221.

‘This Framework Decision is the first important step in European Union law on prevention of conflicts of jurisdiction’¹⁴⁴. Before its adoption¹⁴⁵, the only regulation was article 54 CISA, an unsatisfactory norm whose outcome is the ‘first come, first served’ rule¹⁴⁶. The Schengen Agreement does not guarantee the adjudicating jurisdiction being the best-placed one; instead, it simply acknowledges who was the first to start the proceedings or to deliver a judgment.

The main purpose of the FD is circumventing parallel prosecutions from being carried out, with a view of reducing *ne bis in idem* violations¹⁴⁷. Again, the idea is countering the harmful effects of those violations by providing for anticipatory bars. In order to achieve this goal, the Council conceived a system for making MSs mutually aware of concurrent proceedings¹⁴⁸, followed by a mechanism to let MSs make arrangements for a preferred forum. Nonetheless, the FD does not go beyond the consultation phase¹⁴⁹ and maybe the term ‘consultation’ itself marks its modest objectives¹⁵⁰.

Besides, there are hypotheses not included in the scope of the application of the FD. It does not consider, for example, the international *lis pendens* where more accomplices that committed the same crime are prosecuted in different MSs¹⁵¹. According to article 3, which provides for the relevant definitions,

¹⁴⁴ Commission, ‘Report from the Commission to the European Parliament and the Council on the implementation by the Member States of Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings’ (Report on the Implementation) COM (2014) 313 final, 3.

¹⁴⁵ Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of jurisdiction in criminal proceedings (FD on conflicts of jurisdiction) [2009] OJ L328/42.

¹⁴⁶ Tracogna (n 65) 66.

¹⁴⁷ FD on conflicts of jurisdiction, art 1 para 2 lett b and recital 3.

¹⁴⁸ *ibid* art 2.

¹⁴⁹ De Amicis and Calvanese (n 15) 10.

¹⁵⁰ Daniel Flore, *Droit Pénal Européen: les Enjeux d’une Justice Pénale Européenne* (Larcier 2009) 540.

¹⁵¹ De Amicis and Calvanese (n 15) 7.

‘parallel proceedings’ means criminal proceedings, including both the pre-trial and the trial phases, which are conducted in two or more Member States concerning the same facts involving the same person; (...)

In addition, where a more flexible and faster solution is available between MSs, the FD does not apply¹⁵². Indeed, in such a case it would burden MSs with an ‘undue bureaucracy’¹⁵³. Furthermore, cases under competition law are excluded from the FD scope of application too¹⁵⁴.

Basically, the FD puts forward a two-phase mechanism, a phase of the exchange of information and another of direct consultations. The mechanism starts when a prosecuting MS has ‘reasonable grounds to believe that parallel proceedings are being conducted in another Member State’¹⁵⁵. Whether a MS has such grounds, it shall touch the other MS involved, in order to obtain a confirmation or denial of the existence of parallel proceedings. Although the FD presumes that MSs may easily understand which is the foreign competent authority they shall refer to, it also mentions the possibility to ask the European Judicial Network and its contact points for a help¹⁵⁶. For the same purpose, while implementing the FD, MSs shall communicate to the General Secretariat of the Council which national authorities act in accordance with the FD, and the General Secretariat shall make this information ‘available to all Member States and to the Commission’¹⁵⁷. Where a MS has been contacted, it is duty bound to reply, and the time by which it shall do so depends on some circumstances. If the request specifies that ‘the suspected or accused person is held in provisional detention or custody’¹⁵⁸, the contacted MS shall urgently reply. Otherwise, it shall reply within the deadline, if established, or without

¹⁵² FD on conflicts of jurisdiction, recital 16.

¹⁵³ Initiative of the Czech Republic, recital 16.

¹⁵⁴ FD on conflicts of jurisdiction, art 2 para 2.

¹⁵⁵ *ibid* art 5 para 1.

¹⁵⁶ *ibid* art 5 para 2.

¹⁵⁷ *ibid* art 4 para 4.

¹⁵⁸ *ibid* art 6 para 1.

undue delay, if no deadline has been established. In addition, whether it is not able to respect the deadline, the contacted MS shall inform the contacting MS about a new deadline and about the ‘reasons thereof’¹⁵⁹. Furthermore, whereas the contacted authority is not the competent one, it ‘shall without undue delay transmit the request for information to the competent authority and shall inform the contacting authority accordingly’¹⁶⁰. Of course, the exchange of information phase shall not take place where a MS has already come to know that parallel proceedings exist.

Once ‘it is established that parallel proceedings exist’¹⁶¹, the FD forces the MSs concerned to enter into direct consultations. Such consultations should lead to an ‘effective solution’¹⁶² preventing the noxious consequences of multiple proceedings. No further indications about the solution content are provided for, unless a possible outcome: the concentration of the proceedings in a sole MS. Instead, some suggestions on the carrying out of the consultations are given. MSs shall mutually reply to requests of information, but they are not required to do so, when information ‘could harm essential national security interests or could jeopardise the safety of individuals’¹⁶³. While reaching consensus on the most effective solution, MSs are not bound by referring criteria; they shall just ‘consider the facts and the merits of the case and all the factors which they consider to be relevant’¹⁶⁴. If the consensus is reached and then the proceedings have been concentrated in one of the MSs, the chosen MS shall communicate to the other MS(s) involved the outcome of the proceedings¹⁶⁵. On the contrary, when such an event does not occur and the

¹⁵⁹ *ibid* art 6 para 2.

¹⁶⁰ *ibid* art 6 para 3.

¹⁶¹ *ibid* art 10 para 1.

¹⁶² *ibid*.

¹⁶³ *ibid* art 10 para 3.

¹⁶⁴ *ibid* art 11.

¹⁶⁵ *ibid* art 13.

consensus has not been reached, any interested MS may ask for the Eurojust's intervention¹⁶⁶ — according to the Decision establishing it¹⁶⁷.

i. Comments

It has generally been noted that the FD regulation is rather meagre, mainly from the procedural safeguards point of view. In particular, several points may be raised.

First, the concept of 'effective solution' is pretty vague and fanciful. In essence, the Council omitted to take action over those matters because of which the wreck of the previous proposals¹⁶⁸ had occurred. Therefore, according to the FD, MSs are free to come to the most suitable solution for their national legal systems. In such circumstances:

[T]he consultation procedure could be (ab)used to 'forum-shop' the location to prosecute which is most convenient to the prosecution, or to manipulate the exceptions to the double jeopardy rules so that a second prosecution could take place even after a final judgment in one Member State.¹⁶⁹

In particular for those systems informed by the legality principle¹⁷⁰, the preamble ensures that they will not waive their jurisdiction, unless they 'wish to do so'¹⁷¹. Nonetheless, if a proceeding has been concentrated in a certain MS, the natural consequence for the others would be waiving jurisdiction. Albeit such an option is not put into writing within the FD's articles, it becomes problematic unless not certainly regulated. Indeed, the FD does not

¹⁶⁶ *ibid* art 12 para 2.

¹⁶⁷ Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime [2002] OJ L 63/1.

¹⁶⁸ De Amicis and Calvanese (n 15) 8.

¹⁶⁹ Peers (n 26) 833.

¹⁷⁰ Its corollary of the 'tribunal established by law' is also involved. Please, see Luchtman, (n 130).

¹⁷¹ FD on conflicts of jurisdiction, recital 11.

mention any criteria that can lead the MSs' decision¹⁷². Especially in the absence of a transparent and pre-set arrangement, States ruled by mandatory prosecution could not waive their power to prosecute. In short, in order to overlook the national rule, they need at least something grounded to grasp and, of course, the MSs' discretion may not suffice. For this purpose, even the statement in recital 12 does not help:

In the common area of freedom, security and justice, the principle of mandatory prosecution (...) 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.

More, despite the intentions to avoid losses of time and resources¹⁷³, the FD does not set any time limit by which MSs should close each phase or sub phase¹⁷⁴. Again, it is all up to them.

The mechanism is also incomplete. Indeed, whether an agreement is not reached and no States refer the case to Eurojust, what is up? Nothing in fact. The *ne bis in idem* would remain the last chance to make a fix.

Above all, a cross nonchalance for individual rights should be strongly exposed. Actually, it is 'a very serious matter since this is exactly what it is supposed to improve'¹⁷⁵. Within the FD, it is impossible to find a provision that involves somehow the defendant or the defence in general¹⁷⁶. The mechanism simply disregards other interests, but those of the MSs. As a consequence, no remedies nor possibilities to challenge the MSs' decision are provided for, so a 'breach of defence rights' is implied¹⁷⁷. Indeed, a defendant might be brought before a court instead of another, without having had the chance to contest the decision where to prosecute and having his/her interests being taken into

¹⁷² Some criteria are actually indicated in recital 9. However, common knowledge is that the preamble provisions are not part of the binding core of any legislative act.

¹⁷³ De Amicis and Calvanese (n 15) 9.

¹⁷⁴ Tracogna (n 65) 70.

¹⁷⁵ Den Hollander (n 12) 65.

¹⁷⁶ Tracogna (n 65) 56.

¹⁷⁷ *ibid* 70.

account. Maybe a supranational and *ex ante* check on the reasonableness of that decision would have at least balanced a bit¹⁷⁸.

Given all the defects listed above, the gap left by the FD amounts to serious difficulties for the practitioners, especially in terms of legal uncertainties. In this regard, it may be foreseen that the Luxembourg Court will be forced to keep ‘its praetorian role’¹⁷⁹ for restoring those *lacunae* the legislature was not able to fill. While, on one hand, the fact that a court is attributed such an important role diminishes the rigidity of a system, on the other hand, it jeopardises the certainty of this system. Moreover, some implications, resulting from the regulation of the jurisdictional conflicts, need a statutory law intervention and cannot be directly dealt with by the judiciary¹⁸⁰. For example, this is the case for the principle of a ‘tribunal established by law’, ie a corollary of the legality principle, which by definition requires a rule of law establishing the competence of the judiciary¹⁸¹.

ii. Final remarks

The unsatisfactory regime of the 2009 FD is probably the outcome of a particular hurry the Council had in adopting this document¹⁸². Indeed, it cannot be by chance that the FD entered into force on the 30th November, so just a day before the new Treaty enforcement, the 1st December. Despite the Parliament asked the Council to wait for adopting the act under the new regime provided for the Lisbon Treaty, the Council decided to go faster and to bring home the FD. The consequences are multiple and involve all the Institutions’ powers¹⁸³.

¹⁷⁸ De Amicis and Calvanese (n 15) 9.

¹⁷⁹ Vervaele, (n 5) 221; of the same opinion, Ligeti (n 1) 42.

¹⁸⁰ Luchtman (n 130) 95.

¹⁸¹ *ibid.*

¹⁸² Tracogna (n 65) 70.

¹⁸³ European Parliament, ‘European Parliament legislative resolution of 8 October 2009 on the initiative of the Czech Republic, the Republic of Poland, the Republic of Slovenia, the Slovak Republic and of the Kingdom of Sweden for adoption of a Council framework decision 2009/.../JHA on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings’ [2010] OJ 2010/C 230 E/05, point 5.

First of all, the same act adopted under the EU Reform Treaty would have had the form of a Directive. Then, it would have been adopted ‘jointly by the Council and the Parliament’ and the former would have acted by qualified majority¹⁸⁴. As a result, at present the Commission would be able to start a formal infringement procedure and the national courts would ask the ECJ for a preliminary ruling¹⁸⁵ since the entry into force of the new Treaty. On the contrary, by being an act adopted under the third pillar system, the actual FD will be challenged before the ECJ just after the 1st December 2014, according to Protocol on Transitional Provisions¹⁸⁶. Similarly, the Commission’s powers are put off. Therefore, it is easy to understand how the scenario would have differed from the actual. Lest the consensus would not have been reached once more – or maybe just cleverly, the Council did not even accept the risk.

The results are plain.

¹⁸⁴ Den Hollander (n 12) 65.

¹⁸⁵ *ibid.*

¹⁸⁶ Protocol n°36 to the Consolidated Version of the TFEU on Transitional Provisions [2012] OJ C 326/322, art 10.

Chapter II

Towards a uniform notion of ‘idem’ and ‘res iudicata’

The scope of application of the *ne bis in idem* principle is a fundamental issue as to the extent of its practical relevance in a stratified context like the EU. The reach of its applicability is of course up to the interpretation of both the *bis* and *idem* concepts.

What do we consider to be the basis for the definition of the same/*idem*? Is it the legal definition/classification of the offences (*in abstracto*) or the set of facts (*idem factum, in concreto*)? Does it depend upon the scope of and the legal values to be protected by the legal provisions? (...) What is a final judgment? Does it include acquittal or dismissal of charges? What does an enforced final judgment mean? Does it also concern final settlements concluded by prosecuting or other judicial authorities out of court? Does respect for the *ne bis in idem* principle require a bar on further prosecution or punishment (*Erledigungsprinzip*), or can the authority imposing the second punishment take into account the first punishment (*Anrechnungsprinzip*)? Does the principle imply parallel or repeated criminal proceedings for the same facts?¹

The following pages will try to give an answer to some of the questions above with a view of both the main legal sources and the European Courts’ case law.

¹ Norel Neagu, ‘The *Ne Bis in Idem* Principle in the Interpretation of European Courts: Towards Uniform Interpretation’ [2012] *Leiden Journal of International Law* 955, 955-6; roughly, the same questions were being asked by John AE Vervaele, ‘*Ne Bis In Idem*: Towards a Transnational Constitutional Principle in the EU?’ (2013) 9 (4) *Utrecht Law Review* 211, 212.

As a general premise, it is worth underlining that three factors in fact jeopardise the uniform application of the *ne bis in idem* principle within the EU: the multiplicity of the relevant legal sources, their divergent wording² and diverse interpretations carried out by different Courts³.

Already in the time of the Green Paper on conflicts of jurisdiction, the Commission itself seemed aware of the problem. Beyond questioning the existence of derogations and conditions, it asked ‘whether there is a need for clarifying certain elements and definitions, for instance regarding 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”’⁴. Deleting/reducing those elements that make uncertain its application confines, as well as creating a new EU provision, are both feasible options within the GP. Nonetheless, the Commission did not take any position in this regard⁵. Similarly, albeit envisaging a legislator’s intervene, it was not clarified to which extent it should either have a predominant role or give way the ECJ to keep its creative function. In any case, given its strong relevance as to the *ne bis in idem* interpretation, Luxembourg case law might not be disregarded even by an ‘active’ legislator⁶.

² Valsamis Mitsilegas, *EU Criminal Law* (Hart 2009) 143-4.

³ Robin Lööf, ‘54 CISA and the Principle of *Ne Bis In Idem*’ [2007] *European Journal of Crime, Criminal Law and Criminal Justice* 309, 320.

⁴ Commission, ‘Green Paper on Conflicts of Jurisdiction and the Principle of *ne bis in idem* in Criminal Proceedings (Green Paper)’ COM(2005) 696 final, 8; Tommaso Rafaraci, ‘Procedural Safeguards and the Principle of *Ne Bis In Idem* in the EU’ in Bassiouni MC Militello V and Satzger H (eds), *European Cooperation in Criminal Matters* (CEDAM 2008) 363, 400.

⁵ Martin Wasmeier and Nadine Thwaites, ‘The development of *Ne Bis In Idem* into a transnational fundamental right in EU Law: Comments on Recent Developments’ [2006] *European Law Review* 565, 577.

⁶ Maria Fletcher, ‘The Problem of Multiple Criminal Prosecutions: Building an Effective EU Response’ [2007] *Yearbook of European Law* 33, 45; Mitsilegas (n 2) 152-3.

1. *Ne Bis In Idem*: sources and case law

As above stated, the EU legal framework with regard to the *ne bis in idem* rule is quite fragmented. Beyond special rules on double jeopardy, dealing with the European *ne bis in idem* chiefly means referring to either article 54 of the CISA or to article 50 of the Charter. Likewise, article 3 and 4 of the Framework Decision on the European Arrest Warrant as well as article 4 of the 7th Protocol of the ECHR are at stake.

Even without going into more detail, it is plain for all to see how this framework is multi-structured. The lack of one and only double jeopardy provision within the Union was also denounced by the AG Kokott in the *Toshiba* case⁷. In particular, she criticised the different scope of application of the competition and criminal *ne bis in idem*⁸. By asking what should be considered as *idem*, the AG found that different criteria lead up to the application of the principle within criminal and antitrust law, and that the ECJ and ECHR' case law was not uniform on this point. As a result of her analysis, she stated as follows:

To interpret and apply the *ne bis in idem* principle so differently depending on the area of law concerned is detrimental to the unity of the EU legal order. The crucial importance of the *ne bis in idem* principle as a founding principle of EU law which enjoys the status of a fundamental right means that its content must not be substantially different depending on which area of law is concerned. For the purposes of determining the scope of the guarantee provided by the *ne bis in idem* principle, as now codified

⁷ Case C-17/10 *Toshiba Corporation and Others* [2012] ECR I-00000, Opinion of the AG Kokott, paras 111-24.

⁸ John AE Vervaele, '*Ne Bis In Idem*: Towards a Transnational Constitutional Principle in the EU?' (2013) 9 (4) *Utrecht Law Review* 211, 222.

in Article 50 of the Charter of Fundamental Rights, the same criteria should apply in all areas of EU law.⁹

Therefore, if a '*reductio ad unum*'¹⁰ is preferable within a transversal context that hems in different branches of law, it should *a fortiori* be desirable within the sole criminal law. Is it still endurable having a multiplicity of sources in a single Area of Freedom, Security and Justice?

However, such reasoning may not prevent the current legal framework from being examined. For systematic reasons, article 54 of the CISA will be firstly appraised, followed by the provisions within the EAW Framework Decision. After, a human rights perspective will be supplied¹¹, by taking into account the Nice Charter and the ECHR. The theoretical approach will be integrated with the operative dimension by mean of the relevant case law.

⁹ *ibid* para 117.

¹⁰ Stefano Montaldo, 'L'Ambito di Applicazione della Carta dei Diritti Fondamentali dell'Unione Europea e il principio del *Ne Bis In Idem*' [2013] *Diritti Umani e Diritto Internazionale* 574, 578.

¹¹ Steve Peers, 'Double Jeopardy and EU Law: Time for a Change?' [2006] *European Journal of Law Reform* 199, 200.

a. Article 54 CISA

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 Convention Implementing the Schengen Agreement may be defined as a ‘check and balance’ body of law. As it entered into force¹², the Contracting Parties acknowledged the consequent flaws that would have stemmed from a borderless area, ie *inter alia* the increase of cross-border crimes. Nonetheless, in a single area it would have been unconceivable that the same individuals – free to work, live, or study abroad – had been subject to a double prosecution or even served a double sanction for the same offence. Therefore, the State Parties agreed on a provision establishing an international *ne bis in idem* norm¹³.

It would be meaningless reasoning about article 54 of the Schengen Convention without incorporating into the same analysis the interpretation given by the ECJ. Due to more than a dozen preliminary rulings, started with

¹² ‘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’ (CISA) [2000] OJ L239/19

¹³ Van den Wyngaert C and Stessens G, ‘The International *Non Bis In Idem* Principle: Resolving Some of the Unanswered Questions’ (1999) 48 International and Comparative Law Quarterly 779, 787.

the pivotal *Gözütok and Brügge*¹⁴ judgment, nowadays there stands a pretty clear picture of the principle content.

Once again, it fell to the European Court of Justice to assume its praetorian role and to fill the legal vacuum concerning many relevant legal points, related to the rationale and the scope of the principle, but also the transition from Schengen to the EU.¹⁵

Granted that there is no provision establishing ‘any harmonisation, or at least the approximation, of the criminal laws of the member States relating to procedures whereby further prosecution is barred’¹⁶, the ECJ tried to shape the mutual trust into a concept making MSs mutually recognise their own legal systems. Such an ‘avant-gardist’ perspective aims to give ‘useful effect to the “object and purpose of Article 54 CISA” rather than to procedural or purely formal matters, which, after all, vary as between Member States’¹⁷. Walking this path, the Court generally proposed a ‘pro free movement’ approach, by considering the freedom of movement precisely as the ‘object and purpose of Article 54 CISA’. Bearing in mind that it would be undermined whether the double jeopardy had not uniformly applied throughout the AFSJ, the Court has created ‘an embryo (and a good example) of a deontic model regarding *ne bis in idem* as a defence right’¹⁸.

¹⁴ Joined Cases C–187/01 and C–385/01 *Gözütok and Brügge* [2003] ECR I–1345.

¹⁵ Vervaele (n 8) 221; as of the entry into force of the Treaty of Amsterdam on 1999, the Convention is part of the EU Law.

¹⁶ Joined Cases C–187/01 and C–385/01 *Gözütok and Brügge* [2003] ECR I–1345, para 32.

¹⁷ Maria Fletcher and Robin Lööf, *European Criminal Law and Justice* (with Bill öilmöre, Elgar European Law 2008) 135.

¹⁸ Teresa Bravo, ‘*Ne Bis In Idem* as a Defence Right and Procedural Safeguard in the EU’ [2011] *New Journal of European Criminal Law* 393, 398.

i. The *idem* concept

When the material scope of article 54 CISA is dealt with, the issue at stake is what shall be meant by the phrase ‘the same acts’. In essence, the duplication required by the provision to be applied should turn around terms for comparison that have to be somehow the same.

Since the beginning of the ‘*ne bis in idem* saga’, the ECJ was consistent with preferring the ‘same conduct’ test instead of the ‘test of equivalence’¹⁹. In simple words, the Court has not focused its evaluation on the legal qualifications that each MS attributed to criminal facts. Rather, it has minded the concrete acts that made the offender twice (allegedly) accountable. Even differently from what it stated about the *ne bis in idem* rule within the competition law, it has neither regarded legal interests protected by national provisions. It accounted for its different approach as follows:

(....) because there is no harmonisation of national criminal law, considerations based on the legal interest protected might create as many barriers to freedom of movement within the Schengen area as there are penal systems in the Contracting States.²⁰

The ‘import-export’ cases are the milestone as to the interpretation of the *idem* element. By analysing the conduct of drug trafficking among different MSs, the Court found itself to evaluate one and only material act constituting import from a certain State and simultaneously export to another. May it be considered as ‘same acts’ within the meaning of article 54 CISA? The Luxembourg Court had the first chance to answer such a pregnant question in the *Van Esbroeck* case²¹, and it took a position thenceforth never abandoned. It stated that:

(...) the only relevant criterion for the purposes of the application of that article of the CISA is identity of the material acts,

¹⁹ Neagu (n 1) 966.

²⁰ Case C-288/05 *Kretzinger* [2007] ECR I-6441, para 33.

²¹ Case C-436/04 *Van Esbroeck* [2006] ECR I-2333.

understood as the existence of a set of concrete circumstances which are inextricably linked together (...) in time, in space and by their subject matter²².

Moreover, the appraisal shall be '(...) irrespective of the legal classification given to them or the legal interest protected (...) ' ²³. As to the drug trafficking offence, the Court affirmed that, in principle, drug import/export has to be intended as 'same acts' for the purposes of the Schengen Convention as they are theoretically identical act, but seen from different points of view. However, it is up to national courts to verify whether the facts of the merits are actually 'inextricably linked together' ²⁴. Later, the Court also specifies that 'the quantities of the drug that are at issue in the two Contracting States concerned or the persons alleged to have been party to the acts in the two States are not required to be identical' ²⁵.

The Court added another piece to the puzzle in the *Kraaijenbrink* ruling²⁶. It concerned a money laundering offence, 'consisting, in particular, first, in holding in one Contracting State the proceeds of drug trafficking and, second, in the exchanging at exchange bureaux in another Contracting State of sums of money having the same origin' ²⁷. While 'the national court before which the second criminal proceedings are brought finds that those acts are linked together by the same criminal intention' ²⁸, the first charged Mr Kraaijenbrink with just the first segment of his conduct. Required to answer whether the proceedings might fall within the scope of article 54, the ECJ warned the referring Court against confusing the subjective link with the objective one.

²² *ibid* para 36-8.

²³ *ibid* para 42.

²⁴ *ibid*; Neagu (n 1) 968.

²⁵ Case C-150/05 *Van Straaten* [2006] ECR I-9327, para 53.

²⁶ Case C-367/05 *Norma Kraaijenbrink* [2007] ECR I-6619.

²⁷ *ibid* para 25.

²⁸ *ibid*.

As the Commission of the European Communities in particular pointed out, a subjective link between acts which gave rise to criminal proceedings in two different Contracting States does not necessarily mean that there is an objective link between the material acts in question which, consequently, could be distinguished in time and space and by their nature.²⁹

Similarly, the sole fact that a Court held several acts parts of the same criminal intention is not sufficient for make article 54 operate. Indeed, '[a]rticle 54 of the CISA can become applicable only where the court dealing with the second criminal prosecution finds that the material acts, by being linked in time, in space and by their subject-matter, make up an inseparable whole'³⁰. In the case under the Court's consideration, it would be applicable 'if an objective link can be established between the sums of money in the two sets of proceedings'³¹. In this regard, the Court confirmed the national court's role of 'last instance' controller³² on whether such requirements are met.

ii. The meaning of 'finally disposed of'

What kind of decisions is relevant for the purpose of article 54 CISA? The extension reach of the *bis* element was firstly drawn in the *Gözütok and Brügge*³³ ruling, defined *inter alia* as 'a pioneer judgement'³⁴ and 'a revolutionary decision'³⁵. Indeed, in 2003 the Court held the out-of-court settlements final disposition of the cases³⁶ within the meaning of article 54 CISA. Differently from how the instrument of plea bargaining works in some

²⁹ *ibid* para 30.

³⁰ *ibid* para 28.

³¹ *ibid* para 31.

³² *ibid* para 32.

³³ Joined Cases C-187/01 and C-385/01 *Gözütok and Brügge* [2003] ECR I-1345.

³⁴ Bravo (n 18)

³⁵ André Klip, *European Criminal Law* (Intersentia 2009) 233.

³⁶ The ECJ joined Mr Gözütok and Mr Brügge' cases due to their homogeneity.

MSs, like eg Italy, Mr Gözütok and Mr Brügge' proceedings were both discontinued even without a court's intervene. However, they had to fulfil certain obligations and, in particular, pay a certain sum of money, in return for a faster and less onerous proceeding as well as a less serious penalty. In attaching importance to the real effect of such settlements, ie the power to bar further proceedings, the Court disregarded the circumstance that MSs have different – if they do have – legal arrangements in establishing such a sort of dispute resolution. It believed that differences between MSs' legal systems should be overcome by means of the trust they mutually put in their systems. Otherwise, in a context where no harmonisation of systems is required, the object and purpose of the Schengen Convention – ie the ensuring of the freedom of movement – would be frustrated by the mere acknowledgement of existing divergences. Such an outcome would simply be unconceivable in a single Area of Freedom, Security and Justice. Moreover, giving their application to just minor crimes, whether the out-of-court settlements were not recognised as a final disposition of cases, a perverse effect would occur. Who commits a petty offence would not benefit from article 54 CISA protection, since he/she bargained his/her penalty. On the other hand, most dangerous offenders would enjoy their freedom of movement as they had a regular proceeding.

Doubtless, another essential decision by the ECJ is the *Van Straaten* ruling³⁷. Still following the reasoning of free movement, the Court appraised that there is no reference within article 54 to exclude acquittals from the final decisions category. In particular, Mr Van Straaten was acquitted for lack of evidence. As the AG pointed out, the acquittal is *per se* an exercise of State's *ius punendi*, whereas it decides to bar 'any subsequent step' pursuant to an analysis of 'the merits'³⁸. However, the content of the expression 'the merits' depends

³⁷ Case C-150/05 *Van Straaten* [2006] ECR I-9327.

³⁸ *ibid* para 65.

‘on the grounds of the decision, some intrinsic to the defendant and others extrinsic. The intrinsic grounds include those for exonerating a defendant who lacks the indispensable requirements for accountability (grounds relating to lack of criminal responsibility, such as being under age or mental disorder). The extrinsic grounds cover factual situations, in which no other behaviour could be expected (justifying circumstances: self-protection, necessity or overwhelming fear) or in which the personal requirements of the offence (elements relating to the perpetrator of the crime) are not satisfied, and those relating to the passage of time and to the substantive truth of the facts under analysis.

That latter group includes three types of acquittal, depending on whether: (1) the acts do not constitute a criminal offence, (2) the defendant did not commit them or (3) it is not proven that the defendant committed them; the question now referred concerns that third category.³⁹

Then, there are formulas of different hue by which MSs codify the hypothesis of proceeding discontinuance. Nonetheless, the Court gathered up all and split them into two bigger categories: convictions and acquittals⁴⁰. This is the autonomous meaning a final decision may have under European Law⁴¹ and more in particular under article 54 CISA⁴².

What about a referring Court not facing the merits of the case, but simply discontinuing the proceeding on the basis of procedural grounds? The ECJ dealt with such an issue in two cases, *Miraglia*⁴³ and *Gasparini*⁴⁴. As to the

³⁹ *ibid* para 65-6.

⁴⁰ Klip (n 35) 239.

⁴¹ *ibid*.

⁴² On how such autonomy is non politically neutral, please see Raffaella Calò, ‘*Ne Bis In Idem*: l’art. 54 della Convenzione di Applicazione dell’Accordo di Schengen tra Garanzia dei Diritti dell’Uomo ed Istanze di Sovranità Nazionale’ [2008] *Rivista Italiana di Diritto e Procedura Penale* 1120, 1146.

⁴³ Case C-469/03 *Miraglia* [2005] ECR I-2009.

former, Dutch and Italian prosecutions were being jointly investigating Mr Miraglia for international drug trafficking. Due to the fact that Italy brought action against Mr Miraglia, the Dutch prosecutor's office did not even initiate a criminal proceeding, so the merits were not explored at all. Later, the Netherlands, requested to gather judicial assistance to the Italian authorities, denied it on the assumption that there 'was "a final decision of a court" precluding, pursuant to Article 225 of the Netherlands Code of Criminal Procedure, any prosecution in respect of the same criminal acts and any judicial cooperation with foreign authorities (...) '45. Therefore, Italy made a reference to the ECJ, asking whether a decision, took just on the basis of procedural grounds without any referral to the merits, might represent a final disposition of a case for the purpose of article 54 CISA. In fact, whereas it was, Netherlands could legitimately reject any instance of assistance from Italy, so jeopardising a correct administration of justice – the most of evidence was in Holland. Indeed, the Court acknowledged such an impasse:

(...) the consequence of applying that article to a decision to close criminal proceedings, such as that in question in the main proceedings, would be to make it more difficult, indeed impossible, actually to penalise in the Member States concerned the unlawful conduct with which the defendant is charged.⁴⁶

Rightly, the Court did not feel up to boost the free movement until undermining the Security exigencies of preventing and combating crimes⁴⁷.

If *Miraglia* was one of those few cases where the application of the double jeopardy rule was excluded⁴⁸, in the *Gasparini* judgement '[t]he Court

⁴⁴ Case C-467/04 *Gasparini* [2006] ECR I-9199.

⁴⁵ Case C-469/03 *Miraglia* [2005] ECR I-2009, para 22.

⁴⁶ *ibid* para 33.

⁴⁷ *ibid* para 34.

⁴⁸ Richard Lang, 'Third Pillar Developments from a Practitioner's Perspective' in Elspeth Guild and Florian Geyer (eds), *Security Versus Justice?: Police and Judicial Cooperation in the European Union* (Ashgate Publishing 2008) 265, 270. He considered the *Miraglia* case 'the only one' where the Court opted for the non-application of the principle, since the *Turansky* case had not been delivered yet.

(...) applied for the first time the principle *even if there was no assessment of the merits of the case*⁴⁹. With the latter, it indeed held that an acquittal on the ground that prosecution of the offence is time-barred is still to be regarded as a final statement binding the other MSs. This way, it disassociated itself from the AG's more mitigative approach. In Ms Sharpston's view the double jeopardy rule may be triggered by a national decision stating that further prosecution is barred due to time elapse

only if (a) that decision is final under national law, (b) the proceedings in the other Member State have involved consideration of the merits of the case; and (c) the material facts and the defendant(s) are the same in the proceedings before both courts.⁵⁰

Of course, the judgement, being so strict, attracted critics, from the softest to the hardest. On one hand, it has been affirmed that the AG better balanced the two different interests subjected to the *ne bis in idem*, ie 'la libre circulation des personnes et l'exercice de ce droit dans un espace de liberté, de sécurité et de justice caractérisé par un niveau élevé de protection et au sein duquel la criminalité est effectivement contrôlée'⁵¹. On the other hand, there were some that suggested a review of 'this unjustified extensive protection' and full 'return to the requirement that the principle is only triggered after a judgment of the merits of the case'⁵².

In 2008, the ECJ assessed whether an order, that had been issued by a police authority 'after examining the merits of the case brought before it, (...) at a stage before the charging of a person suspected of a crime' and that had suspended criminal proceedings⁵³, may amount to one of those decisions

⁴⁹ Neagu (n 1) 964.

⁵⁰ Case C-467/04 *Gasparini* [2006] ECR I-9199, Opinion of the AG Sharpston, para 122.

⁵¹ Anne Weyembergh, 'La Jurisprudence de la CJ Relative au Principe *Ne Bis In Idem*: une Contribution Essentielle à la Reconnaissance Mutuelle en Matière Pénale' in *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-Law* (Asser Press 2013) 539, 552.

⁵² Klip (n 35) 241.

⁵³ Case C-491/07 *Turansky* [2008] ECR I-11039, para 30.

needed for the *bis*. The Court, by recalling its previous and consistent case law, reminded that a decision may be regarded as final only if it ‘definitely bar[s] further prosecution’⁵⁴. This was not the case of Mr *Turanský*. Under the Slovak Code of Criminal Procedure, police orders such as that in question do not prevent a new proceeding from being opened for the same facts⁵⁵. Therefore, Mr *Turanský*’s position was not ‘finally disposed of’ as article 54 of the Schengen Convention requires.

Another remarkable perspective is that of *in absentia* proceedings. The issue was dealt with in the *Bourquain* case⁵⁶, a judgement that arouses interest also from other viewpoints, as it will be later assessed. The Luxembourg Court held that there is no reason for those proceedings issued *in absentia* to be put out of the scope of application of article 54⁵⁷. To this end, it does not matter if, under the domestic law of the deciding authority – France, the *in absentia* proceedings may be reopened at any time the convicted person reappears⁵⁸. In essence, how *in absentia* proceedings are regulated at national level do not involve their recognition as final decisions by the other MSs, which should mutually trust their legal systems⁵⁹ even when inspired by diametrically opposite values. In an area, like the AFSJ, the lack of harmonisation among the MSs’ regimes of *in absentia* proceedings cannot be a stumbling block to the superior interest of the free movement.

Finally, in the recent *M* case⁶⁰ an Italian Court asked the ECJ whether a decision, which bars further prosecutions against the same person, but that may be reopened whereas new evidence is gathered or new facts emerge, might be regarded as a final disposition of a case. The Belgian criminal procedure and in particular the order of ‘non-lieu’ was substantially up for discussion. Although

⁵⁴ *ibid* para 34.

⁵⁵ *ibid* para 39.

⁵⁶ Case C-297/07 *Bourquain* [2008] ECR I-9425.

⁵⁷ *ibid* para 34-5.

⁵⁸ *ibid* para 40.

⁵⁹ *ibid* para 37.

⁶⁰ Case C-398/12 *M* [2014] OJ C253/7.

such an order proves to assess the merits of the case and to have the force of *res iudicata*, the circumstance of a possible case reopening casted a doubt on the effective nature of the Belgian decision. Nonetheless, as the Court pointed out in paragraph 33, that possibility cannot involve the same proceeding based on the same set of evidence. Instead, it is left open just in case of ‘evidence which has not yet been submitted for examination by the indictment division and which is capable of altering its finding of “non-lieu”’⁶¹. Actually, it would be a proceeding grounded on different premises, ‘rather than the mere continuation of proceedings which have already been closed’⁶². Hence, the Court stated, ‘the possibility of reopening the criminal investigation if new facts and/or evidence become available, cannot affect the final nature of the order making a finding of ‘non-lieu’ at issue in the main proceedings’⁶³.

iii. Clause of enforcement and derogations

From certain points of view, double jeopardy rules set out in the Schengen Convention are obsolete⁶⁴. By now, conditions and exceptions to the *ne bis in idem* are to be considered anachronistic⁶⁵. If Treaties are not just vain words, the security within the ever-expanded AFSJ as well as the judicial cooperation in criminal matters rely on the mutual recognition principle⁶⁶, which increasingly removes filters in the midst of MSs’ legal systems⁶⁷.

⁶¹ *ibid* para 33.

⁶² *ibid* par 40.

⁶³ *ibid*.

⁶⁴ Fletcher and Löff (n 17) 136.

⁶⁵ For a strong opposition to such assertion, please see Lorenzo Cordi, ‘Il Principio del *Ne Bis In Idem* nella Dimensione Internazionale: Profili Generali e Prospettive di Valorizzazione nello Spazio Europeo di Sicurezza, Libertà e Giustizia’ [2007] *L’Indice Penale* 761, 804-6.

⁶⁶ Consolidated Version of the Treaty on the Functioning of the European Union (TFEU) [2012] OJ C326/47, art 67 para 3 and art 82 para 1; Fletcher and Löff (n 17) 138.

⁶⁷ Tommaso Rafaraci, ‘The Principle of *Non Bis In Idem* in the Jurisprudence of the European Court of Justice’ in Stefan Braum and Anne Weyembergh (eds), *Le Contrôle Juridictionnel dans l’Espace Pénal Européen* (Éditions de l’Université de Bruxelles 2009) 93, 103.

In spite of the minor role played by the *ne bis in idem* principle within its framework⁶⁸, the Commission Green Paper seemed to share such a view. As a result, simultaneously with the proposal of a system for jurisdiction allocation, the Commission considered a possible overhaul of the principle⁶⁹. Especially, three – still actual – questions were being pinpointed: whether a definition of the principle and its terms is required; whether the enforcement condition, provided for by article 54 CISA, is still necessary in an AFSJ regulated by the mutual recognition principle; finally, whether derogations allowed by article 55 CISA⁷⁰ are still acceptable, since national interests should be considered at an earlier stage, when jurisdiction is allocated.

In regard to the first point, some argued that the future legislation should follow the copious ECJ's case law. However, the definition of the principle suggested by the Commission⁷¹ goes wrong-way⁷².

As far as the enforcement condition is concerned, granted that its purpose is preventing impunity⁷³, at present such a condition has become meaningless, when a sentence has been delivered but not enforced. Indeed, today the EU is an area regulated by the mutual recognition principle⁷⁴ and thereby supplied with enforcement instruments⁷⁵. In relation to derogations, according to some

⁶⁸ Clara Tracogna, 'Ne Bis In Idem and Conflicts of Jurisdiction in the European Area of Liberty, Security and Justice' (2011) 2 (XVIII) LESIJ 55, 69.

⁶⁹ COM(2005) 696 final, 8-9.

⁷⁰ The first paragraph of the article provides for that:

A Contracting Party may, when ratifying, accepting or approving this Convention, declare that it is not bound by Article 54 in one or more of the following cases:

(a) where the acts to which the foreign judgment relates took place in whole or in part in its own territory; in the latter case, however, this exception shall not apply if the acts took place in part in the territory of the Contracting Party where the judgment was delivered;

(b) where the acts to which the foreign judgment relates constitute an offence against national security or other equally essential interests of that Contracting Party;

(c) where the acts to which the foreign judgment relates were committed by officials of that Contracting Party in violation of the duties of their office.

⁷¹ COM(2005) 696 final, 10 no 15.

⁷² Fletcher, (n 6) 45.

⁷³ Fletcher and Lööf (n 17) 136.

⁷⁴ TFEU, art 82 para 1.

⁷⁵ Fletcher, (n 6) 45.

they ‘should be limited to procedural irregularities/abusive conduct in respect of the first proceedings and the emergence of decisive, new evidence’⁷⁶.

Moreover, in the matter of article 55 CISA, a rather interesting case by an Italian court of first instance⁷⁷ shall be mentioned. The Italian judge, indeed, found article 55 CISA no more in effect under the Italian law, rather article 50 of the Nice Charter has to be regarded as the fundamental norm. Firstly, the declaration that stated Italy’s derogations was not renewed after the implementation of the Schengen Agreement, neither incorporated into the same Convention; so, it still can no longer be considered effective, for they cannot be self-renewed. In addition, the Nice Charter, by being a primary source⁷⁸ directly applicable to national legal systems, should prevail over the CISA’s provisions. Hence, since article 50 does not include derogations to the *ne bis in idem* principle, such exceptions should no longer be invoked. A similar ruling was issued by a Greek judge, and a German Court faced the question too, but finally ‘saved’ the exceptions by virtue of the third paragraph of article 52 CFR. Therefore:

It is a pity that [those judges] did not submit [their] questions to the ECJ for a preliminary ruling, at least concerning the validity of the CISA reservations after the integration of the Schengen *acquis* in the Union (given the fact that they were not mentioned in the Schengen Protocol to the Amsterdam Treaty and in the Council Decision on the Schengen integration), the applicability of Article 50 CFREU to the limitation on the freedom of movement and the consequences for the relationship with the CISA provisions on *ne*

⁷⁶ *ibid* 46; this opinion takes up the Freiburg proposal’s logic.

⁷⁷ Tribunale di Milano, Ufficio del Giudice per le Indagini Preliminari (GIP), no 12396/92 RGNR, no 3351/94 RG GIP, 6 July 2011, *Walz*; Donato Vozza, Verso un Nuovo “Volto” del *Ne Bis In Idem* Internazionale nell’Unione Europea?: Nota a Tribunale di Milano, Uff. Ind. Prel., Ud. 6 Luglio 2011 [2012] 2 Diritto Penale Contemporaneo - Rivista <www.dirittopenalecontemporaneo.it/rivista> 143; see also Vervaele, (n 8) 225-6.

⁷⁸ Consolidated Version of the Treaty on the European Union (TEU) [2012] OJ C326/13, art 6 para 1.

bis in idem. This can be seen as a missed opportunity to receive uniform answers from the ECJ.⁷⁹

The Nice Charter provisions will be dealt with later on and at much length within this Chapter.

Coming back to article 54, the *ne bis in idem* operates as far as ‘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’. Such conditions evidently clash with the goals indicated above. Hence,

[t]he ECJ (...) interprets the enforcement condition very generously, so as to include out-of-court settlements, and suspended sentences, in keeping with the principle of mutual recognition between the Member States and Article 54 CISA’s aim of promoting free movement.⁸⁰

In the *Bourquain* ruling⁸¹, the Court faced a case where a sentence had been inflicted against a French soldier who committed crimes in Algeria in the 60’s. The penalty, however, was never enforced, since the proceedings were firstly celebrated *in absentia* and then amnesty was granted as well as limitation period expired. Afterwards, Germany charged him for the same offence. The German Court before which he was brought casted doubt on

‘whether the condition relating to enforcement referred to in (...) article [54 CISA] , that is the fact that the penalty can no longer be enforced, is also satisfied when, at no time in the past, even before the amnesty or the expiry of the limitation period, could the penalty

⁷⁹ Vervaele (n 8) 226.

⁸⁰ Willem Bas Van Bockel, *The Ne Bis In Idem Principle in EU Law* (Kluwer Law International BV 2010) 170.

⁸¹ Case C-297/07 *Bourquain* [2008] ECR I-9425.

imposed pursuant to the first conviction have been directly enforced',⁸².

The Hungarian Government proposed a literal interpretation of the provision according to which the enforcement condition shall occur 'at least on the date when (...) [the sanction] was imposed'⁸³. Divergently, the Luxembourg Court specified that the phrase 'no...longer' refers to the time when the second proceeding had been started, ie the moment when the second judge shall assess whether the condition provided for by article 54 operates⁸⁴. Therefore, the German proceeding is barred by the *ne bis in idem* principle since at that time the French sentence might no longer be enforced. Otherwise, the freedom of movement – the very scope of the Schengen agreement that all the EU citizens do enjoy – would be undermined. Individuals would not feel free to move throughout Europe, if they feared to be prosecuted once more in another State, despite the sentence being not enforceable anymore in the State of departure⁸⁵. However, some raised their voice against a too reducing approach that the ECJ supported by focusing its reasoning on the freedom of movement. Contrary to what article 50 of the CFR might suggest, the perspective of the *ne bis in idem* as a fundamental right was completely neglected by the Court⁸⁶.

With regard to the condition of enforcement set in article 54 CISA, another ruling has to be examined. In the *Kretzinger* case⁸⁷, the ECJ was asked whether the provision applies in case of suspension of custodial sentence. In particular, the German Court wanted to know if a suspended sentence may be regarded as enforced within the meaning of the CISA, so barring second prosecution and proceeding against the same conduct. The Court held that 'in so far as a suspended custodial sentence penalises the unlawful conduct of a

⁸² *ibid* para 45.

⁸³ *ibid* para 46.

⁸⁴ *ibid* para 47.

⁸⁵ *ibid* para 50.

⁸⁶ Eugenio Selvaggi, 'Osservazioni a Corte di Giustizia delle Comunità Europee – Sezione II - 11 Dicembre 2008 n°297' [2009] *Cassazione Penale* 1283, 1285.

⁸⁷ Case C-288/05 *Kretzinger* [2007] ECR I-6441.

convicted person, it constitutes a penalty within the meaning of Article 54 of the CISA⁸⁸. Specifically, it shall be considered a penalty ‘in the process of being enforced’ during the probation period; instead, it becomes a ‘having been enforced’ sanction as of having that time expired⁸⁹. Divergently, the Court appraised, a period of detention on remand pending trial or even a short period of police custody do not make an imposed penalty be enforced or in the process of being enforced. Indeed, such periods of freedom deprivation aim to preventive – not punitive – goals, even if they may be ‘taken into account in the subsequent enforcement of any custodial sentence’⁹⁰. Therefore, having been taken into police custody for a short time and/or held on remand pending trial do not imply that the subsequent suspended sentence has to be considered enforced or in the process of being enforced within the meaning of article 54⁹¹. Moreover, even in the circumstance in which the authorities imposing the suspended sentence might have – but in fact they did not – issued an EAW in order the sanction to be enforced, does not lead to the conclusion that the sanction has been formally enforced⁹². Rather, the fact itself that an arrest warrant might be issued with the aim of a sentence enforcing testifies that it has not been enforced⁹³.

⁸⁸ *ibid* para 42.

⁸⁹ *ibid*.

⁹⁰ *ibid* para 50.

⁹¹ *ibid* para 52.

⁹² *ibid* para 58; Gaetano De Amicis, ‘Il Principio del *Ne Bis In Idem* europeo nel Contesto della Cooperazione Giudiziaria: Primi Orientamenti della Corte di Giustizia’ [2009] *Giurisprudenza di Merito* 3177, 3207.

⁹³ Case C-288/05 *Kretzinger* [2007] ECR I-6441, Opinion of the AG Sharpston, para 88.

b. The Framework Decision on the EAW

Article 3

Grounds for mandatory non-execution of the European arrest warrant

The judicial authority of the Member State of execution (hereinafter ‘executing judicial authority’) shall refuse to execute the European arrest warrant in the following cases:

(...)

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

It is common knowledge that the European Arrest Warrant (EAW) is the instrument that replaced the extradition mechanism throughout the European Union. After all, when negotiations started, it was 2001 and MSs were shocked by the recent terrorist attacks on 9/11. Boosted by a favourable political spirit, a new system based on mutual recognition of MSs’ judicial decisions was established. MSs were surprisingly determined to shape a truly effective mechanism of judicial cooperation, so they suppressed the traditional political stage of extradition. From then on, the national judicial authorities could directly contact each other in order to ask for the execution of an arrest warrant. The launch of the EAW Framework Decision⁹⁴ paved the way for numerous mutual recognition instruments. Nonetheless, political conditions have changed and no one of the successive instruments is that effective as the EAW has been.

⁹⁴ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision [2002] OJ L190/1.

Article 4

Grounds for optional non-execution of the European arrest warrant

The executing judicial authority may refuse to execute the European arrest warrant:

(...)

2. where the person who is the subject of the European arrest warrant is being prosecuted in the executing Member State for the same act as that on which the European arrest warrant is based;

3. where the judicial authorities of the executing Member State have decided either not to prosecute for the offence on which the European arrest warrant is based or to halt proceedings, or where a final judgment has been passed upon the requested person in a Member State, in respect of the same acts, which prevents further proceedings;

(...)

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

It is therefore opportune considering the Framework Decision as a relevant source of reference. In particular, to what it may here concerns, the grounds for refusing the surrender of a person are crucial. After all, they are the litmus test of the effectiveness of a system based on the principle of mutual recognition⁹⁵.

While implementing the Framework Decision, MSs had the duty to implement some grounds for refusal and the chance to implement some others. As to the optional grounds for refusal set out in article 4, unfortunately there

⁹⁵ Nadia Plastina, 'Osservazioni a Corte di Giustizia dell'Unione Europea – Grande Sezione – 16 Novembre 2010 – Pres. Skouris – Mantello (C-261/09)' [2011] Cassazione Penale 1219, 1222.

has been no case law concerning their interpretation or implementation. However, it may be noted that the recourse to the hypothesis provided for in section 5 strictly depends on how much the MSs ‘tend to acknowledge the negative effect of foreign judgements as an impediment to their own criminal law enforcement’⁹⁶.

Instead, among the mandatory grounds for refusal, the second is the only relevant for the purposes of this dissertation. Beyond requiring a final judgement, the provision proposes again an execution condition to be fulfilled in case of conviction, as the CISA did. In the *Mantello* case⁹⁷, the Court and AG supported the idea of a seamless relationship between the two provisions that would share the same rationale. On the one hand, article 54 allows who has already been finally judged to move freely within the Schengen area, without running the risk of further prosecutions for the same fact. Similarly, article 3 of the FD guarantees his/her stay in another MSs from an EAW execution. Therefore, the latter provision would seem to ‘work (...) towards the same objective as Article 54 of the CISA’⁹⁸. Such a link, the Court stated, justifies an interpretation of the notion of ‘same acts’ in compliance with the ECJ’s case law concerning article 54 of the Schengen Convention⁹⁹ and, in particular, the *idem* element. Nevertheless, the means by which they operate are different. The EAW creates an obstacle to the execution of a cooperation request, while article 54 prevents the exercise of jurisdiction. However, as to the Court’s reasoning such an aspect does not matter. Further, the ECJ recalled that the notion of ‘same acts’ could not have a meaning according to a whatsoever national law. In order to guarantee a uniform application of the principle of *ne*

⁹⁶ Harmen Van Der Wilt, ‘The European Arrest Warrant and the Principle of Ne Bis In Idem’ in Rob Blextoun and Wouter Van Ballegoij (eds), *Handbook on the European Arrest Warrant* (Asser Press 2005) 99, 103.

⁹⁷ Case C-261/09 *Mantello* [2010] ECR I-11477.

⁹⁸ Case C-261/09 *Mantello* [2010] ECR I-11477, Opinion of the AG Bot, para 113.

⁹⁹ See Steve Peers, ‘The European Arrest Warrant: the Dilemmas of Mutual Recognition, Human Rights and EU Citizenship’ in *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-Law* (Asser Press 2013) 523, 532 who questioned the application of article 55 exceptions to the EAWs too.

bis in idem within the EU, it shall have an autonomous meaning, and it coincides with that of article 54 CISA, as interpreted by the Court itself¹⁰⁰.

Some contested the argument above where it justifies a common interpretation of the *idem* on the basis of functions sharing. To Fasolin, it in fact disregarded the structural difference between the CISA and the EAW. While article 54 constitutes a limit for the activation of national jurisdiction, so resulting in a breach of international duties if not respected, the refusal of surrender a person does not directly bar further prosecution in the issuing MS, unless the latter provides for the defendant's presence as a necessary requirement¹⁰¹. Thus, the nexus between article 54 of the CISA and article 3 paragraph 2 of the FD would rather be an exigency of internal coherence within the EU legal system. It would be *per se* contradictory prohibiting double proceedings and at the same time enable MSs to surrender individuals with the sole intent to start a proceeding banned by or to execute a sentence delivered in violation of article 54¹⁰².

In addition, the Court did not give an appropriate argument about the different territorial scope of application between the two provisions. Indeed, the CISA provision applies to cross-border situations only, while the FD norm may prevent the execution of the warrant in case of double prosecution within the same MS¹⁰³. In this regard, an explicit reference to article 50 of the Charter rather than to the CISA would have been well-advised, since the former encompasses both the domestic and the trans-border dimension¹⁰⁴.

Another provocative profile suggested by the *Mantello* case concerns what the 'final judgment' category comprehends. In order to have a plain view on the issue, a hint of the facts of the case is not avoidable. Mr Mantello was a member of an organized crime association. The Italian authorities had been investigating him not only to assess his conducts, but also - and mostly - to

¹⁰⁰ Case C-261/09 *Mantello* [2010] ECR I-11477, para 39-40.

¹⁰¹ Silvia Fasolin, 'Divieto di *Ne Bis In Idem* e Mandato d'Arresto Europeo: Primi Chiarimenti dalla Corte di Giustizia UE' [2013] Cassazione Penale 4696, 4703-4.

¹⁰² *ibid* 4706.

¹⁰³ Peers (n 99).

¹⁰⁴ *ibid* 533.

gather evidence on the existence and extension of the association he was a member. Of course, if they had charged him of the offence relating to the participation in the association, all the evidence gathered so far would have been useful for the proceeding that involved Mr Mantello himself, but - unfortunately – it did not be further enhanced and used against other persons, having become of public domain. Therefore, as is the custom, at least in Italy, those individuals are firstly charged of minor offences, ie such offences they commit ‘on behalf of’ the association. Only at a later stage, they are charged of being part of the criminal association, so the investigations over the association as a whole are not jeopardised. Such a tactic was indeed used with regard to Mr Mantello. He was first convicted for unlawful possession of a large quantity of drugs intended to resale and, only later, he was prosecuted for his participation to a criminal organisation. Nonetheless, at the time of the institution of the second proceeding he was in Germany, so the Italian authorities sent an EAW for his surrender.

Under German Law, it is not possible to choose different times for charging a person of several crimes, unless the authorities were not aware of the latest at the time they brought prosecution for the first. Hence, the German authority required to execute the arrest warrant asked whether a ‘partial’ judgement as that indicated above could justify a refusal of surrender according to article 3 paragraph 2 of the FD as it would bar further proceedings under the law of the executing MS – Germany. Hushing up whatever attempt to frustrate the principle of mutual trust, the Court clearly stated:

Whether a person has been ‘finally’ judged for the purposes of Article 3(2) of the Framework Decision is determined by the law of the Member State in which judgment was delivered.¹⁰⁵

Therefore, the fact that the Italian authorities, requested to give further information about the nature of the decision concerned, ‘expressly stated that,

¹⁰⁵ Case C-261/09 *Mantello* [2010] ECR I-11477, para 46.

under the Italian law, the accused had been finally judged',¹⁰⁶ would have been sufficient for the German colleagues.

c. Article 4 of the 7th Protocol to the ECHR

1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

3. No derogation from this Article shall be made under Article 15 of the Convention.

Conversing about the 7th Protocol to the ECHR means narrating the story of a delay¹⁰⁷. Until 1984, when the Protocol was signed, the Convention did not provide for any safeguard of the *ne bis in idem* principle. Nonetheless, even at present there is not a comprehensive protection against double jeopardy throughout the Council of Europe members. Whilst they signed it, some States have not ratified the Protocol yet: Germany, Netherlands, UK. In Spain and Belgium, it entered into force respectively in 2009 and 2012. Moreover,

¹⁰⁶ *ibid* para 49.

¹⁰⁷ Sergio Bartole Pasquale De Sena and Vladimiro Zagrebelsky, *Commentario Breve alla Convenzione Europea per la Salvaguardia dei Diritti dell'Uomo e delle Libertà Fondamentali* (CEDAM 2012) 894.

Denmark, France, Luxembourg and Switzerland made reservations, while the most made declarations¹⁰⁸.

Evidently, the Protocol is far from being a priority for the Contracting Parties. However, it falls within the unconditional rights protected by article 15 of the Convention. Such a political choice should not be neglected. Rather, it denotes the will to grant the right effectiveness that States cannot limit on the ground of emergency situations¹⁰⁹. It substantially means depriving States of a precious arm for failing to comply with the Convention rules, especially in thorny circumstances.

Including an ECHR provision – even if part of a Protocol – into the circle of relevant sources as to the European *ne bis in idem* conveys taking a viewpoint of the progressive integration at European level¹¹⁰. Particularly after Lisbon, EU and Council of Europe cannot be seen as parallel straight lines, rather as coincident. Such a phenomenon was in fact brought forward by the Advocates General as well as by the Luxembourg Court itself that have tiptoe referred to the ECtHR's orders. Further, both the Treaty and the Charter expressly mention the ECHR. In short, not only it can no longer be ignored, but it shall also be taken into account. After all, this scenario is appreciated, mainly from practitioners' point of view. It will be cleared later on how such an influence has been mutual.

Article 4 of the 7th Protocol has, nevertheless, a huge limit. It is confined by its own wording to the domestic walls. It does not safeguard individuals from being twice prosecuted in case of trans-border crime. It 'simply' forces the Contracting Parties to respect the double jeopardy rule within their legal system. The provision has a mere internal dimension. Besides, granted its current enforcement status, what destiny would the Protocol have been in case of an extension of its scope of application is easily imaginable¹¹¹. Albeit such a

¹⁰⁸ See the updated table of ratification/signature status <<http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=117&CM=8&DF=&CL=ENG>> accessed 9 November 2014.

¹⁰⁹ Bartole De Sena and Zagrebelsky (n 107) 895.

¹¹⁰ *ibid* 897.

¹¹¹ *ibid* 896.

point of weakness, the norm does not provide for any enforcement condition, so distinguishing itself from both the EAW and the CISA. Bearing in mind the interpretation issues raised by such a kind of condition, this is a choice warmly welcomed.

Before exploring the main question, lights have to be pointed over the role of *nova*. The second paragraph of article 4 sets out derogation to *ne bis in idem*. There is no breach of the principle when a proceeding has been reopened, after a final judgement had already been issued, ‘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’. In essence, the provision makes safe the so-called extraordinary remedies, namely those that could be claimed even after a decision having become final. Of course, the circumstances able to reverse the force of *res iudicata* shall be of a certain weight, and they are supposed to be plainly specified. Granted that, academics criticised the inadequate clarification of what shall be meant as ‘new or newly discovered facts’ as well as ‘fundamental defect (...)’, which could affect the outcome of the case’. What is clear is that the norm applies to both convictions and acquittals. What is still uncertain, instead, is whether the new aspects could be already known at the time of the first proceeding, but considered not relevant at that time. The vagueness of the provision might also lead to abuses. Would any technological innovation or investigation technique unknown at the time of the first proceeding suffice for reopening a case?¹¹²

Historically, the ECtHR’s flexibility about the interpretation of ‘criminal proceedings’ did not pair off with the interpretation of *idem* and *bis*¹¹³. How the Court interprets and extends the concept of ‘criminal’ will be assessed in the next Chapter whose main issue is the combination of criminal and administrative sanctions. Hence, that aspect will be here skipped.

¹¹² *ibid* 904-5.

¹¹³ *ibid* 899 who refers to Christina Karacosta, ‘L’Article 4 du Protocol n°7: un Droit à Portée incertaine’ in Stefan Braum and Anne Weyembergh (eds), *Le Contrôle Juridictionnel dans l'Espace Pénal Européen* (Éditions de l’Université de Bruxelles 2009) 111, 115.

As to decisions that the Court holds as final, a clue has already been launched above. When the ordinary means of appeal are still possible, because they have not been exhausted yet or because the time-limit has not been expired yet, orders are not regarded as final for the purposes of article 4 of the Protocol. They have to assume the quality of *res iudicata*, they have to be irrevocable¹¹⁴, except for the possibility set out in paragraph 2.

The pivotal point within the ECtHR's case law remains its view on the element of *idem*. The circumstance that article 4 indicates as *idem* the 'offence' led to believe that the Protocol suggested a legal evaluation of the unlawful facts. Actually, by a careful reading of the Explanatory Report¹¹⁵, it comes to light the real *voluntas legis*, ie lending weight to facts rather than to offence. To this regard, the Court itself did not help at all. Rather, until 2009 there was not a common standard for the meaning of 'offence'.

The first Court's approach was that of the *Gradinger*¹¹⁶ case, where the Court, by overlooking the legal classification given by the States, held the violation of the Protocol as administrative and criminal sanctions were applied on the basis of the same conduct. Later in the *Oliveira* case¹¹⁷, the Court partially reversed its previous orientation. On the one hand, it allowed that the same material act, by violating several norms, might give rise to two proceedings and two relative sanctions. On the other hand, in order to justify its precedents, it stated that article 4 would exclusively prohibit double proceedings for the same offence. Such a viewpoint was confirmed later too. Meanwhile, the Strasbourg judges proposed another perspective, the 'doctrine of essential elements'¹¹⁸. According to it, the *ne bis in idem* operates if the legal provisions share essential elements. Otherwise, it could happen that the differences between the two merely shrink to a divergent *nomen iuris* or to an

¹¹⁴ Steering Committee for Human Rights, Explanatory Report to Protocol No. 7 to the ECHR, para 22.

¹¹⁵ *ibid* para 27.

¹¹⁶ *Gradinger v. Austria* (1995) Series A no. 328-C.

¹¹⁷ *Oliveira v. Switzerland* ECHR 1998-V.

¹¹⁸ Bartole De Sena and Zagrebelsky (n 107) 900-1.

apparent concurrence of offences¹¹⁹. This interpretation front was reiterated time after time too¹²⁰. Only in 2009, the Court recognised its fragmented decisional law with regard to the *idem*, and decided to go back to the drawing board. The Court itself felt the need to harmonise its case law, since it ‘engenders legal uncertainty incompatible with a fundamental right’¹²¹. Profiting from this chance of renewal, the Court smartly directed its glance at what the other supranational jurisdictions did within the same field. Accordingly, it would have been anachronistic keep on sheltering behind the literal meaning of offence, rather to make the Convention a ‘living instrument’¹²². Therefore,

(...) the Court takes the view that Article 4 of Protocol No. 7 must be understood as prohibiting the prosecution or trial of a second “offence” in so far as it arises from identical facts or facts which are substantially the same.¹²³

More importantly, the requirement of facts identity is specified by the Court by perfectly tracing the ECJ’s *Van Esbroeck* ruling, where it refers to ‘a set of concrete factual circumstances involving the same defendant and inextricably linked together in time and space’¹²⁴.

Dialogue between Courts? Accomplished.

¹¹⁹ *ibid* 901.

¹²⁰ *Zolotukhin v. Russia* ECHR 2009-I.

¹²¹ *ibid* para 78.

¹²² *ibid* para 80.

¹²³ *ibid* para 82.

¹²⁴ *ibid* para 84.

d. Article 50 of the CFR

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.

From being a soft law instrument and a mere political declaration, since the entry into force of Lisbon Treaty the Charter has become a ‘formidable strumento ermeneutico’¹²⁵.

Differently from what the drafters of the ECHR did, the Charter has included a *ne bis in idem* provision *ab initio*, precisely in article 50. More, it constitutes ‘a bar to being sentenced twice either by the courts of the same Member State or by the courts of different Member States’¹²⁶. From this point of view, it comprehends both the protection of the Schengen Convention, which safeguards while exercising the freedom of movement, and that of the ECHR, which applied just to the internal context.

Article 50 is *ictu oculi* void of any enforcement clause. While it indicates that it applies both in cases of final convictions and acquittals, it did not go through and specify what such a phrase concretely encompasses. The ECJ will probably have such a task¹²⁷.

Moreover, no derogations and exceptions are incorporated into the text. Nonetheless, as it is notorious, the Charter as a whole is limited by its Title VII that narrows down its scope of application¹²⁸, and that testify the MSs’ will to

¹²⁵ a formidable hermeneutic instrument (self-translated)

Cordi (n 65) 803.

¹²⁶ Case C-261/09 *Mantello* [2010] ECR I-11477, Opinion of the AG Bot, para 35.

¹²⁷ Olivia Den Hollander, ‘Caught Between National and Supranational Values: Limitations to Judicial Cooperation in Criminal Matters as Part of the Area of Freedom, Security and Justice within the European Union’ (2008) 10 International Community Law Review 51, 70.

¹²⁸ Peers (n 11) 206.

constraint it¹²⁹. Understanding the application confines of article 50 substantially means pinpointing those of article 51 and 52. Such a research will be conducted with the essential refer to the case law. However, some aspects of the case law will be omitted, as more related to the next Chapter.

The core norm is article 51 that requires a sufficient link between national and EU law to make the Charter provisions to be applied. Such a link is summarised into the concept of implementation of EU Law. When MSs are considered as implementing EU Law? Signally, they are implementing EU Law when national provisions are adopted to enforce European provisions¹³⁰, but the problem is then shifted on the meaning of ‘enforcement’. The concept of ‘implementation’ is endowed of an intrinsic generality, granted the significant variety of situations stemmed from the relations between EU and national legal systems. Therefore, the Court’s say about was crucial and necessary, albeit historically variable¹³¹.

Traditionally, the Court had a formal approach based on article 6 TUE as well as on article 51 paragraph 2, where it is established that the application of the Charter do not imply any creation or modification of ‘power or task for (...) the Union’ in respect to those attributed by the Treaties. Essentially, according with this approach, the scope of application overlaps that of attributed competences. If on the one hand this orientation does not involve isolated cases, as the time went by it became more flexible, firstly embracing the event

¹²⁹ Laura Delgado, ‘Mise en Œuvre du Droit de l’Union et Principe *Ne Bis Idem* ... Précisions Jurisprudentielles sur l’Applicabilité de la Charte des Droits Fondamentaux’ [2013] Groupe de Recherche – Espace Liberté Sécurité Justice <<http://www.gdr-elsj.eu/2013/03/11/droits-fondamentaux/mise-en-oeuvre-du-droit-de-lunion-et-principe-ne-bis-in-rem-precisions-jurisprudentielles-sur-lapplicabilite-de-la-charte-des-droits-fondamentaux/>> accessed 7 October 2014.

¹³⁰ Montaldo (n 10) 574.

¹³¹ Donato Vozza, ‘I Confini Applicativi del Principio del *Ne Bis In Idem* Interno in Materia Penale: un Recente Contributo della Corte di Giustizia dell’Unione Europea: Nota a Corte di Giustizia dell’UE (Grande Sezione), sentenza del 26 Febbraio 2013, Åkerberg Fransson, C-617/10’ [2013] Diritto Penale Contemporaneo n 6 <<http://www.penalecontemporaneo.it/upload/1365755526VOZZA%202013a.pdf>> accessed 15 April 2013.

of a MS derogating from European Law¹³². In the latter case, the link would be the fact itself that a State wanted to distance from supranational law¹³³.

More recently, the previous formal approach has been switched into a more dynamic one. By abandoning the literal factors, the Court quested after the functions and objectives of the Treaties. Consequently, it could extend its judgement over also those national rules that, even if not directly implementing the European Law, conflict with it as to the purposes of the EU law. Even where the EU has not any competence, national legislature could affect essential profiles for the EU objectives, so as justifying the Charter application.

The recent case *Åkerberg Fransson* made a picture of the situation above:

The Court's settled case-law indeed states, in essence, that the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by European Union law, but not outside such situations. In this respect the Court has already observed that it has no power to examine the compatibility with the Charter of national legislation lying outside the scope of European Union law. On the other hand, if such legislation falls within the scope of European Union law, the Court, when requested to give a preliminary ruling, must provide all the guidance as to interpretation needed in order for the national court to determine whether that legislation is compatible with the fundamental rights the observance of which the Court ensures.¹³⁴

In consideration of such a premise, the Court affirmed its jurisdiction over a case where a conjunction of criminal and fiscal sanctions for a violation of VAT regulation was at bar for breach of *ne bis in idem*. Although Member States are free to regulate their sanctioning regime as they prefer, the fact that such an arrangement indirectly rely on the VAT Directive and that could indirectly

¹³² Emily Hancox, 'The Meaning of "Implementing" EU Law under Article 51(1) of the Charter: *Åkerberg Fransson*' [2013] Common Market Law Review 1411, 1416.

¹³³ Montaldo (n 10) 575.

¹³⁴ C-617/10 *Åkerberg Fransson* [2013] nyr, para 19.

affect EU's financial interests represents a sufficient link with the EU law for applying the Charter.

Chapter III

Non-criminal sanctions and Ne Bis in Idem: comparing ECtHR and ECJ case law

Historically stood on criminal law, the punitive administrative law has – quite – recently achieved its autonomous status¹. Nonetheless, its structure ‘riece i cardini forti del diritto penale’². As a result, this new branch of law has maintained the repressive criminal-like part, that way earning a chance for being the ‘light’ alternative to the criminal law.

Since the administrative³ and criminal proceedings are separately ruled by the *ne bis in idem* principle at EU level, there is no common European standard in the event of a concurrent occurrence of an administrative and criminal sanction⁴. This means, for example, that a European ‘citizen (...) [would] be punished twice with a punitive administrative fine and a criminal penalty for EU subsidy fraud in one EU Member State while he is protected against that type of double punishment in another EU Member State’⁵. Indeed, neither the mutual legal assistance and mutual recognition instruments⁶, nor the

¹ María Lourdes Ramírez Torrado, ‘El *Non Bis In Idem* en el Àmbito Administrativo Sancionador’ [2013] *Revista de Derecho* 1, 3.

² echoes the strong pillars of criminal law (self-translated)

Massimiliano Dova, ‘Ne Bis In Idem in Materia Tributaria: Prove Tecniche di dialogo tra legislatori e giudici nazionali e sovranazionali’ [2014] *Diritto Penale Contemporaneo* <<http://www.penalecontemporaneo.it/materia/-/-/3120-ne-bis-in-idem-in-materia-tributaria-prove-tecniche-di-dialogo-tra-legislatori-e-giudici-nazionali-e-sovrnazionali/#>> accessed 14 September 2014.

³ Steve Peers, *EU Justice and Home Affairs Law* (OUP 2011) 823.

⁴ Michiel JJ Luchtman, ‘Transnational Law Enforcement in the European Union and the *Ne Bis In Idem* Principle’ (2011) 4 *Review of European Administrative Law* 5, 5.

⁵ John AE Vervaele, ‘*Ne Bis In Idem*: Towards a Transnational Constitutional Principle in the EU?’ (2013) 9 (4) *Utrecht Law Review* 211, 212.

⁶ *ibid* 217.

main supranational sources on *ne bis in idem*⁷ totally cover the scope of punitive non-criminal sanctions.

Nevertheless, both the ECJ and the ECtHR have taken giant steps in extending the links of relevant text wording. Thus, next pages will be centred, firstly, on the ECtHR's case law and, in particular, on two recent judgments that confirmed and strengthened the Court's beliefs; then, the focus will be laid upon two relevant ECJ's cases, by mean of which the Luxembourg Court's position will be gauged. Afterwards, the eventual matching of the respective rulings will be assessed, also in the view of the EU's accession to the ECHR.

(...) [F]or most of the EU's existence, integration through rights has been played out in the European courts, not pursued as a policy by the EU's political institution, and the story of human rights in the EU is largely the story of interaction between the Luxembourg and Strasbourg courts. The resulting dynamic between the courts has become an increasingly important feature of European integration and governance – a symbiotic interaction of fragile complexity, continuously working out a solution to the sometimes awkward co-existence of the EU and ECHR.⁸

⁷ Luchtman (n 4) 6.

⁸ Sionaidh Douglas-Scott, 'A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis' [2006] Common Market Law Review 629, 630-1.

1. The ECtHR interpretation of “*matière pénale*”: focus on two recent cases

What falls into the notion of ‘criminal matter’ occurring in article 4 of the 7th Protocol⁹ had been clarified by the ECtHR in 2009. While its interpretation was wavering hitherto, in the *Zolotukhin* case¹⁰ the Strasbourg Court had the chance to draw the line at its earlier confusing case law. In particular, it held its interpretation of ‘criminal’ regarding article 6 of the Convention to be adopted as in article 4 of the Protocol¹¹.

By attaining a substantial approach, the ECtHR has shaped a fluid¹² concept of ‘criminal’ that tries to homogenise the existing differences among the State Parties. Indeed, if it should have relied on the national sanction qualification, the Court would have indirectly jeopardised the *ne bis in idem* equal application ‘Council of Europe-wide’. In addition, it may happen that, in order not to attribute the appropriate guarantees, legislators define a sanction eg as administrative, whereas it would actually be criminal. Such a practice – represented as ‘frode delle etichette’ by the Italian doctrine¹³ – further plays up the role of the inequality through “the greater Europe” of the Council of Europe’¹⁴. Therefore, by taking ‘a bold step forward towards a uniform

⁹ VII Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) article 4.

¹⁰ *Zolotukhin v. Russia* ECHR 2009-I.

¹¹ Peers (n 3) 820.

¹² Corte di Cassazione (Ufficio del Ruolo e del Massimario, Settore Penale), ‘Considerazioni sul Principio del Ne Bis In Idem nella Recente Giurisprudenza Europea: la Sentenza 4 Marzo 2014, Grande Stevens e Altri Contro Italia’ (Rel. no 35/2014) [2014] Diritto Penale Contemporaneo 25 <http://www.penalecontemporaneo.it/area/3-/15-/3109-la_relazione_dell_ufficio_del_massimario_della_cassazione_sulle_ricadute_della_sentenza_de_lla_corte_edu_grande_stevens_c_italia_in_tema_di_ne_bis_in_idem/> accessed 16 September 2014.

¹³ Silvia Melodia, ‘Sistema del doppio binario e garanzie individuali: il controllo dell'autore imputabile pericoloso nel diritto penale francese’ [2013] Diritto Penale Contemporaneo 34 <[http://www.penalecontemporaneo.it/upload/1352727745tesi_silvia_melodia%20\(2\).pdf](http://www.penalecontemporaneo.it/upload/1352727745tesi_silvia_melodia%20(2).pdf)> accessed 15 September 2014.

¹⁴ Paul Gragl, ‘A Giant Leap for European Human Rights? The Final Agreement on the European Union’s Accession to the European Convention on Human Rights’ [2014] Common Market Law Review 13, 14.

interpretation of the *ne bis in idem* principle in respect of the notion of ‘criminal proceedings’¹⁵, the ECtHR set up three different criteria to refer to, whenever the *species* of sanctions has to be assessed. Those canons took the name of ‘*Engel* criteria’, since they were first articulated in the ‘70s within the *Engel* ruling¹⁶.

The ‘starting point’¹⁷ of the Court’s reasoning is the sanction definition under national law. Albeit being relevant, of course it is ‘of relative weight’¹⁸. ‘Otherwise, the application of (...) [article 4 of the Protocol] would be left to the discretion of the Contracting States to a degree that might lead to results incompatible with the object and purpose of the Convention’¹⁹, namely the ‘realisation of Human Rights and Fundamental Freedoms’ with the aim of the ‘unity’ among the Council of Europe members²⁰.

More importantly, the Court is used to look at the very nature of the sanction, distancing from the State Parties’ stance on it. In evaluating whether a penalty may be regarded as substantially criminal, various aspects were being considered²¹. At times, the Court believed relevant the authority that usually makes provision for the sanction and the relative enforcement powers. On the other hand, the purposes of sanctioning were also taken into consideration. Similarly, the Court investigated whether a guilty reasoning is however implied as well as whether the penalty subjects are either specifically or generally determined. More, the judges carried out also their analysis from a comparative point of view. The possibility to be recorded for having served a certain sanction was likewise assessed, but finally the judges found it a merely domestic matter. Besides, in establishing whether a combination of taxation

¹⁵ Norel Neagu, ‘The Ne Bis in Idem Principle in the Interpretation of European Courts: Towards Uniform Interpretation’ [2012] Leiden Journal of International Law 955, 959.

¹⁶ *Engel and Others v. Netherlands* (1976) Series A no 22.

¹⁷ Neagu (n 15) 960.

¹⁸ *ibid.*

¹⁹ *Nykänen v. Finland* App no 11828/11 (ECtHR, 20 May 2014), para 38.

²⁰ ECHR, preamble.

²¹ Neagu (n 15) 960.

and criminal proceedings may fall into the *ne bis in idem* scope of application, the Strasbourg judges reasoned as follows:

La Cour peut donc être amenée, dans certaines circonstances, à examiner globalement, sous l’angle de l’article 6 de la Convention, un ensemble de procédures si celles-ci sont suffisamment liées entre elles pour des raisons tenant soit aux faits sur lesquelles elles portent, soit à la manière dont elles sont menées par les autorités nationales. L’article 6 de la Convention sera ainsi applicable lorsqu’une des procédures en cause porte sur une accusation en matière pénale et que les autres lui sont suffisamment liées.²²

Thirdly and lastly, the Court explores the nature as well as the degree of severity of the penalty that in the worst case the person is liable to incur²³. Arguably, when sanctions are particularly strict, they prove a real criminal core, given their deterrent effect. From such a point of view, the second and the third criteria might be considered as the two sides of the same coin. Nonetheless, the Court held that ‘[t]he relative lack of seriousness of the penalty cannot divest an offence of its inherently criminal character’²⁴; instead, in such an event the other criteria should be assessed in any case.

Regarding the relation among the three criteria, the limited relevance of the first parameter has already been highlighted. Instead, the Court pointed out that the second and third criteria – the most important ones – shall be ‘alternative and not necessarily cumulative’²⁵. However, an exception is inevitable, ‘where separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a criminal charge’²⁶.

²² *Chambaz v. Switzerland* App no 11663/04 (ECtHR, 5 April 2012), para 43.

²³ *Neagu* (n 15) 960.

²⁴ *Jussila v. Finland* ECHR 2006-XIV, para 31.

²⁵ *Neagu* (n 15) 960.

²⁶ *ibid.*

The elastic notion of ‘criminal’ envisaged by the Strasbourg Court has been questioned²⁷, as far as it devolves upon the judiciary a legislative task. According to the legality principle, in criminal matters the legislative power has to determine the sanctioning response as a mouthpiece of a certain community values. Therefore, a judge who reaches beyond the legislative postulate may result in breach of that fundamental principle. Actually, there might be a way to overtake such an impasse. It will be evaluated at the end of the Chapter.

In conclusion, it is worth reminding that, whether an administrative/fiscal sanction is held as criminal within the meaning of article 4 of the 7th Protocol, the relative proceeding is so considered also for the purpose of article 6 of the ECHR²⁸. Therefore, if double ‘criminal’ sanctions for the same fact have been imposed, firstly the *ne bis in idem* principle correctly applies and, secondly, the concerned proceedings shall have been informed by the guarantee requirements set in article 6 of the Convention.

²⁷ Corte di Cassazione (Ufficio del Ruolo e del Massimario, Settore Penale), ‘Considerazioni sul Principio del Ne Bis In Idem nella Recente Giurisprudenza Europea: la Sentenza 4 Marzo 2014, Grande Stevens e Altri Contro Italia’ (Rel. no 35/2014) [2014] Diritto Penale Contemporaneo 25 <<http://www.penalecontemporaneo.it/area/3-/15-/3109-la-relazione-dell-ufficio-del-massimario-della-cassazione-sulle-ricadute-della-sentenza-de-lla-corte-edu-grande-stevens-c-italia-in-tema-di-ne-bis-in-idem/>> accessed 16 September 2014; Gaetano De Amicis, ‘Ne Bis In Idem e “Doppio Binario” Sanzionatorio: Prime Riflessioni sugli Effetti della Sentenza “Grande Stevens” nell’Ordinamento Italiano’ [2014] Diritto Penale Contemporaneo 24 <<http://www.penalecontemporaneo.it/upload/1404108249DE%20AMICIS%202014.pdf>> accessed 9 September 2014.

²⁸ Corte di Cassazione (Ufficio del Ruolo e del Massimario, Settore Penale), ‘Considerazioni sul Principio del Ne Bis In Idem nella Recente Giurisprudenza Europea: la Sentenza 4 Marzo 2014, Grande Stevens e Altri Contro Italia’ (Rel. no 35/2014) [2014] Diritto Penale Contemporaneo 27 <<http://www.penalecontemporaneo.it/area/3-/15-/3109-la-relazione-dell-ufficio-del-massimario-della-cassazione-sulle-ricadute-della-sentenza-de-lla-corte-edu-grande-stevens-c-italia-in-tema-di-ne-bis-in-idem/>> accessed 16 September 2014; Marco Di Alberti (Il Principio del Ne Bis In Idem tra Giurisprudenza Europea e Diritto Interno - Sentenza Corte EDU del 4 marzo 2014 Grande Stevens c/Italia, Corte Suprema di Cassazione - Roma, 23 giugno 2014).

a. *Grande Stevens v. Italia* and the EU reform on market abuse

In March 2014, the Second Section of the ECtHR appraised the validity of the Italian regulation on market abuse in the light of article 4 of the 7th Protocol to the ECHR as well as in the light of article 6²⁹. Under the Italian law, the same *corpus legis*³⁰ provides for both a criminal³¹ and administrative³² sanction for market manipulation: where the former is issued by the judiciary, the latter by the Authority (CONSOB) ‘qui dans le système juridique italien, a pour but, entre autres, d’assurer la protection des investisseurs et l’efficacité, la transparence et le développement des marchés boursiers’³³.

In spite of formally being an administrative proceeding aimed to apply an administrative sanction, the Court held that the proceeding before CONSOB as actually leading to a sanction too severe for being considered just administrative. Indeed, the decision imposed a disbursement of millions of euros in conjunction with other accessory sanctions, which affect the subject’s interests as well. As a result, it largely went beyond the threshold fixed by the second and third *Engel* criteria³⁴. Nevertheless, trying to ward accusation off, the Italian Government preliminarily brought up the reservation made to the Protocol, stating that *inter alia* article 4 would have ‘applied only to offences classified as “criminal” by Italian law’³⁵. Regarded as too general, so not

²⁹ *Grande Stevens and Others v. Italy* App nos 18640/10, 18647/10, 18663/10, 18668/10 and 18698/10 (ECtHR, 4 March 2014).

³⁰ Decreto Legislativo no 58/1998.

³¹ *ibid* art 185.

³² *ibid* art 187 *ter*.

³³ *Grande Stevens and Others v. Italy* App nos 18640/10, 18647/10, 18663/10, 18668/10 and 18698/10 (ECtHR, 4 March 2014), para 9.

³⁴ *Grande Stevens and Others v. Italy* App nos 18640/10, 18647/10, 18663/10, 18668/10 and 18698/10 (ECtHR, 4 March 2014), paras 97-9; Corte di Cassazione (Ufficio del Ruolo e del Massimario, Settore Penale), ‘Considerazioni sul Principio del Ne Bis In Idem nella Recente Giurisprudenza Europea: la Sentenza 4 Marzo 2014, Grande Stevens e Altri Contro Italia’ (Rel. no 35/2014) [2014] Diritto Penale Contemporaneo 3 <<http://www.penalecontemporaneo.it/area/3-/15-/3109-la-relazione-dell-ufficio-del-massimario-della-cassazione-sulle-ricadute-della-sentenza-de-lla-corte-edu-grande-stevens-c-italia-in-tema-di-ne-bis-in-idem/>> accessed 16 September 2014.

³⁵ Registrar of the ECtHR, Press Release 062 (2014) of the 4th March 2014, 6.

fulfilling those requirements set in article 57³⁶, the Court firmly overtook such a reservation.

Although according to the provisions wording the criminal and non-criminal sanctions seem applicable whether different conducts had been carried out, the Court found that the material conducts on the basis of which both the CONSOB and the Turin Tribunal imposed penalties were identical with respect to subjects and period considered³⁷. Therefore, while *in abstracto* different elements constitute the provisions concerned, the Court came up with its usual substantial approach, drawing instead attention to the conducts *in concreto* considered by the Italian authorities³⁸. So, the combination of the two sanctions produced a duplication of sanctioning in violation of article 4 of the 7th Protocol to the ECHR, as being inflicted in consideration of the same material facts.

While from the *idem* point of view the penalty inflicted by CONSOB has to be regarded as criminal too, from the *bis* perspective the same sanction has been considered final. The former finding represents a noteworthy issue as to the domestic administration of justice. The fact that administrative proceedings before CONSOB Authority fall within the framework of article 6 entails those proceedings to be adjusted to criminal proceedings standards. Effectively, as the Court stressed, it signifies providing for equal arms between accusation and

³⁶ ECHR, art 57 that allows reservations under certain conditions:

1. Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this Article.

2. Any reservation made under this Article shall contain a brief statement of the law concerned.

³⁷ *Grande Stevens and Others v. Italy* App nos 18640/10, 18647/10, 18663/10, 18668/10 and 18698/10 (ECtHR, 4 March 2014), para 227.

³⁸ *ibid* paras 224, 227; Andrea F Tripodi, 'Uno Più Uno (a Strasburgo) Fa Sempre Due. L'Italia Condannata per Violazione del Ne Bis In Idem in Tema di Manipolazione del Mercato' [2014] *Diritto Penale Contemporaneo* para 4 <<http://www.penalecontemporaneo.it/materia/-/-/2895-uno-pi-uno-a-strasburgo-fa-due-l-italia-condannata-per-violazione-del-ne-bis-in-idem-in-tema-di-manipolazione-del-mercato/>> accessed 14 September 2014.

defence as well as for a public hearing allowing an oral confrontation³⁹.
Actually,

[l]a Cour relève (...) que la procédure devant la CONSOB était essentiellement écrite et que les requérants n'ont pas eu la possibilité de participer à la seule réunion tenue par la commission, qui ne leur était pas ouverte. (...) À cet égard, la Cour rappelle que la tenue d'une audience publique constitue un principe fondamental consacré par l'article 6 § 1⁴⁰.

In addition, the order of the Italian Court of Cassation of the 23th June 2009, by reaching the end point of the administrative proceedings, made it finally closed. Consequently, from that moment on the accused should have been considered as finally judged, so the Court of Cassation's ruling should have brought the criminal proceedings on being quitted⁴¹.

The Italian Government also argued that the provision of double sanction had been directly required by the Directive 2003/6⁴² that calls upon MSs for a more effective mechanism to fight market manipulation and abuses⁴³. It would be an evidence the *Spector Photo Group* case, where the ECJ 'a admis la coexistence, dans ce secteur, de sanctions administratives et pénales'⁴⁴. The

³⁹ *Grande Stevens and Others v. Italy* App nos 18640/10, 18647/10, 18663/10, 18668/10 and 18698/10 (ECtHR, 4 March 2014), para 123.

⁴⁰ *ibid* para 118.

⁴¹ *ibid* paras 222-3.

⁴² European Parliament and Council Directive 2003/6/EC of 28 January 2003 on insider dealing and market manipulation (market abuse) [2003] OJ L96/16

Article 14(1) provides:

'Without prejudice to the right of Member States to impose criminal sanctions, Member States shall ensure, in conformity with their national law, that the appropriate administrative measures can be taken or administrative sanctions be imposed against the persons responsible where the provisions adopted in the implementation of this Directive have not been complied with. Member States shall ensure that these measures are effective, proportionate and dissuasive.'

⁴³ *Grande Stevens and Others v. Italy* App nos 18640/10, 18647/10, 18663/10, 18668/10 and 18698/10 (ECtHR, 4 March 2014), paras 216, 229.

⁴⁴ Case C-45/08 *Spector Photo Group e Van Raemdonck* [2009] ECR I-12073, paras 76-7.

Strasbourg Court recalled the same ruling⁴⁵, but overturned the Government's reasoning. Indeed, it stressed that the ECJ simply acknowledged the possibility for MSs to set both criminal and administrative sanctions to combat market abuses, yet it does not oblige them to do so. Further, the Court pointed out that the presence of such criminal penalties would not count in the assessment of the administrative sanctions efficacy. Finally, within the same judgment the ECJ warned the MSs that such non-criminal sanctions might be susceptible to a different qualification for the purpose of the ECHR⁴⁶. Then, the Directive 2003/6 does not provide a duty to establish criminal sanctions to combat market abuses, nor bans it.

Bearing in mind that '[t]he adoption of administrative sanctions by Member States has, to date, proven to be insufficient to ensure compliance with the rules on preventing and fighting market abuse'⁴⁷ and that '[n]ot all Member States have provided for criminal sanctions for some forms of serious breaches of national law implementing Directive 2003/6/EC'⁴⁸, in April 2014 a new Directive on criminal sanctions was put forward. Contextually, a general Regulation on market abuse was launched⁴⁹, which *inter alia* repealed the 2003 Directive⁵⁰. Then, what relation have criminal and administrative sanctions under the new regime? The preamble points out that the implementation of the Directive shall require criminal sanctions, whereas the Regulation provides just for administrative provisions. Such an arrangement, however, does not prevent

⁴⁵ By the way, in para 229 the ECtHR points out that 'sa tâche n'est pas celle d'interpréter la jurisprudence de la CJUE'.

⁴⁶ *Grande Stevens and Others v. Italy* App nos 18640/10, 18647/10, 18663/10, 18668/10 and 18698/10 (ECtHR, 4 March 2014), para 229.

⁴⁷ European Parliament and Council Directive 2014/57/UE of 16 April 2014 on criminal sanctions for market abuse (Market Abuse Directive) [2014] OJ L173/179, recital 5.

⁴⁸ *ibid* recital 7.

⁴⁹ European Parliament and Council Regulation (EU) 596/2014 of 16 April 2014 on market abuse (Market Abuse Regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC [2014] OJ L173/1.

⁵⁰ Gaetano De Amicis, 'Ne Bis In Idem e "Doppio Binario" Sanzionatorio: Prime Riflessioni sugli Effetti della Sentenza "Grande Stevens" nell'Ordinamento Italiano' [2014] *Diritto Penale Contemporaneo* 12-4

<<http://www.penalecontemporaneo.it/upload/1404108249DE%20AMICIS%202014.pdf>> accessed 9 September 2014.

MSs from providing for criminal sanctions even in those hypotheses foreseen by the Regulation⁵¹. Specifically, those penalties requiring the intention element and facing – at least – the most serious conducts should fall within the Directive scope of application. Vice versa, the Regulation needs neither the intentional commission of the wrongful acts, nor the seriousness requirement⁵².

b. A confirmation: Nykänen v. Finlandia

In principles, the case under consideration⁵³ does not produce new results. It just reiterates the ECtHR's case law, so the perspective of both the *ne bis in idem* principle and the criteria discerning the criminal nature of a sanction⁵⁴ will be just implied. Instead, its internal effects will be of remarkable interest, also in consideration of the previous ruling.

The ruling concerns a Finnish citizen firstly involved in a taxation proceeding and then charged with tax fraud before a criminal Court. In consequence of the first, he was applied a pecuniary fine of €1700 as surcharge. Afterwards, a criminal proceeding was carried out because of the same unlawful fact. Therefore, he lodged a complaint before the ECtHR, adducing a violation of article 4 of the 7th Protocol to the Convention.

What the Court did first was evaluating the nature of that surcharge in the light of the *Engel* criteria. Recalling a previous decision⁵⁵, the judges anew affirm that a tenuous penalty does not automatically lead to the outcome of its non-criminal qualification. In the *Nykänen* case, for example, the Court attached attention to the purposes of the surcharge. In this particular case, the penalty sounded not as a damages compensation – that would justify its administrative nature, rather an out-and-out criminal sanction with preventive

⁵¹ Market Abuse Directive, recital 22.

⁵² *ibid* recital 23.

⁵³ *Nykänen v. Finland* App no 11828/11 (ECtHR, 20 May 2014).

⁵⁴ *Dova*, (n 2) 1.

⁵⁵ *Jussila v. Finland* ECHR 2006-XIV.

and repressive purposes⁵⁶. For these reasons, the Strasbourg Court held that even €1700 of surcharge might have a criminal characterisation, where it shares the functions of a criminal penalty⁵⁷. As usual, the Court reached beyond the legal labels fixed by the State Parties.

As a further step, the *bis* element fulfilment was examined; that is to say in which precise circumstances the Convention violation springs. Abstractly, the Court stated, parallel proceedings are not in breach of article 4⁵⁸. Nonetheless, in case one comes to a final judgment, the other has to be quitted⁵⁹; otherwise, the State will be accountable for that duplication. Thus, in the *Nykänen* case the criminal proceeding should have been closed, after the fiscal decision deliver. Basically, the Court ruled in the same way as in the *Grande Stevens*⁶⁰, where the administrative proceedings had become final before the criminal one.

c. The expected scenario

The rulings above allow a more global reflection on the impact that the ECtHR's case law will have on the EU MSs' legal systems. In order to efficaciously comply with the EU obligations, most of MSs shaped a 'bold' legal structure functioning as follows: an administrative authority by mean of administrative proceedings inflicts a sanction having criminal character⁶¹. The ECtHR intervenes in such a framework, not doing anything else but transforming quantity in quality⁶². Hence, apparently MSs find themselves at a

⁵⁶ Dova (n 2) 2.

⁵⁷ *ibid.*

⁵⁸ *Nykänen v. Finland* App no 11828/11 (ECtHR, 20 May 2014), paras 48-9.

⁵⁹ *De Amicis* (n 50) 11.

⁶⁰ *Grande Stevens and Others v. Italy* App nos 18640/10, 18647/10, 18663/10, 18668/10 and 18698/10 (ECtHR, 4 March 2014), para 237.

⁶¹ Marco Di Alberti (Il Principio del Ne Bis In Idem tra Giurisprudenza Europea e Diritto Interno - Sentenza Corte EDU del 4 marzo 2014 *Grande Stevens c/Italia*, Corte Suprema di Cassazione - Roma, 23 giugno 2014).

⁶² *ibid.*

very important juncture: the more they respect their duties under the EU law, the less they guard against eventual breaches of the Convention.

A further in-depth analysis on this pivotal topic will be developed in the last paragraph. Meanwhile, it is worth quoting the conclusion of the Dissenting Opinion joined with the *Grande Stevens* case that, despite referring to market abuse regulation, summarises the ECtHR's view on the 'système à double voie'.

Les États européens sont confrontés à un dilemme. Pour assurer l'intégrité des marchés européens et relancer la confiance des investisseurs dans ces marchés, ils ont créé des infractions administratives de portée très large basées sur le comportement, qui punissent le risque abstrait de préjudice au marché par des peines pécuniaires et non pécuniaires sévères et indéterminées qualifiées de sanctions administratives, imposées par des autorités administratives « indépendantes » dans le cadre de procédures inquisitoires, inégalitaires et expéditives. Ces autorités cumulent des pouvoirs de sanction et des pouvoirs de poursuites avec un large pouvoir de supervision sur un secteur particulier du marché, exerçant le second de manière à faciliter l'exercice des premiers, en imposant parfois à la personne contrôlée/soupçonnée une obligation de coopérer avec ses propres accusateurs. La succession de trois, voire quatre, stades de communication de pièces écrites pour la défense (deux devant l'autorité administrative, un devant la cour d'appel, et éventuellement un autre devant la Cour de cassation) est une garantie illusoire qui ne compense pas le caractère intrinsèquement inéquitable de la procédure. Il est clair que la tentation a été de déléguer à ces « nouvelles » procédures administratives la répression de conduites qui ne peuvent pas être traitées avec les instruments classiques du droit pénal et de la procédure pénale. Néanmoins, la pression des marchés ne peut prévaloir sur les obligations internationales de respect des droits de l'homme qui incombent aux États liés par la Convention. On ne

peut éluder la nature répressive des infractions et la sévérité de la peine, qui appellent clairement le bénéfice de la protection apportée par les garanties procédurales et matérielles que consacrent les articles 6 et 7 de la Convention.⁶³

i. Constitutional issues under Italian Law

Whilst the ECtHR's case law was largely settled and its order broadly predicted, the *Grande Stevens* ruling has raised up an ample debate within the Italian academia. How may Italy prevent a condemnation by Strasbourg while looking forward to a legislature's intervene⁶⁴? Solutions have varied.

A first answer could be found in article 187^{ter} of D.lgs. 58/98 itself, ie the object of the Court's scrutiny. The text of the provision establishing the administrative sanction for market manipulation begins with a pivotal phrase: 'Salve le sanzioni penali quando il fatto costituisce reato, (...)'⁶⁵. In addition, article 9 of L. 689/81 generally regulates that, where the same fact is simultaneously sanctioned by criminal and administrative law, the special rule has to be applied. A smart appreciation of the expression above could exclude sanctions conjunction in case of a final administrative proceeding and a pending criminal one. As the Court of Cassation has already ruled in 2006⁶⁶, the two norms – article 185 and 187^{ter} – are linked by a speciality relation. Although both indicate the requirement of price sensitiveness, only the criminal provision – the former – requires the judge to ascertain whether it actually occurs. In the event of the administrative proceedings, instead, the fact that the conduct may *in abstracto* have such a feature suffices. Hence, the

⁶³ *Grande Stevens and Others v. Italy* (Joint Partly Dissenting Opinion) App nos 18640/10, 18647/10, 18663/10, 18668/10 and 18698/10 (ECtHR, 4 March 2014), para 32.

⁶⁴ Francesco Viganò, 'Ne Bis In Idem: la Sentenza Grande Stevens è Ora Definitiva' [2014] Diritto Penale Contemporaneo <http://www.penalecontemporaneo.it/materia/-/-/3206-ne_bis_in_idem_la_sentenza_grande_stevens_ora_definitiva/> accessed 10 September 2014.

⁶⁵ Except for criminal sanctions when the fact constitutes an offence, (...) (self-translated).

⁶⁶ Cass Pen sez VI, sent no 15199, 16 March 2006, *Labella*.

criminal provision would represent *lex specialis* in respect of the general provision of administrative nature.

Such a scenario would let Italy comply with its Convention duties, as the Maxim Office of the Court of Cassation also stressed⁶⁷. Nonetheless, apart its 2006 decision, the Court of Cassation usually interprets the clause above, by taking into account the abstract provisions rather than the concrete conducts⁶⁸. In the light of the recent case law, such an orientation runs the risk to bring Italy before the ECtHR once more. As the Strasbourg Court has indicated several times, the analysis shall be conducted on the ground of the concrete conduct committed by the accused. Sceptic as to a conventionally oriented interpretation of article 187ter, some authors also denoted a likely conflict with the EU law where it provides for a complete overlapping between criminal and administrative sanctions, at least, in the subject of abuse of privileged information⁶⁹.

When the criminal proceeding is still pending and the administrative one became final, article 649 of the Italian Code of Criminal Procedure, namely the prohibition of a second proceeding, seems not to help. Some pointed out an evident lacuna, since it does not formally comprehend final decisions issued by administrative authorities. The rule is that acquittal or conviction verdicts⁷⁰ as well as criminal decree⁷¹, when become irrevocable⁷², inhibit further

⁶⁷ Corte di Cassazione (Ufficio del Ruolo e del Massimario, Settore Penale), ‘Considerazioni sul Principio del Ne Bis In Idem nella Recente Giurisprudenza Europea: la Sentenza 4 Marzo 2014, Grande Stevens e Altri Contro Italia’ (Rel. no 35/2014) [2014] Diritto Penale Contemporaneo 27 <<http://www.penalecontemporaneo.it/area/3-/15-/3109-la-relazione-dell-ufficio-del-massimario-della-cassazione-sulle-ricadute-della-sentenza-della-corte-edu-grande-stevens-c-italia-in-tema-di-ne-bis-in-idem/>> accessed 16 September 2014.

⁶⁸ De Amicis (n 50) 19.

⁶⁹ *ibid* 19-20.

⁷⁰ The category comprehends plea bargaining, simplified and shortened proceedings, acquittal decisions passed in the pre-trial stage and extraordinary appeal for error of facts misrepresentation; instead, dismissal and order of *non lieu* are excluded. See Sergio Bartole Pasquale De Sena and Vladimiro Zagrebelsky, *Commentario Breve alla Convenzione Europea per la Salvaguardia dei Diritti dell’Uomo e delle Libertà Fondamentali* (CEDAM 2012) 903.

⁷¹ The ‘decreto penale di condanna’ is delivered when the prosecutor holds that the accused may be applied only a pecuniary sanction or a pecuniary sanction in place of detention according to article 459 of the Code of Criminal Procedure.

proceeding against the same person for the same fact according to article 649 of Code. Would it be possible to consider criminal according to the Code what the ECtHR held as substantially criminal? A certain part of the doctrine⁷³ accepts such a scenario on the ground that article 649 has a general reach, so it may be subject to an extensive interpretation. On the other side, it has also been appraised as undeserved interference with national sovereignty, empowered to make criminal policy choices⁷⁴. Of course, filling that gap would not be a judiciary's task. In the absence of an elucidative say by the legislature, making a reference to the Constitutional Court would be the only feasible option, so as to have an *erga omnes* decision that tidies up such an uncertain situation⁷⁵.

Which role would article 50 of CFR have within this framework? On the one hand it was attributed a resolving function⁷⁶. It is undisputed that market abuse is a subject pertinent to EU law and that article 50 is directly applicable where MSs are implementing EU law. Thus, as the content of article 50 shall be consistent with that of the Convention, ie article 4 of the 7th Protocol, according to article 52 paragraph 3 of the Charter, there should not be any obstacle for seeping through it the ECtHR's case law. Nonetheless, contrasting opinions did not miss on this point too. If the statements on the Charter value may not be neglected as a matter of principle, according to someone the automatic disapplication of national fundamental guarantees is felt as a straining element⁷⁷. Hence, it would need an intermediate step: a referral to a Supreme Court, being either the Constitutional Court or the ECJ.

⁷² They are irrevocable when ordinary remedies are no more available according to article 648 of the Code of Criminal Procedure.

⁷³ Tripodi (n 38) para 6.

⁷⁴ De Amicis (n 50) 20.

⁷⁵ De Amicis (n 50) 20; Francesco Viganó (Il Principio del Ne Bis In Idem tra Giurisprudenza Europea e Diritto Interno - Sentenza Corte EDU del 4 marzo 2014 Grande Stevens c/Italia, Corte Suprema di Cassazione - Roma, 23 giugno 2014).

⁷⁶ Viganó (n 64).

⁷⁷ De Amicis (n 50) 21.

2. The *Bonda* and *Åkerberg Fransson* rulings: the Court of Luxembourg's point of view

The following paragraph will deal with two ECJ decisive judgments in the matter of the *ne bis in idem* scope of application, the first on the subject of CAP and the second in regard to VAT evasion. The Court's attempt to align its case law with that of the Strasbourg colleagues justifies the relevance of the cases here reported. However, albeit such increasingly compact perspective, Luxembourg did not completely lose its originality. Moreover, the Court had also the chance to draw the boundary lines of its competence under article 51.

a. The *Bonda* case, the 'test case'

(...) [T]he *Bonda* preliminary ruling is something of a 'test case' not just for appraising the confines of the principle of *ne bis in idem*, but also for 'sounding the mood' of the ECJ as the Union moves toward accession to the European Convention on Human Rights.⁷⁸

In 2005, Mr *Bonda*, a Polish citizen, submitted a request for an agricultural subsidy to the competent national authority⁷⁹. By carrying out controls over the declarations veracity, the Polish authorities realised that Mr *Bonda* had actually overestimated the cultivated land, so as to obtain a more conspicuous aid. Consequently, he was imposed a penalty tantamount to 'the loss of entitlement to the single area payment, up to the amount of the difference between the real area and the area declared, for the three years following the year in which the incorrect declaration had been made'⁸⁰. In 2009, after the administrative sanction having become final, Mr *Bonda* was

⁷⁸ Arianna Andreangeli, '*Ne bis in idem* and Administrative Sanctions: *Bonda*' [2013] Common Market Law Review 1827, 1841.

⁷⁹ Nonetheless, the relative funds belong to the EU budget.

⁸⁰ Case C-489/10 *Lukasz Marcin Bonda* [2012] ECR-I 0000, para 18.

charged and then sentenced for subsidy fraud ‘on the ground that, for the purpose of obtaining subsidies, he had made a false declaration concerning facts of essential importance (...)’⁸¹. Although the Regional Court certainly assessed a breach of the *ne bis in idem* rule on the ground that the two penalties were inflicted on the basis of the same facts, the Supreme Court questioned this approach and asked the ECJ to determine whether the fine provided for in the Regulation 1973/2004⁸² was of a criminal nature.

As opposed to the Advocate General’s reasoning, the Court touched upon neither the *ne bis in idem* scope of application as of its fundamental right nature, nor the issue of its competence by virtue of article 51 of the CFR. It just evaluated the characterisation of the penalty as to the potential breach of the domestic *ne bis in idem*⁸³. In other words, the Court did not press its ruling beyond the strict wording of the referring Court’s question.

Nonetheless, the AG did so. Albeit bearing in mind the Polish Court’s demand, she asked herself whether article 50 was applicable to the facts of the case, ie the applicability of the EU law prohibition of double penalties⁸⁴. Therefore, it was preliminarily minded whether or not MSs are intended to implement EU law – within the meaning of article 51 – when imposing sanctions as to the EU agricultural law. As a result, the administrative penalty provided for by Polish law is meant as a direct implementation of EU law and, in particular, of article 138 paragraph 1 of the Regulation 1973/2004. On the other hand, the criminal provision originates from national law, but it still satisfies the State’s obligation to protect the financial interests of the Union, by means of ‘effective and appropriate penalties’⁸⁵. Hence, in the AG’s opinion, Poland implemented EU law, by imposing sanctions aimed to protect the Union’s

⁸¹ *ibid* para 19.

⁸² Commission Regulation (EC) 1973/2004 of 29 October 2004 laying down detailed rules for the application of Council Regulation (EC) No 1782/2003 as regards the support schemes provided for in Titles IV and IVa of that Regulation and the use of land set aside for the production of raw materials [2004] OJ L 345/1.

⁸³ Andreangeli (n 78) 1836.

⁸⁴ Case C-489/10 *Łukasz Marcin Bonda* [2012] ECR-I 0000, Opinion of AG Kokott, para 11.

⁸⁵ *ibid* para 17.

financial interests as to the Common Agricultural Policy (CAP). Further, the AG stated,

‘The application of the fundamental rights of the European Union cannot ultimately depend on the chance circumstances of weather a penal provision already existed or was only adopted when implementing the European Union law obligation.’⁸⁶

Following the AG’s reasoning, once article 51 is fulfilled, the relevant provision of the Charter, ie article 50, shall be interpreted and then applied. Previous precedents were called to mind to show off how the Court has leaned towards the non-criminal nature of sanctions in the agricultural sector.⁸⁷ In particular, the ECJ usually grounded its analysis on a ‘two-stage test’⁸⁸ focused on the ‘nature of the breaches complained of’ and on the ‘objective of the penalty imposed’⁸⁹. As a result, the agricultural penalty imposed to Mr *Bonda* would not be criminal in its nature. Nonetheless, the AG smartly noted that, if the Charter applies, article 52 could not be disregarded. Thus, the ECJ’s interpretation of the Charter shall be consistent with the ECHR and the relative case law, namely the *Engel* criteria. However, even using those criteria, outcome would be the same: Mr *Bonda* was not punished twice for the same facts within the meaning of article 50 of the CFR.

The same conclusion was in fact reached by the Court itself, without referring to any provisions of the Charter, but just taking ‘as a point of departure’ the *Engel* criteria⁹⁰. It even did not remind its previous two-phase approach, except to recall ‘that penalties laid down in rules of the common

⁸⁶ *ibid* para 20.

⁸⁷ Case C-489/10 *Lukasz Marcin Bonda* [2012] ECR-I 0000, Opinion of AG Kokott, paras 35-6.

⁸⁸ Emily Hancox, ‘The Meaning of “Implementing” EU Law under Article 51(1) of the Charter: Åkerberg Fransson’ [2013] *Common Market Law Review* 1411, 1414.

⁸⁹ Case C-489/10 *Lukasz Marcin Bonda* [2012] ECR-I 0000, Opinion of AG Kokott, paras 38-9.

⁹⁰ Justyna Lačný and Monika Szwarc, ‘Legal Nature of European Union Agricultural Penalties: Comments on the ECJ Ruling in Case C-489/10 *L. Bonda*’ (2012) 4 *EuCrim* 170,171.

agricultural policy, such as temporary exclusion of an economic operator from the benefit of an aid scheme, are not of a criminal nature'⁹¹.

Divergently from what happens within criminal law, such administrative penalties do not aim to sanction an individual who wrongfully acted, rather to restore a balance in the European budget and market. In essence, the Polish administrative and criminal sanctions do not share the same purpose. Therefore, in principles criminal and non-criminal penalties may coexist and not breach the double jeopardy rule 'on account of the different objectives and differing nature and severity of each sanction'⁹². Moreover, agricultural sanctions, such as that of the case, are not designed for the whole society, yet for those 'economic operators who have freely chosen to take advantage of an agricultural aid scheme'⁹³. Indeed, 'the penalty imposed (...) constitutes a specific administrative instrument forming an integral part of the scheme of aid'⁹⁴.

Such reasoning, the Court stated, is not questioned by the ECtHR's case law and by its *Engel* criteria, so nullifying the referring Court's doubts; instead, both approaches converge on the same point⁹⁵. As far as the first criterion concerns, the European provision directly refers to the sanction as an administrative one. As regards the second *Engel* criterion, ie the purpose of the sanction under consideration, Luxembourg observed that it 'is not punitive, but is essentially to protect the management of European Union funds by temporarily excluding a recipient who has made incorrect statements in his application for aid'⁹⁶. Last, as long as the third criterion concerns, the sanction did not affect Mr *Bonda*'s fundamental freedoms, but simply prevented him to obtain further aids for a certain period. In conclusion, even under the *Engel*

⁹¹ Case C-489/10 *Lukasz Marcin Bonda* [2012] ECR-I 0000, para 28.

⁹² *Andreangeli* (n 78) 1841.

⁹³ Case C-489/10 *Lukasz Marcin Bonda* [2012] ECR-I 0000, para 30.

⁹⁴ *ibid.*

⁹⁵ *ibid* para 36.

⁹⁶ *ibid* para 40.

criteria, the penalty required by article 138 paragraph 1 of Regulation 1973/2004 cannot be regarded as criminal.

The interesting aspect of the *Bonda* case lies in the fact that the ECJ substantially borrowed the *Engel* criteria from Strasbourg. Although there is no mention within the ruling of the legal basis that justifies such a ‘loan’, it is clearly evident that the Court wanted to comply with the Charter consistency clause, namely article 52⁹⁷. Nonetheless, it refrained from defining the constitutional framework within which the CFR is linked to the ECHR. Such an ‘integrative approach’⁹⁸ advocates the steps taken by the ECJ towards the EU’s accession to the Convention.

‘[I]t may be argued that the position adopted in *Bonda* not only confirms the central role of the ECHR in shaping the interpretation of the EU human rights’ catalogue, but also suggests that the “status” of the Convention has moved from being an “informal” “source of inspiration” (albeit admittedly a leading one), toward being progressively “incorporated” into Union law.’⁹⁹

b. Remarks on the *Åkerberg Fransson* ruling

The case that is going to be commented pertains to a very sensitive matter. The fact that nine of the MSs put forward their observations constitutes a damning evidence¹⁰⁰. Probably, they worried about the extension of the Charter scope of application beyond those boundaries fixed by article 51. In fact, the ECJ considerably stretched the requirement of the implementation of the EU law, in contrast with the AG’s finding of a too ‘weak link’ between

⁹⁷ Andreangeli (n 78) 1839.

⁹⁸ Lačný and Szwarc (n 90) 174.

⁹⁹ Andreangeli (n 78) 1839.

¹⁰⁰ Observations were submitted by the Swedish, Czech, Danish, German, Irish, Greek, French, Dutch and Austrian Governments.

European and national law. However, in spite of being one of the aspects that draws interest the most, such an issue has been already gone through in the previous chapter, where the European sources on *ne bis in idem* are assessed.

In order for the judgement to be summed up, at least three bullet points would be written down. As the Italian Court of Cassation correctly resumed,

la CGUE ha affermato i seguenti principi:

- a) l'applicabilità del diritto dell'Unione implica quella dei diritti fondamentali garantiti dalla Carta;
- b) l'articolo 50 di quest'ultima (che garantisce il principio del *ne bis in idem*) presuppone che le misure adottate a carico di un imputato assumano carattere penale;
- c) per valutare la natura penale delle sanzioni fiscali, occorre tener conto della qualificazione della sanzione nel diritto interno, della natura dell'illecito e del grado di severità della sanzione che rischia di subire l'interessato.¹⁰¹

If in the *Bonda* case the Court dodged evoking article 50 of the Charter¹⁰², in the *Fransson* it simply could not: the referring Court expressly referred to. Indeed, the Haparanda District Court asked the ECJ, *inter alia*,

¹⁰¹ the ECJ affirmed the following principles:

- a) The applicability of the EU Law implies the applicability of the fundamental rights guaranteed by the Charter,
- b) Article 50 of the Charter – that guarantees the *ne bis in idem* principle – presupposes that those measures taken against the defendant have a criminal nature, and
- c) In order to assess the nature of fiscal sanctions, there should be taken into account the qualification of the sanction under the domestic law, the nature of the offence and the degree of severity of the sanction the defendant risks to incur.

(self-translated)

Corte di Cassazione (Ufficio del Ruolo e del Massimario, Settore Penale), 'Considerazioni sul Principio del Ne Bis In Idem nella Recente Giurisprudenza Europea: la Sentenza 4 Marzo 2014, Grande Stevens e Altri Contro Italia' (Rel. no 35/2014) [2014] Diritto Penale Contemporaneo 15 <http://www.penalecontemporaneo.it/area/3-/15-/3109-la_relazione_dell_ufficio_del_massimario_della_cassazione_sulle_ricadute_della_sentenza_della_corte_edu_grande_stevens_c_italia_in_tema_di_ne_bis_in_idem/> accessed 16 September 2014.

¹⁰² Monika Szwarc, 'Application of the Charter of Fundamental Rights in the Context of Sanctions Imposed by Member States for Infringements of EU Law: Comment on *Fransson* Case' [2014] European Public Law 229, 238.

whether is admissible under article 4 of the 7th Protocol as well as under article 50 of the Nice Charter that a conjunction of tax offence charge and financial penalty is inflicted due to the same act¹⁰³.

The facts of the case involve a Swedish fisherman who misrepresented his tax return, so causing loss of the income tax and VAT levy. As a result, in 2007 he was inflicted a tax surcharge by the Skatteverket (the Swedish Tax Agency), and this penalty became final since Mr *Fransson* did not challenge it. Two years later, he was charged of tax offences. In particular, the facts relied upon by the Public's Prosecutor Office were identical with those of the fiscal proceeding, ie his false declarations regarding his outcomes. Therefore, the District Court suspended the proceeding and interrogated the ECJ in order to remove all doubts as to the risk of violation of double jeopardy rule. Such a risk, indeed, becomes further concrete in consideration of other ECtHR's judgements¹⁰⁴, holding that also 'the surcharge provided for in Swedish law at issue in these proceedings (...) comes under the heading of a criminal penalty'¹⁰⁵ according to the *Engel* criteria¹⁰⁶.

A thought-provoking point of view is that of the AG that proposed a European notion of *ne bis in idem* released from the ECtHR's. By reflecting on a comparative basis, the AG held that the so-called 'système a double voie' is at the same time commonly part of the national legal systems as well as a regime neglected by the ECtHR from the *Zolotukhin* ruling on. Probably because of such an approach of the Strasbourg Court, several MSs decided not to ratify the 7th Protocol even after the signature time¹⁰⁷. As a result, the AG

¹⁰³ Case C-617/10 *Åkerberg Fransson* [2013] ECR I-00000, para 15.

¹⁰⁴ *Janosevic v Sweden* ECHR 2002-VII; *Västberga Taxi Aktiebolag and Vulic v. Sweden* App no 36985/97 (ECtHR, 23 July 2002).

¹⁰⁵ Case C-617/10 *Åkerberg Fransson* [2013] ECR I-00000, Opinion of AG Cruz Villalón, para 76.

¹⁰⁶ *Ida Karlsson, Petra Enmalm and Amandine Douma, 'Åklagaren v. Hans Åkerberg Fransson, Case C-617/10 of 26 February 2013' (EU Constitutional Law - Örebro Universitet, 16 June 2014)* <<http://eulaworebro.wordpress.com/2013/04/26/aklagaren-v-hans-akerberg-fransson-case-c-61710-of-26-february-2013/>> accessed 3 October 2014.

¹⁰⁷ The 7th Protocol was opened for signature on 22 November 1984 and entered into force on 1 November 1988, while the Convention itself was opened for signature on 4 November 1950 and entered into force on 3 September 1953.

suggested a ‘partially autonomous interpretation’ of article 50 of the Charter¹⁰⁸. He indeed recommended to disregard the reference to the ECHR placed in article 52, by arguing that the elements above demonstrate an oppositely directed constitutional tradition common to the MSs¹⁰⁹.

In clear contrast to the AG’s opinion, the ECJ certainly accorded its decision to the Strasbourg case law¹¹⁰. It firstly reminded that article 50 of the Nice Charter bars a second criminal prosecution when the first proceeding has become final and a sanction having criminal nature has been inflicted¹¹¹. Moreover, on the subject of VAT, MSs may freely choose whatever sanction they think more appropriate in order to protect the financial interests of the Union. Thus, they may alternatively provide only administrative sanctions, only criminal sanctions or a combination of the two in respect of the same harmful act. They will violate the Charter provision just when, by choosing the third option, the administrative penalty has to be regarded as criminal too¹¹². How does the Court assess the criminal nature of a sanction? In the *Fransson* case, it simply quoted those criteria listed in its previous judgement *Bonda*¹¹³ that, on its part, follows the *Engel* case of the ECtHR.

Moreover, the Court pointed out that the analysis on the national regulations – despite considered an implementation of EU law, shall be carried out by the domestic courts. Hence, the latter are called upon to fulfil a manifold test. Firstly, they shall not only apply the *Engel/Bonda* criteria, but they shall also evaluate whether a conjunction of criminal and administrative – yet of criminal nature – sanctions occurs¹¹⁴. Besides, the outcome shall satisfy

¹⁰⁸ Case C-617/10 *Åkerberg Fransson* [2013] ECR I-00000, Opinion of AG Cruz Villalón, para 87.

¹⁰⁹ See also Peers, (n 3) 97 who casts doubt on the recognition of rights set out in the 7th Protocol as general principles of EU law.

¹¹⁰ Stefano Montaldo, ‘L’Ambito di Applicazione della Carta dei Diritti Fondamentali dell’Unione Europea e il principio del *Ne Bis In Idem*’ [2013] *Diritti Umani e Diritto Internazionale* 574, 579.

¹¹¹ Case C-617/10 *Åkerberg Fransson* [2013] ECR I-00000, para 33.

¹¹² *ibid* para 34.

¹¹³ *ibid* para 35.

¹¹⁴ Donato Voza, ‘I Confini Applicativi del Principio del *Ne Bis In Idem* Interno in Materia Penale: un Recente Contributo della Corte di Giustizia dell’Unione Europea: Nota a Corte di

national standards of protection of fundamental rights, as far as the penalties concerned are provided for by national law. However, when the application of such standards ‘lead (...), as the case may be, to regard [the] combination as contrary to’ them, the Court asked that ‘the remaining penalties are effective, proportionate and dissuasive’¹¹⁵. Therefore, the object of the national courts’ appraisal becomes more complex, since they shall take into account both internal and supranational interests. In short, national judges are increasingly charged with guaranteeing a widespread safeguard of the EU primacy¹¹⁶. Essentially, the Court kept on relying upon a hierarchical ‘scale’ on the first step of which the EU safeguards lay, and where the internal safeguard arrangement is symbolically postponed¹¹⁷.

The same rigid approach led to a sharp remark concerning possible conflicts between national laws and the Convention, in case the MSs are implementing the EU law¹¹⁸. In theory, it might happen that a MS, by respecting the principle of the EU primacy – as the ECJ requires, *de facto* commits a violation of the Convention provisions. The Luxembourg Court proved to acknowledge such a situation, but it still did not reach a real meeting point.

As regards (...) the conclusions to be drawn by a national court from a conflict between national law and the ECHR, it is to be remembered that whilst, as Article 6(3) TEU confirms, fundamental

Giustizia dell’UE (Grande Sezione), sentenza del 26 Febbraio 2013, Åkerberg Fransson, C-617/10’ [2013] Diritto Penale Contemporaneo 7 <<http://www.penalecontemporaneo.it/upload/1365755526VOZZA%202013a.pdf>> accessed 15 April 2013.

¹¹⁵ Case C-617/10 *Åkerberg Fransson* [2013] ECR I-00000, para 36.

¹¹⁶ De Amicis (n 50) 5.

¹¹⁷ Roberto Conti, ‘Gerarchia tra Corte di Giustizia e Carta di Nizza/Strasburgo? Il Giudice Nazionale (Doganiere e Arciere) alla Ricerca dei “Confini” fra le Carte dei Diritti dopo la Sentenza Åklagaren (Corte Giust., Grande Sezione, 26 Febbraio 2013, causa C-617/10)’ [2013] Diritti Comparati s 1 <www.diritticomparati.it/2013/03/page/2> accessed 6 March 2014.

¹¹⁸ De Amicis (n 50) 15; Denys Simon, ‘*Ne Bis In Idem*: La Cour Valide à Certaines Conditions la Faculté de Cumul de Sanctions Fiscales et Pénales au Terme d’un Examen Approfondi des Exigences Résultant de la Convention Européenne des Droits de l’Homme et de la Charte des Droits Fondamentaux’ (2013) 4 Europe 14, 15.

rights recognised by the ECHR constitute general principles of the European Union's law and whilst Article 52(3) of the Charter requires rights contained in the Charter which correspond to rights guaranteed by the ECHR to be given the same meaning and scope as those laid down by the ECHR, the latter does not constitute, as long as the European Union has not acceded to it, a legal instrument which has been formally incorporated into European Union law. Consequently, European Union law does not govern the relations between the ECHR and the legal systems of the Member States, nor does it determine the conclusions to be drawn by a national court in the event of conflict between the rights stressguaranteed by that convention and a rule of national law (see, to this effect, Case C-571/10 *Kamberaj* [2012] ECR, paragraph 62).¹¹⁹

Substantially, the Court did not make the ECHR 'une source formelle du droit de l'Union'¹²⁰, so leaving the relation between domestic law and Convention up to the MSs, as long as the accession is not fulfilled¹²¹.

¹¹⁹ Case C-617/10 *Åkerberg Fransson* [2013] ECR I-00000, para 44.

¹²⁰ Simon (n 118) 15.

¹²¹ Corte di Cassazione (Ufficio del Ruolo e del Massimario, Settore Penale), 'Considerazioni sul Principio del Ne Bis In Idem nella Recente Giurisprudenza Europea: la Sentenza 4 Marzo 2014, Grande Stevens e Altri Contro Italia' (Rel. no 35/2014) [2014] Diritto Penale Contemporaneo 8 <<http://www.penalecontemporaneo.it/area/3-/15-/3109-la-relazione-dell-ufficio-del-massimario-della-cassazione-sulle-ricadute-della-sentenza-de-lla-corte-edu-grande-stevens-c-italia-in-tema-di-ne-bis-in-idem/>> accessed 16 September 2014.

3. The possibility of overlapping with a view to the EU accession to the ECHR

As it has been explicitly stated so far, the two Courts put forward different approaches, while sometimes they shared common values. Now it is the time to reach the point at issue. More, the following considerations should be gauged with the perspective of the EU accession to the Convention. Such a ‘historically unprecedented move’, as it was wisely defined¹²², will be touched upon at the end of the paragraph.

Despite having been mutually limited their relevance, both Courts *de facto* make use of the same guiding criteria for the assessment of sanction nature¹²³. It is not by chance that they were being recalled the *Engel/Bonda* criteria. As it has been already underlined above, whilst affirming its non-involvement in the ECHR-national laws relations¹²⁴, the ECJ coined identical criteria as those figured by the ECtHR. That way, it practically implemented the scope of application of corresponding rights set out in article 52 CFR.

However, by comparing the Courts’ case law, thorny discordances emerge. While Strasbourg seems to reject *per se* the combination of administrative and criminal sanctions for the same act, in Luxembourg such an arrangement is *in abstracto* accepted, unless envisaging an *ex post* control over the real nature of the sanctions. Moreover, it is unclear who shall do what. In the aftermath of such rulings, one might ask what MSs should do to comply

¹²² Gragl (n 14) 13.

¹²³ Corte di Cassazione (Ufficio del Ruolo e del Massimario, Settore Penale), ‘Considerazioni sul Principio del Ne Bis In Idem nella Recente Giurisprudenza Europea: la Sentenza 4 Marzo 2014, Grande Stevens e Altri Contro Italia’ (Rel. no 35/2014) [2014] Diritto Penale Contemporaneo 8 <<http://www.penalecontemporaneo.it/area/3-/15-/3109-la-relazione-dell-ufficio-del-massimario-della-cassazione-sulle-ricadute-della-sentenza-de-lla-corte-edu-grande-stevens-c-italia-in-tema-di-ne-bis-in-idem/>> accessed 16 September 2014.

¹²⁴ Laura Delgado, ‘Mise en Œuvre du Droit de l’Union et Principe *Ne Bis Idem* ... Précisions Jurisprudentielles sur l’Applicabilité de la Charte des Droits Fondamentaux’ [2013] Groupe de Recherche – Espace Liberté Sécurité Justice <<http://www.gdr-elsj.eu/2013/03/11/droits-fondamentaux/mise-en-oeuvre-du-droit-de-lunion-et-principe-ne-bis-in-rem-precisions-jurisprudentielles-sur-lapplicabilite-de-la-charte-des-droits-fondamentaux/>> accessed 7 October 2014.

with those, especially with regard to the ‘double voie’. An outlet could be fixing a ‘tolerability threshold’. MSs would be free to provide for double sanctions, but the administrative penalty should not exceed such a degree of affliction that the *ne bis in idem* would be infringed, according to the ECtHR’s opinion¹²⁵.

Furthermore, who is in charge of establishing whether a sanction is criminal or non-criminal is obscure. Indeed, whether in *Grande Stevens* the Strasbourg Court leans toward the control centralization in the Court itself, the *Fransson* case delegates the check to the national judges¹²⁶. Even if in *Grande Stevens* the ECtHR partially mentioned the *Fransson* judgement, it finally passed over the pivotal arguments on the internal judicial evaluation of the sanctions combination¹²⁷. The same omissive approach was that of the ECJ in respect to the Opinion of the AG in *Fransson*. While the Advocate General tried to draw the line between the CFR and the ECHR by suggesting a partially autonomous interpretation of the former, the ECJ manifestly skipped this issue. If on one hand the future EU accession to the Convention might justify a prudent attitude, on the other this perspective did not prevent the Court from affirming the primacy of the CFR¹²⁸.

At the end of the story, however, what should be avoided at any cost is a State condemn by the ECtHR for having it implemented the EU law and its decisional law. Indeed, it is still disputable to what extent national judges will be able to extend the article 50 interpretation, without a State’s overexposure to

¹²⁵ Corte di Cassazione (Ufficio del Ruolo e del Massimario, Settore Penale), ‘Considerazioni sul Principio del Ne Bis In Idem nella Recente Giurisprudenza Europea: la Sentenza 4 Marzo 2014, Grande Stevens e Altri Contro Italia’ (Rel. no 35/2014) [2014] Diritto Penale Contemporaneo 7, 26 <<http://www.penalecontemporaneo.it/area/3-/15-/3109-la-relazione-dell-ufficio-del-massimario-della-cassazione-sulle-ricadute-della-sentenza-de-lla-corte-edu-grande-stevens-c-italia-in-tema-di-ne-bis-in-idem/>> accessed 16 September 2014.

¹²⁶ Ernesto Lupo (Il Principio del Ne Bis In Idem tra Giurisprudenza Europea e Diritto Interno - Sentenza Corte EDU del 4 marzo 2014 Grande Stevens c/Italia, Corte Suprema di Cassazione - Roma, 23 giugno 2014).

¹²⁷ De Amicis (n 50) 10.

¹²⁸ Conti (n 117) 4-5.

Strasbourg axe¹²⁹. Maybe, the easiest solution would be fully implement article 52 of the Charter itself, where it states that

[i]n so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention.

Then, by a literal interpretation, each provision of the Charter should have the same content of that of the corresponding provision of the Convention, as interpreted by the ECtHR¹³⁰.

Above all that, some general remarks on the above-described case law merit attention.

It has been noted that the recent decisional law on the *ne bis in idem* principle leads the national policies of decriminalisation to be radically rethought¹³¹. It is notorious that decriminalisation plans are committed to a switch from criminal to administrative – yet punitive – law, and it has been seen in the cases above how they can be anyway afflictive. To this end, the Courts gave precise and unambiguous, yet strict, indications regarding the border between administrative and criminal matters. There are even States where the decriminalisation expedient was not only a choice as to the criminal policy, but a deflative mean of fundamental relevance.

However, the change of mind that would be requested to MSs does not involve the *an*, ie whether the punitive sanctions are to be maintained; rather, it involves the *quomodo*, ie the way the MSs configures the offence, and, above all, the relative sanction¹³². Almost arguably, given the particular guarantees informing criminal law, it seems hard to provide for a judiciary that defines those ontological decisions referred to the parliamentary power. Judges cannot

¹²⁹ De Amicis (n 50) 7.

¹³⁰ Viganò (n 64).

¹³¹ De Amicis (n 50) 23.

¹³² Viganò (n 64).

move freely within the ‘garden’ circumscribed by the legislator, making criminal what the Parliament formally defined as administrative¹³³. On the contrary, some authors, bearing in mind the ‘two-speed development’ model envisaged by the Lisbon Treaty and considering the usual MSs’ recalcitrance to take steps towards a more harmonised ASFJ, suggested the judicial power to ‘fill in the gaps left by the legislative and executive powers’¹³⁴.

a. The EU accession to the ECHR

The future EU accession to the ECHR will try to leap over an obstacle become over time increasingly important. At least ‘[i]n the perspective of (...) the increasing role of the European Union in the direct enforcement of criminal law, it is necessary that complaints against the European Union or one of its bodies or offices are admissible’¹³⁵. Moreover,

[u]ntil the EU has acceded to the Convention, the EU Member States (when implementing Union law) will not be held responsible for alleged violations of the Convention as long as the Union protects fundamental rights in a manner equivalent to that provided by the Convention.¹³⁶

It is pretty obvious that this is not the proper setting where systematically facing the complex issue of the accession. Therefore, only the relevant aspects will be selected. In particular, the current stage of negotiations and the forthcoming scenario will be assessed.

¹³³ De Amicis (n 50) 24-5.

¹³⁴ Teresa Bravo, ‘*Ne Bis In Idem* as a Defence Right and Procedural Safeguard in the EU’ [2011] New Journal of European Criminal Law 393, 395.

¹³⁵ André Klip, *European Criminal Law* (Intersentia 2009) 229.

¹³⁶ Gragl (n 14) 14.

It is common knowledge that article 218 TFEU¹³⁷ applies whenever the EU intends to conclude an agreement with an international organisation, as the Council of Europe is. After years of hard discussions and stressful negotiations in order to fulfil the complex Treaty procedure, the final Agreement on EU Accession to the Convention (AA) was signed. It comprehends provision both modifying the Convention and regulating the ‘status of the EU as a High Contracting Party to the Convention’¹³⁸. Nevertheless, the ECJ’s Opinion 2/13¹³⁹, required according to paragraph 11 of article 218, is still awaited. It is worth considering that whether the Court’s Opinion is adverse, the draft shall be amended. This is just one of the reasons why the AA practical results will put off entering into effect, since some legal issues are still unsolved¹⁴⁰.

That granted, the negotiators, aware of the politically-sensitiveness of the matter, decided not to run the risk to further postpone the agreement. As a result, they focused on those provisions on which a full consent had been already given by the EU MSs. Consequently, those Protocols not ratified by all of them were repealed from the scope of the accession. Then, the 7th Protocol is not affected by the AA¹⁴¹. Nonetheless, the agreement itself provides for an eventual future extension of its scope of application. In particular, although the agreement under consideration ‘already covers accession to the other Protocols in substantive terms’, a separate AA would be necessary¹⁴² and the relative procedures of accession are established by each Protocol itself¹⁴³.

¹³⁷ As article 218 is a particularly long provision, the reader may find it reported in Appendix, p 104.

¹³⁸ Gragl (n 14) 15.

¹³⁹ ECJ, *Agreement On EU Accession to the ECHR* (request for an Opinion by the Commission OJ C 260/19, Opinion 2/13).

¹⁴⁰ Gragl (n 14) 16.

¹⁴¹ CDDH (Steering Committee for Human Rights) *ad hoc* Negotiation Group and the Commission, ‘Draft Explanatory Report to the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms’ Appendix V on the Final report to the CDDH (Strasbourg 3-5 March 2013) 47+1(2013)008rev2, para 17; Simon, (n 118) 15.

¹⁴² Gragl (n 14) 17.

¹⁴³ CDDH (Steering Committee for Human Rights) *ad hoc* Negotiation Group and the Commission, ‘Draft Explanatory Report to the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms’

In such circumstances, Paul Gragl poignantly envisaged two different situations, both relevant in the light of the *ne bis in idem* principle. Firstly, what might the ECJ do when the same rights are laid down both in the EU Charter and in a Convention Protocol not ratified by all the MSs? Actually, it would find itself at crossroads. It could stand firm and not apply those Protocols not ratified by the EU, as the AA prescribes. Otherwise, it could bypass such obstacle, by referencing article 52 of the Charter and, in particular, its Explanations that includes among the ‘rights guaranteed by the Convention’ those set out in the Protocols too¹⁴⁴.

In fact, how the ECJ would have answered in the *Åkerberg Fransson* case?

Moreover, the Queen Mary Professor asked

how the ECtHR will decide when requested to adjudicate upon an application against an EU Member State for violating – whilst implementing Union law – a right set forth in a Protocol to which the Union has not acceded, but which the Member State in question has in fact ratified.

Also, the ECtHR has two possibilities. Either it may keep using its *Bosphorus* doctrine, so having just an overview on the degree of protection offered by the EU; or it may implement the purposes of the accession and generally adjudicate the EU actions, as it would be desirable¹⁴⁵.

Which outcome the *Grande Stevens* as well as the *Nykänen* cases would have had?

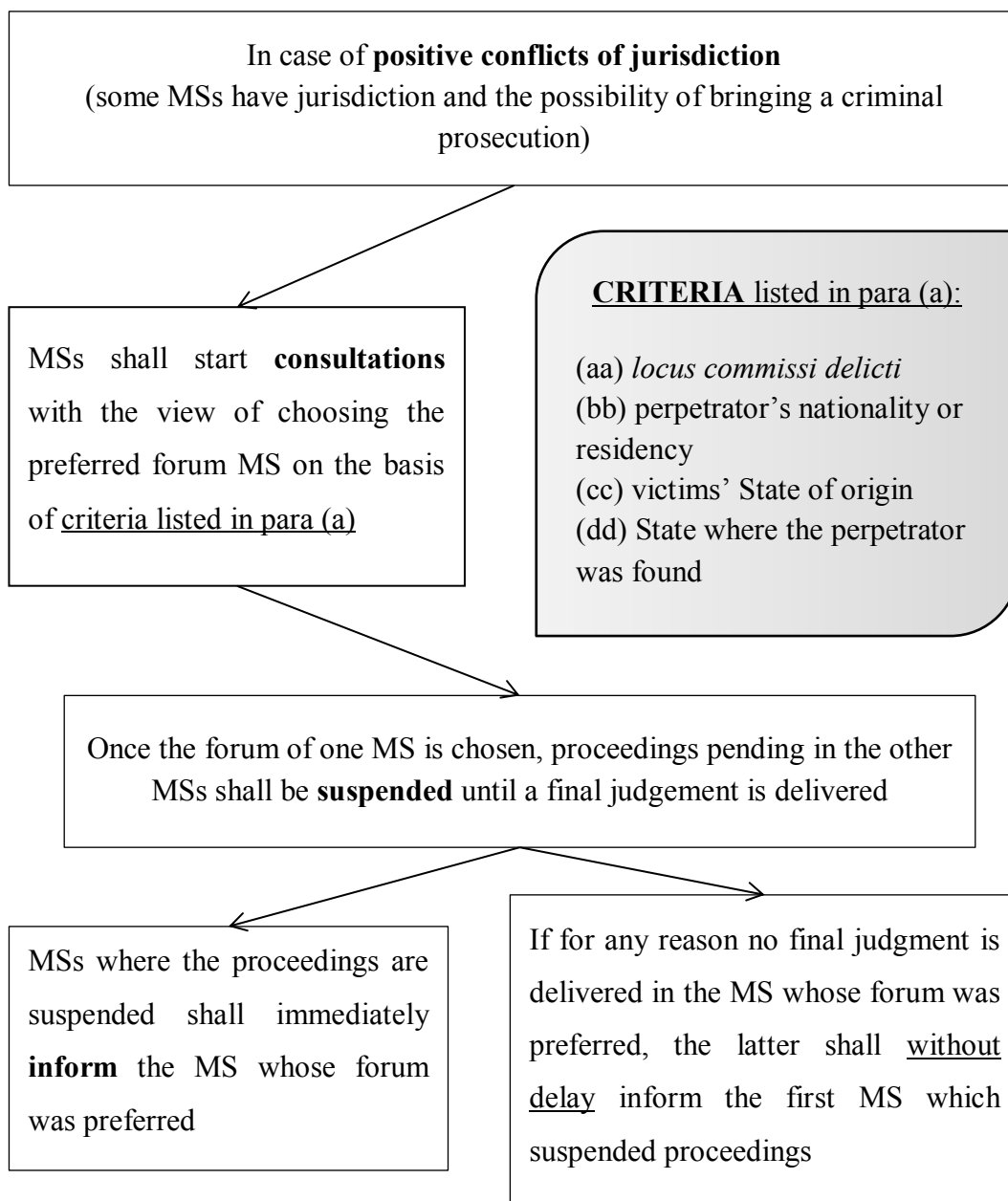
Appendix V on the Final report to the CDDH (Strasbourg 3-5 March 2013) 47+1(2013)008rev2, para 20.

¹⁴⁴ Explanations Relating to the Charter of Fundamental Rights [2007] OJ C 303/33.

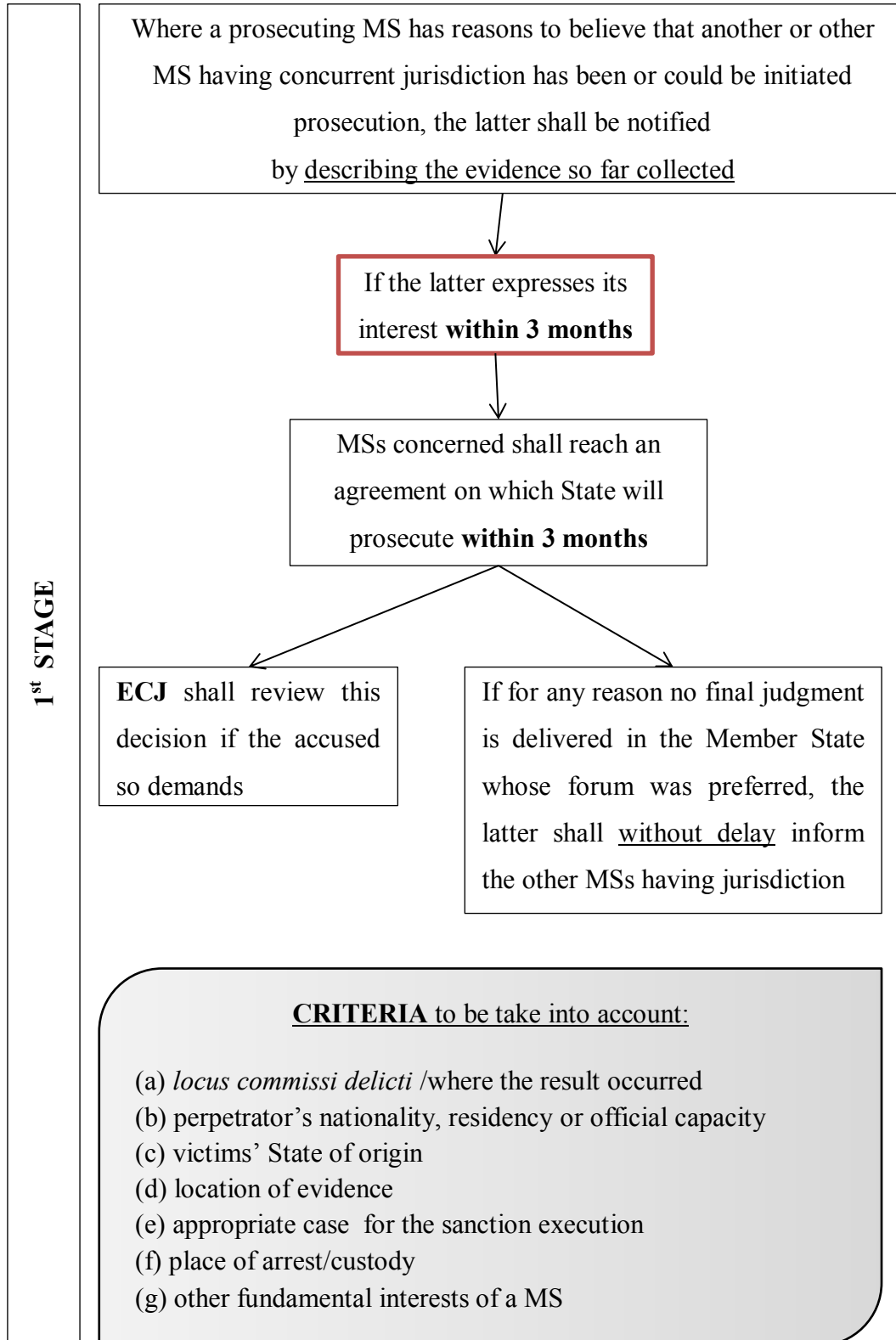
¹⁴⁵ Gragl (n 14) 18-9.

Appendix

DOC 1: Mechanism of jurisdiction allocation according to the Initiative of the Hellenic Republic (2003)

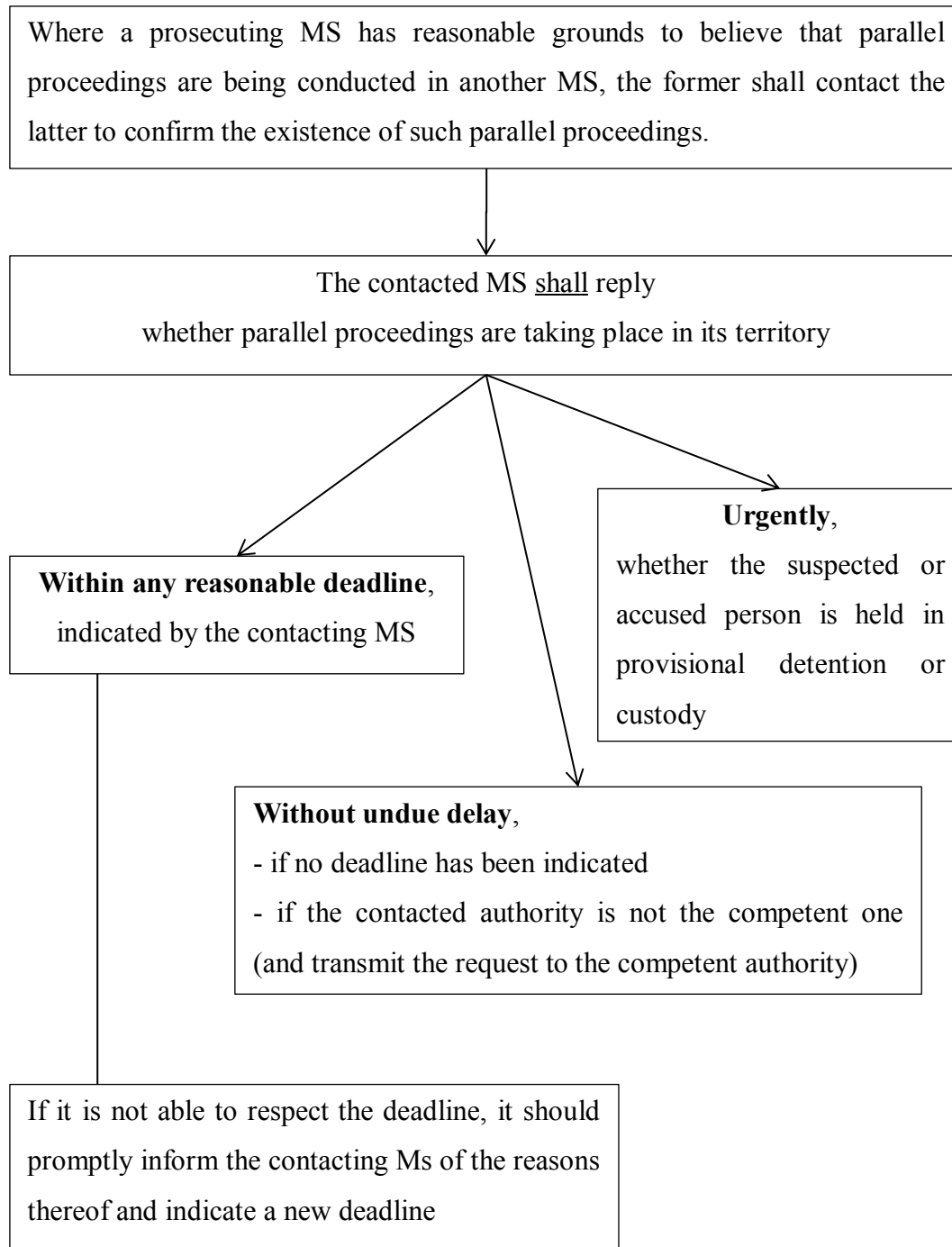


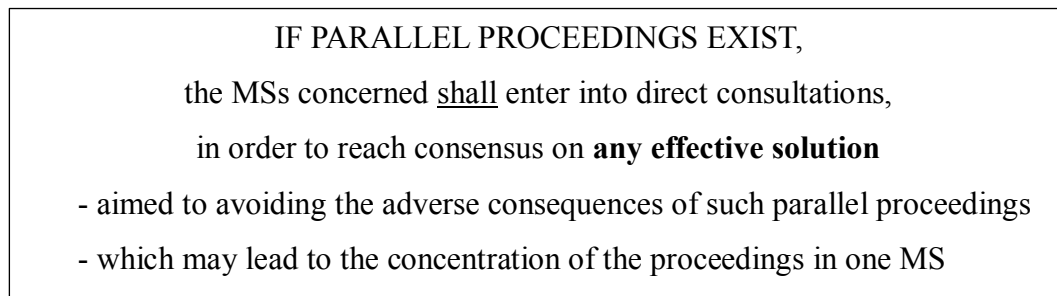
DOC 2: Mechanism of jurisdiction allocation according to the Freiburg Proposal (2003)



2 nd STAGE	<div data-bbox="604 394 1211 456"><i>Ne bis in idem</i></div> <div data-bbox="499 456 1315 696"> <p>A person may not be prosecuted in the EU for an act that has already been <u>finally disposed of</u> (a decision terminating in a way that bars future prosecution and makes reopening subject to exceptional substantial circumstances) in a MS or by a European organ.</p> </div>
3 rd STAGE	<div data-bbox="604 712 1211 775">Accounting principle</div> <div data-bbox="499 775 1315 1016"> <p>If, despite stage 1st and 2nd, the same act is prosecuted in different jurisdictions, the sanctions imposed in one jurisdiction that have been already enforced must be taken into account in the other jurisdictions during both the sentencing and the enforcement process</p> </div>

DOC 3: Mechanism of jurisdiction allocation according to the Framework Decision (2009)





During the consultations...

MSs involved shall mutually reply to request of info.
However, they are not required to provide it when such info could harm **essential national security interests** or could jeopardise the safety of individuals.

MSs shall consider the facts and merits of the case and all factors which they consider to be relevant.
NO LIST OF CRITERIA

If the agreement on concentration of proceedings is **reached**....



the MS that prosecuted the case shall inform the other MS(s) involved about the outcome.

If the agreement is **not reached**...



Any MS involved may refer the case to Eurojust, whether it is competent according to the Eurojust Decision

DOC 4: Article 218 TFUE

1. Without prejudice to the specific provisions laid down in Article 207, agreements between the Union and third countries or international organisations shall be negotiated and concluded in accordance with the following procedure.
2. The Council shall authorise the opening of negotiations, adopt negotiating directives, authorise the signing of agreements and conclude them.
3. The Commission, or the High Representative of the Union for Foreign Affairs and Security Policy where the agreement envisaged relates exclusively or principally to the common foreign and security policy, shall submit recommendations to the Council, which shall adopt a decision authorising the opening of negotiations and, depending on the subject of the agreement envisaged, nominating the Union negotiator or the head of the Union's negotiating team.
4. The Council may address directives to the negotiator and designate a special committee in consultation with which the negotiations must be conducted.
5. The Council, on a proposal by the negotiator, shall adopt a decision authorising the signing of the agreement and, if necessary, its provisional application before entry into force.
6. The Council, on a proposal by the negotiator, shall adopt a decision concluding the agreement.

Except where agreements relate exclusively to the common foreign and security policy, the Council shall adopt the decision concluding the agreement:

- (a) after obtaining the consent of the European Parliament in the following cases:
 - (i) association agreements;

- (ii) agreement on Union accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms;
- (iii) agreements establishing a specific institutional framework by organising cooperation procedures;
- (iv) agreements with important budgetary implications for the Union;
- (v) agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required.

The European Parliament and the Council may, in an urgent situation, agree upon a time-limit for consent.

(b) after consulting the European Parliament in other cases. The European Parliament shall deliver its opinion within a time-limit which the Council may set depending on the urgency of the matter. In the absence of an opinion within that time-limit, the Council may act.

7. When concluding an agreement, the Council may, by way of derogation from paragraphs 5, 6 and 9, authorise the negotiator to approve on the Union's behalf modifications to the agreement where it provides for them to be adopted by a simplified procedure or by a body set up by the agreement. The Council may attach specific conditions to such authorisation.

8. The Council shall act by a qualified majority throughout the procedure.

However, it shall act unanimously when the agreement covers a field for which unanimity is required for the adoption of a Union act as well as for association agreements and the agreements referred to in Article 212 with the States which are candidates for accession. The Council shall also act unanimously for the agreement on accession of the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms; the decision concluding this agreement shall enter into force after it has been approved by the Member States in accordance with their respective constitutional requirements.

9. The Council, on a proposal from the Commission or the High Representative of the Union for Foreign Affairs and Security Policy, shall adopt a decision suspending application of an agreement and establishing the positions to be adopted on the Union's behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects, with the exception of acts supplementing or amending the institutional framework of the agreement.
10. The European Parliament shall be immediately and fully informed at all stages of the procedure.
11. A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised.

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