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The ne bis in idem principle in EU law : a conceptual and jurisprudential analysis

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The ne bis in idem principle in EU law

The *ne bis in idem* principle in EU law
A conceptual and jurisprudential analysis

PROEFSCHRIFT

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For Janny, Cees and their children

Foreword

This dissertation is the result of two conversations. In the first, which took place in December of 2003, professor Piet Jan Slot pointed me in the direction of examining the adverse consequences of parallel enforcement in competition cases. The conversation which resulted in the specific subject of this thesis was with Eddy de Smijter in May of 2005. By then Regulation 1/2003 had entered into force, opening up the possibility of parallel application of EC competition law within the European Competition Network. Furthermore, a draft of the ‘Green Paper on Conflicts of Jurisdiction and the Principle of *ne bis in idem* in Criminal Proceedings’¹ had just been prepared. The following years saw a rapid succession of ground breaking new cases on the *ne bis in idem*-principle, and I could not have come across this topic at a better time.

There are many other people to whom I owe thanks. Among them are my *promotor* Piet Jan Slot and my colleagues at the Europa Institute. I look back on a great time, and I thank you all for your friendship and support. Special thanks also to Christa Tobler and her partner Jacques for their kind hospitality, which made all the difference.

There are many others: my partner Françoise, my friends, my foster family. Last but certainly not least I want to thank Paul de Klerk, for everything.

Rome, 23 May 2009

Bastiaan van Bockel

¹ Green Paper On Conflicts of Jurisdiction and the Principle of *ne bis in idem* in Criminal Proceedings, COM(2005) 696 final, Annex.

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List of abbreviations

Appl. No.	Application number
Art.	Article
1991 Agreement	Agreement between the Government of the United States of America and the Commission of the European Communities regarding the application of their competition laws – Exchange of interpretative letters with the Government of the United States of America
1998 Agreement	Agreement between the European Communities and the Government of the United States of America on the application of positive comity principles in the enforcement of their competition laws
AFSJ	Area of Freedom, Security and Justice
The Charter	Charter of Fundamental Rights of the European Union
CFI	Court of First Instance
CIA	Central Intelligence Agency
CISA	Convention of 19 June 1990 implementing the Schengen Agreement
CoE	Council of Europe
c.p.	'concerted practice' within the meaning of art. 81 EC
EC	(Treaty establishing the) European Community
ECJ	European Court of Justice
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECMR	European Community Merger Regulation
ECSC	(Treaty establishing the) European Coal and Steel Community
ECR	European Court Reports
ECtHR	European Court of Human Rights
EEA	European Economic Area
EU	European Union
Europol Convention	Convention of 26 July 1995 on the establishment of a European Police Office
FDEAW	Framework Decision on the European Arrest Warrant
GPCL	General principles of Community Law
<i>i.e.</i>	<i>id est</i> ('that is')
JHA	Justice and Home Affairs
Lisbon Treaty	Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, [2007] OJ C350/1

<i>ne bis in idem</i>	<i>ne bis in eadem re sit actio</i>
NGO	non-governmental organization
n.y.r.	not yet reported in ECR
p.	page
pp.	pages
para.	paragraph
pnt.	point
4P7 ECHR	Article 4 of the seventh Protocol of the ECHR
Regulation 17/62	Council Regulation (EEC) No 17/62 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty
Regulation 1/2003	Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty
Schengen Agreement	Agreement 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 (1985)
Schengen Protocol	Protocol integrating the Schengen <i>acquis</i> into the framework of the European Union
SIS	Schengen Information System
TEU	Treaty on European Union
The Hague Programme	Council doc. 16504/04, 13 December 2004, Strengthening Freedom, Security and Justice in the European Union
US	United States of America

1 | Scope, research questions, and methodology

In this first chapter the subject of this study is introduced. The background, scope and research questions of this study are explained.

1.1 INTRODUCTION: THE *NE BIS IN IDEM* PRINCIPLE

The principle of *ne bis in idem* is an important fundamental principle of law which restricts the possibility of a defendant being prosecuted repeatedly on the basis of the same offence, act or facts.¹ The principle has a long history; the earliest known reference to the *ne bis in idem* principle originates from approximately 355 BC, when Demosthenes reasoned that ‘the laws forbid the same man to be tried twice on the same issue’.² The principle appeared again in Justinian’s *Corpus Juris Civilis*.³ The ecclesiastical *ne bis in idem* principle (as a principle of natural law) is based on St Jerome’s comment on the prophet Nahum: ‘for God judges not twice for the same offence’.⁴ It is believed that the protection against double jeopardy, its equivalent in common law, is as old as the common law itself.⁵

The apparent simplicity of the *ne bis in idem* rule is generally considered to be deceptive, the principle is actually rather complex.⁶ Within the application of the *ne bis in idem* principle, the tension between the ideals of material justice and the security of law is often particularly apparent.⁷

1 Bourgeois 2007, p. 313, Wils 2003 I, p. 131.

2 “Speech against Leptines” (355 BC), *Demosthenes I*, translated by J. H. Vince, Harvard University Press, 1962.

3 Dig.48.2.7.2 and Cj.9.2.9pr: 529-534 AD. On the history of the principle, see in particular: Sigler 1963.

4 “*Non iudicat Deus bis in id ipsum*” (also: “*idipsum*”), from St. Jerome’s commentary on the Prophet Nahum, Book 1, reference cited from Bourgeois 2007, p. 313 (footnote 1).

5 Hunter 1984, pp. 3-4.

6 Trechsel 2005, p. 381.

7 Spinellis 2005, p. 1149.

1.2 THE PROBLEM: THE *NE BIS IN IDEM* PRINCIPLE IN THE EU LEGAL ORDER

1.2.1 Introduction

Although it is virtually undisputed that multiple prosecutions are harmful to both private as well as public interests, there is no rule of mandatory public international law offering international protection against double jeopardy in international situations.⁸ Conduct giving rise to criminal liability in more than one jurisdiction is traditionally regarded as constituting separate offences in each of the jurisdictions concerned.

This traditional non-application of the *ne bis in idem* principle on the international level is increasingly called into question.⁹ Amongst other things, this is to some extent evidenced by the fact that several international instruments establishing international criminal law tribunals have provided for *ne bis in idem* provisions between each other, and between them and national jurisdictions.¹⁰ Furthermore, some international conventions have provided for “certain legal consequences in application of the principle in the relations between States”.¹¹ The most comprehensive provision in a convention establishing an international *ne bis in idem* principle as an individual’s right *erga omnes* to date is undoubtedly Article 54 of the Convention on the Implementation of the Schengen Agreement (“CISA”), a provision within the EU’s Third Pillar.¹² According to some, Article 54 CISA can be seen as the first real attempt at internationalising *ne bis in idem*, in a legal area that consists of the participating Member States of the EU, supplemented by Iceland, Norway, and Switzerland.¹³

8 Vervaele 2005, p. 102; Spinellis 2002, p. 1150; Hoet 2004, pp. 31 & 50. Cassese argues that the “internal” *ne bis in idem* principle “may be held to be prescribed by a customary rule of international law”, whereas the status of an “equivalent international principle is still controversial” (Cassese 2003).

9 Spinellis 2002, p. 1150.

10 The statutes of the international criminal tribunals for the former Yugoslavia and Rwanda, and the Statute of the International Criminal Court. See: Spinellis 2002, p. 1151.

11 Spinellis 2002, p. 1150.

12 Vervaele 2005, p. 107.

13 ‘Agreement concluded between the European Union, the European Community and the Swiss Confederation concerning the association of the Swiss Confederation with the implementation, application and development of the Schengen acquis’, signed on 26 October 2004 (Council Decision of 25 October 2004, [2004] OJ L370/78). Since an open border policy has existed between Switzerland and Liechtenstein for several decades, Article 16 of the agreement already anticipated Liechtenstein’s association with the Schengen *acquis*, and further steps have been taken to effectuate this. After a slight delay due to some problems concerning the implementation of the second generation Schengen Information System (“SIS II”), Switzerland became fully associated with the Schengen-area on December 12, 2008, although for air travel to and from Switzerland, passports checks continued to be conducted until March 2009. Liechtenstein is set to join ‘Schengen’ in the first half of 2009.

In spite of this, the legal framework for the protection of the right not to be tried twice in EC and EU law on the whole is confusing, and still leaves much to be desired. The interpretation and application of the *ne bis in idem* principle in the legal framework of the EU gives rise to several types of problems, which are briefly set out below.

One of the main problems in discussing the *ne bis in idem* principle from the European perspective is the difficulty of defining “Europe”. In 2003, Hans-Jürgen Bartsch commented that “(a)s regards the application of *ne bis in idem*, several different frameworks need to be considered: the Council of Europe (...), the European Union (...), and the Schengen Area (...). In each of them the application of the principle is governed by different legal instruments, with the added complication that the Schengen-*acquis*, although applicable only in the participating states, has been integrated into the European Union framework by virtue of a protocol to the 1997 Amsterdam Treaty (on European Union). Moreover, all EU Member States are also members of the Council of Europe, and, as such, many – and in some cases most of them – are party to the conventions concluded within that organization.”¹⁴

The fact that a number of –differently worded- *ne bis in idem* provisions exist within different ‘European’ frameworks is however not the only problem for the protection from double jeopardy within the EU. The European Court of Justice (the “ECJ”) has, from the early 1970’s on, developed a full range of general principles of Community law through its case law, amongst which the *ne bis in idem* principle.¹⁵ The introduction of Article 54 CISA into the legal order of the EU has led to two ‘lines’ in the case law before the ECJ concerning the *ne bis in idem* principle, one concerning the *ne bis in idem* principle as a general principle of Community law, the other concerning Article 54 CISA. These two lines of case law on the *ne bis in idem* principle are not fully consistent with one another, giving rise to confusion and conflict *within* the case law of the Community courts on this point.¹⁶

A third problem is the issue of positive conflicts of jurisdiction and the allocation of cases between the Member States. Although it is a necessary instrument for the regulation of transnational justice, the *ne bis in idem* principle does not regulate criminal law *jurisdiction* between the Member States. The application of the *ne bis in idem* principle within the EU leads to a system of ‘first come, first served’: the first Member State in which proceedings against a subject are conducted which result in a *final* outcome of the case (*res iudicata*) is therefore the *only* Member State to pass judgment on the subject in question, in respect of certain conduct. Presently, there are no guarantees that this will

¹⁴ Bartsch 2003, p. 1163.

¹⁵ Vervaele 2004, p. 795; see also Sevenster 1992.

¹⁶ AG Sharpston argued in her Opinion of 15 June 2006 in Case C-467/04 *Gasparini* [2006] ECR I-9199 (para.’s 61-63, that there are “inconsistencies” between the case-law on Article 54 of the CISA, and the case-law on *ne bis in idem* as a ‘fundamental principle of EC law’.

be the Member State which is in the *best position* to proceed. Additional mechanisms for the coordination of the allocation of cases between the authorities in the Member States are therefore necessary.

Fourthly, there are some indications that the interpretation and application of certain aspects of EU law such as the *ne bis in idem* principle may pose some problems for national courts. To give one example: on June 7 2008, the Dutch newspaper *NRC Handelsblad* wrote that Dutch judges are, overall, unfamiliar with important aspects of EU criminal law.¹⁷ The example given by the newspaper is that judges in The Netherlands would not have familiarised themselves with the case law of the ECJ on the EAW and on Article 54 CISA in particular. The article went on to state that there are even indications that some judges are altogether unaware of the existence of “disculpating provisions in EU law” such as Article 54 CISA.

A fifth and final problem for the *ne bis in idem* rule in Article 54 CISA are the exception possibilities to that provision laid down in Article 55 CISA. Those exceptions are broad and vague in wording, potentially undermining the application of the guarantee between the Member States.

1.2.2 Initiatives and proposals aimed at reinforcing the application of the *ne bis in idem* principle within the legal system of the EU

In order to tackle these and other problems, several initiatives and proposals have been launched, aimed at strengthening the position and the application of the *ne bis in idem* principle within the EU legal order.

In 2003, the Republic of Greece submitted a proposal for a Framework Decision, which would have to replace Articles 54-58 CISA.¹⁸ The main aim of the proposal was to offer further *clarification* of the transnational *ne bis in idem* rule, amongst other things by defining the concept of ‘criminal offence’ broadly.¹⁹ Furthermore, the proposal included an exception to the *ne bis in idem* rule in case of new and previously undiscovered evidence (*novum*),²⁰ and what could (perhaps) be seen as a soft law “mechanism” for the resolution of positive conflicts of jurisdiction: a list of criteria, relevant for the allocation of cases between the Member States.²¹

For various reasons, the proposal met strong criticism and was never adopted. The general consensus appeared to be that it might be better to wait

17 *NRC handelsblad* of 7 June 2008, “Nederlandse rechter kent EU-wet niet”.

18 Initiative of the Hellenic Republic with a view to adopting a Council Framework Decision concerning the application of the ‘*ne bis in idem*’ principle, [2003] OJ C 100/24.

19 In the proposal, criminal offences are defined as offences, covered by national provisions of criminal law as well as “administrative offences or breaches of the order”, punishable by a fine (Article 1(a) of the proposed Framework Decision).

20 Article 2(2) of the proposed Framework Decision.

21 Article 3 of the proposed Framework Decision.

for the Commission to take action, where matters under the Third Pillar are concerned.²²

Another (private) initiative from 2003 was the so-called “Freiburg proposal on concurrent jurisdictions and the prohibition of multiple prosecutions in the European Union”.²³ The proposal presented a three-step approach to resolving various issues in the context of the application of the *ne bis in idem* principle within the EU. In the first step, the proposal attempted to resolve various issues concerning the coordination of concurrent jurisdiction in criminal cases in the pre-trial stages of the prosecution. The second step was a *clarification* of various aspects of the ‘European’ *ne bis in idem* principle; the third step concerned the clarification and application of the prohibition of double punishment.

In 2005, the Commission launched a public consultation on the *ne bis in idem* principle and the issue of positive jurisdiction conflicts.²⁴ The ‘Green Paper on conflicts of jurisdiction and the principle of *ne bis in idem* in criminal proceedings’, addressed three main issues:²⁵

- the need to *clarify* “certain elements and definitions” concerning the *ne bis in idem* principle contained in Article 54 CISA;
- the question whether the requirement that a penalty has to have been “enforced, is actually in the process of being enforced or can no longer be enforced”, contained in Article 54 CISA, is still *appropriate* within the EU;
- the question whether there is still any need for the *derogations* contained in Article 55 CISA

Furthermore, the Green Paper outlined the possibilities for the creation of a mechanism for allocating cases to an appropriate jurisdiction.

It must be said that the scope of this consultation was rather narrow. Amongst other things, the issue of parallel prosecutions was excluded from the Green Paper. Although no Commission proposal has so far resulted from this consultation, it did produce a response from several Member States, national parliaments, and various organizations.²⁶

22 The Law Society of England and Wales – Subcommittee E- Inquiry into the initiation of EU legislation, at para. 32 (<http://www.parliament.uk/documents/upload/LawSocietyEnglandWales.04.08.pdf>).

23 Max-Planck-Institut für ausländisches und internationales strafrecht 2003, available from: http://www.mpicc.de/ww/de/pub/forschung/forschungsarbeit/strafrecht/archiv/freiburg_proposal.htm.

24 COM (2005) 696 final, Green Paper on conflicts of jurisdiction and the principle of *ne bis in idem* in criminal proceedings.

25 See also the accompanying information on ScadPlus: <http://europa.eu/scadplus/leg/en/lvb/l16011.htm>.

26 Available from: http://ec.europa.eu/justice_home/news/consulting_public/conflicts_jurisdiction/news_contributions_conflicts_jurisdiction_en.htm.

Amongst other things, it appears from the reactions to the consultation that many feel that the jurisprudence of the ECJ on the *ne bis in idem* principle is just beginning to take shape, and that there is a need for further clarification of the principle *itself*, before any further steps are considered or taken.²⁷ This leads us directly to the aim of this study.

1.3 THIS STUDY

1.3.1 Aim

This study is an attempt to further strengthen the position and the application of the *ne bis in idem* principle by examining and further *clarifying* the *substance*, *scope* and *interpretation* of the principle within the legal order of the EU, as it is (*lex lata*), or as it ought to be (*lex ferenda*).

The purpose of this study is therefore *not* to address each and every issue which may arise in connection with the application of the *ne bis in idem* principle within the legal order of the EU, but merely to take the next step in further developing and refining the ‘European’ *ne bis in idem* principle. Furthermore, this study does not propose or discuss the possibility of implementing mechanisms for the resolution of positive jurisdiction conflicts or the allocation of jurisdiction in criminal matters within the EU.

In sum, the purpose of this study is to contribute to a more in-depth *understanding* of the *ne bis in idem* principle in EU law, amongst other things as a *prerequisite* for any future initiatives or proposals on these points.

²⁷ See, amongst others: Ministerio de Justicia, Kingdom of Spain – *Comments on the Green Paper on Conflicts of Jurisdiction and the principle of ne bis in idem in criminal proceedings*, pp. 2-3; Response by the Netherlands Government to the Green Paper on Conflicts of Jurisdiction and the principle of *ne bis in idem* in criminal proceedings, pp. 8-9; Bar Council of England and Wales – *Response to Commission’s December 2005 Green Paper COM (2005) 696 final*, pp. 12, 15, 19, 20, 21, and 22; Council of Bars and Law Societies in Europe – *CCBE response to the Green Paper on Conflicts of Jurisdiction and the Principle of Ne Bis In Idem*, p. 3; and finally pp. 1-3 of the *Reaction to the Green Paper on Conflicts of Jurisdiction and the principle of ne bis in idem in criminal proceedings on behalf of the Europa Institute, Leiden University*. In her *Comments on the Green Paper on Conflicts of Jurisdiction and the principle of ne bis in idem in criminal proceedings* on behalf of the Max Planck Institute, Juliette Lelieur-Fischer identified many points requiring further clarification, but argued that these issues require *legislative* intervention (Juliette Lelieur-Fischer, *Comments on the Green Paper on Conflicts of Jurisdiction and the principle of ne bis in idem in criminal proceedings*, pp. 13-20). The ‘Meijers Standing Committee of Experts on International Immigration, Refugee and Criminal Law’ strongly disagreed, pointing out that the ECJ is doing “very well” in interpreting and applying Article 54 CISA (*Response of the Standing Committee of Experts on International Immigration, Refugee and Criminal Law*, p. 4). All contributions are available from: http://ec.europa.eu/justice_home/news/consulting_public/conflicts_jurisdiction/news_contributions_conflicts_jurisdiction_en.htm.

1.3.2 Method

The research method used in this study is often used in legal research. Some would refer to it as “black letter law”, and this study certainly belongs in that category. What the phrase “black letter law” refers to are the *basic standard elements* in a particular field of law. As these standard elements are not found in any one source, one has to research a particular field of law in order to determine them.

As the title suggests, this study approaches the *ne bis in idem* principle in EU law in two different ways: by way of *conceptual* analysis (the first step of the research), and through a *jurisprudential* analysis of the case law of the ECJ and the ECtHR (the second step). There is no universally accepted *ne bis in idem* rule or provision available on the international level, which could serve as a point of reference for a study such as this one. The purpose of the conceptual analysis is therefore to provide a *basic conceptual framework* for the purposes of this study, by examining and considering various aspects of the *ne bis in idem* principle as much as possible independently from the specific context of the legal systems of the EU and the Member States, in which the principle exists.

In the second step, the case law of the ECJ, the Court of First Instance (the “CFI”) and the European Court of Human Rights (the “ECtHR”) concerning the *ne bis in idem* principle and the prohibition of double prosecution is analyzed on the main points.

In the third step, the findings from the first and second step of the research are brought together and examined in the broader context of the legal order of the EU, in order to draw conclusions.

1.3.3 Scope

This study focuses on the *ne bis in idem* principle in EC and EU law. According to established case law before the ECJ, fundamental rights “form an integral part of the general principles of law whose observance the Court ensures”.²⁸ In formulating and applying those rights, the Court “draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories”, whereby the ECHR “has special significance”.²⁹ Furthermore, Article 6(2) EU refers to the ‘fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms

28 Most recently, see: Joined Cases C-402/05 P and C-415/05 P *Kadi* (n.y.r.), para. 283.

29 Para. 283 of the *Kadi* judgment

signed in Rome on 4 November 1950', that the Union shall respect. The Convention on Human Rights (ECHR), as well as the case law before the ECtHR therefore come within the scope of this study, and will be discussed and analysed.

The "constitutional traditions common to the Member States" are not homogeneous on the point of the *ne bis in idem* principle. As several authors have found, there are considerable differences in the way the principle is construed within national systems of law.³⁰ These differences are not necessarily decisive for the way the *ne bis in idem* principle is interpreted and applied in the case law of the Community courts. In formulating general principles of Community law, the European Court of Justice does not carry out a comparative analysis of the national laws of the Member States on a particular point in order to identify a common denominator.³¹ The European Court of Justice has – at best – taken an eclectic or 'holistic' rather than a systematic approach to identifying the rights contained in the constitutional traditions common to the Member States, from which it draws 'inspiration' in formulating fundamental rights as general principles of Community law.³² For these (and similar) reasons, this study does not propose carry out a comparative analysis of the *ne bis in idem* rule in the legal systems of the Member States. Nevertheless, as Tridimas points out, "the raw material is found, inevitably, in the laws of Member States", and the importance of the legal traditions of the Member States for developments in the case law of the Community courts where it concerns fundamental legal principles such as *ne bis in idem* should therefore not be underestimated.³³ For this reason this study considers the main aspects of several of the various *ne bis in idem* rules which exist within the legal systems of the Member States at several points, in particular in the following chapter.³⁴

1.4 SET-UP OF THE STUDY

The set-up of this study is as follows. In chapter 2, the *ne bis in idem* principle is conceptually introduced and explored. The various *ne bis in idem* provisions relevant to this study are presented and discussed, and various aspects of the *ne bis in idem* principle are explored and discussed, as much as possible in-

30 Vervaele 2005, p. 100; De la Cuesta 2002, p. 708.

31 Tridimas 2006, pp. 20-21.

32 See (amongst many others) De Witte 1999, pp. 878 *et seq.*

33 Tridimas 2006, pp. 23-24.

34 A very useful comparative study of the *ne bis in idem* principle in a number of states was carried out in the framework of the Preparatory Colloquium of the IVth Section of the XVIIth International Congress of the International Association of Penal Law, held in Berlin (Germany) on 1-4 June 2004, and was published in 2004 in "*Revue internationale de droit pénal*", vol. 73.

dependently from the specific context of the legal systems in which the principle exists.

In chapter 3, the supranational context (the criminal law 'dimension' of the EU in the wider sense) is presented and discussed. Particular attention is given to the Third Pillar of the EU, and EC competition law.

In chapter 4 the case law of the Community courts on the *ne bis in idem* principle and the prohibition of double punishment is discussed and analysed.

Chapter 5 presents the reader with a discussion of the case law of the ECtHR concerning Article 4 of the 7th Protocol to the ECHR (Article 4P7 ECHR).

In chapter 6, the findings from chapters 2, and 4 and 5 are brought together and further considered against against the background of the supranational context of the EU. Conclusions are drawn.

In chapter 7, the findings from this study are presented.

2 | Introducing the principle of *ne bis in idem*: sources and concepts

In this chapter, the *ne bis in idem* principle is generally introduced, and some of the main concepts and issues are explained.

2.1 THIS CHAPTER

In this chapter the *ne bis in idem* principle is conceptually introduced, providing the necessary background for the later analysis of the case law of the Community courts and the ECtHR. In order to provide the reader with some examples, reference is occasionally made to the case law of the ECJ and the ECtHR as well as some other courts.

By way of introduction, some of the main concepts which are explored and discussed in the remainder of this chapter can be set out briefly as follows:

- There are several *ne bis in idem* provisions in EU secondary law instruments and human rights instruments, containing a *ne bis in idem* rule. These provisions vary as to their wording, scope, and exceptions. Article 14(7) ICCPR, Article 4P7 ECHR, Article 50 of the Charter, and Article 54 of the CISA are of particular relevance to this study.
- Various *rationale* can be identified, underlying the *ne bis in idem* principle.
- Different versions of the *ne bis in idem* principle exist, which can be divided up into two basic categories of rules: the *Erledigungsprinzip* and the *Anrechnungsprinzip*.
- The scope of application of the *ne bis in idem* principle can be divided into three elements: the *subjective* scope of application of the principle (the question who can benefit from the protection offered by the principle), the *objective* (or: territorial) scope of application of the principle, and the scope of application of the principle *ratione materiae* or “subject-matter jurisdiction”.
- The first element of the principle is that of *bis*. The answer to the question whether a subject has been tried or punished *again* depends on the question whether the first conviction has become *final* (*res iudicata*).
- The second, and probably the most challenging element of the *ne bis in idem* principle is the element of *idem*: when is an act “the same”?
- In national systems of law, exceptions to the *ne bis in idem* principle typically exist, in particular in case of newly discovered evidence (*novum*).

2.2 SOURCES OF THE *NE BIS IN IDEM* PRINCIPLE IN INTERNATIONAL INSTRUMENTS

2.2.1 Introduction

The *ne bis in idem* principle features in various different forms in regional and international instruments, offering national, regional, or international protection.

Within the UN framework, Article 14(7) of the 1966 International Covenant on Civil and Political Rights (“ICCPR”) contains a *ne bis in idem* rule. Several other international instruments exist, which contain a *ne bis in idem* rule: the 1945 Charter of the International Military Tribunal (the “Nuremberg Charter”),¹ the statutes of the ad hoc International Criminal Tribunals for the former Yugoslavia (“ICTY”) and Rwanda (“ICTR”); the statute of the International Criminal Court (“ICC”; “Statute of Rome”), the American Convention on Human Rights, the United Nations Standard Minimum Rules for the Treatment of Prisoners, the Universal Convention on Obscene Publications, and the Unique Convention on Drugs of 1961. All NATO agreements which contain penal provisions or rules on criminal procedure or assistance in criminal matters contain *ne bis in idem* provisions.²

Of particular relevance to this study are the *ne bis in idem* provisions *erga omnes*³ which exist within the respective frameworks of the EU and the Council of Europe, notably Article 4 of Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms (“4P7 ECHR”), Article 50 of the Charter of Fundamental Rights of the European Union (the “Charter”), and Articles 54 to 58 of the Convention Implementing the Schengen Agreement (“CISA”). These provisions (which will be cited further on) differ considerably from each other, on several points. Article 4 of Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms only offers protection against trial or punishment *in one and the same state*. Article 50 of the Charter contains the same rule, but expands its geographical scope of application from the national level to the level of the European Union (“...within the Union”). Article 54 CISA is worded differently, and

1 The Nuremberg Charter nowadays only carries historical significance.

2 Schomburg 2002, p. 953.

3 A distinction is usually made between *ne bis in idem* provisions *erga omnes* (“against all”), and *inter partes* (“between parties to an agreement”). Whereas *erga omnes* provisions establish more or less ‘universally’ applicable *ne bis in idem* rules, *inter partes* provisions establish a *ne bis in idem* rule in specific cases, typically in the specific context of judicial cooperation (some examples are several of the Conventions within the Council of Europe). Upon closer examination, this distinction is not as clear-cut as it appears, and its usefulness is rather limited. Article 54 CISA for example, although generally considered as a provision *erga omnes*, is strictly speaking only a provision *inter partes*: it only applies between the ‘Schengen states’.

more precisely than the other three provisions. It states that it shall apply to any subsequent set of proceedings on the basis of the same *facts* in any other Member State than the one where the first decision was taken, *finally disposing of someone's trial*.

Ne bis in idem provisions are also found in a number of specific instruments, aimed at establishing judicial cooperation in the field of criminal law within the EU. Article 3, section 2 of the Framework Decision on the European Arrest Warrant ("FDEAW")⁴ is a provision in EU secondary law which stipulates that the executing judicial authority shall refuse to execute the European Arrest Warrant ("EAW") if the person in question has been (finally) judged in a Member State in respect of the same acts, provided that where a sentence has been imposed, the sentence has been served, is being served, or can no longer be served. Article 4 section 2 FDEAW refers to pending criminal proceedings as an optional grounds for refusal of an EAW, and section 5 of Article 4 FDEAW allows for optional refusal if the requested person has been finally judged by a third State. *Ne bis in idem* provisions (in one form or another) also feature in provisions of several Community instruments: Regulation no. 2988/95 on the protection of the European Communities' financial interests⁵, the Convention on the protection of the European Communities' financial interests⁶; the Convention on the Fight against Corruption involving Officials of the European Communities or Officials of the Member States of the EU.⁷ The 1987 Convention between the Member States of the European Communities on Double Jeopardy⁸ was only ratified by 6 Member States, and never entered into force, but was nevertheless provisionally applied between those Member States.⁹ The 1987 Convention is highly similar to the CISA; the latter has effectively superseded it.¹⁰

Furthermore, a number of Conventions establishing judicial co-operation in criminal matters adopted within the Council of Europe feature a *ne bis in*

4 Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2002] OJ L 190/1.

5 Article 6 read in conjunction with recital 10 of Council Regulation 2988/95 of 18 December 1995 on the protection of the European Communities' financial interests [1995] OJ L312/1.

6 Article 7 of the Convention of 26 July 1995 on the protection of the European Communities' financial interests, [1995] OJ C316/49.

7 Article 10 of the Convention of 26 May 1997 on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union, [1997] OJ C195/2.

8 Brussels 25 May 1987 OJ 1987, L 167.

9 Germany, Denmark, France, Italy, The Netherlands, and Portugal. A list of the signatures and ratifications is available at http://www.consilium.europa.eu/cms3_Applications/applications/Accords/details.asp?cmsid=297&id=1987009&lang=EN&doclang=EN.

10 The wording of Article 54 CISA is based on that of the 1987 Convention. An important difference between the CISA and the 1987 Convention is that the latter does not provide for a derogation possibility in the event that the crime took place on the territory of the second Member State along the lines of Article 55 CISA.

idem rule.¹¹ Two of these Conventions (Article 54 of the European Convention on the International Validity of Criminal Judgments and Article 35 of the European Convention on the Transfer of Proceedings in Criminal Matters, which are nearly identical in wording on the point of their *ne bis in idem* provisions) “have rather extensive regulations on the *ne bis in idem* principle on the international level, which are not related to international cooperation”.¹² This broad scope of application is limited by the fact that, similarly to Article 55 CISA, both Conventions allow for derogations where the jurisdiction assumed by the second state to consider prosecution is founded on the territoriality principle (*i.e.* in the event the crime took place within the territory of the second state).

“Multiple problems” arise out of the fact that so many instruments exist containing a *ne bis in idem* rule in some form, each with its’ own random area of applicability.¹³ The overall picture is one of fragmentation.

In the following paragraphs Articles 14(7) ICCPR, Article 4P7 ECHR, Article 50 of the Charter, and Articles 54 *et seq.* CISA are considered in more detail.

2.2.2 Article 14(7) ICCPR

Article 14(7) of the 1966 International Covenant on Civil and Political Rights (ICCPR) reads as follows:

‘no one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country’.

This provision was absent from the original text of the ICCPR. Its inclusion was first considered in the Human Rights Commission drafting the Covenant in 1951, but disappeared in the background again. There is no mention of the

11 Articles 53-57 of the European Convention on the International Validity of Criminal Judgments, Article 9 of the European Convention on Extradition, Article 2 of the Additional Protocol to the European Convention on Extradition, Articles 8&9 of the European Convention on the Punishment of Road Traffic Offences, Articles 35-37 of the European Convention on the Transfer of Proceedings in Criminal Matters, Article 8 of the Convention on the Transfer of Sentenced Persons, Article 17 of the European Convention on Offences relating to Cultural Property, Articles 2, 3, and 14 of the Agreement on illicit traffic by sea, implementing Article 17 of the United Nations Convention against illicit traffic in narcotic drugs and psychotropic substances; Article 31 of the Council of Europe Convention on Action against Trafficking in Human Beings (conflict of jurisdiction), Article 28 of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism.

12 Klip & van der Wilt 2004, p. 1102. The wording of the 1987 Double Jeopardy Convention is based on these provisions. See also: van den Wyngaert & Stessens 1999, p. 787.

13 De la Cuesta 2002, p. 720; Schomberg 2002, pp. 953-954.

principle in the 1954 draft. A second proposal stirred heated debate in the Third Committee of the General Assembly, but made it in the end.¹⁴

Article 14(7) ICCPR offers states that it falls to be applied to “an offence” (...) “in accordance with the law and penal procedure of each *country*”. Trechsel points out that, at the time when the ICCPR was drafted, “international criminal jurisdiction was virtually unknown”. Otherwise, “instead of *country*, the term *jurisdiction* would have been chosen”.¹⁵ On the national level this suggestion would not make much difference, as it is clear from the wording of the provision that it applies to the system of criminal law of each country in the sense of *lex fori*. Internationally however both international criminal courts, as well as some international and supranational organizations can nowadays assume jurisdiction in certain cases. This is a possibility which the wording of Article 14(7) ICCPR does not yet take into account.

The question whether Article 14(7) ICCPR “bears the promise of international application” is disputed.¹⁶ Little can be inferred with any degree of certainty from the wording of the provision on this point.¹⁷ Although some have argued that the provision may apply internationally, there are several known decisions by national courts, as well as an opinion issued by the UN Human Rights Committee, supporting the view that the provision only applies within one and the same state.¹⁸ The latter opinion therefore “appears to prevail”.¹⁹

Article 14(7) ICCPR refers to an offence under “the law and *penal* procedure of each country”. This appears to exclude the possibility of application to proceedings of any other nature, in particular administrative law proceedings.²⁰ What the words “law and penal procedure of each country” mean however is contested. They were inserted following a proposal from the Ecuadorian representative, who feared that “finally acquitted or convicted” would in practice be interpreted too broadly.²¹ According to Spinellis, the words “law and *penal* procedure of each country” imply that the state is bound by the obligation to recognise the “whole previous procedure” in another state.²² Others have suggested that the words relate to the conviction, imposing the conditionality of a *lawful* acquittal or conviction.²³

14 Trechsel 2005, p. 382. According to Trechsel, the matter has nevertheless remained controversial ever since.

15 Trechsel 2005, p. 386.

16 Spinellis 2002, p. 1152.

17 Spinellis 2002, p. 1152.

18 HRC *A.P. v. Italy* 16 Juli 1986 (Comm.no. 204/1986); available from <http://www.unhchr.ch/tbs/doc.nsf/MasterFrameView/da4db6de25fbfa7fc1256aca004dc4f3?Opendocument>.

19 Spinellis 2002, p. 1152. See also: Bartsch 2002, p. 1165.

20 Spinellis 2002, p. 1153.

21 Trechsel 2005, p. 390.

22 Trechsel 2005, p. 390.

23 Trechsel 2005, p. 390.

On the basis of the wording of Article 14(7) ICCPR²⁴ the answer to the question who can rely on the protection offered by this provision appears straight-forward: “*no one* shall be liable to be tried or punished again (for an offence for which) *he* (or *she*) has already been finally convicted or acquitted”. It is “rather obvious” that only someone who has actually stood trial should subsequently be in a position to benefit from the protection offered by the principle.²⁵ It is perhaps remarkable that Article 14(7) ICCPR does not contain any exceptions, and does not require that the sentence must have been *enforced* or is in the process of being enforced.²⁶

2.2.3 Article 4 Protocol 7 ECHR

Article 4 of Protocol no. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”; “Article 4P7 ECHR”)²⁷ reads as follows:

- “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.”

Similarly to Article 14(7) ICCPR, Article 4P7 ECHR forms a later addition to the ECHR. The draft provision was prepared by the Steering Committee for Human Rights and finally adopted and opened for signature by the Member States of the Council of Europe at the 374th meeting of the Ministers’ Deputies on 22 November 1984.²⁸ This is no coincidence; the reason for including the 7th Protocol was, according to Explanatory Report, that “problems might arise from the coexistence of the European Convention on Human Rights and the

24 Article 4P7 ECHR and Article 50 of the Charter are worded in the same way as Article 14(7) ICCPR on this point.

25 Trechsel 2005, p. 392.

26 Although it is far from clear whether there are in fact any such obligations, the Netherlands made a reservation to Article 14(7) ICCPR, stating that it would not accept any obligations arising out of that provision which go beyond those arising out of Article 68 of the Dutch penal code, *Tractatenblad* (Netherlands Treaty Journal) 1978, p. 117. See also: Klip & van der Wilt 2002, p. 1093.

27 Strasbourg, 22 November 1984.

28 The Explanatory Report is available from: <http://conventions.coe.int/Treaty/en/Reports/Html/117.htm>.

United Nations Covenants”.²⁹ In Recommendation 791,³⁰ the Assembly urged the Committee of Ministers to “endeavour to insert as many as possible of the substantive provisions of the Covenant on Civil and Political Rights in the Convention”. Against this background, it is unsurprising that the influence of Article 14(7) ICCPR on Article 4P7 ECHR is clear. Nevertheless there are also some important differences.

The wording of Article 4P7 ECHR limits the scope of application of the *ne bis in idem* rule contained therein more clearly and precisely to one and the same state than Article 14(7) ICCPR.³¹ According to Trechsel, Article 4 of Protocol 7 ECHR is generally regarded as both more accurate, as well as more *restrictive* in nature than Article 14 (7) ICCPR.³² Article 4P7 ECHR stipulates that it falls to be applied in the event of “criminal proceedings *under the jurisdiction of the same State*”. Similarly to Article 14(7) ICCPR, Article 4P7 ECHR generally refers to the criminal law jurisdiction of the state, regardless of whether the criminal jurisdiction assumed by a state in a certain case is territorial, or, for example, personal or universal in nature.

The 7th Protocol was not ratified by all of the Member States of the Council of Europe.³³ The (practical) limitation in the scope of application of Article 4P7 which results from this is partially compensated by the fact that, according to established case law before the ECJ the general principles of Community law are ‘inspired’ amongst other things by the fundamental rights contained in the ECHR, and the *ne bis in idem* principle is amongst those general principles of Community law. Because the Member States are bound by the general principles of Community law when acting within the scope of Community law, the sphere of influence of Article 4P7 ECHR also extends into the legal systems of those Member States which have not ratified the 7th Protocol, although only in certain types of situations. This will be further discussed in chapter 5 of this study.

The wording of Article 4P7 ECHR differs from that of Article 14(7) ICCPR where it mentions “*criminal proceedings*”, something “which clearly echoes the term ‘criminal charge’ found in Article 6 par. 1” (ECHR).³⁴ According to the Explanatory Report, “(i)t has not seemed necessary (...) to qualify the offence as “criminal”. Indeed, Article 4 already contains the terms “in criminal proceedings” and “penal procedure”, which render unnecessary any further specification of the text of the article itself”. In point 32 this is further em-

29 Explanatory Report, at point 1.

30 Recommendation 791 (1976) on the protection of human rights in Europe, available from <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta76/EREC791.htm>.

31 Trechsel 2005, p. 385.

32 Narcisco Da Cunha Rodrigues 2005, p. 167.

33 Belgium, Germany, the Netherlands, Spain and Turkey have signed but not ratified the Protocol, the United Kingdom has not signed it. (<http://conventions.coe.int>, date: 11/03/2009).

34 Trechsel 2005, p. 387.

phasized where the Report claims that Article 4 does not prevent a subject from being subjected to an action of a different “character”.³⁵ In spite of these reassurances, the ECtHR has not limited the scope of application of the provision to criminal law proceedings *strictu sensu*, but has interpreted terms “criminal proceedings” in Article 4P7 ECHR and “criminal charge” in Article 6 ECHR broadly and autonomously, on the basis of a threefold test.³⁶ As a result, the scope of application of Article 4P7 ECHR has expanded into other areas of law, in particular that of administrative law.

Article 4P7 ECHR requires that the subject is “finally acquitted or convicted”; similarly to Article 14(7) ICCPR it does not require that the penalty imposed has been enforced or is actually being enforced. Furthermore, Article 4P7 ECHR contains an exception to the *ne bis in idem* rule, whereas Article 14(7) ICCPR and Article 50 of the Charter (below) do not. Article 4P7 ECHR allows for a second trial where new or newly discovered facts (*novum*), or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case”. According to the Explanatory Report, this includes evidence of new or newly discovered evidence, including new means of proof relating to the previously existing facts.³⁷ Furthermore, according to the Explanatory Report, Article 4P7 ECHR does not “prevent the reopening of the proceedings in favour of the convicted person or any changing of the judgment to the benefit of a convicted person.”³⁸

The ECHR places the *ne bis* rule amongst those guarantees that cannot be derogated from even in time of war or other public emergency, “a clear indication of the importance which is being attached to the principle in connection with fairness of criminal proceedings.”³⁹ It is therefore all the more surprising that the principle was originally not included in the ECHR.

2.2.4 Article 50 of the Charter of Fundamental Rights of the European Union

Along the same lines as Article 4P7 ECHR, article 50 of the Charter of Fundamental Rights of the European Union (“the Charter”) reads as follows:

³⁵ Explanatory Report, at pnt. 28.

³⁶ Both are determined according to “the classification of the offence under national law, the nature of the offence and the nature and degree of severity of the penalty that the person concerned risked incurring.” ECtHR, *AP, MP, and TP v. Switzerland*, 29 August 1997 (Appl. No. 19958/92) para. 39 and ECtHR, *EL, RL and JO v. Switzerland*, 29 August 1997 (Appl. No. 20919/92) para. 44. ECtHR, *Hangl vs. Austria* (admissibility), 20 March 2001 (Appl. No. 38716/97); ECtHR, *Zolotukhin v. Russia*, Grand Chamber, 10 February 2009 (Appl. No. 14939/03). See also Trechsel 2005, p. 387, and Wils 2003 I, p. 134.

³⁷ At pnt. 31.

³⁸ *Idem*.

³⁹ Bartsch 2002, p. 1164.

"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."⁴⁰

The Charter was proclaimed on 7 December 2000 in Nice.⁴¹ The Charter is, at present, not (directly) legally binding but "reaffirms, with due regard for the powers and tasks of the Community and the Union and the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Community and by the Council of Europe and the case law of the Court of Justice of the European Communities and of the European Court of Human Rights."⁴²

According to the explanatory memorandum (provided by the Bureau of the Convention, the body which drafted the Charter),⁴³ "in accordance with Article 50, the 'non bis in idem' principle applies not only within the jurisdiction of one State but also between the jurisdictions of several Member States. That corresponds to the *acquis* in Union law; see Articles 54 to 58 of the Schengen Convention, Article 7 of the Convention on the Protection of the European Communities' Financial Interests and Article 10 of the Convention on the fight against corruption." Article 50 of the Charter was therefore drafted with Articles 4P7 ECHR and 54 CISA in mind, but differs considerably from both in wording. In particular, Article 50 of the Charter is worded more restrictively than Article 54 CISA, as it only mentions the possibilities of "acquittal of conviction" as possible outcomes of the first trial.⁴⁴

On the basis of the wording of the provision, its scope of application is far from obvious. Article 50 of the Charter states that it falls to be applied in the event in which a subject has been "finally acquitted or convicted *within* the Union". The phrase "*within the Union*" is somewhat puzzling. Does this

40 Article II-110 of the 2004 draft European Constitution contained a *ne bis in idem* provision, identical to Article 50 of the Charter.

41 According to Annex IV to the Conclusions of the Presidency of the Cologne European Council (3-4 June 1999) the aim was "to establish a Charter of fundamental rights in order to make their overriding importance and relevance more visible to the Union's citizens", available from http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/kolnen.htm. See also: European Commission for Democracy through law ("Venice Commission"), Opinion 256/2003, 18 December 2003, available from: [http://www.venice.coe.int/docs/2003/CDL-AD\(2003\)022-e.pdf](http://www.venice.coe.int/docs/2003/CDL-AD(2003)022-e.pdf).

42 Preamble, at par. 5.

43 "Convent 49: Text of the explanations relating to the complete text of the Charter as set out in CHARTE 4487/00/CONVENT 50", available from: http://www.europarl.europa.eu/charter/pdf/04473_en.pdf. The explanatory notes state that they have "no legal value" and are "simply intended to clarify (the Charter)".

44 Hoet 2004, pp. 28-30.

mean that the litigious conduct must have taken place within the Union, or should “*within the Union*” be understood as: “by a court in a Member State” (and could this include proceedings before the Community courts)? Along the same lines, it is not clear from the provision whether “the law” should be understood as “the law of one of the Member States”, as “Community law”, or both. Remarkably, the use of the terms “criminal law” and “offence” would *prima facie* appear to exclude the possibility of the application of the provision to Community law, as well as all other areas of law except for criminal law.

Article 51 of the Charter addresses the Charter’s scope of application. It states that “the provisions of this Charter are addressed to the institutions and bodies of the Union” (and, or so it must be assumed, to the Member States when implementing Community law). It follows from this that the precise wording of Article 50 of the Charter (although perhaps opaque) is not necessarily decisive in determining the scope of application of the *ne bis in idem* principle contained in that provision. If the provisions of the Charter are “addressed to” the Union’s institutions and bodies as stated by Article 51 of the Charter, Article 50 of the Charter is therefore intended to apply to all areas of Community/Union law.

The only alternative would seem to be to regard Article 50 of the Charter as a provision which only applies to the systems of criminal law of the Member States as well as to those areas of *Community* law where the Community has criminal law competences, and where national criminal law exists, implementing Community law.⁴⁵ Needless to say that such an interpretation would drastically limit the scope of application of the provision, at least as far as its application to Community law is concerned. Furthermore, it does not follow from the Charter or from the explanatory memorandum that such an interpretation was intended in any way, by the Charter’s draftsmen. On the contrary, it appears from Article 51 that the envisaged scope of application of the Charter is particularly wide.

In order for Article 50 of the Charter to fulfil its function as a provision which applies to Community/Union law in keeping therefore with Article 51 of the Charter, the term “criminal proceedings” contained in that provision must be interpreted broadly, perhaps analogously to the interpretation given to the concept of “criminal charge” by the ECtHR. In this connection it is worth noting that article 23(5) of Regulation 1/2003 stipulates that EC competition law is not of a “criminal law nature”. This statement is however in itself not

⁴⁵ That the Community has certain competences in the field of criminal law is (by now) undisputed. In 2003, the ECJ held for the first time that the Community has the power to require that the Member States lay down criminal penalties for the protection of the environment Case C-176/03 *Commission v. Council* [2005] ECR I-7879, regarding Council Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law [2003] OJ L 29/55). Since then, the Court has confirmed this in several cases, concerning environmental law and maritime safety.

decisive in determining the nature of EC competition law, as fines imposed in competition cases are almost certainly of a criminal law nature within the meaning of the ECHR.⁴⁶

In view of all the above, it seems doubtful to what extent Article 50 of the Charter could actually have the effect of reaffirming the *ne bis in idem* rule on the EU-level. The opaque wording of the provision aside, it appears that the provision merely adds to the sheer number of differently worded *ne bis in idem* provisions in EU law, without however adding anything in terms of substance (other than the words “within the Union”).

2.2.5 Articles 54 *et seq.* CISA

The introduction in the Union-*acquis* of articles 54 to 58 of the CISA⁴⁷ “has been an important landmark for the establishment of a multilateral treaty-based international *ne bis in idem*”.⁴⁸ Articles 54 *et seq.* CISA read as follows:

“Article 54: 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.

Article 55: 1. 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.

46 The case law of the ECtHR concerning the scope of application *ratione materiae* of Articles 6 and 4P7 ECHR is analysed and discussed more in-depth in para. 5.4 of this study. It appears “difficult if not impossible” to deny that proceedings in EC competition law are of a criminal law nature within the meaning of Article 6 ECHR (Wils 2003 I, p. 133).

47 Convention of 19 June 1990 implementing the Schengen Agreement, [2000] OJ L239/19 (“CISA”).

48 Vervaele 2005, p. 109. Schomburg points out that the application of a *ne bis in idem* rule in Europe exclusively “between the Schengen/EU states” is nevertheless still “rather arbitrary” (Schomburg 2002, p. 952).

2. A Contracting Party which has made a declaration regarding the exception referred to in paragraph 1(b) shall specify the categories of offences to which this exception may apply.

3. A Contracting Party may at any time withdraw a declaration relating to one or more of the exceptions referred to in paragraph 1.

4. The exceptions which were the subject of a declaration under paragraph 1 shall not apply where the Contracting Party concerned has, in connection with the same acts, requested the other Contracting Party to bring the prosecution or has granted extradition of the person concerned.

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

Article 57:1. Where a Contracting Party charges a person with an offence and the competent authorities of that Contracting Party have reason to believe that the charge relates to the same acts as those in respect of which the person's trial has been finally disposed of in another Contracting Party, those authorities shall, if they deem it necessary, request the relevant information from the competent authorities of the Contracting Party in whose territory judgment has already been delivered.

2. The information requested shall be provided as soon as possible and shall be taken into consideration as regards further action to be taken in the proceedings underway.

3. Each Contracting Party shall, when ratifying, accepting or approving this Convention, nominate the authorities authorised to request and receive the information provided for in this Article.

Article 58: The above provisions shall not preclude the application of broader national provisions on the *ne bis in idem* principle with regard to judicial decisions taken abroad."

The 1985 Schengen-agreement and the 1990 CISA (together: the "Schengen-agreements"), although concluded outside of the Community framework, were drafted with European integration in mind, and are functionally linked to the objective of free movement.⁴⁹ The Schengen-agreements aim at establishing free circulation of persons by abolishing border checks,⁵⁰ while at the same time implementing countervailing measures, which lead to an increase in cross-border enforcement of the criminal laws of the Schengen-group Member States (the "Schengen-states"). In the absence of rules on positive conflicts of law in international criminal law, this increase in law enforcement activities within the Schengen-area would lead to an increased risk for subjects of being prosecuted, tried, and punished repeatedly in several Schengen-states. Apart

49 Wagner 1998, p. 5.

50 Article 2(1) CISA.

from being unfair for the subjects in question, this would also undermine the free movement aim of the Schengen-agreements.⁵¹ Article 54 CISA counteracts this.

Article 54 CISA is generally regarded as the most developed expression of an internationally applicable *ne bis in idem* rule in force in the way it is worded.⁵² In Article 55 CISA however the prohibition of Article 54 is substantially watered down. According to Bartsch, “if it were not for Article 55, the Convention would have created, for the Schengen countries, the first European legal area throughout which the *ne bis in idem* principle would enjoy an international application.”⁵³ It is important to note that, in order to be able to rely on this article, a prior declaration must be made by the state when ratifying, accepting or approving the CISA.⁵⁴ Article 55 CISA stipulates that the *ne bis in idem* principle of Article 54 CISA does not apply in respect of: i) crimes committed in whole or in part in the territory of the second state to initiate the prosecution, ii) crimes affecting the states’ “essential interests”, and iii) crimes which have been committed by the officials of the (second) state, in the exercise of their duties.⁵⁵

Article 54 CISA applies to a trial which “has been finally disposed of in one Contracting Party”. It stipulates that a person who has had his or her trial disposed of, may “may not be prosecuted in another Contracting Party”.

51 Van der Wilt 2005, p. 100.

52 Amongst others, see: Hoet 2004, p. 24; Bartsch 2002, p. 1167; De la Cuesta 2002, p. 719; Van de Wyngaert & Stessens 1999, p. 787.

53 Bartsch 2002, p. 1168.

54 This information has not been published in the Official Journal, nor has it been made (centrally) available anywhere else. It appears from the case law of the ECJ that Austria is one Schengen state which has issued such a declaration (case C-491/07, *criminal proceedings against Vladimír Turanský*, at para. 29). The judgment only mentions that this declaration was published in the Austrian legislative digest (BGBl. III of 27 May 1997, p. 2048). Furthermore it appears (amongst other things) from the responses submitted by those states to the Green Paper on conflicts of jurisdiction and the principle of *ne bis in idem* in criminal proceedings (*supra*) that Italy and Greece have also issued declarations under Article 55 CISA.

55 Contrary to Article 55 CISA, the 1987 Convention on Double Jeopardy (see para. 2.2.1, above) does not provide for a derogation in the event that the crime took place on the territory of the second Member State to considering prosecution. It was for this reason that the 1987 Convention on Double Jeopardy was considered in the Programme of measures to implement the principle of mutual recognition of decisions in criminal matters ([2001] OJ C 12/10) as a possible “template” for the revision of Article 55 CISA. So far, Article 55 CISA has not been revised, nor is the 1987 Convention likely to enter into force anymore. The issue of the derogations laid down in Article 55 CISA was again addressed in question 21 of the Commission’s Green Paper on conflicts of jurisdiction and the principle of *ne bis in idem* in criminal proceedings (COM(2005) 696 final), where the Commission suggested that Article 55 CISA could perhaps be abolished, if replaced by a (binding) mechanism allocating criminal jurisdiction between the Member States. Those Member States which submitted responses to the consultation document did not react favourably to the idea of abolishing Article 55 CISA.

Contrary to Article 14(7) ICCPR and Article 4P7 ECHR (as well as Article 50 of the Charter), Article 54 CISA does not apply to multiple prosecutions *within one and the same state*, but only to a second prosecution *in another Schengen state*.

The question whether Article 54 CISA could also apply in respect of administrative law proceedings has so far not been addressed in the case law of the ECJ, or in academic writing. At first glance, the answer to this question would seem to be negative. Article 54 CISA was drafted for criminal law purposes, something which is also evidenced by the wording of the provision.⁵⁶ As further explained and discussed in para. 3.4 of this study, Article 2 of Decision 1999/436 stipulates that Articles 34 and 31 of title VI of the TEU form the appropriate legal basis for the *ne bis in idem* provision in Article 54 CISA. Title VI of the TEU is entitled “provisions on police and judicial cooperation in criminal matters”. It would therefore seem that, by its nature, the scope of application of Article 54 CISA is restricted to the sphere of criminal law. It is also apparent from this that Article 54 CISA does not apply to Community law. On the other hand, it is a fact that in many Member States administrative law plays an important role in penalising certain types of conduct. It is conceivable that in one Member State, certain types of acts are a matter of criminal law, whereas in another Member State the same acts fall within the realm of administrative law, or both. Such differences on the national level could partially undermine the protection offered by Article 54 CISA. This raises the question whether Article 54 CISA could, in some instances, also apply to judicial decision of an administrative law nature, in order to remedy this disparity. In the light of its aim and function⁵⁷ one might consider that it may (in some instances) be appropriate to apply the same or similar reasoning as the ECtHR has applied to the autonomous concept of “criminal charge” to the *ne bis in idem* principle contained in Article 54 CISA, and therefore to apply Article 54 CISA to certain administrative law proceedings, provided that these proceedings essentially aim at penalizing certain types of conduct in the same way as criminal law would. So far however there has not been a case before the ECJ, concerning this issue.

Article 54 CISA states that “a person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party”. Again, it is clear from the wording of this provision that only the person who actually stood trial subsequently benefits from the protection offered by the principle. In *Miraglia*⁵⁸ the ECJ faced the question whether, in the event proceedings against a defendant were finally discontinued on account of a time bar, the protection offered by Article 54 CISA would extend to others who were involved in the same conduct, given that the same time bar would

56 English: “trial”, Dutch: “berecht”, German: “abgeurteilt”, French: “jugée”.

57 The aims and functions of the Schengen *acquis* in general and art. 54 CISA in particular will be further discussed in paras. 3.4 and 3.5 of this study.

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

have applied, had they been prosecuted too. To this question, the Court answered in the negative.

2.2.6 Issues arising out of the scope and wording of the provisions

Two main issues arise out of these observations. The first issue is that of the comparative scope of application of the provisions; the second is that of the textual differences between the provisions themselves. Leaving aside for now the question whether it concerns an instance in which Community law or national law (or national law, *implementing* Community law) is being applied in a given case, the scope of application of the *ne bis in idem* principle within the EU legal order can be seen as a matrix of five different types of possible situations, involving two different levels of jurisdiction: the level of the Member States, and the level of the Community/EU.

Within this matrix, the first possible situation is the application of the *ne bis in idem* principle within one and the same state. This concerns the familiar, 'traditional' situation that the subject is tried again within one and the same state on the basis of the same conduct.

The second possible situation is the application of the *ne bis in idem* principle between several Member States. This concerns situations in which a subject is tried again, but this time in a different Member State than the one in which he or she was already (finally) acquitted or convicted for the same facts.

The third possibility within the matrix is the application of the *ne bis in idem* principle between the Community/Union and a Member State. This may occur when a subject has already been tried and (finally) acquitted or convicted by the authorities of a Member State, and subsequently incurs a fine imposed by the Commission on the basis of the same facts, or *vice versa*.

The fourth possibility is the application of the *ne bis in idem* principle on the level of the Community/Union. This concerns situations in which the Commission imposes a fine twice for the same conduct.

A fifth possibility is the application of the *ne bis in idem* principle in the relationship between the Community/EU legal order and a third country. This is the case where both the Commission as well as an authority in a third country have imposed a fine for the same infringement. As will be discussed in chapter 4 of this study, this has happened frequently in competition cases.

The sixth and final possibility which for now remains hypothetical would be the possible application of the principle between the Union and other international organisations.⁵⁹

Applying these observations to the *ne bis in idem* provisions which have been discussed in the previous paragraphs, it appears that the six different types of possible situations just described are not (fully) covered by the provisions. Article 14(7) ICCPR and 4P7 ECHR both apply to the first type of situation: the application of the principle within one and the same state. These provisions are 'mirrored' by Article 54 CISA, which only applies in situations *between* the Member States,⁶⁰ but not to Community law, or to situations within one and the same Schengen state. This implies that the burden of covering all situations of the third, fourth, and fifth type would rest on the shoulders of Article 50 of the Charter, a summarily drafted provision which is (at present) non-binding. This broad scope of application is far from obvious from the wording, and the provision itself does not appear to be very effective, making it less suitable for the important task assigned to it.⁶¹ Furthermore, it is far from clear from the provision how it should be applied in specific and complex areas of Community law, such as competition law and environmental law. In sum, it must be said that Article 50 of the Charter fails to confirm the position of *ne bis in idem* rule within the legal order of the Community/EU clearly and unambiguously.

As regards the problem of the wording of the provisions, the following main textual differences between the provisions can be identified:

- Article 54 CISA refers to "the same acts", whereas Article 14(7) ICCPR, Article 4P7 ECHR, and Article 50 of the Charter refer to the same "offence";
- Article 54 CISA employs the word "trial", whereas 4P7 ECHR and Article 50 of the Charter use the term "criminal offence";
- Article 54 CISA appears to apply more generally to situations in which someone has had his (or her) trial "finally disposed of", whereas Article 14(7) ICCPR, Article 4P7 ECHR, and Article 50 of the Charter require the subject to have been "finally acquitted or convicted";
- Contrary to Article 4P7 ECHR, Articles 54 *et seq.* CISA do not provide for an exception to the *ne bis in idem* rule in case of newly discovered facts, or a mistrial.

59 A further distinction could for example be made between a). situations in which Community or EU law is applied (either by the authorities of a Member state, or by the European Commission), b.) situations in which national law is applied by national authorities, *implementing* Community law, and c). situations in which national law is applied (by national authorities).

60 With the important exception of situations covered by Article 55 CISA.

61 De la Cuesta argues that although the provision "foresees" a European *ne bis in idem* rule, it "still needs a further juridical treatment in order to be effective" (De la Cuesta 2002, p. 720).

- Articles 14(7) ICCPR, 4P7 ECHR, and 50 of the Charter do not require that a sentence is being enforced or has been enforced, whereas Article 54 CISA does.

Needless to say, these textual differences are substantial, and could lead to a considerable degree of confusion over the interpretation of the principle. Out of all the provisions discussed, only Article 54 CISA stands out as a precisely and strongly worded provision with a clearly defined scope of application. In every situation in which Article 54 CISA does not apply however, the mere fact that there are several differently worded *ne bis in idem* provisions is therefore an important problem for the protection against double jeopardy within the EU. These two problems could be remedied in several different possible ways. Leaving aside the difficult question *how* and *where* this could be done, one possibility could –at least in theory- be to insert a new and legally binding *ne bis in idem* provision in the EU's *acquis*, superseding (as well as clarifying, where necessary) the existing provisions. An important disadvantage could be that this provision would add to the sheer number of differently worded *ne bis in idem* provisions in existence, which is precisely (an important part of) the problem. In practice however it will probably prove difficult, if not impossible to reach agreement on the appropriate wording of such a provision.⁶²

Another, and perhaps more innovative solution could be to regard the existing provisions as forming different expressions of one single overarching, “core” understanding of the *ne bis in idem* principle within the EU. This approach may offer several potential advantages. Firstly, this could shift the interpretative focus away from the differences (and flaws) in the wording of the provisions, and towards an interpretation based on the *nature and purpose* of the principle within the EU's legal order, thus filling in the ‘gaps’ in the provisions. Secondly, it would require no further legislative action. Thirdly, and finally it simply seems to make sense that there should be one single understanding of the *ne bis in idem* principle, or at least within the legal order of the EU, in the interest of legal certainty.

For these and similar reasons, this study proposes that the *ne bis in idem* principle in EU law must be seen as a single and indivisible fundamental right, which applies in the same way in every (punitive) area of Community and EU law, whilst fully taking into account the particular characteristics of each area of law (*mutatis mutandis*). This proposition will be further substantiated at several points in this study.

62 The fact that the 1987 Convention on Double Jeopardy never entered into force, as well as the fact that the 7th Protocol to the ECHR was poorly ratified may provide an indication in this respect.

2.3 RATIONALE OF THE *NE BIS IN IDEM* PRINCIPLE

2.3.1 General

Within national systems of law, the *rationale* of the *ne bis in idem* principle which can be identified are manifold, leading to differences in the way the principle is construed in different states.⁶³ These differences are amongst the main problems encountered when the *ne bis in idem* principle is applied internationally, as the way in which the principle is understood varies from state to state, and there is no common denominator on the international level.⁶⁴ The question of the principle's underlying *rationale* is therefore not merely an academic one; it also finds its way into the problem of the international (non-)applicability of the principle. A list of the main *rationale* of the *ne bis in idem* principle which can be found in national law would include individual freedom, protection of human rights, protection of the individual from state abuses, justice, proportionality, rule of law, legal certainty, 'juridical security' (legal certainty), due process, respect for *res iudicata*, procedural efficiency, and the interest of social peace and order.⁶⁵ For the purposes of this study, it is useful to examine some of these concepts in more detail.

2.3.2 Distinction between the functions of the principle

In continental law traditions, a distinction is usually made between the principle's role as an individual right, and its function as a guarantee for legal certainty by upholding the finality of judicial decisions.⁶⁶

In the former sense, the principle protects the individual from possible abuses of the state's *ius puniendi*. Even if there is no abuse on the part of the state, additional burdens arising out of double prosecution of a subject "include the duplicated costs of legal representation, coercive measures to the person and property, and psychological burdens associated with the extended procedures and the absence of finality".⁶⁷

In the latter sense, the principle protects not only the individual, but also the *authority of the judgement itself* and therefore of the judge who rendered it.⁶⁸

63 De la Cuesta 2002, p. 710, Vervaele 2005, p. 100.

64 Vervaele 2005, p. 100; de la Cuesta 2002, p. 708.

65 De la Cuesta 2002, p. 710.

66 Trechsel 2005, p. 383.

67 Fletcher 2007 II, p. 10.

68 Van den Wyngaert & Stessens 1999, pp. 780-781.

In common law traditions, the principle is primarily seen as an individual's right; a retrial therefore *in principle* only threatens to breach the principle if the second sentence is less favourable for the accused and if the difference between the first and second sentence sufficiently compensates for the suffering the defendant underwent as a result of his or her second trial.⁶⁹

2.3.3 Some of the *rationale* underlying the guarantee as an individual's right

In its capacity as an individual right, the protection against double jeopardy derives from "common sense" and serves "the superior interest of dignity, justice and humanity".⁷⁰ Several different, logically linked, *rationale* can be identified here. Firstly, the protection against double jeopardy is a *precondition for a fair trial*. It could for instance be argued that a court is not *impartial* within the meaning of Article 6(1) ECHR, unless its decisions are binding on other organs of the state and on other courts, with the exception of the possibility of appeal.

Article 4P7 ECHR does not treat the principle as an aspect or element of the right to a fair trial, but lists it as a separate guarantee. Article 14(7) ICCPR however *does* form an element of the right to a fair trial within the framework of that Convention. Before the 7th Protocol was adopted, the question therefore arose whether the *ne bis in idem* principle should also be seen as an element of Article 6 ECHR.⁷¹ One important difference with, for example, the protection against self-incrimination is that the *ne bis in idem* principle is not as such "a guarantee which requires a specific quality of the trial, but leads to the consequence that there should be no trial at all in specific circumstances."⁷² After the adoption of the 7th Protocol, this question could still arise in relation to states which have not ratified that Protocol. In its decision in *Ponsetti and Chesnel*⁷³ however, the ECtHR stressed that the *ne bis in idem* principle "is embodied solely in Article 4 of Protocol No. 7; the other provisions of the Convention do not guarantee compliance with it either expressly or implicitly."⁷⁴

Secondly, the *ne bis in idem* principle forms an important *guarantee for legal certainty*.⁷⁵ This important *rationale* of the *ne bis in idem* principle is self-evi-

⁶⁹ Trechsel 2005, p. 383.

⁷⁰ Huet & Koering-Joulin 2005, p. 256 (translation by the author).

⁷¹ Trechsel 2005, p. 384.

⁷² Trechsel 2005, p. 385.

⁷³ ECtHR, *Ponsetti and Chesnel v. France* (admissibility), 14 September 1999 (Appl. nos. 36855/97 and 41731/98).

⁷⁴ Para. 6 of the Decision.

⁷⁵ Trechsel 2005, p. 383; Van der Wilt 2005, p. 99; De la Cuesta 2002, p. 710; Schomburg 2002, p. 942.

dent, and is found in nearly all legal systems which feature a *ne bis in idem* rule, both in common law as well as continental law traditions.

A third *rationale* is that of proportionality,⁷⁶ which is also an important principle in Community law. It is exceedingly difficult (if not impossible) to define what “proportionality” is precisely. The principle of proportionality carries many different names in different jurisdictions, such as: “fairness”, “reasonableness”, and “equity”, which all have different specific meanings within each legal system. What these concepts have in common is that they are all somewhat difficult to define, and that they are all linked to the *ne bis in idem* principle by the same basic logic.

2.3.4 The interests of society as a whole

Alongside the individual, the principle to an extent also protects society as a whole, in several ways.⁷⁷ The first is that there is a connection between the *ne bis in idem* principle and the principle of *legality*. The underlying logic is that the requirement that a previously laid down provision of criminal law must exist on which a prosecution must be based “would be merely an illusion if a person could be troubled continually with various aspects of the same offence”.⁷⁸

Along similar lines, the second is the rule of law and, in the same connection, the legitimacy of the state (or *Rechtsstaatsprinzip* in German). The rule of law requires the state which has initiated proceedings against one of its subjects to respect the outcome of those proceedings.⁷⁹ If *res iudicata* would therefore not be final, this would undermine the legitimacy of the State.⁸⁰ Furthermore, multiple prosecutions increase the risk of a wrongful conviction.

The *ne bis in idem* rule is sometimes considered as a sanction against the authorities for any negligence during the first trial.⁸¹ The principle creates an incentive for efficient law enforcement; the authorities only get one full chance of “settling society’s score” in respect of certain conduct. If the authorities have “missed their chance” the defendant should benefit from this.⁸²

In this way, the principle incidentally also has the effect of minimising the cost incurred by society as a result of enforcement efforts.⁸³

⁷⁶ Schomburg 2002, p. 942.

⁷⁷ Van den Wyngaert & Stessens 1999, p. 780.

⁷⁸ Klip & van der Wilt 2002, p. 1094, van den Wyngaert & Stessens 1999, p. 781.

⁷⁹ Klip & van der Wilt 2002, p. 1094.

⁸⁰ Van den Wyngaert & Stessens 1999, p. 781.

⁸¹ Trechsel 2005, p. 384, in the same sense: Wils 2003 I.

⁸² Similar reasoning has been proposed in the context of EC competition law by Wils (Wils 2003 I).

⁸³ Which can be costly and time-consuming.

2.3.5 The problem of defining the *rationale* of the principle on the international level

Although the fact that several different (yet logically linked) *rationale* can be identified underlying the *ne bis in idem* principle highlights its importance as a fundamental principle of law, this may somewhat ironically also stand in the way of its application internationally. The reason for this is that, although there is considerable overlap between the various *rationale* within national legal systems, there appears to be no *single* common denominator, (sufficiently) specific to the *ne bis in idem* principle which is shared by all states, and which would therefore form a useful point of reference on the international level. It may therefore be useful to narrow things down, in as far as possible.⁸⁴ There are two conceivable ways of doing this: firstly, by trying to identify those *rationale* which are particularly *relevant* on the international level, or, secondly, by attempting to eliminate those *rationale* which are less *common* within national systems of law (and which can therefore not serve as a common point of reference).

Along the lines of the first approach, Van den Wyngaert & Stessens⁸⁵ argue that some of the *rationale* of the *ne bis in idem* principle are equally relevant in an international context as they are domestically, whereas others only matter directly on the national level. According to the authors, those *rationale* which relate directly to the protection of the individual (the first category, *above*) are also particularly relevant on the international level, whereas those *rationale* which relate to the interest of society as a whole are primarily relevant within domestic systems of law.⁸⁶ In order to further the international application of the principle, its function as an individual's right should therefore be emphasised first and foremost.

In support of their proposition, the authors argue that it is "striking that many common law legal systems, with the notable exception of the United States- do recognise the *res iudicata* effect of foreign judgments." What this would demonstrate is that common law systems attach relatively more weight to the *rationale* of the *ne bis in idem* principle as an individual's right.⁸⁷

However, the resulting "common denominator" proposed by Van den Wyngaert and Stessens ("the protection of the individual") is hardly specific to the *ne bis in idem* principle; it equally applies to every one of the rights contained in the ECHR. This would seem to limit the added value of agreeing on one such *rationale* internationally. Furthermore, some domestic systems of law (such as notably the Netherlands) emphasise legality, the rule of law, and the legitimacy of the state as the most important *rationale* underlying the

⁸⁴ Van den Wyngaert & Stessens 1999.

⁸⁵ Van den Wyngaert & Stessens 1999, para. 2 *et seq.*

⁸⁶ Van den Wyngaert & Stessens 1999, p. 782.

⁸⁷ Van den Wyngaert & Stessens 1999, pp. 783-784.

ne bis in idem principle, which can be seen as ‘interests of society as a whole’, rather than functions of the principle as an individual’s right. Out of all of the *ne bis in idem* rules which are known to exist in present-day (national) systems of law, it is therefore *equally* striking that it should be the *ne bis in idem* rule contained in Article 68 of the Dutch penal code which is by far the most ‘international’ in its application. From this it would seem that the various *rationale* underlying the principle are not the only factor which must be considered in connection with the issue of its international non-application. On the one hand, emphasising the function of the principle as an individual right does not *guarantee* its application internationally; whereas on the other hand, the principle’s function as a guardian of the respect for *res iudicata* does not necessarily appear to limit its application internationally.

It is important to point out that the *rationale* which Van den Wyngaert & Stessens identify as relating to the interests of society are equally relevant for the Community/EU as a whole as they are for each individual Member State. According to established case law before the ECJ, the Community is an autonomous legal system which is based on the rule of law, and which is therefore bound by fundamental rights which form an *expression* of the rule of law (as guarantees stemming from the EC Treaty).⁸⁸ As will be discussed later on in this study, it is fixed case law before the Community courts that the *ne bis in idem* principle is among those fundamental rights which form an expression of the rule of law, by which the Community is bound.

An example of the second way of narrowing down the number of *rationale* by selecting those *rationale* which are the most common is found in AG Colomer’s Opinion in *Gözütok and Brügge*.⁸⁹ According to the AG, “the principle rests on two pillars found in every legal system. One is legal certainty and the other is equity. When the offender is prosecuted and punished, he must know that, by paying the punishment, he has expiated his guilt and need not fear further sanction. If he is acquitted, he must have the certainty that he will not be prosecuted again in further proceedings.”⁹⁰ This selection makes sense; legal certainty is probably the most common denominator internationally (but does not cover it all in most legal systems), whereas “equity” is an extremely flexible concept. This flexibility could also limit the usefulness of the concept internationally. Nevertheless, the selection proposed by AG Colomer is helpful in order to simplify and clarify matters. There seems to be no need

88 Most recently, the Court held in joined cases C-402/05 and C-415/05 *Kadi* (n.y.r.) that “the validity of any Community measure in the light of fundamental rights must be considered to be the expression, in a community based on the rule of law, of a constitutional guarantee stemming from the EC Treaty as an autonomous legal system (para. 316).

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

90 Opinion of Advocate General Colomer 19 September 2002 in Joined Cases C-187/01 and C-385/01 *Gözütok and Brügge* [2003] ECR I-1345, para. 49.

to list all of the *rationale* attributed to the principle in every instance, as this does not necessarily add much in terms of substance.

2.4 FORM AND SUBSTANCE OF THE PRINCIPLE

2.4.1 The question of the principle's origins in Roman law

Although there are considerable differences between the legal traditions of states on the point of the *ne bis in idem* principle and its underlying *rationale*, it is generally assumed they all share common origins in Roman law. This does not provide any indication why it is, that so many differences nevertheless exist between the states on this point.

It is perhaps worth noting that there actually appears to be little or no hard evidence to support the notion that all of the *ne bis in idem* provisions in existence in national systems of law actually do have common origins; there is no comprehensive historical research available on this point. It is therefore also possible that, in *some* cases, it actually concerns legal principles with different origins which have developed in a similar direction and have been labelled "*ne bis in idem*" at a later time. What is commonly referred to as "*ne bis in idem*" may therefore actually form an open category of legal rules and principles, which have more in common than that they all establish a legal link between a first and a second set of proceedings (on the basis of the same acts, facts, or offences) by barring a second prosecution, trial, or penalty, or by laying down certain conditions for the second trial (although in many, if not most cases, common origins probably do exist). This could perhaps also explain some of the differences. It is therefore conceivable that some of the different existing expressions of the *ne bis in idem* rule are essentially 'neighbouring principles', instead of different versions of one and the same legal rule. This could offer at least a partial explanation for the many differences which exist between *ne bis in idem* rules in the legal systems of states.

2.4.2 *Ne bis in idem* rules

A number of different basic "versions" of the principle are known to exist. Each "version" corresponds to a different interpretation of the *ne bis in idem* principle. The full expression is "*bis de eadem re ne sit actio*"; it reveals the origins of the principle in the *actio* in Roman (civil) law. Another version of this full expression is: "*bis de eadem re agere non licet*". In Roman private law, the initiation of proceedings ("*litis contestatio*") had several, far-reaching legal consequences. Firstly, the parties were bound by the outcome, and secondly, the *litis contestatio* "consumed" the claim, whereby it became *res in iudicium deducta*, not susceptible to a second *actio* or *iudicium*.

In continental Europe, the adage “*ne* (or: *non*) *bis in idem*”⁹¹ is the most commonly used expression of the prohibition. Some other rules and adage which are regarded as belonging to the “*ne bis in idem*”-family are “*res iudicata*” (the rule that a judgment acquires finality, except for the possibility of appeal), “double jeopardy” (the rule in Anglo-American law that corresponds to *ne bis in idem*), “*autrefois acquit*”⁹² (the adage that any earlier *acquittal* bars a second prosecution) and “*autrefois convict*” (the adage that any earlier *conviction* bars a second prosecution), “*la chose jugée au criminel sur le criminel*” and *una via*⁹³ (the rule that all charges brought against a defendant on the basis of the same conduct should be concentrated in one set of proceedings). It is worth noting that each of these ‘versions’ of the principle are really different legal rules.

An important distinction is that between the prohibition of double *prosecution*, and the prohibition of double *punishment*.⁹⁴ The former is a procedural rule; it stands in the way of a second *prosecution*. The latter rule is *substantive* rather than procedural in nature; it prevents a subject from being *punished* twice.⁹⁵ Contrary to what one might perhaps expect, the procedural rule offers more protection for the individual than the substantive one. These two rules will be further discussed in the following paragraphs.

2.4.2.1 Prohibition of double prosecution (“*Erledigungsprinzip*”)

The adage “*nemo debet bis vexari*”, “*bis de eadem re ne sit actio*”, and the abbreviation “*ne bis in idem*” can all be seen as different expressions of the prohibition of double prosecution.⁹⁶ In German this rule is known as the *Erledigungsprinzip*. The term “*Erledigungsprinzip*” derives from the notion that the claim to prosecute (*ius puniendi*) that results from a criminal act is *consumed* or *released*

91 The term “*non*” is commonly used alongside “*ne*”. This raises the question which of the two is (more) accurate. In the full expression “*bis de eadem re ne sit actio*”, of which the expression “*ne bis in idem*” is thought to be an abbreviation, the verb (“*esse*”) is in the form of a *coniunctivus* (“*sit*”). A *coniunctivus* can not be accompanied by “*non*” in the same sentence. *Ne bis in idem* is therefore the accurate expression. According to Dr. H. Vroom’s authoritative handbook on Latin grammar: “a *prohibition* can not be expressed by an *imperativus I* (the simple form used for an order or command construed in the second person, see para. 269 of the same book) combined with a negation, but should be construed in the following manner: *ne dicamus; noli dicere; nolite dicere*; (etc.) (Vroom 1949 at para. 240; translation from Dutch by the author).

92 Of which Article 368 of the French code of criminal procedure forms an example. See: Dessard 2005, pp. 913-916.

93 The Netherlands.

94 The terms “*ne bis in idem*”, “prohibition of double punishment”, and “prohibition of double prosecution” are often used interchangeably; Schomburg 2005, p. 941.

95 De la Cuesta 2002, p. 710.

96 Van der Wilt 2005, p. 99; Van der Beken, Vermeulen, & Ongena 2002, p. 812; Trechsel 2005, p. 382.

(literally: ‘used up’ or ‘emptied’)⁹⁷ by the initiation of the first prosecution.⁹⁸ A second prosecution is thereby generally rendered inadmissible, but some exceptions typically exist in national law in case of new evidence, a mistrial, or other defects in the first proceedings.

The *Erledigungsprinzip* or: prohibition of double prosecution bars any second set of proceedings once the outcome of the first proceedings has become final. It does not, in principle, preclude the possibility of several penalties being imposed on the subject on the basis of the same conduct, as long as those penalties are imposed *within one and the same set of proceedings*. The *Erledigungsprinzip* therefore *only* offers protection against the accumulation of penalties, imposed in respect of the same conduct, if the imposition of those penalties would otherwise have taken place in the course of a *second* set of proceedings. Contrary to the prohibition of double punishment, the *Erledigungsprinzip* is directly linked to the respect for *res iudicata* (*pro veritate habetur*): it is the need to respect the *finality* of the first trial which leads directly to the *inadmissibility* of the second one.

The *Erledigungsprinzip* is by far more common among the legal systems of the Member States than the prohibition of double punishment, although in many cases *ne bis in idem* rules in national law reveal some characteristics of both principles, either in their wording or in the way that they are applied in practice. In systems of law which adhere (primarily) to the *Erledigungsprinzip*, the prohibition of double prosecution usually *takes precedence* over the prohibition of double punishment. What this means in practice is that “in those exceptional cases where the opening of a new prosecution is not blocked by the previous final decision, *ne bis in idem* works to impede a double punishment.”⁹⁹

2.4.2.2 Prohibition of double punishment

The adage *nemo debet bis puniri pro uno (delicto)* expresses the prohibition of double *punishment*, known in German as *Anrechnungsprinzip*. In the English language, the *Anrechnungsprinzip* is usually referred to as the “accounting principle” or the principle of “set-off”.¹⁰⁰ This rule stipulates that any previous *penalty* must be taken into account when imposed a subsequent penalty, without however having the effect of barring a second prosecution.¹⁰¹

⁹⁷ ‘Erledigung’

⁹⁸ See above, para. 2.4.2; see also Van den Wyngaert & Stessens 1999, p. 781.

⁹⁹ De la Cuesta 2004, p. 714.

¹⁰⁰ Also known as the principle of “deduction”, or: the principle of “taking into account”.

¹⁰¹ It would appear that an example of the *Anrechnungsprinzip* is found in Article 103 of the German *Grundgesetz für die Bundesrepublik Deutschland* (“GG”) (the Constitution for the Federal Republic of Germany). However, the wording of Article 103 (3) GG is unanimously considered to be misleading; the provision is considered to prohibit double *prosecution*.

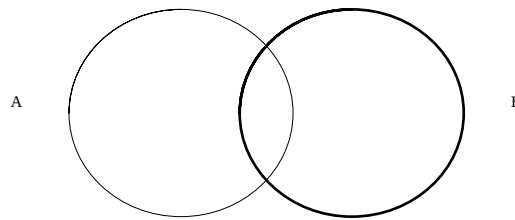
The *Anrechnungsprinzip* exists in various different forms in national systems of law. In most legal systems, the *Anrechnungsprinzip* does not necessarily preclude the possibility that a second penalty is imposed for the same conduct in the event that a single act (*concursum idealis*) or a course of action (*concursum realis*) constitutes multiple offences under the law, but only stipulates that any other penalties imposed must be *deducted*. As such, the *Anrechnungsprinzip* can take on the form of a summary rule of procedure, stipulating that only the highest penalty imposed is enforced against the subject. The *Anrechnungsprinzip* may therefore take on the form of a rule which applies to any *second* imposition of a penalty, but also exists in national systems of criminal law as a rule which applies within one and the same set of proceedings.

The *Anrechnungsprinzip* is often considered to be the “lesser” of the two versions of the *ne bis in idem* principle, offering less legal certainty, and providing only a limited incentive for coordination and procedural efficiency. In a number of national systems of law, the *Anrechnungsprinzip* is not regarded as a *ne bis in idem* guarantee, but as rule which derives from general principles of the proper administration of justice.

Contrary to the *Erledigungsprinzip*, the respect for *res iudicata* is not amongst the *rationale* underlying the *Anrechnungsprinzip*, because the *finality* of the first conviction is not upheld by it.

2.4.2.3 The problem of defining the substance of the guarantee

It follows from the above that the *Erledigungsprinzip* and the *Anrechnungsprinzip* form two different legal rules, although there is some overlap. This can be illustrated as follows:



In this diagram, the *Anrechnungsprinzip* (A) and the *Erledigungsprinzip* (E) are shown as two, partially overlapping circles. The overlap exists because the prohibition of double prosecution also protects against double punishment, if the second penalty would have been resulted from the second set of proceedings. The *Erledigungsprinzip* does not protect against double punishment within one and the same procedure (circle A, minus the area of overlap); the *Anrech-*

See also Article 51 par. 3 of the German *Stafgesetzbuch* (criminal code) (Schomburg 2004, p. 942).

nungsprinzip does not protect against a second prosecution (circle E, minus the overlap). The area of overlap therefore represents the transition from the first proceedings to the second proceedings.

The *Anrechnungsprinzip* and the *Erledigungsprinzip* not only differ on the points of their substance and scope but also on the point of their underlying *rationale*. The *Anrechnungsprinzip* does not count amongst its *rationale* the respect for *res iudicata*, and to a much lesser degree serves the interests of legal certainty and the legitimacy of the state than the *Erledigungsprinzip*. It would seem that the only *rationale* that the two principles have fully in common is that of *equity*.

The differences between the two principles may pose something of a problem on the international level, and raise some important questions. Which of the two is actually the ‘real’ *ne bis in idem* rule? Should an internationally applicable *ne bis in idem* rule be construed in accordance with the *Anrechnungsprinzip*, the *Erledigungsprinzip*, or both? It must be said that it is remarkable that this important question has received relatively little attention in legal literature.

The first question is whether or not the *Anrechnungsprinzip* and the *Erledigungsprinzip* can both be seen as different aspects of the same legal principle. As mentioned before, in some national systems of law the *Anrechnungsprinzip* is not regarded as ‘*ne bis in idem*’, but as rule which derives from general principles of the proper administration of justice, whereas in other states the *Anrechnungsprinzip* is considered as an expression of the *ne bis in idem* principle.

Various authors hold different views on this point. Vervaele views the two as different expressions of the same fundamental principle.¹⁰² Spinellis only remarks that in criminal justice systems, the *ne bis in idem* principle “appears mainly in its negative form”; the *Erledigungsprinzip* is by far more common amongst states.¹⁰³ Van den Wyngaert and Stessens only mention the *Erledigungsprinzip* at all, whereas Daniels only mentions the *Anrechnungsprinzip*.¹⁰⁴ Schomburg simply observes that, in reference to the *ne bis in idem* principle, the concepts of the protection against double prosecution and that against double punishment are in practice used interchangeably.¹⁰⁵ Wils remarks that the *ne bis in idem* principle consists of both the protection against double punishment as well as that against double prosecution.¹⁰⁶ Contrarily, Van der Wilt expressly views only the *Erledigungsprinzip* as the *ne bis in idem* principle ‘proper’, but does not go into the nature of the *Anrechnungsprinzip*.¹⁰⁷

¹⁰² Vervaele 2005, p. 100.

¹⁰³ Spinellis 2005, p. 1149.

¹⁰⁴ Van den Wyngaert & Stessens 1999; Daniels 2006.

¹⁰⁵ Schomburg 2005, p. 941.

¹⁰⁶ Wils 2003 I, p.131.

¹⁰⁷ Van der Wilt 2005, p. 99. Similarly: De la Cuesta 2005, p. 707.

Trechsel and Bartsch leaves the matter aside altogether¹⁰⁸; Fletcher does not mention the issue as such but emphasises the problem of multiple prosecutions rather than that of multiple penalties.¹⁰⁹

There are several arguments conceivable in favour of viewing only the *Erledigungsprinzip* as the “true” *ne bis in idem*. One argument is of a linguistic nature. If one accepts that the adage “*ne bis in eadem re sit actio*” (or: “*bis de eadem re agere non licet*”) is the most authentic expression of the principle, it follows that only the *Erledigungsprinzip* confirms with this, as the *Anrechnungsprinzip* does not preclude the possibility of a second set of proceedings. However, as both expressions find their origins in Roman private law, this argument probably cannot in itself be decisive anymore in the context of 21st century criminal law, where different problems present themselves and different issues are at stake. Another argument is that the *Erledigungsprinzip* is far more common amongst states and is usually regarded as the only “true” *ne bis in idem* principle in those states. There are therefore several arguments in favour of treating the *Anrechnungsprinzip* as a principle distinct from the “true” *ne bis in idem* principle. The only argument to the contrary would seem to be that in many cases, *ne bis in idem* rules in national law reveal some characteristics of both principles, either in wording or in the way that they are applied in practice.¹¹⁰

But does it necessarily matter all that much, for the international application of the principle? After all, and in spite of the various differences, the logic underlying both rules is equally self-evident. Most would agree that no-one should in principle have to undergo double *punishment*, any more than double *prosecution*. Why not then simply apply both rules jointly? At first sight this approach would seem to offer the subject “the best of both worlds” in terms of legal protection, in keeping with the aims of the ECHR, the ICCPR, and the Charter. Furthermore the wording of Articles 14(7) ICCPR, art 4P7 ECHR, and Article 50 of the Charter appears to have foreseen the possibility of joint application of the two principles, where the provisions stipulate that “no one shall be liable to be *tried or punished* again” (etc.). Out of the existing “international” *ne bis in idem* provisions presented in this study, only Article 54 CISA clearly and unambiguously sides with the *Erledigungsprinzip* stating that “a person (...) may not be *prosecuted*” (etc.).

Upon closer examination however, the combined application of the two principles leads to a dilemma, and the dilemma to an impossibility, which brings us back to our point of departure. Imagine again the two circles shown above. One represents the prohibition of double punishment, the other the prohibition of double prosecution. The area in the middle represents the initiation of the second prosecution. There is overlap, only because the prohi-

108 Trechsel 2005; Bartsch 2005.

109 Fletcher 2007 I.

110 The Netherlands is one example.

bition of double prosecution prevents the second set of proceedings from taking place; and thus the second penalty from being imposed as a possible outcome of those proceedings. The prohibition of double punishment does *not* however prevent the second prosecution from taking place. The dilemma is therefore that one of the two rules allows for a second set of proceedings, whereas the other does not.

The only way to combine these two incompatible points of departure would therefore seem to be to *disallow* the second prosecution to take place *in principle*, but to *allow* it nevertheless, only if there is no risk of a double punishment being imposed. A solution? Hardly. If the *Anrechnungsprinzip* is thus treated as a general exception to the *Erledigungsprinzip*, only the protection against double *punishment* remains; the prohibition of double *prosecution* is actually cancelled out entirely. And thus the impossibility is revealed: two rules, one *allowing* for a second prosecution, and the other *prohibiting* a second prosecution cannot possibly both be applied to the same situation (the possibility of a second trial) without the one infringing the other. And thus we have arrived back at our point of departure.

It is remarkable, given its simplicity, that this fundamental issue has received little or no attention in legal writing. These observations also reveal a problem in the wording of Articles 14(7) ICCPR, art 4P7 ECHR, and Article 50 of the Charter. The wording of those provisions (“no one shall be liable to be *tried or punished* again”) simply *cannot* be applied literally in the same case as this would automatically lead to an infringement the prohibition of double prosecution stated by the provisions themselves. It is not difficult to imagine how the wording of these provisions came about on this point. It should be borne in mind that Articles 14(7) ICCPR and 4P7 ECHR were drafted with existing national systems of criminal law in mind. In all of those national systems of criminal law, a *ne bis in idem* rule in some form already existed, either in the form of the *Erledigungsprinzip*, or in that of the *Anrechnungsprinzip*. It is therefore understandable that the draftsmen sought to provide a minimum standard covering both types of situations, without creating a direct obligation for the parties to these conventions to change their national systems of criminal law and criminal procedure on this point.

It follows from all the above that, regardless of whether or not one agrees that the *Erledigungsprinzip* forms the only ‘true’ *ne bis in idem* principle, a choice between the *Anrechnungsprinzip* or the *Erledigungsprinzip* must be made, in order for the principle to be effective. By their very nature, the two rules cannot be applied jointly to a second set of proceedings in the same case, neither within national systems of law, nor internationally.

In sum, and notwithstanding the differences which exist between national systems of law on this point, there are strong arguments in favour of recognising only the *Erledigungsprinzip* as the ‘real’ *ne bis in idem* principle internationally.

2.5 SCOPE OF APPLICATION

There are four main aspects to the scope of application of the *ne bis in idem* principle: the objective and subjective scope of application of the principle, and the scope of application of the principle *ratione materiae* and *ratione temporis*. These four aspects will be explored in general terms in the following paragraphs.

2.5.1 Limitations to the objective scope of application of the principle

As is well known, the application of the *ne bis in idem* principle is traditionally limited to situations within one and the same state. As a matter of state sovereignty, criminal behaviour affecting different states has always been regarded as a set of independent offences in each of those states.¹¹¹ Applying the *ne bis in idem* principle between states requires those states to recognise foreign judicial decisions which have become *res iudicata* as an obstacle to their own criminal law enforcement, something which is commonly referred to as the 'negative effect' of *res iudicata*.¹¹² Overall, the main limitation to the objective scope of application of the *ne bis in idem* principle is therefore the fact that the principle is rarely applied between states as a result of the unwillingness of states to recognize the negative effect of foreign *res iudicata*.¹¹³

Van der Wilt identifies three main reasons why states are generally reluctant to recognise this negative effect of foreign *res iudicata*. Firstly, this requires a high degree of confidence in the other states. Secondly, "self-interest" may incite states to reconsider criminal prosecution, especially so if the crime was committed on their own territory or affects their own national interests. Thirdly, the *ne bis in idem* principle itself varies significantly from state to state.¹¹⁴

The scope of application of the *ne bis in idem* principle in the international sphere therefore depends primarily on its inclusion in international instruments, and the scope of application of the principle is therefore *in principle* limited to situations within one and the same state, but there are some exceptions.

111 De la Cuesta 2002, p. 707. An exception is Article 68(2) of the Dutch penal code (*Wetboek van Strafrecht*), which applies to any earlier prosecution, in any (foreign) jurisdiction. Case law based on this provision is very scarce. Article 76(2) of the Indonesian Penal Code (*Kitab Undang-Undang Hukum Pidana*) is based on this provision, but reads slightly differently, due to differences between the languages. All text books however agree that, similarly to Article 68(2) of the Dutch penal code, Article 76(2) of the Indonesian penal code applies to *foreign* judgments. No case law is known to exist on this provision.

112 Van der Wilt 2005, p. 100.

113 Van der Wilt 2005, p. 100.

114 Van der Wilt 2005, p. 100.

The first exception is that the *res iudicata* effect of foreign judgment is “more generally respected when it comes to exercising extraterritorial jurisdiction”.¹¹⁵ The reason for this is that, although by now common practice in international criminal law, the exercise of *extraterritorial* jurisdiction is still regarded as an exception to the notion that criminal jurisdiction is essentially *territorial* in nature. Several states therefore consider that primacy should be given to the outcome of the proceedings in the state, where the offence actually took place (principle of territoriality).¹¹⁶ Other states however do not provide for the possibility of the recognition of foreign *res iudicata* at all, regardless of the *locus* of the offence.¹¹⁷

The second exception is that foreign judgments can be invoked as a (mandatory or voluntary) ground for refusal to cooperate under a number of instruments establishing cooperation in criminal matters between states.¹¹⁸ Of these, Article 3 section 2 of the Framework Decision on the European Arrest Warrant (“FDEAW”)¹¹⁹ is the most important example within the EU. In the context of international cooperation, the application of the principle varies from one agreement to the next.¹²⁰

From all this it appears that, although little can be said in general about the objective scope of application of the *ne bis in idem* principle on the international level, there is a link between the scope of application of the principle, and the primarily territorial nature of criminal law jurisdiction. The reason for this is that the international non-application of the *ne bis in idem* principle is considered to be especially problematic in view of an increasing willingness on the part of states to assume extraterritorial jurisdiction in criminal cases. In theory, if all states would agree to refrain categorically from assuming extraterritorial jurisdiction in criminal cases, the general international non-application of the principle would not necessarily be much of a problem

115 Van de Wyngaert & Stessens 1999, p. 784.

116 In particular Belgium and The Netherlands.

117 Van de Wyngaert & Stessens 1999, p. 784. Belgian law for example recognises foreign *res iudicata* if the offence took place abroad, but not if it took place “within Belgium”. The authors note however that this protection is in practice sometimes circumvented by misconstruing the *locus* of the offence (!). Germany and Italy do not recognise foreign *res iudicata* regardless of where the actual offence took place (therefore regardless of whether criminal law jurisdiction is territorial or extraterritorial in nature). Other states such as France do recognise foreign *res iudicata* in some types of situations in which France could claim (extraterritorial) jurisdiction, and not in others, for instance where it concerns a French citizen.

118 Several examples of agreements containing a *ne bis in idem* rule as a ground for refusal to cooperate with other states in criminal matters have been listed in paragraph 2.2.1 (above).

119 Council Framework Decision 584/2002 of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ 2002, L 190/1.

120 Van de Wyngaert & Stessens 1999, p. 784.

anymore, as each case would only be tried only once, within the territory where it took place.

2.5.2 Internationalisation and ‘territoriality’

Could this mean that the concept of (extra)territoriality could form the key to solving the problem of multiple prosecutions in international situations? In my opinion, the answer must probably be: no. Extraterritorial jurisdiction should be seen as a *response* to the underlying problem of internationalisation, rather than as the problem itself. This deserves some further explanation.

As Huet & Koering Joulin have argued, the concept of the “territoriality” of criminal law is a “*fausse notion claire*”, and one that is increasingly frequently used.¹²¹ The term is subject to two assumptions: that of ‘substantive territoriality’ and that of ‘formal territoriality’. In the substantive sense, a law can be seen as “territorial” if it is linked to a *place* as opposed to the nationality of a *person*. In the formal sense, a law can be seen as “territorial” because its application is exclusively reserved for the authorities of the State which adopted that law. In the latter sense, “territoriality” is synonymous to the principle of *lex fori*. Contrary to private law (which can be applied by the judiciary of another state), criminal and administrative law are therefore “territorial” in the formal sense: they may be applied exclusively by the authorities and courts of the state which adopted those laws.¹²²

On the international level, it is the *substantive notion* of territoriality which is relevant from the viewpoint of the *ne bis in idem* principle. The problem is that, in today’s global society, this substantive notion of territoriality in criminal law has lost much of its meaning. To give some examples: it is often difficult or impossible to pinpoint one single *locus* where offences are concerned which involve the internet. Offences such as smuggling form another example of offences which can be territorially linked to two or more different states. Moreover, within an area without borders such as the EU, concepts such as “import” and “export” of illegal substances have effectively lost their meaning altogether.¹²³ What this illustrates is that the internationalisation of society undermines the *usefulness* of the principle of territoriality as a guiding principle for the application of criminal law, potentially leading to “negative” jurisdiction conflicts: situations in which offences are not prosecuted anywhere, because there is no clear ‘territorial’ link to any one state as a result of the international nature of the offence. It is in response to such development that extraterritorial criminal jurisdiction is increasingly relied on by states.

¹²¹ Huet & Koering Joulin 2005, p. 200.

¹²² Huet & Koering Joulin 2005, p. 201.

¹²³ See cases C-436/04, *Léopold Henri van Esbroeck* [2006] ECR I-2333 and C-150/05 *Van Straaten* [2006] ECR I-9327.

It follows that, as regards the issue of the international (non-) application of the *ne bis in idem* principle, the territorial nature of criminal law jurisdiction does not provide a possible solution, but rather forms a response to the underlying problem of internationalisation.

2.5.3 Subjective scope of application

Contrary to the objective scope of application of the principle, its subjective application scope (the answer to the question who can rely on the *ne bis in idem* principle) is rather straight-forward: only someone who has actually been subjected to a previous prosecution (and who has been finally acquitted or convicted, or has had his trial finally disposed of in another fashion) can rely on the principle. Trechsel remarks that it is “rather obvious” that if several persons have been involved in the same criminal activities, but only one of them has been faced prosecution and trial, only that person will benefit from the protection offered by the principle.¹²⁴

In many states, legal entities can be prosecuted for certain offences under criminal law, whereas in others only natural persons can be tried before a criminal court. In those states where undertakings can be prosecuted under criminal law, the criminal liability of the legal entity is normally regarded as one that is distinct from that of its’ executives or employees, for the application of the *ne bis in idem* principle. Although the actual historical offence can evidently only be committed by natural persons, the legal entity therefore counts as a *separate culpable subject*. If one accepts the possibility of criminal liability for legal entities, no other approach would produce the desired result (that of enhanced deterrence), as the criminal charge would simply ‘shift’ from the executives or employees to the legal entity or vice versa, precisely because of the application of the *ne bis in idem* principle.

Another question is whether several legal entities, belonging to the same *group* can be held separately (criminally) liable. In as far as is known, nothing has (so far) been published on this issue in this particular connection. In my opinion, it must be assumed that the answer to this question will depend on the extent to which the undertakings concerned are able to act *independently* from each other.

124 Trechsel 2005, p. 392.

2.5.4 Scope of application of the provisions *ratione materiae*

Whilst in most legal traditions the *ne bis in idem* rule applies exclusively in the field of criminal law,¹²⁵ it is increasingly difficult to maintain that a clear distinction between administrative law and criminal law in general can be made.¹²⁶ Huet and Koering Joulin argue that there is no longer any difference in the nature of administrative and criminal law sanctions, “both having the same repressive finality”.¹²⁷ In many instances the only distinction between criminal sanctions and administrative sanctions relates to the nature of the public body or agency which rendered it (the public prosecutor, or any administrative body). Even such an ‘organic’ distinction is not absolute. In some Member States, government agencies exist which are empowered to impose sanctions of *both* a criminal and an administrative law nature.

As discussed in para. 2.3.3 of this study, the term “criminal proceedings” in Article 4 Protocol 7 ECHR corresponds to the term “criminal charge” in Article 6 ECHR, which is interpreted autonomously by the ECtHR on the basis of a threefold test, and may apply to proceedings of any nature.¹²⁸ As a result, the principle of *ne bis in idem* is gradually extending into new areas of the law, in particular administrative law.¹²⁹ Some of the Member States of the Council of Europe have taken measures to ensure the coordination and concentration of the prosecution within one set of proceedings, in order to comply with the ECtHR’s case law on Article 4P7 ECHR.¹³⁰

In their case law, the Community courts have consistently held that the *ne bis in idem* principle applies in EC competition law, a field of law which is enforced by means of administrative law.¹³¹ The fact that the procedural

125 One exception is the double jeopardy clause in the Fifth Amendment of the Constitution of the United States, which may also apply in administrative law proceedings.

126 Huet & Koering-Joulin 2005, p. 60.

127 Huet & Koering-Joulin 2005.

128 ECtHR, *Jussila v. Finland* 23 November 2006 (App. No. 73053/01); see also Bartsch 2004.

129 Van der Wilt 2005, p. 107; Trechsel 2005, p. 387. This is one of the main reasons why several states have not ratified the 7th Protocol.

130 De la Cuesta 2004, p. 712. Although it has not ratified the 7th protocol, The Netherlands have for example introduced the principle of “*una via*” in its system of national law, forcing the authorities to choose between criminal and administrative law proceedings.

131 *Walt Wilhelm* (Case 14-68 *Walt Wilhelm and others v Bundeskartellamt* [1969] ECR 1) and *Boehringer* (Case 7/72 *Boehringer Mannheim v Commission* [1972] ECR 1281) are generally considered as the first judgments in which the *ne bis in idem* principle was applied in EC competition law, although the judgment of the CFI in *PVC*, Joined Cases T-305/94, T-306/94, T-307/94, T-313/94, T-314/94, T-315/94, T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *PVC* [1999] ECR II-9931, is actually the first judgment in which the application of the *ne bis in idem* principle in EC competition law was, as such, explicitly confirmed.

regulations¹³² stipulate that fines in competition cases ‘shall not be of a criminal law nature’ has not changed this.¹³³

Therefore, although most states still view criminal law and other areas of law as being separate and distinct for the application of the *ne bis in idem* principle, there is a clear willingness on the part of the Community courts and the ECtHR to accept that legal principles such as that of *ne bis in idem* also apply to administrative penalties.¹³⁴

It would appear that there are good grounds for this. A rigid distinction between administrative law and criminal law for the application of legal principles such as that of *ne bis in idem* would make it possible for the Member States of the Council of Europe to circumvent the guarantees laid down in the ECHR, by ‘shifting’ certain offences from the realm of criminal law to that of administrative law.

Furthermore, the EU does not have a system of criminal law as it is traditionally understood on the national level. If the Community courts would consider that certain fundamental rights apply exclusively in the field of criminal law, this would mean that the protection of those fundamental rights would be cancelled out on the EU level.

2.6 ELEMENTS

By establishing a legal connection between a first and a second trial on the basis of the same facts, the prohibition of double prosecution raises two basic questions: when is there a *second trial*, and when are the facts *the same*? These two questions correspond to the two elements of the *ne bis in idem* principle: *bis* and *idem*. Although both elements raise a number of questions on the international level, it is the answer to the second question that poses the most fundamental problems.

2.6.1 The first trial: *bis*

As mentioned before (paragraph 2.3.4, above), the rule of law requires the state which has initiated proceedings against one of its subjects to respect the

132 Council Regulation (EEC) No 17/62 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty [1962] OJ 13/204 and Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1.

133 Nor has the general question whether principles of criminal law such as the *ne bis in idem* principle may find their application in the field of EC competition law received any specific attention in any of the Court’s judgments. The Court therefore appears to accept this as self-evident.

134 Although the case law of the ECtHR is more developed on this point.

outcome of those proceedings.¹³⁵ The *ne bis in idem* principle upholds the respect for the finality of *res iudicata*, in the interest of the legitimacy of the State.¹³⁶ It follows from this, as well as from the principle's purpose of promoting legal certainty, that the outcome of the first proceedings must have become final (*res iudicata*), in order to have the effect of barring a second prosecution (*bis*).

Within national systems of law, the national rules governing the finality of judicial decisions are decisive for the application of *ne bis in idem*. On the international level the finality of judgments and other decisions may pose something of a problem, as very few states recognise foreign *res iudicata* in general, and national rules of criminal procedure may vary on the point of the finality of judicial decisions. In some states, for example, only the *operative* part of a judgment acquires finality (and the considerations do not), whereas in others the entire text of judgments eventually acquires the force of *res iudicata*.

In general, it could be said that a judicial decision is *final* when there is no possibility of *appeal*.¹³⁷ There is no possibility of appeal where such is not provided for by national law, where all appeals have been exhausted, where the time limits for filing an appeal have expired (and no appeal was brought), where the appeal was withdrawn, or the right to appeal was waived.¹³⁸ In some states, certain extraordinary judicial remedies (such as "review") are available, outside of the normal system of appeals. Such (rare) possibilities typically don't influence the finality of judicial decisions, and are not covered by the *ne bis in idem* principle.

As mentioned before, in most states the *ne bis in idem* principle applies exclusively in criminal law proceedings. Only final decisions of a *criminal* court (as well as settlements in criminal cases) are therefore considered as final, and having *ne bis in idem*-effect.¹³⁹ The question of the finality of the first judgment or decision therefore ties in with the scope of application *ratione materiae* of the principle within national systems of law.

Articles 14(7) ICCPR and 4P7 ECHR require that the first set of proceedings have to end in a *final acquittal* or *conviction* of the subject. Article 54 CISA more broadly requires that the subjects' trial was "finally disposed of". Trechsel argues that, for the application of Article 4P7 ECHR and 14(7) ICCPR, the *final* "character of the decision" must be seen as decisive, rather than on the question whether it could be said that the decision constitutes an *acquittal* or *conviction* by a criminal court *strictu sensu*.¹⁴⁰ These observations appear to be

¹³⁵ Klip & van der Wilt 2002, p. 1094.

¹³⁶ Van den Wyngaert & Stessens 1999, p. 781.

¹³⁷ Trechsel 2005, p. 389.

¹³⁸ Trechsel 2005, p. 389.

¹³⁹ Van der Wilt 2005, p. 107.

¹⁴⁰ Trechsel 2005, p. 388.

accurate; the fact that Article 4P7 ECHR also applies to final decisions of an administrative law nature, which are by definition not ‘acquittals or convictions by a *criminal court*’, leads to the same result.¹⁴¹

Apart from the absence of a possibility of appeal, a final judgment generally also “presupposes that the court has reached a conclusion on the merits of the case.”¹⁴² Preliminary rulings usually do not bar further proceedings under national rules on criminal procedure. A finding that the prosecution of an offence is time-barred however *does* bar further proceedings. Some authors contend that a finding by a court that the prosecution of an offence is time-barred does constitute a decision on the criminal charge itself, and therefore has ‘*ne bis in idem*-effect’.¹⁴³ However, a finding by a court that the prosecution is time-barred is essentially *preliminary* in nature because it leads to the consequence that the charges will not be *considered* at all by the court.¹⁴⁴ Such a finding should not, in my opinion, be considered on par with a *verdict on the merits* of the case.¹⁴⁵ It is not because of the final nature of such a finding, but merely as a result of the time bar itself, any subsequent attempts to prosecute the offence are barred.

An interesting question is whether a decision by a public prosecutor not to prosecute has *ne bis in idem*-effect.¹⁴⁶ Generally speaking, such decisions are not necessarily *final*.¹⁴⁷ However, transactions, mediation, out-of-court settlements and other *conditional* discontinuations of the prosecution usually have the effect of finally releasing the criminal charge against the subject, in the sense that the prosecutor cannot revive the prosecution if the conditions of the settlement are met. In *Gözütok and Brügge*¹⁴⁸ the ECJ held that if subsequent to an out of court settlement “further prosecution is definitively barred, the person concerned must be regarded as someone whose case has been finally disposed of for the purposes of Article 54 of the CISA in relation to the acts which he is alleged to have committed. In addition, once the accused has complied with his obligations, the penalty entailed in the procedure whereby further prosecution is barred must be regarded as having been enforced for the purposes of Article 54.”¹⁴⁹

141 Van der Wilt 2005, p. 107.

142 Van der Wilt 2005, p. 107.

143 Vander Beken, Vermeulen, & Ongena 2004, p. 813.

144 Although national systems of criminal law vary on this point.

145 At least, in most states. One exception is (apparently) Portugal, where time bars are considered as *substantive* rules of criminal law, instead of procedural ones.

146 Vander Beken, Vermeulen, & Ongena 2004, p. 813.

147 Vander Beken, Vermeulen, & Ongena 2004, p. 813.

148 Joined Cases C-187/01 and C-385/01 *Gözütok and Brugge* [2003] ECR I-1345. See also the case note by Vervaele (2004).

149 Para. 30 of the *Gözütok and Brugge* judgment. It is worth noting that the wording of Article 54 CISA on this point is rather different in the various language versions: (“finally disposed; rechtskräftig abgeurteilt; onherroepelijk vonnis; définitivement jugée, etc.).

Proceedings may be suspended or terminated in some instances for various external reasons. New legislation, developments in the case law of constitutional or other higher courts, public debate, and social unrest may bring the public prosecution to suspend and review pending cases. Similarly to a preliminary ruling, a mere suspension of proceeding does not trigger the application of the *ne bis in idem* principle.¹⁵⁰

2.6.2 The second trial: *idem*

The prohibition of double prosecution only protects the subject from prosecutions which are based on the same facts ("*idem*") as those at issue in the first proceedings.¹⁵¹ It is common belief that there are two ways of approaching the question of whether the basis for the prosecution is "the same": by taking into account the *historical facts* (the "act"), or the *legal qualification* ("offence") of the conduct at issue in the first and second proceedings (the "natural" or "legal" unity of conduct).¹⁵²

A narrow interpretation of the same facts, based on the legal qualification of those facts (the "offence"), "would almost entirely obliterate the protection afforded by the principle."¹⁵³ The reason for this is that the protection against double prosecution could be circumvented by prosecuting under a different (but similar) charge, if the identity of the facts is determined by reference to their legal qualification.¹⁵⁴

Another important reason why the 'factual' approach to the question of *idem* is preferable to an approach based on the legal qualification of the facts is the interest of legal certainty. In reality, there is no clear distinction between the historical facts and their legal qualification, and these two approaches are not necessarily mutually exclusive.¹⁵⁵ The abovementioned distinction between the 'legal' and the 'factual' approach of "the same" facts can probably at best be seen as a sliding scale of degrees of objectivity in the appreciation of the historical event. Trechsel gives the example of the act of shooting a person, which consists of at least two elements: pointing the gun, and pulling the trigger.¹⁵⁶ For the purpose of legal proceedings, those two actions are forged into an artificial legal unity such as for example the offence of homicide.

150 See, for example: ECtHR, *Smirnova and Smirnova v. Russia* (admissibility), 3 October 2002 (Appl. Nos. 46133/99 and 48183/99).

151 Klip & van der Wilt 2004, p. 1095.

152 Van den Wyngaert & Stessens 1999, p. 789; Klip & van der Wilt 2004, p. 1095; Trechsel 2005, p. 393.

153 Van der Wilt 2005, p. 111.

154 Van der Wilt 2005, p. 111.

155 In general, "conduct" can be seen as an *ontological* (scientific, observable) phenomenon, or as a *normative* notion. Trechsel 2005, p. 393.

156 Trechsel 2005, p. 393.

This offence is essentially defined by the *result*: the death of a person, rather than by the actual historical event.¹⁵⁷ The facts underlying the proceedings are inevitably filtered, and thus subjected to a degree of distortion in the course of proceedings, in view of the subsequent legal qualification of the event. Certain facts have been selected, presented, and emphasised, whereas others were omitted, and this process of selection and presentation constitutes a kind of (preliminary) legal qualification of the original event in itself. A degree of interpretation of the facts in the light of their legal qualification therefore inevitably takes place at every instance, before and during legal proceedings.

This process is perhaps comparable to photography. The viewpoint, the lens specifications, the light conditions and countless other factors culminate in the resulting picture, which only *reflects* a segment of an actual historical event. By the time proceedings are brought (and even more so by the time the *second* proceedings are brought) the actual historical situation no longer exists. All that remains is a mere reflection of an historical event, gradually captured by a legal camera in the course of the proceedings. The bringing of a second set of proceedings adds to the degree to which the underlying historical event is filtered and consequently distorted. For the application of the *ne bis in idem* principle, the degree to which the event is distorted can perhaps be *reduced* by emphasising the historical facts rather than their legal qualifications, but the inevitable distortion of the actual event cannot be prevented or undone.¹⁵⁸ From this it follows that, if the *ne bis in idem* principle is applied on the basis of the legal qualification of the facts, the outcome becomes harder to predict or even (seemingly) random because of the double distorting effect which results from two separate instances in which legal qualifications are, in one way or another, attached to a single historical event.

It therefore comes as no surprise that the majority of national systems of law emphasize the actual, historical event as the decisive element for the determination of *idem*.¹⁵⁹ Very few countries appear to emphasize the criminal “offence”, *i.e.* the legal classification of conduct under national law.¹⁶⁰ To give some examples from national law: in Germany, “*idem* refers to an actual, historical event”.¹⁶¹ In France, a “long line of impervious case law” on this

157 Countless examples of offences which are not defined by an obvious result are also found in the legal systems of states. To give some examples: *possession* of a firearm, *driving* while under the influence, *participating in* or membership of a criminal organization. The underlying, *potential* result however is clear: the bearer of the firearm and the drunk driver of the car both may end up wounding or killing someone; criminal organizations are, generally speaking, up to no good.

158 Scrambled eggs cannot be unscrambled, so to speak.

159 De la Cuesta 2002, p. 711. Van den Wyngaert & Stessens point out that it is not certain whether a clear distinction between “offences” and “facts” for the application of the *ne bis in idem* principle exists everywhere in systems of law: Van den Wyngaert & Stessens 1999, p. 789.

160 China is (apparently) one example.

161 Van der Wilt 2005, p. 111.

point has been suppressed through legislative intervention; in Article 368 of the French code of criminal procedure (“*Code de Procédure Pénale*”), the words “*même sous une qualification différente*” were inserted, putting an end to the uncertainty arising out of the (original) wording of that provision.¹⁶² Since 1963,¹⁶³ the Dutch Supreme Court has adhered to a middle-of-the-road approach, based *primarily* on the historical facts, but also (to a degree) taking account of the legal classification of those facts by requiring a “similar reproach of guilt”.¹⁶⁴ Somewhat remarkably, in Belgium a finding of *idem* on the basis of the facts is restricted to *domestic* cases, whereas in *international* situations, offences are decisive.¹⁶⁵

In contrast with most national *ne bis in idem* rules however, Articles 14(7) ICCPR, 4P7 ECHR, and 50 of the Charter all refer to the same “*offence*”. Out of the provisions discussed in this chapter, only Article 54 CISA refers to “the same *acts*”. It should be born in mind however that Articles 14(7) ICCPR and 4P7 ECHR were only included into the respective conventions later on and have remained controversial, which may be evidence by the fact that the 7th Protocol to the ECHR was rather poorly ratified. This may provide an indication that the drafting of the provisions on this point actually reflects the concerns and preoccupations of the signatories to the conventions on the point of the *ne bis in idem* principle, rather than their respective opinions on the proper construction and interpretation of the *ne bis in idem* principle. It is conceivable that the signatories may have deliberately opted for weak and ineffective *ne bis in idem* provisions in international human rights instruments, in order to avoid any problems within their domestic legal systems.

The vague and restrictive wording of Article 4P7 ECHR on this point led to problems in the application of the provision in concrete cases. For several decades, the ECtHR grappled with the interpretation of ‘the same offence’ in Article 4P7 ECHR. In the recent judgment in the case of *Zolotukhin v. Russia* the ECtHR however, the Grand Chamber put an end to the confusion and uncertainty when it held 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”.¹⁶⁶ This judgment, which marks a clear departure from the earlier case law of the ECtHR on the point of *idem* will be further discussed in chapter 4 of this study.

¹⁶² Van der Wilt 2005, p. 111.

¹⁶³ The year of the “*Joyriding*”-judgment (Dutch Supreme Court): *Hoge Raad*, judgement of 17 December 1963, NJ 1964, 385.

¹⁶⁴ Klip & van der Wilt 2002, p. 1095; Van der Wilt 2005, p. 112. There are indications that the Dutch supreme court may be returning to the strictly-the-facts-approach it adhered to between 1889 and 1932. Between 1932 and (approximately) the early 1960’s, it adhered to a more restrictive approach, based on the legal qualification of the facts.

¹⁶⁵ Vander Beken, Vermeulen & Ongena 2002, pp. 812-817.

¹⁶⁶ ECtHR (Grand Chamber), *Sergey Zolotukhin v. Russia* 10 February 2009 (Appl. No. 1493/03), para. 83.

Even when the *ne bis in idem* principle is thus applied on the basis of 'strictly-the-facts', several categories of problems may still arise out of the interaction between the principle and the legal qualification of offences. One potential problem is that a single historical event may constitute several offences under the law (*concursum*). Another legal phenomenon which may give rise to questions of *ne bis in idem* is that several events actions may be forged into an artificial legal unity. For example: several consecutive *blows* may amount to a *beating*.¹⁶⁷ Along similar lines, a relative new phenomenon in criminal law in many states is that of offences with a particularly wide (and vague) scope, such as "involvement with a criminal organization", or "involvement in terrorist activities". Within such offences, a particularly wide and open category of possible illegal activities which are forged into a legal unity.¹⁶⁸ Finally, some offences only take into account a *segment* of the actual event: the offence of *exporting* drugs for example does not take into account the fact that the same shipment of drugs will automatically be *imported* into another country at the same time.

In my opinion, what all of the above issues have in common is that they are essentially problems of the *legal qualification of offences* under national law, which in turn may lead to problems of the application of the *ne bis in idem* principle.¹⁶⁹ In the case of a single act constituting several offences (*concursum idealis*) or a course of action constituting several offences (*concursum realis*), the problem is that one single offence (*charge*) is insufficient to cover all the culpable elements contained in a given historical event. For example: the act of drunk driving is in itself punishable, but additional punishment is appropriate if this also caused the death of another road-user. If there is no legal charge available to the prosecution which covers *both* reprehensible aspects of that event, additional charges are needed in order to prevent under-punishment. A *concursum* could therefore equally be described as a situation in which none of the charges available to the prosecution under the law are *in themselves* wide enough in scope to cover every reprehensible aspect of the litigious conduct.

Conversely, the problem with charges with a particularly *wide* scope is that, because of their general nature, such charges can not *a priori* sufficiently take into account the potential gravity of each of the individual elements which are (potentially) covered by the offence. An open, and particularly wide range of potential offences are artificially forged into a single legal unity, regardless of their respective 'seriousness'. To give another example: where one 'member

¹⁶⁷ Trechsel 2005, p. 393.

¹⁶⁸ Apart from questions of *ne bis in idem*, such broad offences more generally raise questions of legality, compatibility with constitutional principles, and the rule of law.

¹⁶⁹ The essence of this problem lies in the fact that, in the case of a single act constituting several offences, offences with a particularly wide scope, and offences of the import/export-type, the application of the *ne bis in idem* principle could potentially lead to under-punishment if for some reason not all charges are brought *within the same proceedings*.

of a criminal (or terrorist) organization' may have busied himself with tasks of relatively minor importance and reprehensibility (such as for example obstructing the course of justice by giving out false information) another member of that organization may have been involved in counts of manslaughter, smuggling of illicit substances, and other offences of a particularly serious nature. In such cases, additional (specific) charges are needed in order to enable the judiciary to impose an appropriately severe penalty in view of the seriousness of the individual offences committed by the latter.

The prohibition of double prosecution does not, in principle, stand in the way of the possibility of a conviction on several charges, as long as those charges are brought in the same set of legal proceedings.¹⁷⁰ There is therefore generally speaking no need for a derogation to the *ne bis in idem* principle in the event of a *concoures d'infractions*. After all, the purpose of the prohibition is precisely to ensure that (all of) the charges against the subject are brought *within the same proceedings*.

The autonomous interpretation which the ECtHR has given to the concept of "criminal charge" in its case law gives rise to difficulties within national systems of law, because criminal and administrative offences normally lead to separate proceedings. Furthermore, due to the length and complexity of criminal law proceedings, administrative law penalties are often imposed *before* the final outcome in a criminal case, thereby (potentially) barring any further criminal prosecution.

The second (potential) issue in this connection is the possibility of a prosecution *in another state*. If some aspect of the litigious conducted was not covered by the charges pressed against the subject in the first state where that subject was prosecuted, could it perhaps be reasonable to allow for an additional prosecution in a second state? As we will see later on in this study, the answer to this question should be no, or at least not in situations which fall within the scope of application of Article 54 CISA. Under those circumstances, a second prosecution would *not* be permissible in most states under national law, as a matter of *ne bis in idem*.¹⁷¹ A second prosecution must therefore *also* be disallowed in *another* Member State. Allowing for a second prosecution in another Member States in such types of situations would lead to the unrealistic and undesirable result that "the same act" on the *international* level would not be the same as "the same act" on the *national* level. These and other find-

170 For example: the Dutch Supreme Court held in 1996 that a *subsequent* prosecution for certain specific acts committed within the framework of a criminal organization, after an initial conviction for the general offence of "participating in a general organization" infringed the *ne bis in idem* provision, where a *simultaneous* conviction for both offences would have been admissible. (Dutch Supreme Court) *Hoge Raad*, judgment of 26 November 1996, *NJ* 1997, 209.

171 ...except in those states where, the legal qualification of the offence is decisive for the application of the *ne bis in idem* principle. As mentioned before, this appears to be exceptional; the only clear example known to me is that of China.

ings will be presented and further discussed in more detail in chapter 6 of this study.

Although it would not make sense to interpret the concept of “the same acts” for the application of the prohibition of double punishment as a concept distinct from “the same acts” for the prohibition of double prosecution, there is nevertheless a difference between the two guarantees on the point of *idem*. Taking again the example of a *concursum* consisting of the offences of driving a car while under the influence of alcohol and causing the death of another motorist, the prohibition of double punishment would prevent two cumulating penalties from being imposed (or enforced) for the same conduct, if the prohibition is applied on the basis of the (historical) *facts*. If the prohibition is applied on the basis of the *legal qualification* of the facts (the offence), then the prohibition would *not* prevent this, as the two offences concerned (drunk driving and manslaughter) do not overlap in their constituting elements.

The issue is therefore very much linked to the particular method chosen for calculating the appropriate length of the sentence in national systems of criminal law. In many states, national rules of criminal law and criminal procedure stipulate that only the *highest* penalty imposed in a given set of proceedings will be executed. There are however exceptions; in the USA for example unrealistically long prison sentences (up to 500 years) are no exception. Trechsel argues that it is not “up to the Court in Strasbourg” to interfere with this, because “one country may have a system which would deal with a certain set of facts as constituting one crime, whereas in another country each single act would be regarded individually. Similarly, it must be left to the states to determine their system of meting out the sentence.”¹⁷² There are considerable differences between states on this point, even between states that recognise the prohibition of double punishment in their national laws, giving the ECtHR reason to refrain from interfering (too much) with such matters.¹⁷³

The ECJ however is in a somewhat different position, for two reasons. The first is that Article 56 CISA stipulates that “if a further prosecution is brought by a Contracting Party against a person whose trial, in respect of the same acts, has been finally disposed of in another Contracting Party, any period of deprivation of liberty (...) shall be *deducted* from any penalty imposed”. The second is that the ECJ has, in its case law consistently recognised that the prohibition of double punishment also forms a general principle of Community law. The ECJ must therefore address the issue of the prohibition of double

¹⁷² Trechsel 2005, p. 393.

¹⁷³ In one state “a system of accumulation will be used (with the possibility of letting prison terms run consecutively or concurrently)” whereas in another the sentence for the most serious offence will be used as a starting point, and adjusted so as to take into account the other aspects of the act. In some states “the most serious crime may be considered to absord any further sentence” (Trechsel 2005, p. 393).

punishment in its case law, in a manner consistent with its case law on the prohibition of double prosecution on this point.

2.6.3 The requirement of enforcement of the penalty

Out of the *ne bis in idem* provisions presented and discussed in this chapter, only Article 54 CISA requires 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 enforcement of the penalty is therefore a condition for the application of the *ne bis in idem* principle contained in that provision. It must be said that it is remarkable that Articles 4P7 ECHR, 14(7) ICCPR, and 50 of the Charter do not require that the penalty has been enforced. Nothing is known of the specific reasons (if any) for this omission.

It can be difficult for a state to enforce a penalty against a subject, in particular where the surrender of that subject can not be effectuated, or where a foreign sentence cannot be enforced through judicial recognition of that sentence by another state. Under those circumstances, it would generally speaking seem reasonable to allow for a second prosecution, because ‘justice was not fully done’ if the sentence could not be enforced.

2.7 EXCEPTIONS

In many jurisdictions the prohibition of double prosecution is not absolute; a re-trial may take place under certain conditions, for example in case of newly discovered evidence (*novum*), or in case of a mistrial or other defects in the proceedings. In general, the reasons for providing for exceptions include the interests of material justice, and the need to correct “mistakes” in the first proceedings.¹⁷⁴ However, out of the four provisions which were discussed in more detail in this chapter, only Article 4P7 ECHR provides for the possibility of exceptions.

The requirement of a *novum* can be seen as a condition, imposed on the second set of proceedings; if the evidence produced in those proceedings cannot be seen as new (and previously undiscovered), the second set of proceedings breach the *ne bis in idem* principle as a consequence. The other exceptions (a mistrial, or defect in the proceedings) would appear to remove the *final character* of the first proceedings, rather than impose specific conditions on the second proceedings.

174 De la Cuesta 2004, p. 714.

To give some examples (from national law): in Germany a second trial may take place under certain circumstances, both to the detriment of the subject, as well as in favour of the subject.¹⁷⁵ In Belgium, several exceptions are available in order to remedy fundamental defects in the first proceedings, but there is no possibility of bringing new proceedings if new evidence surfaces.¹⁷⁶ In the Netherlands there are some exceptions available (for example in case of conflicting decisions by the courts), but new evidence is only admissible if the evidence would have led to a more *favourable* decision for the convicted subject.¹⁷⁷

Other types of situations, such as the possibility of “review” should be seen as falling outside of the scope of application *ratione materiae* of the principle, rather than as an exception to the principle as such. It is interesting to note that the double jeopardy rule of the Fifth Amendment of the US Constitution does not apply in situations in which the accused was never placed in any real ‘jeopardy’ of being convicted. This is the case if the jury was, for example, *bought* by him or her.

PROVISIONAL SUMMARY

A number of *ne bis in idem* provisions exist, within different ‘European’ frameworks. These provisions vary considerably as to their wording and scope. At present, Article 50 of the Charter merely adds to the sheer number of differently worded *ne bis in idem* provisions in EU law. If the Charter would become legally binding, there is presently a risk that Article 50 of the Charter would actually undermine rather than strengthen the application of the *ne bis in idem* principle in the EU legal order, because of the defective drafting of the provision.

A distinction is traditionally made between the prohibition of double punishment (*Anrechnungsprinzip*) and the prohibition of double prosecution (*Erledigungsprinzip*). The wording of Articles 14(7) ICCPR, 4P7 ECHR and 50 of the Charter might suggest that these two legal rules form different aspects of the *ne bis in idem* principle. However, notwithstanding the wording of the provisions, the *Anrechnungsprinzip* and the *Erledigungsprinzip* must be seen two distinct, complementary, as well as mutually exclusive legal rules. There are several strong argument in favour of only considering the *Erledigungsprinzip* as the ‘true’ *ne bis in idem* principle.

The application of the *ne bis in idem* principle is gradually extending into fields of law other than criminal law *strictu sensu*. This will likely lead to

¹⁷⁵ Sections 359 and 362 of the German Code of Criminal Procedure (*StPO*). A translation of these provisions is provided by Schomburg (2004, p. 946).

¹⁷⁶ Vander Beken, Vermeulen, & Ongena 2004, p. 814.

¹⁷⁷ Klip & van der Wilt 2004, p. 1097.

difficulties within national systems of law, in particular in the light of the case law of the ECtHR on the concept of “criminal” within the meaning of Article 6 ECHR.

A “*concurso ideal d’infractions*”, meaning a single act (*concursum idealis*) or several acts (*concursum realis*) constituting several different infringements can not infringe the prohibition of double prosecution, as this prohibition does not stand in the way of several charges being brought within one set of proceedings. For the prohibition of double punishment, this is a different matter, and one which must be seen in the context of the particular method of calculating the sentences.

3 | The supranational context: the criminal law dimension of the EU

By its nature, the *ne bis in idem* principle may apply in areas of law where penalties may be imposed on subjects. This is not only the case in criminal law in the traditional, narrow sense, but also in areas of the law which are of an administrative law nature. In this chapter, the areas of EC/EU which are of particular relevance to the topic of this study, namely: EC competition law and Third Pillar law, are presented and discussed in more detail.

3.1 THIS CHAPTER

By its nature,¹ the *ne bis in idem* principle applies in those areas of law, in which *penalties* may be imposed on subjects.² So far, the *ne bis in idem* principle has been elaborated and applied by the Community courts mainly in two areas of law: that of EC competition law, and that of Third Pillar law. In this chapter, in which the supranational context of the relevant areas of EU law is explored and discussed, particular attention is given to those two punitive areas of EU law.

Although the earliest cases on the *ne bis in idem* principle in competition law predate the first cases on Article 54 CISA by three decades, Third Pillar law is considered *before* EC competition law in this chapter. The reason for this is that criminal law –in the traditional sense– is the *ne bis in idem* principle’s “natural habitat”. The challenge of adapting the *ne bis in idem* principle to the specific features of Community law presents itself in particular when the principle is applied in other areas than criminal law *strictu sensu*. For this reason, it is helpful to consider criminal law in the *narrower* sense (the Third Pillar) first, before moving on to Community law.

3.2 INTRODUCTION: EU CRIMINAL LAW IN THE WIDER SENSE

It has been mentioned before that within national systems of law, a distinction is usually made between ‘traditional’ criminal law (in which the *ne bis in idem*

1 (“tried or punished”)

2 ...and which are therefore *punitive* in nature.

rule generally applies), and other *punitive* areas of law (in which there is, generally speaking, no *ne bis in idem* rule). In the context of EU law however, such a distinction between ‘traditional’ criminal law and other areas of *punitive* law cannot be maintained in full. The EU “has” no system of criminal law enforcement as it is traditionally understood within domestic systems of law, nor is there a general theory or authoritative opinion (yet) on what “European criminal law” is, precisely.³ The term “criminal” is used in EU primary and secondary law in several places,⁴ but EC and EU law does not provide a definition of what is “criminal”.⁵ This does not mean that the EU has no criminal law competences⁶ in some areas of law, or criminal law relevance in others. On the contrary, the criminal law dimension of the EU is expanding rapidly, and its importance is growing exponentially.

The criminal law ‘dimension’ of the legal order of the EU (or: “EU criminal law”, in the wider sense) is rather diverse, and consists of four main aspects.⁷ The first aspect is the impact of Community law on national criminal law. Community law may set aside a rule of national criminal law if that rule is incompatible with the EC Treaty or a measure adopted under the Treaty.⁸ Furthermore, the doctrine of equivalence requires that rights under Community law must be ensured by the Member States in the same way (“no less favourable”) as similar national rules. What this can mean is that the Member States may, in some cases, have to give effect to Community law by providing criminal sanctions, if such sanctions are also provided for similar national laws.⁹ The second aspect of the criminal law dimension of EU law is police and judicial cooperation in Title VI of the EU Treaty (what is known as the Third Pillar). Ever since 2005, a third aspect is formed by harmonisation in the field of criminal law and the criminal law competences of the Community

3 Corstens & Pradel 2002, pp. 2-3.

4 Both in the ‘positive’ as well as the ‘negative’ sense. Article 23(5) Regulation 1/2003 for example (negatively) states that fines imposed on undertakings “shall not be of a criminal law nature. Article 30(a) of the EU Treaty on the other hand (positively) states that common action shall include the investigation of ‘criminal offences’.

5 Wils 2006, p. 4.

6 With the term ‘criminal law competences’, I mean firstly the EU’s competence to take measures pursuant to the provisions of Title VI of the EU Treaty, and secondly the competence of the Community to require the Member States to adopt criminal law sanctions in their national legislation for certain environmental crimes following the ruling of the ECJ in case C-176/03, *Commission v. Council*. For now, the question whether this competence of the Community could also be extended into other Community policy areas remains contentious between the Commission and several of the Member States.

7 Corstens & Pradel 2002, pp. 7 *et seq.*

8 See for some examples cases 186/87, *Cowan v. Tesor Public* [1989] ECR 195 and C-348/96 *Criminal proceedings against Donatella Calfa* [1999] ECR I-11. This is also known as the “negative criminal law effect of Community law” (Corstens & Pradel 2002, pp. 507-509).

9 Case C-68/88 *Commission v Greece* [1989] ECR 2965.

and the Union.¹⁰ The fourth and final aspect of the criminal law dimension of EU law is the fact that in some of areas of Community law such as EC competition law but also public procurement and environmental law, the Community (by way of the Commission) has the power to impose penalties directly on subjects.¹¹

Although the administrative penalties which may be imposed on undertakings in competition cases are generally speaking not as severe as criminal law penalties, it is clear from the case law of the Community courts that the same general principles are applied in both instances, but now always with the same intensity.¹² Although “the rigour with which the principles are applied varies (...) it is clear that principles such as the presumption of innocence, the *ne bis in idem* rule, lawfulness and culpability are legislative constructs which are applicable to both criminal law and the penalties implemented by the administrative authorities.”¹³

3.3 DEVELOPMENTS IN ENHANCED COOPERATION

3.3.1 Introduction

At the time that it was established, the Community did not cover criminal law, a field that remained exclusively in the sovereign domain of the Member States.¹⁴ It soon became clear however that the view that economic integration would not affect national systems of criminal law was not tenable, as both the Treaties as well as secondary Community law may form sources of obligations for Member States in the sphere of criminal law.¹⁵ From the onset, the project of European integration has displayed a tendency to develop, in various ways, into new fields which were originally not “supposed to have any EEC relevance at all”, including that of criminal law.¹⁶

10 ...the “positive criminal law effect of Community law” (Corstens & Pradel 2002, pp. 512-519).

11 In EC competition law the Commission shares this competence with the authorities in the member States.

12 Para. 56 of the Opinion of Advocate General Colomer, 24 January 2008, in Joined cases C-55/07 and 56/07 *Michaeler and others*, n.y.r., 24 April 2008.

13 *idem*. See also Para. 47 of Opinion of AG Colomer of 26 May 2003 in Case C-176/03 *Commission v. Council* [2005] ECR I-7879: “there are criminal penalties – those of greater severity – and administrative penalties. Both categories are manifestations of the penalising authority of the State and obey the same ontological principles. However, the less stringent nature of the second type entails a relaxation of the safeguards which must accompany their imposition, without prejudice to the fact that (...) in both situations similar principles must be observed”.

14 Sevenster 1992, p. 29.

15 Sevenster 1992, p. 29.

16 Sevenster 1992, p. 30.

The first and second aspect of the criminal law dimension of EU law mentioned in the previous paragraph (the impact of Community law on national criminal law, and police and judicial cooperation) are interrelated. Amongst other things, the necessity of developing EU policies in the field of criminal law was born out of the fact that a Europe without borders not only facilitates legitimate activities, but also cross border crime. An illustrative example used by Sevenster is the case of a bank robber who declared during his trial (in 1987) that he had targeted a bank in The Netherlands specifically because of the light sentences in that country.¹⁷

Initially (that is to say, between the late 1950's and the late 1970's) cooperation in criminal matters developed primarily through a small number of basic conventions between a large number of European states.¹⁸ In 1977, (then) President of the republic of France Valerie Giscard D'Estaing launched a proposal to create a "European criminal justice area".¹⁹ The proposed convention failed, but the idea of a European legal area had begun to take shape.²⁰

3.3.2 The Maastricht and Amsterdam Treaties

The next major development in enhanced cooperation came in 1992, when the Maastricht Treaty institutionalized co-operation in the field of Justice and Home Affairs within the framework of the intergovernmental Third Pillar. Similarly to the Schengen-agreements, the aim of this new area of Union law was to establish free movement of persons while at the same time adopting 'flanking' measures in order to combat cross-border crime within the EU more effectively. The pillar structure was the result of political compromise following failed attempts on the part of several Member States to secure specific positions in some policy areas such as justice, security, and foreign affairs.²¹ Some of the specificities of the new Third Pillar included its intergovernmental character with unanimous decision making, and the (initially) optional jurisdiction of the ECJ.

The original Third Pillar in the Maastricht-version covered asylum and refugee law, external boundaries, visas and immigration, cooperation in the field of civil law, customs cooperation, and police and judicial cooperation in criminal law. Under the Treaty of Amsterdam, only police and judicial

17 Sevenster 1992, p. 30. As a result of the publicity surrounding this case, a question was posed to the Commission by a member of the European Parliament, asking whether harmonisation of criminal law, and improvement of extradition procedures between the Member States should be considered (Written question 765/86 by Mr. Florus Wijsenbeek to the Commission concerning harmonisation of criminal law, [1987] OJ C 72/13.

18 Corstens & Pradel 2002, p. 46.

19 Corstens & Pradel 2002, p. 48.

20 Corstens & Pradel 2002, p. 49.

21 Vervaele 2005, p. 3.

cooperation in the field of criminal law remained in the Third Pillar. All of the other policy areas were 'Communitized', *i.e.* brought within the scope of the First Pillar.²² Another important change brought about by the Amsterdam Treaty was that the position of the ECJ in the Third Pillar was strengthened. The Court was given the power to answer preliminary questions,²³ and to review the legality of Framework decisions and Decisions.²⁴

The changes brought about by the Amsterdam Treaty raised the question whether the Third Pillar could now perhaps be seen as an area of Community law like any other. Different authors hold different views on this matter. Vervaele –perhaps somewhat unconvincingly– argues that this is the case.²⁵

Peers on the other hand argues that, contrary to the substance of the internal market, the subject matter of the Third Pillar (criminal law) goes "to the heart of international and national human rights protection, concern the very core of state sovereignty, and entail drastic consequences for individuals".²⁶ According to Peers, it is therefore primarily the subject matter of Third Pillar law which sets it apart from the EU's other policy areas, and not necessarily the specificities of the Third Pillar, which are nevertheless evidence of the political sensitivities that surround it.

Both lines of reasoning raise questions. An important weakness in the Peers' reasoning is that it implicitly downplays the importance of the EU's other policy areas (and that of the internal market in particular), both for the Member States as well as for the citizens of the Union, as well as the clear functional link between the internal market and the need for enhanced police and judicial cooperation within the framework of the EU. Another important matter which may be overlooked by Peers is that it is difficult, if not impossible, to draw a clear distinction between administrative law and criminal law, where the penalisation of certain types of conduct is concerned. At the same time it must be said that this close relationship between the internal market and police and judicial cooperation between the Member States within the EU framework is, at present, not (yet?) fully reflected by the position of the Third Pillar within the framework of the EU. Police and judicial cooperation remains for now an area which is separated from Community law through its placement in the TEU, and which differs from it in three main respects: its subject matter, its

22 Kuiper 2004, p. 610.

23 Although there is the possibility of limiting this power to courts, deciding in the final instance, as several Member States have done.

24 Although only in actions brought by a Member State or the Commission.

25 According to him, "ever since the Treaty of Amsterdam, it is quite obvious that the Third Pillar is fully-fledged European Union law and thus subject to the particularities of European Union law as far as these deviate from international law" (Vervaele 2005, pp. 5-6). Vervaele's statement is somewhat confusing, as there can be no question that the Third Pillar is ("fully fledged") EU law. The question should therefore be to what extent it differs from *Community* law.

26 Peers 2004, p. 24.

strong intergovernmental component resulting from the Council's legislative monopoly, and the remaining limitations on the jurisdiction of the ECJ.²⁷ This special position was born out of political compromise at Maastricht, and after the failure of the Constitutional Treaty and the Reform Treaty must for now remain as it is.

3.3.3 The Lisbon Treaty

Although the future of the Lisbon Treaty²⁸ is uncertain at the time of writing this, it is nevertheless worth considering the changes that would be effectuated by it, if it were still to enter into force. 'Post-Lisbon', the Union would be founded on two treaties: the new Treaty of European Union ("new TEU") and what is now the EC Treaty, and which would be renamed the "Treaty of the Functioning of the European Union" ("TFEU").²⁹ The European Union, which would be given legal personality in Article 47 of the new TEU, would succeed and replace the Community.

Common policies in the AFSJ (including the Schengen-*acquis*) would be assimilated within the "Community method" in the TFEU (Title V). Article 3(2) TEU names the Union's aim of establishing an AFSJ even before the internal market and the economic and monetary union: 'The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.'

Article 82 TFEU provides that judicial cooperation in criminal matters shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the members States in the areas referred to in paragraph 2 of that article, and Article 83.

Title V provides a unified set of legal bases for Union action across the board, including a legal basis for adopting directives on the definition of criminal offences and sanctions in "areas which have been subject to harmonisation measures" (Article 83 (2), *i.e.* environmental law and maritime safety), and a legal basis for the creation of a European Public Prosecutors Office.

²⁷ Spaventa 2007, p. 8.

²⁸ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, [2007] OJ C350/1.

²⁹ According to Article 1 TEU (new), the Union 'shall be founded on the present Treaty and on the Treaty on the Functioning of the European Union'. Prior changes to the EC Treaty, found in title II of current version of the TEU are incorporated into the TFEU.

An important development would be that legislative measures would henceforth have direct effect. Furthermore, the new AFSJ would see a significant enhancement of the role of the EP through the use of QMV, and the powers of review of the ECJ are extended.

In sum, in as far as the Amsterdam Treaty left some doubts, what is now the 3rd Pillar would be fully assimilated within the Community method, and would become “fully fledged Union law” under the Lisbon Treaty.³⁰ There would also be a significant increase in the powers of the Union to act in the AFSJ, with increased democratic accountability and better protection of individual’s rights. On the other hand, a number of “specificities” would continue to reflect the sensitivities that surround the police and judicial cooperation. In particular, Articles 82(3) and 83(3) TFEU provide for the possibility of a suspension of the ordinary legislative procedure (“emergency brake”) in case a draft directive would affect fundamental aspects of the criminal system of a Member State. This would suspend the ordinary legislative procedure. In such cases, the remaining Member States may go forward on the basis of Article 20 TFEU, which lays down the possibility of “enhanced cooperation”.³¹

3.3.4 Mutual recognition in an Area of Freedom, Security and Justice

The EU’s objectives in the Third Pillar are, in accordance with Article 29 TEU and the more general aim of an “ever closer Union” to “provide citizens with a high level of safety within an area of Freedom, Security and Justice”, without prejudice to the powers in the First Pillar.³² Unlike the general aim of establishing a common market with undistorted competition³³ this ‘vision’ of an Area of Freedom, Security and Justice can be seen as a threefold aim. Each of these three rather different aims has the potential of undermining the other two, when given unlimited scope. In particular, this ‘threefold allegiance’ may lead to some tensions in the application of the *ne bis in idem* principle.

At the Cardiff European Council of 1998, the Council had been asked “to identify the scope for greater mutual recognition of decisions of each other’s

30 The Schengen *acquis* would be amended by declarations concerning the protocols annexed to the Treaties ([2007] OJ C 306/264). The Schengen protocol ([2007] OJ 340/93) deals with the special position of the UK and Ireland (Article 5 of the Schengen Protocol). Art 6 of the Protocol specifies that Norway and Iceland shall be associated with the further development of the Schengen *acquis*.

31 if the objectives of such cooperation cannot be attained within a reasonable period of time by the Union as a whole, and provided that at least 9 Member States participate.

32 Article 47 TEU.

33 Which could be seen as a single aim; competition and free movement are “different sides of the same coin”.

courts".³⁴ In response, the UK Home Secretary (Jack Straw) pointed to some 'parallels' between Article 29 TEU and the objectives underlying the single market, and suggested that it might be possible to use an approach "comparable to that used to unblock the single market", by establishing a general obligation for the Member States to recognise as valid decisions by courts in other Member States. Following his suggestion, it was agreed at Tampere³⁵ that "(t)he European Council (...) endorses the principle of mutual recognition which, in its view, should become the cornerstone of judicial co-operation in both civil and criminal matters within the Union".³⁶ Since then, the concept of mutual recognition, which finds its origins in the internal market has stood at the centre of the triptych of the 'Area of Freedom, Security and Justice' as the cornerstone of judicial co-operation in the Union, and is actively advocated by the Council as an alternative to harmonisation in the field of criminal law.³⁷

The extension of the application of the concept of mutual recognition from the internal market into the sphere of criminal law has received strong criticism in scholarly writing.³⁸ A number of authors have pointed out that, unlike product requirements in the context of the free movement of goods, systems of criminal law are not 'comparable' to each other,³⁹ so that harmonisation may well be a prerequisite to mutual recognition in the sphere of criminal law, instead of the other way around.⁴⁰ The application of the principle of mutual recognition in the sphere of criminal law would undermine the protection of fundamental rights in the EU, because of the differences which

34 Cardiff European Council, 15 and 16 June 1998, Presidency Conclusions, para. 39, available from http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/54315.pdf. See also Mitsilegas 2006, p. 1278.

35 At the European Council in Tampere (October 1999), a first working programme was established ("Five Years to establish the Area of Freedom, Security and Justice"), the implementation of which was achieved in 2004 (Communication from the Commission to the Council and the European Parliament, COM (2004) 4002 final, available from: http://ec.europa.eu/justice_home/doc_centre/intro/docs/bilan_tampere_en.pdf). On November 4 2004, the European Council adopted the Hague Programme ("Strengthening Freedom, Security and Justice in the European Union", Council doc. 16504/04, 13 December 2004), which set the objectives to be implemented in the area of freedom, security and justice between 2005 and 2010 (available from: http://ec.europa.eu/justice_home/doc_centre/doc/hague_programme_en.pdf). In May of the following year, the Commission presented a joint action plan (with the Council) for the implementation of the Hague Programme, the progress of which is assessed regularly (COM (2007) 373 final, Communication from the Commission to the Council and the European Parliament, Report on the implementation of The Hague programme for 2006, available from: http://ec.europa.eu/prelex/detail_dossier_real.cfm?CL=fr&DosId=195917).

36 Tampere European Council Presidency Conclusions, 15&16 October 1999, par. 33, available from: ue.eu.int/ueDocs/cms_Data/docs/pressdata/en/ec/00200-r1.en9.htm.

37 Peers 2004, pp. 8-10, Mitsilegas 2006, p. 1279.

38 Mitsilegas 2006, p. 1280.

39 ...because the two would be "qualitatively different"; Mitsilegas 2006, p. 1280.

40 See, for example: Peers 2004 and Alegre & Leaf 2007.

continue to exist between the systems of criminal law of the Member States in the absence of the harmonisation of those systems of criminal law.⁴¹

Another point of critique which has been voiced by several authors is that the application of the mutual recognition principle in judicial cooperation in criminal matters is based on the presumption that a high level of mutual trust exists between the Member States' systems of criminal law. Several authors generally express doubts that the required high level of mutual trust really exists, between the Member States at present.⁴²

3.4 THE SCHENGEN *ACQUIS*

3.4.1 Introduction

The 1985 Schengen agreement was concluded as an intergovernmental instrument between only five Member States.⁴³ It was followed by the Convention on the Implementation of the Schengen Agreement ("CISA") in 1990 (together: the "Schengen-agreements").⁴⁴ Although the Schengen agreements were concluded outside of the Community framework, they were drafted with European integration in mind, and are functionally linked to the objective of free movement.⁴⁵ The Schengen agreements establish free circulation of persons by abolishing border checks,⁴⁶ while at the same time implementing 'counter-vailing measures'. These are provisions on police cooperation, mutual assistance in criminal matters,⁴⁷ extradition, transfer and enforcement of judgments,⁴⁸ and the Schengen Information System ("SIS").

3.4.2 The integration of the Schengen *acquis* into the framework of the EU

At the IGC of 1996, the Deputy Minister of Foreign Affairs of the Netherlands submitted a proposal for the integration of the Schengen *acquis* into the frame-

41 Mitsilegas 2006, p. 1280; Löff 2006; Peers 2004; Weyembergh 2005.

42 Weyembergh 2005; Peers 2004.

43 Agreement 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 (1985), [2000] OJ L 239/13.

44 Convention of 19 June 1990 implementing the Schengen Agreement, [2000] OJ L239/19.

45 ...as evidenced by the first recital of the Preamble to the 1985 Schengen Agreement, which states the signatories' intention to give concrete expression to "the increasingly closer union of the peoples of the Member States of the European Communities (...) manifested through freedom to cross internal frontiers for all nationals of the Member States and in the free movement of goods and services". See also: Wagner 1998, p. 5.

46 Article 2(1) CISA.

47 Title III, Chapters 1 & 2, CISA.

48 Title II, Chapter ,5 CISA.

work of the Third Pillar. The underlying reason for this was the “close relationship between the substance of the Schengen-co-operation and the substance of the Third Pillar”.⁴⁹ An important argument in favour of integrating the Schengen *acquis* into the EU was that it enabled the EU to benefit from the progress which had already been made within the Schengen framework, and with the entry into force of the Treaty of Amsterdam, three years later, the Schengen *acquis* was successfully ‘hijacked’ by the EU. Several aspects of the integration of the Schengen *acquis* into the framework of the EU deserve some further explanation.⁵⁰

The Schengen *acquis* was formally integrated into the Framework of the European Union by way of a Protocol⁵¹ to the Treaty of Amsterdam, and entered into force on the date of entry into force of that Treaty.⁵² This “Schengen Protocol” is accompanied by an annex which broadly (though not precisely) indicates what constitutes the Schengen *acquis*.⁵³ Article 2 of the Schengen Protocol provides the legal basis for further action by the Council in order to establish, where necessary,⁵⁴ the legal basis of the Schengen *acquis*, as well as to determine precisely which documents together make up the Schengen *acquis*. Two Council Decisions followed, based on this provision: Decision 1999/435/EC,⁵⁵ listing the documents that together make up the Schengen-*acquis*, and Decision 1999/436/EC,⁵⁶ establishing the legal basis for these documents in the EC and/or EU Treatises.⁵⁷

The Schengen *acquis* also entered into force in the non-Member States of Norway and Iceland on March 25, 2001, and Switzerland on December 12, 2008. Norway, together with Sweden, Denmark, Finland, and Iceland belonged to the Nordic Passport Union. The Nordic Passport Union was associated with

49 De Zwaan 1998, p. 18.

50 See in particular: Wagner 1998, and Kuijper 2000.

51 Protocol no. 2, the “Schengen Protocol”.

52 1st of May 1999.

53 Kuijper 2000, p. 364.

54 Some Schengen-documents and provisions are now redundant (in particular the institutional provisions within the Schengen-framework). Other documents did not require a specific legal basis to be attributed to them.

55 Council Decision 436/1999 of 20 May 1999 concerning the definition of the Schengen *acquis* for the purpose of determining in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union the legal basis for each of the provisions or decisions which constitute the Schengen *acquis*, OJ 1999, L176/1.

56 Council Decision 436/1999 of 20 May 1999 determining in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union the legal basis for each of the provisions or decisions which constitute the Schengen *acquis*, OJ 1999, L 176/17.

57 As result of the ‘Communitization’ of the Third Pillar under the Amsterdam Treaty some provisions of the CISA have been ‘split’ between a Union and a Community legal basis. See: Kuijper, 2000, p. 348, fn. 18.

the Schengen group from 1996 on.⁵⁸ The aim of the Nordic Passport Union was similar to that of Schengen agreements; it abolished border checks between its signatories, and the association between the Schengen group and the Nordic Passport Union was extended through the 1999 agreement between the EU and Iceland and Norway.⁵⁹ Switzerland entered into an association agreement with the EU and the EC 2004, which included provisions concerning Liechtenstein.⁶⁰ It is expected that Liechtenstein will become fully associated with the Schengen-acquis early on in 2009.

3.4.3 The functioning of the Schengen *acquis* in the framework of the EU

The 374-page Schengen *acquis* as it stood when the Treaty of Amsterdam entered into force, and as it was published in the Official Journal⁶¹ consists of 64 documents: the Schengen agreements, the accession agreements, and various decisions adopted within the Schengen institutional framework by the Executive Committee and the Central Group, elaborating and implementing various aspects of the Schengen agreements.

The SIS is at the heart of the 'Schengen machinery': it is an electronic network which allows border posts, police stations and consular agents from Schengen-group Member States (the "Schengen states") to access data on specific individuals. The central system (C-SIS) is connected to national networks (N-SIS), as well as a supplementary network known as "SIRENE" ("Supplementary Information Request at the National Entry"), which controls and filters the incoming datastream. A Schengen state (the 'requesting state') may enter an alert into the SIS (Article 95 CISA) requesting the arrest and surrender of a wanted person, or requesting that an alien be refused entry (Article 96 CISA). Only the *requesting* state can remove an alert issued by it.

58 Cooperation Agreement between the Contracting Parties to the Schengen Agreement and the Schengen Convention and the Republic of Iceland and the Kingdom of Norway, Brussels, 19 December 2003 [2004] OJ L 26/3. This agreement is not included in Council Decision 1999/435/EC.

59 Council Decision 437/1999 of 17 May 1999 on certain arrangements for the application of the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the association of those two States with the implementation, application and development of the Schengen *acquis* [1999] OJ L 176/31.

60 'Agreement concluded between the European Union, the European Community and the Swiss Confederation concerning the association of the Swiss Confederation with the implementation, application and development of the Schengen *acquis*', signed on 26 October 2004 (Council Decision of 25 October 2004, [2004] OJ L 370/78).

61 The Schengen *acquis* as referred to in Article 1(2) of Council Decision 435/1999 of 20 May 1999, [2000] OJ L 239/1. This is the Schengen *acquis* as defined in Council Decision 1999/435/EC, (OJ 1999, L 176/1). Some parts of the Schengen *acquis* labelled "confidential" have not been disclosed, mainly information regarding investigation, and technical information concerning methods for the protection of documents against falsification. See: Kuijper 2000, p. 347, ft. nt. 11.

The CISA-provisions on extradition (Title III, chapter 4 CISA) have in the mean time been replaced by the Framework Decision on the European Arrest Warrant ("FDEAW").⁶² The FDEAW stipulates that an alert in the SIS with a view to arrest and surrender shall be equivalent to a European Arrest Warrant ("EAW"), if it is accompanied by the requisite information.⁶³ If there are grounds for the requested party (the Schengen state requested to proceed with the arrest and surrender of a person) to refrain from making the arrest (for instance if the subject of the alert has already been finally convicted or acquitted for the same acts), it may enter a "flag" into the data file of its N-SIS, prohibiting the arrest of the person for whom the alert was issued until the flag is deleted from the alert (Article 95(3) CISA). This flag is visible to other SIS-users, but is only *binding* on the state that entered the flag into the SIS. In practice, this means that anyone for whom an alert has been entered into the SIS is well advised to stay home, even if the alert has been "flagged". Only the requesting state is authorized to delete or modify the alert and the accompanying information (Article 106 CISA).

Article 111 CISA states that any person who is the subject of an alert may bring an action before the national court of any member state, with a view to the correction or deletion of an alert, or in order to seek compensation for damages resulting from the entry of an alert into the SIS. This is necessary because the subject of an SIS-alert can not practically speaking travel from one member state to the other in order to challenge his SIS-alert before the courts there, without running the risk of being arrested.

3.5 THE NECESSITY OF A *NE BIS IN IDEM* PRINCIPLE IN THE CONTEXT OF ENHANCED COOPERATION IN CRIMINAL MATTERS WITHIN THE UNION

3.5.1 Introduction

Enhanced cooperation in police and judicial matters has facilitated the cross-border gathering of evidence, the recognition of judicial decisions, and most importantly the arrest and surrender of subjects within the EU to a considerable extent. This has created an incentive for the authorities in the Member States to pursue a greater number of cases, including cases with jurisdictional links to other Member States. Furthermore, when a subject is tried *in absentia*, the penalty which is imposed through criminal proceedings is considerably more

62 Council Framework Decision 584/2002 of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ 2002, L 190/1. For this reason, the FDEAW-term "surrender" is used here rather than the CISA-term "extradition".

63 Chapter 2, art 9(3) FDEAW. See also: Blekon 2005, p. 247.

likely to be enforced against the subject with success afterwards, through the existing instruments of cooperation.⁶⁴

In the absence of any uniform regulation of the rules on criminal law jurisdiction,⁶⁵ enhanced cooperation gives rise to instances in which several states lay claim to criminal law jurisdiction in respect of the same criminal act (so-called 'positive law conflicts'). This leads to the accumulation of simultaneous or subsequent penalties being imposed on the same person or persons in different states, in respect of the same criminal conduct.⁶⁶ In the context of enhanced cooperation, a transnational *ne bis in idem* principle is therefore *necessary* (although in itself not *sufficient*) as an instrument for the regulation of transnational justice.

3.5.2 Article 54 CISA

With the coming into force of the Treaty of Amsterdam, the EU was aware of the necessity to provide for a transnational *ne bis in idem* principle in the Area of Freedom, Security and Justice.⁶⁷ As we have seen in the previous chapter of this study, provisions in international instruments were "too different, and their application in the Member States varied too much" to be effective.⁶⁸ Apart from being unfair towards the subject in question, the possibility of incurring multiple prosecutions and penalties when exercising the right to move freely from one Member State to another would also run counter to *the objective of free movement within the EU*.⁶⁹ This gap was filled through the incorporation into the legal framework of the EU of the transnational *ne bis in idem* provision contained in Article 54 CISA.

Article 54 CISA was perhaps something of an 'added bonus' that came along with the incorporation of the Schengen *acquis* as a whole. It would probably have been considerably more difficult (if not impossible) to reach agreement on a provision like Article 54 CISA if the Schengen-agreements would have been concluded *within* the framework of the EU.

64 The SIS is a particularly effective instrument to this end, as a subject can be arrested at any Schengen-border if an alert to that extent has been entered into the SIS. As O'Keeffe has pointed out, the irony of judicial cooperation within the EU is therefore that "the objective of free circulation is paid for in terms of restrictions of the subject" (O'Keeffe 1999, p. 2).

65 Or, for that matter, any rules on conflict of law in international criminal law.

66 On positive law conflicts in international criminal law see in particular: Huet & Koering Joulin 2005, p. 204 *et seq.*

67 Vervaele 2005, p. 18.

68 Vervaele 2005, p. 18.

69 Mitsilegas 2006, p. 1300.

3.5.3 Further initiatives

Judging by the number of referrals by national courts under Article 42 TEU, guidance is often required when interpreting and applying Article 54 CISA in practice. Some difficulties in interpreting the provision arise out of the inherent complexity of the *ne bis in idem* principle generally, others are caused by the differences which exist between the systems of criminal law of the Schengen states, and therefore arise specifically in the context of the transnational application of the provision. Another, different issue is that the CISA does not provide for a mechanism for the resolution of positive conflicts of jurisdiction. For these and similar reasons, several initiatives have been brought, aimed and further strengthening the application of the *ne bis in idem* principle within the EU.

As discussed in chapter 1 of this study, the Republic of Greece submitted a proposal for a Framework Decision in 2003.⁷⁰ The main aim of the proposal, which was intended to replace Articles 54-58 CISA, was to offer further clarification of the transnational *ne bis in idem* rule, amongst other things by defining the concept of 'criminal offence' broadly.⁷¹ Furthermore, the proposal included an exception to the *ne bis in idem* rule in case of new and previously undiscovered evidence (*novum*),⁷² and something that could perhaps be seen as a soft law "mechanism" for the resolution of positive conflicts of jurisdiction: a list of criteria, relevant for the allocation of cases between the Member States.⁷³ Otherwise, the proposal left the resolution of jurisdictional conflicts entirely to the Member States. The Greek proposal met strong criticism. The UK government pointed out some "deficiencies in the English translation of the text, but also serious concerns as to its detail".⁷⁴ The Select Committee on European Scrutiny came to the conclusion that "it is evident that the proposal requires considerably more work to produce an acceptable text".⁷⁵ The proposal was never adopted, and the general consensus appeared to be that it might be better to wait for the Commission to take action, where matters under the Third Pillar are concerned.⁷⁶

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

71 In the proposal, criminal offences are defined as offences, covered by national provisions of criminal law as well as "administrative offences or breaches of the order", punishable by a fine (Article 1(a) of the proposed Framework Decision).

72 Article 2(2) of the proposed Framework Decision.

73 Article 3 of the proposed Framework Decision.

74 House of Commons, Select Committee on European Scrutiny, 28th Report, at para. 6.13 (available from www.publications.parliament.uk).

75 House of Commons, Select Committee on European Scrutiny, 28th Report, at para. 6.17.

76 The Law Society of England and Wales – Subcommittee E- Inquiry into the initiation of EU legislation, at para. 32 (<http://www.parliament.uk/documents/upload/LawSocietyEnglandWales.04.08.pdf>).

In 2005, the Commission did take action by launching a public consultation on the *ne bis in idem* principle and the issue of positive jurisdiction conflicts.⁷⁷ The Green Paper outlines the possibilities for the creation of a mechanism for allocating cases to an appropriate jurisdiction and addresses the need to clarify certain aspects of the interpretation and application of Article 54 CISA, and the possibility of doing away with the derogation laid down in Article 55 CISA.⁷⁸ So far, no Commission proposal has resulted from this consultation.

3.5.4 Article 54 CISA and mutual recognition

Article 54 CISA has been “an important landmark for the establishment of a multilateral international principle of *ne bis in idem*”.⁷⁹ The provision distinguishes itself from traditional expressions of the *ne bis in idem* principle on the national or federal level, in that it extends the scope of application of the principle to judicial decisions (as well as some other types of decisions) originating from all Schengen states, ‘finally disposing of’ a person’s trial.

According to Article 2 of Decision 1999/436, Articles 34 and 31 EU form the appropriate legal basis for the *ne bis in idem* provision in Article 54 CISA. What was originally a provision in an international agreement is therefore now secondary Union law within the Third Pillar, and has consequently become an instrument which is based on the application of the mutual recognition principle in criminal matters within the EU. Article 54 CISA lays down an obligation for the Schengen states to mutually recognise each others’ judicial decisions finally disposing of a trial, regardless of the differences which may exist between their national systems of criminal law, and regardless of whether a penalty was imposed in the end.

Article 54 CISA could be seen as the ‘flipside of the coin’ of the application of the mutual recognition principle in criminal matters, because it has *contributed* to human rights protection in the Third Pillar (“rather than diminished it”).⁸⁰ Contrary to other examples of instruments based on mutual recognition in criminal matters such as the EAW (which require coercive action by the requested state) the mutual recognition of decisions which finally dispose of someone’s trial has “protective, and not enforcement consequences”.⁸¹ In the parlance of the AFSJ, Article 54 CISA is the only mutual recognition instrument

77 COM (2005) 696 final, Green Paper on conflicts of jurisdiction and the principle of *ne bis in idem* in criminal proceedings.

78 Explanation of the Green Paper on <http://europa.eu/scadplus/leg/en/lvb/l16011.htm>. “If prosecutions were concentrated in a single jurisdiction, those concerned would not run the risk of being tried several times for the same offence in different States. The Commission considers that such a mechanism would complement the principle of mutual recognition”.

79 Vervaele 2005, p. 18.

80 Peers 1999, p. 185.

81 Mitsilegas 2006, p. 1300.

to date which serves the aims of *freedom* and *material justice*, rather than those of *security* and the *enforcement* of justice.

What Article 54 CISA and other mutual recognition instruments such as the EAW have in common is that “(t)he redefinition of territoriality within the European Union is key to both approaches”.⁸² Apart from being the main focus of the Council’s legislative agenda in the Third Pillar, the principle of mutual recognition has the effect of ‘inducing extraterritoriality’.⁸³ Within their scope of application, instruments of mutual recognition in criminal matters effectively remove territorial limitations which exist in the national systems of criminal law of the Member States, by treating the Union as one common judicial area, similar to a single state.⁸⁴ It follows from this that the ‘key’ to the transnational application of the *ne bis in idem* rule in Article 54 CISA is that the principle applies *between* the Schengen states much in the same way as *ne bis in idem* rules traditionally apply *within* one and the same state. There is an important difference on this point between Article 54 CISA and *ne bis in idem* provisions in other international instruments, which are not based on mutual recognition. As will be discussed later on in this study, this difference, which is instrumental in understanding the case law of the ECJ on Article 54 CISA, may sometimes have been overlooked by some commentators.

3.6 THE ADDITIONAL NECESSITY OF COORDINATING CRIMINAL INVESTIGATIONS AND PROSECUTIONS

3.6.1 Introduction

As mentioned before, although a transnational *ne bis in idem* principle forms a necessary instrument for the regulation of transnational justice, it is in itself not sufficient in order to achieve effective *coordination* of criminal investigations and prosecutions. Additional measures are still necessary to this end. At present, the *ne bis in idem* principle in Article 54 CISA leads to a system of “first come first served”.⁸⁵

3.6.2 Eurojust, the EJP, and Europol

Although there are several actors, active in the coordination of police and judicial cooperation in criminal matters (Eurojust, the EJP, and Europol⁸⁶)

⁸² Mitsilegas 2006, p. 1302.

⁸³ Mitsilegas 2006, p. 1281.

⁸⁴ ...an Area of Freedom, Security, and Justice.

⁸⁵ Vervaele 2005, p. 18.

⁸⁶ Furthermore, a Council Framework Decision has enabled the Member States to form so-called “joint investigative teams” (Council Framework Decision 465/2002 of 13 June 2002

it could be said that the instruments for effective coordination are overall still lacking within the EU. One of the main issues is that no clear division of tasks and competences has been established between them.⁸⁷

Eurojust⁸⁸ was born out of a request, made at the Tampere European Council, and was subsequently included in the Nice Treaty. The aim of Eurojust is to improve cooperation and coordination of prosecutions at the strategic level as well as in individual cases. Eurojust is the judicial counterpart of Europol, and a complement to the EJM.⁸⁹

The EJM⁹⁰ is 'merely' a network of contact points in courts or prosecution offices, in order to facilitate cooperation between them. According to its website, Europol⁹¹ (from "European Police Office") "is the European Law Enforcement Organisation which aims at improving the effectiveness and co-operation of the competent authorities in the Member States in preventing and combating terrorism, unlawful drug trafficking and other serious forms of international organised crime."⁹²

The issue of the coordination of judicial enforcement between the Member States was amongst those, raised in the 2005 'Green Paper on Conflicts of Jurisdiction and the Principle of *ne bis in idem* in Criminal Proceedings'.⁹³ So far, no Commission proposal has resulted from the consultation.

3.7 SUMMARY FINDINGS

Within the Area of Freedom, Security and Justice, instruments based on the mutual recognition principle bring national systems of criminal law within the scope of EU law.⁹⁴ As a result, the application of national criminal law

on joint investigative teams [2002] OJ L 162/1). This Framework Decision is based on articles 13, 15, and 16 of the 2000 Convention on mutual assistance in criminal matters (Convention established by the Council in accordance with Article 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between the Member States of the European Union [2000] OJ C 197/3). Almost all Member States have signed and ratified the Convention (except for Greece, Italy, Ireland and Luxemburg). For comments see Denza 2003, pp. 1064.

87 Weyembergh 2005, p. 1577.

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

89 See also Van den Wyngaert 2004, p. 206.

90 Joint Action 428/98 of 29 June 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on the creation of a European Judicial Network [1998] L 191/4.

91 Convention of 26 July 1995 on the establishment of a European Police Office, [1995] OJ C 316/2 ("the Europol Convention").

92 <http://www.europol.europa.eu/>

93 COM(2005) 696 final, Green Paper On Conflicts of Jurisdiction and the Principle of *ne bis in idem* in Criminal Proceedings. For comments see amongst others Van Bockel 2005.

94 At least, in certain cases.

may produce direct obligations under EU law for other Member States. By its very nature, as well as by virtue of its incorporation in the framework of EU law, Article 54 CISA forms an instrument of mutual recognition.

Article 54 CISA categorically obliges the Schengen states to refrain from further prosecution on the basis of the same facts, once a subject's trial finally been disposed of in another Member State. Within its scope of application, the *ne bis in idem* principle in Article 54 CISA does not set a minimum standard for the protection against double jeopardy, but (notwithstanding the exception possibilities contained in Article 55 CISA) establishes an unconditional mutual recognition obligation in the form of a prohibition, based on the notion that a high level of mutual trust exists between the Member States, regardless of the differences which may exist between national systems of criminal law.⁹⁵

3.8 HARMONISATION OF CRIMINAL LAW

3.8.1 Introduction

As mentioned before, the third 'aspect' of the criminal law dimension of EU law is the competence of the Union and the Community to harmonise the criminal laws of the Member States.

Several unsuccessful attempts had been made to enable the Community to harmonise the criminal laws of the Member States in certain areas during the 1960's and 1970's, and the 1970's saw a burst of legal literature on the topic of European criminal law.⁹⁶ In 1977, the European Parliament passed a resolution, urging the Commission to carry out further research into criminal law harmonisation in several problem areas, amongst which the distortion of competition, and the *ne bis in idem* principle.⁹⁷ After that, the matter disappeared from sight for several decades.

3.8.2 EU competences

Nowadays, the EU presents us with a very different picture. Ever since the entry into force of the Maastricht Treaty, harmonisation of criminal law "has been a major area of activities in the Third Pillar of the EU".⁹⁸ Nevertheless, approximation in the field of criminal law remains a sensitive and controversial

⁹⁵ and without any margin of discretion for the Member States, but subject to the exceptions contained in Article 55 CISA, if a declaration as referred to in that article was issued by a Member State.

⁹⁶ Sevenster 1992, pp. 35-37.

⁹⁷ Resolution of the European Parliament of 7 March 1977, [1977] OJ C 57/55. For comments, see: Sevenster 1992, p. 37.

⁹⁸ Weyembergh 2005, p. 1567.

area of EU activity, raising many of the same issues and objections as the application of the mutual recognition principle in that field.⁹⁹

One of the main problems is the narrow wording of the legal basis for harmonization in Article 31(e) TEU. According to that provision, common action on judicial cooperation includes “progressively adopting measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the field of organized crime, terrorism, and illicit drugs trafficking”. It has been argued that instruments which were adopted on the basis hereof, in particular the FDEAW, exceed this narrow basis.¹⁰⁰

3.8.3 Competences of the Community

The EC Treaty does not explicitly confer upon the Community the power to define criminal offences or to require the Member States to adopt criminal sanctions in Community legislation. It was therefore long believed by, amongst others, the Member States that the Community had no legislative competence in relation to criminal law and that the EU’s legislative competence in relation to criminal law was limited to the (rather narrow) basis provided for in Title VI TEU.¹⁰¹ The best known examples of a ‘criminal’ prohibition contained in a Community Directive is the money laundering Directive from 1991.¹⁰² A (voluntary) statement attached to the directive by the Member States ensures that criminal law measures would be enacted by them before the end of 1992.¹⁰³

The judgments of the ECJ in cases C-176/03 *Commission v. Council*¹⁰⁴ and C-440/05 *Commission v. Council* (ship source pollution)¹⁰⁵ have marked important developments in the area of harmonisation of criminal law. In case C-176/03 *Commission v. Council* the Court struck out Council Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law, because the criminal sanctions prescribed in that Framework Decision were based on Articles 29 *et seq* TEU. The Court specified that where the harmonizations of criminal law is needed to ensure the effectiveness of Community law, a measure must be adopted under the first pillar only, *because the competences of the EU within the Third Pillar would otherwise encroach upon the competences of the Community*. Because of their aim and their content, the sanctions provided for in the Framework Decision had as their main

⁹⁹ Dawes & Lynskey 2008, p. 131.

¹⁰⁰ Weyembergh 2005, p. 1569.

¹⁰¹ Dawes & Lynskey 2008, pp. 132-133.

¹⁰² Council Directive 91/308 of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering [1991] OJ L166/77.

¹⁰³ For comments, see: Peers 2000, pp. 146-147.

¹⁰⁴ Case C-176/03 *Commission v. Council* [2005] ECR I-7879.

¹⁰⁵ Case C-440/05 *Commission v. Council* [2007] ECR I-9097.

purpose the protection of the environment. These provisions could therefore have been properly adopted on the basis of Article 175 EC, and should not therefore have been adopted on the basis of provisions in the Third Pillar. Similarly, in case C-440/05 the Court found that the framework decision had as its primary objective the improvement of maritime safety and the protection of the environment and that the provisions requiring the Member States to adopt criminal law sanctions could have been validly adopted on the basis of the EC Treaty. When the application of effective, proportionate and dissuasive criminal penalties by the national authorities is essential for combating serious environmental crimes, the Community may require the Member States to adopt criminal law sanctions in order to ensure the *effet utile* of Community law on this point. The Court however found that the determination of the *type* and *level* of the criminal penalties to be applied falls outside of the Community's competence.

Although these judgments undoubtedly have important constitutional and institutional implications because of the differences which presently exist between the Community and the Third Pillar, the extent of the criminal law competences of the Community has remained in dispute. In both cases, the contested Framework Decisions required the Member States to introduce criminal sanctions only for certain, particularly serious environmental crimes. For now it remains to be seen whether the Community will also have certain competences to require the Member States to introduce criminal sanctions in policy areas other than environmental law.

3.9 EC COMPETITION LAW

3.9.1 Introduction

As was mentioned earlier, the fourth aspect of the punitive dimension of Community/EU law is formed by those areas of law in which the Community has the power to impose penalties directly on subjects. EC competition law is an important area of Community law in which the Community has the power to impose sanctions directly on undertakings. Another reason why EC competition law is of particular relevance to the topic of this study is that the majority of cases on the *ne bis in idem* principle which were brought before the Community courts concerned Article 81 EC. Article 3(1)(g) of the EC Treaty requires "a system ensuring that competition in the internal market is not distorted". The EC's main competition rules are contained in (now) Articles 81-89 of Chapter 1, part III of the EC Treaty and the European Community Merger Regulation ("ECMR"), and consist of three principal 'legs': the prohibition of cartels, the prohibition of abuse of a dominant position, and the

prohibition of entering into mergers, detrimental for competition.¹⁰⁶ At the time it was established, this commitment on the part of the EEC to promote competition in the marketplace was a significant step. Antitrust or competition law was “virtually non existent in Europe” and there was a considerable degree of state control in the markets of many of the original Member States.¹⁰⁷

In the remainder of this chapter, several aspects of EC competition law which are of particular relevance to the topic of this study will be examined in more detail. Those are: the nature of (EC) competition law, the system of enforcement of the EC competition rules and the fining practices of the Commission and the NCA’s, and the ‘international dimension’ of competition law.

3.9.2 The nature of competition law

As is well known, it is difficult to give a general definition of the concept of competition law or antitrust, or the purposes of having competition law, and much has been written on this matter over time.¹⁰⁸ Different authors, institutions, and administrations hold different views on this matter, and it could be said that there is a continuing “battle over the soul of antitrust”.^{109,110} As Bork explained in his acclaimed work “The Antitrust Paradox”, the question of the *rationale* of competition law and policy depends entirely on the question how one defines *the rationale of law in general*.¹¹¹ As there is no one single answer to either question, one can only identify a number of different, equally legitimate opinions on the nature and purposes of EC competition law and

106 The Treaty provisions have remained unchanged since their inclusion in the Treaty of Rome in 1957; the ECMR forms a later addition (the first ECMR, Regulation 4064/89, dates from 1989, the second, Regulation 139/2004 from 2004).

107 Slot 2004, p. 443.

108 Slot 2004, p. 444. Internationally, the terms ‘antitrust’ (which stems from US legal terminology) and ‘competition law’ (which is more commonly used in the context of Community law) are nowadays used interchangeably. Increasingly, EC competition law is briefly referred to as ‘antitrust’. Both terms may refer to Articles 81 and 82 of the EC Treaty, Regulation 139/2004 (the ECMR), and sections 1 and 2 of the Sherman Act, as well as section 7 of the Clayton Act and their respective application within the framework of EC and US law. Increasingly, EC competition law is referred to as ‘antitrust’, notably in Commission documents and statements.

109 Monti 2007, p. 2.

110 Fox 1987, p. 917.

111 Bork 1993, p. 50.

policy.¹¹² Additionally, these opinions have changed considerably over time.¹¹³

The essentially economic nature of competition law in general is seldom questioned.¹¹⁴ There is a widespread belief that the application of competition laws should be based on economic insight, because of the primarily economic nature of the *goals* of competition law.¹¹⁵ This economic rationalisation of competition law and policies finds its origins in the Chicago School of thought, which advocated the view that markets, untouched by government interference, were robust and reliable and considerably more likely to produce the best (*i.e.* most efficient) results for society than arbitrary, inefficient, and heavy-handed governments.¹¹⁶

Although the importance of economics for competition law and policy should not be underestimated, they do not exist in isolation from other policy areas. Various policy objectives have been pursued in the name of competition law, some of which were “plainly inimical” to the pursuit of allocative and productive efficiency.¹¹⁷

Monti argues that there are three (main) factors that influence competition law and policies: economics, politics, and institutions.¹¹⁸ It would seem difficult, if not impossible, to draw a clear distinction between those three. Competition has become an increasingly important issue on political agenda’s in many parts of the world, and this has led to increased political influence in antitrust. Conversely, economic ideas have influenced political thought, and there are several known examples of this.

Ehlermann & Laudati even argue that antitrust is *essentially* political in nature. One of the main reasons the authors give for their findings is that the degree of influence of politics on institutions depends on the degree of independence enforcers enjoy from their governments, and existing systems of antitrust vary considerably on this point.¹¹⁹

Apart from the various aspects mentioned above, most systems of competition law also possess a *moral* trait, something which they share with other

112 Although the terms “competition law” and “competition policy” are used interchangeably, the two are actually distinct. The concept of competition policy is broader, and is used to describe the way in which governments and institutions take measures to promote competitive market structures and behaviour, Jones & Suftrin 2004, p. 1.

113 Monti 2007, pp. 2-3.

114 Slot 2004, pp. 444-445 ; Jones & Suftrin 2004, pp.s’1-14. In a different sense: Ehlermann & Laudati 1998, p. 58.

115 ...such as the maximization of the wealth of society through the combined effect allocative and productive efficiency, or the protection of competition and (ultimately) consumers. See, amongst others: Slot 2004, p. 445; Whish 2008, pp. 19-22; Jones & Suftrin 2004; p. 1, Nazzini 2006, p. 497; Fox 2003; p. 149.

116 Fox 1987, p. 917.

117 Whish 2008, p. 19.

118 Monti 2007, p. 5.

119 Ehlermann & Laudati 1998, p. 58.

areas of law (in particular criminal law). Amongst other things, a ‘moral element’ in EC competition law is apparent from the wording of several provisions of secondary Community law.¹²⁰ Article 15 (2) of Regulation 17/62 for example stated that a fine shall be imposed on undertakings that “either *intentionally or negligently* (...) infringe Article 85 (1) or Article 86 of the Treaty” italics added.¹²¹ In itself, the fact that activities like price fixing and monopolisation are considered to be *morally reprehensible* is nothing new. There are several known examples of competition rules which were in force long before the birth of economic science. The *Codex Iustinianus* for example contained several provisions forbidding price-fixing and monopolisation in relation to clothes, fishes, and other goods. The punishment was quite severe: perpetual exile.¹²²

This raises the question whether competition law distinguishes itself from other areas of the law, in any fundamental way. Several authors have argued that this is the case, for various reasons. Nazzini for example contends that whereas other areas of the law “protect tangible or intuitively recognizable interests, competition law protects competition, a concept dependant, to a significant extent, on cultural, social, and economic constructs”.¹²³ This statement exemplifies a widespread belief that the underlying, economic goals of competition law are more “technical” in nature than the aims pursued in most other areas of law, and criminal law in particular.

Upon closer examination, these arguments raise several questions. One question is whether the same could not be said for many other areas of the law, such as for example criminal laws prohibiting fraud and insider trading. Furthermore, several of the interests protected by competition law could easily be translated into more ‘tangible’ and ‘intuitively recognizable’ concepts. To give a simple example: Nazzini himself holds a position in the Office of *Fair Trading*. To the general public this term is highly descriptive, because behaviour such as excessive pricing practices by a dominant firm or the forming of a secret cartel are examples of *economic* conduct which is widely regarded as “*unfair*”. In spite of its strong economic orientation, one can therefore only agree with Whish’s observation¹²⁴ that competition law does not exist in isolation from changing political ideas, but forms “*an expression of the current values and aims of society*” like any other area of the law.¹²⁵

120 Huet & Koering Joulin 2005, p. 54.

121 Corresponding to Article 23(2) of Regulation 1/2003; Article 14(2) of Regulation 139/2004; and the same article of Regulation 4064/89. Huet & Koering Joulin 2005, p. 54.

122 Weidmann 1954.

123 Nazzini 2006, p. 497.

124 ...and therefore: with Bork’s more general statement, cited above.

125 Whish 2008, p. 19.

3.9.3 The 'single market imperative'

In addition to the traditional functions of competition law in general,¹²⁶ EC competition law has also played a key part in the achievement of single market integration, a function which is commonly referred to as the "single market imperative".¹²⁷ Whereas the competition rules in the EC Treaty only take up anywhere between two and sixteen provisions (depending on how one counts)¹²⁸ a relatively much larger portion of primary and secondary Community law is concerned with free movement of goods, services, capital, and persons, and freedom of establishment. Although the elimination of obstacles to free movement within the internal market in itself contributes significantly to greater competition within the Community, the EC Treaty does not literally state the link between the free movement provisions on the one hand, and undistorted competition on the other. In order to understand this link, the competition provisions contained in the EC Treaty must be read in conjunction with the principles laid down in the earlier Treaty Articles, in particular Articles 2 and 3 EC.¹²⁹

The Spaak report, which paved the way for the Treaty of Rome, is the first available source which sheds some light on the functional link between the free movement rules and competition law: *'Des règles de concurrence qui s'imposent aux entreprises sont donc nécessaires pour éviter que des doubles prix aient le même effet que des droits de douane(...)'*.¹³⁰ As two sides of the same coin, competition and free movement together thus constitute the 'kernel' of the economic constitutional law of the Community.¹³¹ The single market imperative has continued to play an important role in EC competition law, even after the initial stages of market integration.¹³²

According to Whish, "EC competition law is applied by the Commission and the Community courts very much with the issue of single market integration in mind. Agreements and conduct which might have the effect of dividing the territory of one Member State from another will be closely scrutinised and

126 Whish 2008, pp. 19-23; similarly: Kapteyn-VerLoren van Themaat 2003, p. 649.

127 Whish 2008, p. 22.

128 Depending on whether one chooses to count only the two provisions laying down directly applicable prohibitions for private undertakings (Articles 81 and 82 EC); the entire competition chapter (Chapter 1 of part III of the EC Treaty) but not the articles on the approximation of laws (Whish 2008, p. 49); or all of the provisions just mentioned (Kapteyn-VerLoren van Themaat 2003, p. 645).

129 Whish 2008, pp. 49-51. Article 4 of the EC Treaty more generally proclaims the aim of adopting "an economic policy which is based on the close coordination of Member States' economic policies, on the internal market and on the definition of common objectives, and conducted in accordance with the principle of an open market economy with free competition".

130 P. 16 of the Spaak-report

131 Baquero Cruz 2002, p. 86; Kapteyn-VerLoren van Themaat 2003, pp. 646-647.

132 Slot 2004, p. 445.

may be severely punished.”¹³³ This functional link between the objectives of free movement and undistorted competition within the internal market is also reflected by the wording of art 81 EC, which requires an agreement to *affect* trade between the Member States for the purposes of that provision. In its judgment in *Grundig/Consten*¹³⁴ the ECJ held that “in this connection, what is particularly important is whether the agreement is capable of constituting a threat (...) to freedom of trade between Member States in a manner which might harm the attainment of the objectives of a single market between states”.¹³⁵

The progression of market integration has fostered competition, and strengthened the role of the competition policy in the Union.¹³⁶ It is therefore surprising that the reference to competition as a separate objective contained in Article 3(1)(g) EC would have been repealed by the Reform Treaty, which was not ratified at the time of writing this. However a Protocol on the Internal Market and Competition, annexed to the Reform Treaty, expressly provides that the internal market includes a system that competition is not distorted. There appears to be consensus that the Reform Treaty, if it would have entered into force, would not have changed the legal status of competition policy within the EU.¹³⁷

3.10 THE ENFORCEMENT OF EC COMPETITION LAW

3.10.1 Introduction

The first paragraph of Article 81 (1) EC prohibits all agreements which prevent, restrict, or distort competition within the internal market; the third paragraph merely states this prohibition “may be declared inapplicable” in certain cases, however without specifying *who* would be competent to issue such a declaration.¹³⁸ There is a difference with the wording of the corresponding provision of the ECSC Treaty on this point: Article 65(4) the ECSC Treaty did specify that “*the High Authority* shall have sole jurisdiction” to rule on the compatibility of any agreement with that provision.¹³⁹

¹³³ Whish 2008, p. 51.

¹³⁴ Joined cases 56 and 58/64 (*Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Community*). (*Grundig/Consten*) [1966] ECR 429. Barents points to a number of passages in the case law of the Court, confirming these points: Kapteyn-VerLoren van Themaat 2003, pp. 646-650.

¹³⁵ Para. 341 of the *Grundig/Consten* judgment.

¹³⁶ Slot 2004, p. 445.

¹³⁷ Whish 2008, p. 51.

¹³⁸ Ehlermann 2000, p. 539.

¹³⁹ According to Ehlermann, it is ‘remarkable’ that Articles 81 and 82 EC do not provide any indication how they should be applied, and by whom. Ehlermann 2000, p. 539.

In Article 83(2) EC, the Council is given the task of establishing detailed rules to give effect to the principles set out in Articles 81 and 82 EC.¹⁴⁰ In particular, those rules have to “ensure compliance with the prohibitions laid down in Article 81(1) and in Article 82 by making provision for fines and periodic penalty payments; lay down detailed rules for the application of Article 81(3)”, “take into account the need to ensure effective supervision”, and “simplify administration to the greatest possible extent”. Finally, Article 83(2) EC authorizes the Council “to determine the relationship between national laws and the provisions contained in this section or adopted pursuant to this article”.¹⁴¹

3.10.2 Regulation 17/62

In 1962, the job description set out in Article 83(2) EC resulted in Regulation 17/62, the first procedural regulation for EC competition law.¹⁴² In many respects, Regulation 17/62 only established a rudimentary framework for the enforcement of the EC’s competition rules, without a comprehensive procedural “toolkit”.¹⁴³ In response, the Community courts embarked on the task of further fleshing out the requisite procedural rules and legal guarantees on a case-by-case basis, to a considerable extent by drawing on principles of the legal systems of the Member States, and the standards of the ECHR.¹⁴⁴ The result is that many important jurisprudential developments in Community law took place in the context of EC competition law, including the first line of cases on the *ne bis in idem* principle. The creation of subjective rights was through case law, in the words of Eilmansberger, “a bit of an accident”.¹⁴⁵ Individual rights, stemming from Community law were a kind of by-product of the direct applicability of Community law.¹⁴⁶ Much of the body of procedural case law that developed under Regulation 17/62 was not codified by Regulation 1/2003, the successor to Regulation 17/62.¹⁴⁷

¹⁴⁰ Article 83(1) EC.

¹⁴¹ Article 83 (2) a-e EC.

¹⁴² For the meanwhile, until measures were adopted by the Council pursuant to Article 83 EC (therefore between 1957 and 1962), Article 84 EC provides that “the authorities of the Member States shall rule on the admissibility of agreements”. Needless to say, this did not happen. At the time, only Germany had a functioning competition authority in place, which was not empowered under German law to apply the Treaty provisions, and indeed refrained from doing so.

¹⁴³ Slot 2004, p. 447.

¹⁴⁴ Slot 2004, p. 447.

¹⁴⁵ Eilmansberger 2004, p. 1202.

¹⁴⁶ Eilmansberger 2004, p. 1203.

¹⁴⁷ Some procedural rules which derive from the case law of the Community courts did find their way into the new Regulation. The rule on burden of proof found in Article 2 of

Regulation 17/62 laid down a centralized system of EC competition law enforcement, by establishing a monopoly on the application of Article 81(3) EC for the Commission¹⁴⁸ and a corresponding notification requirement for businesses when entering into agreements.¹⁴⁹ Regulation 17 did not establish exclusive Commission competence for application of Article 81(1) or art 82 EC, a system which became known as the “procedural bifurcation” of Article 81 EC.¹⁵⁰

This complex, and perhaps somewhat curious system of enforcement of the EC competition rules should be understood in its historical context. According to Ehlermann, a centralized system of enforcement and oversight of this kind corresponded to “the needs, but also the concepts and perspectives, of the early years of the EC”.¹⁵¹ On the one hand, the (then) EEC was intended as a much less centralised system than the ECSC.¹⁵² On the other hand, the dominant legal and administrative culture of the early EC was nevertheless “rather centralist”, and the French preoccupation with uniformity may have played an important role in the initial architecture of Community law enforcement.¹⁵³

A centralized system was also necessary at the time, because the few national authorities which already existed in the Member States could not yet be entrusted with the task of uniformly enforcing the Communities’ competition rules. There was no ‘competition culture’ in existence in most (if not all) of the six Member States at the time, “comparable to what we have today”.¹⁵⁴ Advocates of active industrial policies were, over all, more influential than advocates of rigorous competition rules, and the dominant concept of how markets should be regulated varied considerably between the Member States.¹⁵⁵ Furthermore, many of the Member States generally lacked the kind of administrative infrastructure, necessary for the task of enforcing the EC competition rules. As a result, the Commission viewed its own monopoly on the application of Article 81(3) as a “natural” one, enabling it to firmly establish EC competition law throughout the Community, as well as to provide for the necessary legal certainty for actors through the system of prior notification of agreements laid down in Regulation 17/62.¹⁵⁶

Regulation 1/2003 for example codifies the existing case law on this point (see, amongst others case T-66/89, [1992] ECR II-1995, para. 69).

148 Article 9(1), Regulation 17/62.

149 Article 4(1), Regulation 17/62.

150 Venit 2003, pp. 548-549.

151 Ehlermann 2000, p. 540.

152 It was probably for this reason that, contrary to Article 9(4) ECSC (which refers to the High Authority of the ECSC), Article 81(3) EC does not refer to the European Commission.

153 Ehlermann 2000, p. 540.

154 Ehlermann 2000, p. 540, Slot 2004, p. 468.

155 Ehlermann 2000, p. 540.

156 Ehlermann 2000, p. 537.

Regulation 17/62 established a division of tasks and competences between the Commission and national competition authorities for the application of the EC competition rules, without in any way obliging them to align their national competition rules with the Treaty rules.¹⁵⁷ Article 9 of the Regulation stipulates that the national competition authorities of the Member States are competent¹⁵⁸ to apply Articles 81(1) and 82 EC, “as long as the Commission has not initiated any procedure”. In practice, this meant that there was little or no risk of double prosecutions *under EC competition law*, as the national competition authorities were automatically relieved of their duties as soon as the Commission stepped in to take action in any given case.¹⁵⁹ However, as more and more Member States proceeded to adopt systems of competition law over time the risk of double prosecution *under national competition law on the one hand and EC competition law on the other* gradually became more real.

The fact that Regulation 17/62 left the Member States free in the design and method of implementation of their national systems of competition law did (and does) not mean that the EC competition rules would have no legal implications for national laws at all. In *Walt Wilhelm*,¹⁶⁰ the ECJ faced the question what legal consequences might result for the Member States in the application of their national competition laws, from the fact that the Commission had already taken action in a certain case under Article 81 EC. In short, the case concerned an agreement between a group of German undertakings, and the *Bundeskartellamt* had initiated proceedings under German competition law, after the Commission had done the same on the basis of (now) Article 81 EC. The *Kartellsenat* of the *Kammergericht Berlin*¹⁶¹ stayed proceedings, in order to ask the Court whether national authorities are at liberty to “apply to the same facts the provisions of national law” after the Commission has initiated proceedings in the same case. Furthermore, the *Kartellsenat* inquired whether “the risk of its resulting in a double sanction imposed by the Commission (...) and by the national authority with jurisdiction in cartel matters renders impossible the acceptance for one set of facts of two parallel procedures”.¹⁶²

The ECJ held that Regulation 17/62 only dealt with the competence of the authorities of the Member States in so far as they are authorised to apply (now) Articles 81 (1) and 82 EC (in situations in which the Commission has not taken

157 ...in spite of calls from several authors to harmonise national competition laws. Slot 2004, p. 467.

158 although they were, on the basis of the Regulation, not directly obliged to do so.

159 Furthermore, as a consequence of their general obligations under Article 10 EC, the Member States could not apply stricter national competition rules to an agreement for which the Commission had granted an *exemption*.

160 Case 14-68 *Walt Wilhelm and others v Bundeskartellamt* [1969] ECR 1.

161 (a specialized court dealing with cases under German competition law).

162 Therefore, although the *Kartellsenat* did not mention this explicitly, it essentially asked whether this situation is capable of violating the *ne bis in idem* principle.

action), and does not apply to situations in which national authorities apply *national* competition laws.¹⁶³ Drawing a sharp distinction between national and EC competition rules, it stated that “Community and national law on cartels consider cartels from different points of view. Whereas article (...) 85 regards them in the light of obstacles which may result for trade between the Member States, each body of national legislation proceeds on the basis of the considerations peculiar to it and considers cartels only in that context.”. Furthermore, the ECJ considered that although the “economic phenomena and legal situations” concerned may well be “interdependent”, “one and the same agreement may, in principle, be the object of two sets of parallel proceedings”, for several reasons.¹⁶⁴ The first is that art 83 EC “authorizes the Council to determine the relationship between national laws and the Community rules on Competition”, and the Council had, in bringing about Regulation 17/62, made no use of this competence.¹⁶⁵ In principle, this would leave the national authorities free in the application of their national competition laws, regardless of any proceedings under Community law in respect of the same conduct. However, “if the ultimate general aim of the Treaty is to be respected, this parallel application of the national system can only be allowed in so far as it does not prejudice the uniform application throughout the common market of the Community rules on cartels and of the full effect of the measures adopted in implementation of those rules”. If there is a conflict between national law and Community law on this point, Community law therefore takes precedence.¹⁶⁶ This applies “(...) so long as a regulation adopted pursuant to Article 87(2)(e)¹⁶⁷ of the Treaty has not provided otherwise (...)”.¹⁶⁸

Turning to the question whether the risk of accumulation of penalties imposed “renders impossible the acceptance for one set of facts of two parallel procedures, the one Community and the other national”, the ECJ observed that “the special system of sharing jurisdiction between the Community and the Member States with regard to cartels” laid down in Council Regulation 17/62 does not preclude the possibility of different proceedings, each pursuing distinct ends.¹⁶⁹

First off, it should be born in mind that the *Walt Wilhelm* judgment dates from 1968. At the time, there were virtually no systems of competition law in place in the Member States comparable to what we have today outside of Germany, and the internal market was still quite far removed from its completion. Most if not all markets within the EC were therefore considerably

163 Para. 3 of the *Walt Wilhelm* judgment

164 Para. 3 of the *Walt Wilhelm* judgment.

165 Para. 4 of the *Walt Wilhelm* judgment.

166 Para. 6 of the judgment.

167 (Now: Article 83(2) EC).

168 Para. 9 of the judgment.

169 Para. 11 of the judgment.

less intertwined (or perhaps rather: integrated) than they are today. For such reasons alone it is questionable whether *Walt Wilhelm* is still good law in the context of the present landscape of EC competition law and policy. Another, different question is what the rule from *Walt Wilhelm* was, precisely. Most commentators agree that it is sufficiently clear from *Walt Wilhelm* that the grant of an individual *exemption* by the Commission under Article 81(3) would prevent the *subsequent* application of national law to the same agreement.¹⁷⁰ What is not clear from the judgment is whether the same reasoning could for example have applied to negative clearances of notified agreements by the Commission under Article 81(1) EC, or to comfort letters.

As mentioned before, the main purpose of the centralized system of enforcement of Regulation 17/62 was to enable the Commission to create a “culture of competition” in Europe.¹⁷¹ It could be said that, in the 40 years of its existence, Regulation 17 was successful in achieving this goal. Amongst other things, this is evidenced by the fact that all Member States now have national systems of competition laws in place, which are closely modelled after the example of the EC’s competition rules. As a result of this (more or less) ‘spontaneous’ harmonisation of the national competition laws of the Member States, the harmonisation of competition law in the Union is nowadays “a fact of life”, which made the subsequent decentralisation of the system of enforcement of the EC competition rules possible.¹⁷²

3.10.3 Developments that led to the modernisation of the system of enforcement of EC competition law

Several practical problems resulted from the system of enforcement of Regulation 17/62. The ordoliberal interpretation given to the Treaty provisions by the Commission (and sanctioned by the Community courts) led to a very broad application of those provisions. As a result, Article 81(1) EC covers a large number of agreements between undertakings in the EU (as well as a relatively smaller number of agreements between undertakings *outside* of the EU).¹⁷³ Because of the procedural bifurcation of Article 81 EC laid down in Regulation 17/62, only the Commission could declare the prohibition of Article 81 EC inapplicable, and this was only possible if the agreement had been formally notified.¹⁷⁴ In other words: ‘everything that was not permitted was pro-

170 See: Monti 2007, p. 395, footnote 13.

171 COM (99) 101 final, White paper on modernisation of the rules implementing Articles 85 and 86 of the EC Treaty.

172 Slot 2004, p. 467.

173 Due to the fact that the ‘net’ of the application of the provision was cast very wide in the Commission’s practice and the case law of the Community courts. Venit 2003, p. 549; Slot 2004, p. 468.

174 Venit 2003, p. 549.

hibited'.¹⁷⁵ Because of the fact that this narrow procedural funnel created by the system of notifications could not be (legitimately) circumvented, it soon became congested.¹⁷⁶ In order to avert "total administrative paralysis", the Commission developed block exemptions, published notices and communications giving certain categories of agreements de-facto green light ("*de minimis*"¹⁷⁷), and launched the informal instrument of "comfort letters", taking the place of formal negative clearances or exemptions.¹⁷⁸

During the 1980's and 1990's, there was growing criticism of this situation.¹⁷⁹ Most critics targeted the Commission's perceived legal formalism, the considerable backlog in the handling of notifications,¹⁸⁰ the lack of transparency, and the uncertainty resulting out of the lack of legal effect of the comfort letters.¹⁸¹ Furthermore, the new ECMR demonstrated that the Commission *was* capable of delivering adequately motivated, formal decisions in complex cases, within short (and strict) time limits.¹⁸² It was clear that filings under the ECMR received priority over notifications under Article 81 EC, and added to the Commission's sheer workload.¹⁸³

Increasingly the need for reform was felt, even so by the Commission, which had jealously guarded its monopoly over the application of Article 81(3) EC for the previous four decades. One of the main reasons given by the Commission was that its scarce resources were consumed by notifications of agreements and requests for exemptions, rather than the more important tasks of handling complaints and the investigating of secret cartels.

Another, different matter was that the *necessity* (as well as the justification) of the Commission's monopoly had gradually diminished. The EU was expanding rapidly, making the effectiveness and efficiency of a centralized system of oversight, run by a single body based in Brussels, far less evident than before. In the course of 40 years, the Commission had succeeded in developing a comprehensive Community competition policy, backed up by a well-developed body of case law before the Community courts, and supplemented by the experience gained from the Commission's 40 years of decisional practice. By the turn of the century, the landscape of competition law and policy in the EU was fundamentally different from that of 1962.¹⁸⁴

175 Calvani 2003, p. 420.

176 After the first year, the Commission received more notifications than it could handle and this overload remained in subsequent years.

177 Commission notice – Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, [2004] OJ C101/81.

178 Ehlermann 2000, p. 541; Slot 2004 p. 468.

179 Ehlermann 2000, p. 541.

180 A few thousand notifications were usually still awaiting scrutiny by the end of each year.

181 Ehlermann 2000, p. 544.

182 Ehlermann 2000, p. 542.

183 Slot 2004, p. 468.

184 Ehlermann 2000, p. 545.

Because of this, the authorities and courts in several of the Member States had become increasingly involved in the implementation of the EC competition rules from the mid-1990's onward, therefore well ahead of the adoption of Regulation 1/2003. Furthermore, and perhaps most importantly, *all* of the Member States had over time established functioning systems of competition law, modeled after the example of the EC competition rules, as well as specialized authorities to enforce those rules.

3.10.4 Modernisation and decentralisation through Regulation 1/2003¹⁸⁵

The new Regulation 1/2003 entered into force in May of 2004, concurrently with the Union's main wave of enlargement.¹⁸⁶ It fundamentally changed the enforcement of EC competition law in several ways.¹⁸⁷ The two main features of the 'modernised' system of enforcement set out in Regulation 1/2003 are the abolition of the notification system (which is replaced by the direct application of Article 81(3) EC),¹⁸⁸ and the decentralisation of the authority and responsibility involved in applying the EC's competition rules.¹⁸⁹ Under the new system, the Commission, and the authorities in the Member States (the National Competition Authorities or "NCA's") as well as the courts in the Member States are fully involved in all aspects of the implementation of the EC competition rules, and share parallel competences for their application.

Several Commission notices and guidelines were published alongside Regulation 1/2003 (the 'modernisation package'):

- Council Regulation 411/2004 (concerning air transport between the Community and third countries)¹⁹⁰;
- Commission Regulation 773/2004 relating to the conduct of proceedings by the Commission,¹⁹¹

185 Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1 ("Regulation 1/2003").

186 Venit 2003, p. 546.

187 "A legal and cultural revolution" (Ehlermann 2000, p. 537). See also: Slot 2004, p. 468; and Calvani 2003, p. 420. Monti disagrees. He argues that the changes that led to modernisation and decentralisation of the system of enforcement of the EC competition rules took place over several years, and that the adoption of Regulation 1/2003 was "merely the final and decisive step towards a different policy model". Monti 2007, p. 394.

188 in French: "*exception légale*".

189 Reichelt 2005, p. 746.

190 Council Regulation (EC) 411/2004 of 26 February 2004 repealing Regulation (EEC) 3975/87 and amending Regulations (EEC) 3976/87 and (EC) 1/2003, in connection with air transport between the Community and third countries [2004] L68/1.

191 Commission Regulation (EC) 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty [2004] OJ L123/18.

- Commission Notice on cooperation within the network of Competition Authorities,¹⁹²
- Commission Notice on the cooperation between the Commission and the courts of the Member States;¹⁹³
- Commission Notice on the handling of complaints by the Commission;¹⁹⁴
- Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 EC;¹⁹⁵
- Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty;¹⁹⁶
- Guidelines on the application of Article 81(3) of the Treaty¹⁹⁷

3.10.5 The regulation of the relationship between the Treaty provisions and national competition laws in Article 3 of Regulation 1/2003

As such, Regulation 1/2003 does *not* harmonize national competition laws, national procedures, or sanctions in national law. Contrary to Regulation 17/62 however, Article 3 of Regulation 1/2003 does regulate some important aspects of ‘the relationship between articles 81 and 82 of the Treaty and national competition laws’, in order to ensure the effective and uniform application of the EC competition rules throughout the Community. Article 3(1) of the Regulation states that, where the NCA’s apply their national laws to agreements, decisions or concerted practices which may affect trade between the Member States,¹⁹⁸ the NCA’s *must also* apply the Treaty rules¹⁹⁹ to those agreements, decisions, and concerted practices.²⁰⁰ This regulation of the relationship between national and EC competition law in Article 3 of regulation 1/2003 has brought the national competition laws, in their application in situations which affect trade between the Member States *within the scope* of Community

192 Commission Notice on cooperation within the network of Competition Authorities [2004] OJ C101/43.

193 Commission Notice on the cooperation between the Commission and the courts of the Member States [2004] OJ C101/54.

194 Commission Notice on the handling of complaints by the Commission [2004] OJ C101/65.

195 Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 EC [2004] OJ C101/78.

196 Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, [2004] OJ C101/81.

197 Guidelines on the application of Article 81(3) of the Treaty [2004] OJ C101/97.

198 According to settled case law, this notion implies “that it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that the agreement or practice may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States”.

199 ...therefore *alongside* their national competition laws.

200 ...within the meaning of Article 81 EC, see Article 3(1) of the Regulation.

law, much in the same way as full harmonization of national competition law would have.

It is worth noting that there is a difference on the point of Article 3 with the original proposal for Regulation 1/2003, which foresaw that the NCA's would apply *only* their national competition laws if the agreement would *not* (appreciably) affect trade between the Member States, and only the Treaty provisions if it *would*. In both cases, the aim of the provision is to guarantee a level playing field "with respect to the body of law to be applied within the Network".²⁰¹ This change in the wording of the provision resulted from the debate on Regulation 1/2003 which took place in the Council in 2002.²⁰² Little is known of the precise reasons for this amendment of Article 3 of Regulation 1/2003. It has been suggested that an important reason for it was that it is not always *a fortiori* certain whether or not an agreement 'affects trade between the Member States'.²⁰³ In order to minimize the amount of time and effort wasted in the event that it would turn out, later on in the proceedings, that the NCA proceeded on the basis of the wrong provision, the Regulation enables the NCA's to apply *both* sets of rules at the same time. This is only possible because of the fact that the competition laws of the Member States are fully aligned with EC competition law.²⁰⁴

The regulation of the relationship between articles 81 and 82 of the Treaty and national competition laws, as it is set out in Article 3 of Regulation 1/2003 raises some questions. The second and third paragraphs of art 3 of Regulation 1/2003 provide that:

"2. The application of national competition law may not lead to the prohibition of agreements, decisions by associations of undertakings or concerted practices which may affect trade between the Member States but which do not restrict competition within the meaning of Article 81(1) of the Treaty, or which fulfill the conditions of Article 81(3) of the Treaty or which are covered by a Regulation for the application of Article 81(3) of the Treaty. Member States shall not under this Regulation be precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings.

201 Atanasiu 2004, p. xxvi.

202 Atanasiu 2004, p. xxvi.

203 The *de minimis*-rule (Commission notice – Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, [2004] OJ C101/81) operates on the basis of a 5% aggregate market share threshold, on any of the markets potentially affected by the agreement. It can be difficult to predict whether this threshold is met.

204 Another possible explanation could be that the larger Member States that had retained certain distinctive features in their national laws sought to protect those distinctive features, amongst other things in this particular way (Monti 2007, p. 406). Upon closer examination of Article 3 Regulation 1/2003, it would appear that this may provide an explanation for the exceptions contained in that article, but not necessarily for the overall system of joint application of national and EC competition law.

3. Without prejudice to general principles and other provisions of Community law, paragraphs 1 and 2 do not apply when the competition authorities and the courts of the Member States apply national merger control laws nor do they preclude the application of provisions of national law that predominantly pursue an objective different from that pursued by Articles 81 and 82 of the Treaty.

A distinction can therefore be made between three types of situations: a.) situations in which *only* provisions in national competition law are applied by an NCA (in situations which do not appreciably restrict trade between the Member States); b.) situations in which *both* national competition laws and the Treaty provisions are applied by an NCA, and c.) situations in which *only* the Treaty provisions are applied, by an NCA or the Commission.

The situations under a.) and c.) are not necessarily problematic. Under a.), the provisions of the EC Treaty do not apply, because the agreement does not appreciably affect trade between the Member States. Under c.), only Community law is applied. In both cases there will no (direct) interaction between the Treaty provisions and national competition laws. In situations under b.) however, the NCA's simultaneously apply both their national laws as well as the Treaty rules in the same case, subject to the conditions set out in the provision. The provision "is designed to ensure the supremacy of EC competition law"²⁰⁵ by stipulating that, in their application, the national rules may not lead to a result which is *more strict* than that under Article 81 EC or Article 82 EC, but with one exception: in the next sentence the provision states that this shall not preclude stricter national laws prohibiting unilateral behavior.²⁰⁶ This system of parallel application of national and Treaty competition rules is perhaps somewhat similar to sailing a catamaran, which consists of two symmetrical hulls (the national competition provisions on the one side and Articles 81 and 82 EC on the other), that move in the same direction.

Article 3 of the Regulation does not specify how the fine should be calculated, in the event that a provision of national law and a Treaty provision are applied simultaneously in the same case.²⁰⁷ I would argue that in those situations the rule that "a general requirement of natural justice" demands that any penalty must be taken into account where two different competition rules are applied to the same situation will lead to the result that only one penalty may be imposed in the end, in spite of the fact that two separate sets of rules are applied to the same situation.

²⁰⁵ Monti 2007, p. 406.

²⁰⁶ As far as is known, only Germany has made use of this possibility by maintaining stricter national legislation, which prohibits the abuse of a dominant position.

²⁰⁷ It merely specifies that the application of national competition laws may not lead to the "prohibition" (etc.).

It is important to note that Article 3 of Regulation 1/2003 has not, as such, *introduced* the notions of direct effect or primacy of the competition provisions in the Treaty, but merely *confirms* these two concepts, in a specific way. Direct effect of Articles 81(1) and 82 EC was already established by the ECJ through its case law as early on as 1974.²⁰⁸ As regards the *primacy* of the EC competition rules, it is established case law that “if the ultimate general aim of the Treaty is to be respected, this parallel application of the national system can only be allowed in so far as it does not prejudice the uniform application throughout the common market of the Community rules on cartels and of the full effect of the measures adopted in implementation of those rules”.²⁰⁹

The general notion of the primacy of EC competition law contained in this statement by the ECJ is therefore merely given a more specific and concrete elaboration in the first sentence of Article 3(2) of Regulation 1/2003: “the application of national competition law may not lead to the *prohibition* of agreements, decisions by associations of undertakings or concerted practices which may affect trade between the Member States but which do not restrict competition within the meaning of Article 81(1) of the Treaty, or which fulfill the conditions of Article 81(3) of the Treaty”.²¹⁰

Article 3 Regulation 1/2003 stipulates that exceptions to this rule (and therefore to the primacy of the EC competition rules) are admissible, firstly, in case of stricter national laws which prohibit unilateral behavior, and secondly, in case provisions of national law “predominantly pursue an objective different” from the Treaty provisions. As regards the first exception (for stricter national rules prohibiting unilateral behavior), Slot has pointed out that in Article 3(2) can not be seen as “a blank cheque discharging NCA’s and national courts from their duty under article 10” (EC).²¹¹ It may therefore (perhaps) be expected that this exception will be interpreted restrictively by the Community courts.²¹² Whereas Regulation 1/2003 has introduced the full application

208 italics added. For Community law in general in *Van Gend & Loos* (Case 26/62, *Van Gend en Loos v. Administratie der Belastingen*, [1963] ECR 3); more specifically for Article 81(1) in *BRT* (Case 127/73 *Belgische Radio en Televisie v SV SABAM and NV Fonior (BRT)* [1974] ECR 313) and for Article 82 in *Sacchi* (Case 155/73 *Giuseppe Sacchi* [1974] ECR 409). See also: Eilmansberger 2004, pp. 1201-1202.

209 This was held by the ECJ for the first time in para. 6 of the *Walt Wilhelm* judgment. As is well known, the primacy of Community law in general follows from the Court’s judgment in *Costa/ENEL* (Case 6/64, *Flaminio Costa v E.N.E.L.* [1964] ECR 1141); *Walt Wilhelm* has confirmed this specifically for the EC’s competition rules. See also Norberg 2003, p. 6 (speech).

210 italics added.

211 Slot 2004, p. 469, see also Article 16 of Regulation 1/2003.

212 For instance: in the interest of protecting the “level playing field” created by the uniform application of competition rules throughout the Community. Little can be said with any degree of certainty of this point because so far no case has been brought before the Community courts on the interpretation of Article 3(2) of Regulation 1/2003.

of (all parts of) Article 81 EC, it may therefore, somewhat ironically, have removed some of this for Article 82 EC (in certain cases).

As for the second exception, the third paragraph of art 3 of Regulation 1/2003 provides that the first and second paragraphs of the same provision shall not preclude “the application of provisions of national law that *predominantly pursue an objective different*” from the Treaty provisions.²¹³ This statement is reminiscent of the considerations of the ECJ in *Walt Wilhelm*, where it held that the special system of sharing jurisdiction between the Community and the Member States with regard to cartels does not preclude the possibility of different proceedings, each “pursuing distinct ends”.²¹⁴ Clearly, the problem here is that of defining the *objectives* and *purposes* of competition law in general, and establishing whether national laws “predominantly” pursue the same objectives.²¹⁵ Again, it cannot be assumed that this is a ‘blank cheque’ for the Member States to maintain in force provisions in national law (under a different heading than that of “competition law”), which may in their application contradict the EC’s competition rules.²¹⁶ As has been mentioned before, there is no single answer to the question what the purposes and functions of competition law are in general. It is worth noting here that recital 9 of Regulation 1/2003 broadly states that Articles 81 and 82 EC have as their objective “to protect competition in the market”. It may therefore be expected that the Community courts will avoid hair splitting, by interpreting the objectives of EC and national competition rules broadly (and therefore the exception narrowly).

One might consider that, in spite of the radical changes to the system of enforcement Articles 81 and 82 EC brought about by modernisation and decentralisation, the regulation of the relationship between national laws and the Treaty provisions in Article 3 of Regulation 1/2003 is somewhat vague, and raises a number of questions.²¹⁷ At first glance, it would appear that Article 3 Regulation 1/2003 is to an important extent still based on some of the considerations of the ECJ from *Walt Wilhelm*, and does not (adequately) reflect the development of a competition culture in the Member States, which has made decentralisation and modernisation possible. At the same time, what

213 italics added. This rule was included in order to avoid any conflict with national laws concerning unfair trading practices; see also recital 9 of Regulation 1/2003. For comments, see Ullrich 2005, pp. 6 *et seq.*

214 Para. 11 of the judgment.

215 For a more detailed discussion of various aspects of this issue see in particular: Ullrich 2005.

216 Along somewhat similar lines, the Court held in *Delimitis* (Case C-234/89, *Delimitis v. Henninger Bräu* [1991] ECR I-935) and later elaborated in *Masterfoods* (Case C-344/98, *Masterfoods v. HB* [2000] ECR I-11369) that national courts cannot take decisions which run counter to a decision already adopted by the Commission, see also Article 16 of Regulation 1/2003.

217 Slot 2004, p. 469.

the third paragraph of Article 3 regulation 1/2003 *does* confirm (albeit implicitly) is that nowadays, competition laws in the Member States “predominantly” pursue *the same objective* as the Treaty rules. Otherwise the exception provided for would be devoid of any purpose.

In conclusion, the general impression conveyed by Article 3 of Regulation 1/2003 is one of political compromise, reflecting the sensitivities surrounding competition law and policy in the Member States.²¹⁸ As was the case for its predecessor Regulation 17/62, the necessary fine-tuning to the Community courts: “*without prejudice to general principles and other provisions of Community law*”.

3.10.6 Concurrent jurisdiction and the allocation of cases

Under the system of enforcement of Regulation 1/2003, at least 27 national competition authorities²¹⁹ presently share parallel competences for the application of the Articles 81 and 82 EC.²²⁰ Article 3(1) Regulation of 1/2003 obliges all these NCA’s to apply the Treaty provisions alongside their national competition laws where trade between the Member States may be appreciably affected (therefore in the majority of the cases handled by them). Recital 18 of Regulation 1/2003 states the *objective* that cases should be dealt with by a single authority. However, the Regulation does not establish the method according to which cases are allocated between the NCA’s and the Commission, nor does it empower any organ or body to assign cases to a particular authority.²²¹

Furthermore, the competence of the NCA’s to apply articles 81 and 82 EC is not geographically restricted in any way in Regulation 1/2003.²²² Although some limitations may result from national provisions, which preclude NCA’s from prosecuting anticompetitive behavior, predominantly affecting markets outside of the “domestic territory” of that Member State, the vast majority of cases decided under Articles 81 and 82 EC will have significant cross border elements, and therefore produce effects in several Member States. The only

218 In fact, Germany initially objected to the proposed regulation, arguing in favour of a system that allowed for the application of stricter national laws, with the Treaty provisions serving only as a minimum standard. Monti 2007, p. 401, footnote 40.

219 Under Article 36 of Regulation 1/2003, the Member States are free to divide the different functions of competition authorities up between different authorities, responsible for the application of Articles 81 and 82 EC. Several Member States have done so; for some further comments see Gauer 2004, p. 189.

220 Pursuant to Article 35 of Regulation 1/2003, all Member States have empowered one or more of their national authorities to apply Article 81 and 82 of the Treaty.

221 For example in the event of a conflict over the allocation of a case. Brammer 2005, p. 1385.

222 Brammer 2005, pp. 1385-1386. This is logical; it would seem contradictory to restrict the competence of the NCA’s to apply provisions of the Treaty which have as their purpose the protection of competition *in an area without internal frontiers* (the EU).

jurisdictional rule contained in Regulation 1/2003 is Article 11(6), which relieves the NCA's of their competence, when the Commission initiates proceedings.²²³ This provision (also known as the Commission's "trump card")²²⁴ may perhaps to some extent exclude the possibility of parallel investigations at the national and Union level, but *not* the subsequent initiation of a second set of proceedings by the Commission (after an NCA has previously dealt with a case), or the possibility of parallel investigations by two or more NCA's. Furthermore, the Commission is not under any obligation to invoke this provision in the event of multiple proceedings.²²⁵

Because there are no 'hard' allocation rules in Regulation 1/2003, which could prevent two or more NCA's from pursuing the same case, the NCA's and the Commission must cooperate in order to achieve the objective that cases should be dealt with by a single authority. To this end, recital 15 of Regulation 1/2003 provides that the Commission and the NCA's "should together form a network of public authorities applying the Community competition rules in close cooperation". This network (the European Competition Network, or "ECN"), was established in tandem with the adoption of Regulation 1/2003.²²⁶ The main purpose of the ECN is to ensure the efficient and effective division and allocation of work between the various authorities, as well as the consistent application of the EC competition rules,²²⁷ through the continuous exchange of information between the authorities.²²⁸

Regulation 1/2003 lays down several specific cooperation obligations for the Commission and the NCA's, which take place within the Network. Pursuant to Article 11(1) Regulation 1/2003, the Commission is obliged to transmit to the NCA's 'the most important documents' relating to its enforcement activities.²²⁹ In turn, the NCA's are *obliged* to inform the Commission (as well as *able* to inform the other NCA's)²³⁰ when they take 'the first formal investigative measure' in a case,²³¹ and 30 days in advance when taking a *decision*

223 Brammer 2005, p. 1385.

224 ...or, jokingly, as the Commission's "nuclear button".

225 As Brammer has tentatively pointed out, one other possible mechanism for solving allocation problems is provided by Article 20(7) Regulation 1/2003. This provision enables the Commission to put cases on the agenda of the Advisory Committee, which may serve as a forum for the discussion of case allocation (Brammer 2005, p. 1403). Paragraph 62 of the Commission Notice on cooperation within the network of Competition Authorities provides a further indication in this respect.

226 Although the ECN was already functional before the entry into force of Regulation 1/2003.

227 Burnside & Crossley 2005, p. 236.

228 Smits 2005, p. 178.

229 Smits 2005, p. 178.

230 Before, or afterwards 'without delay'.

231 Article 11(3) Regulation 1/2003.

in a case.²³² This obligation only applies where a case may affect trade between the Member States; information on purely national cases is not shared within the network. There is therefore a risk that some information does not reach the other members of the network, because an NCA mistakenly believes that the conduct in question does not affect markets in other Member States. On the other hand, it is also important that the network is not flooded by information on cases of relatively minor importance.

The Commission Notice on cooperation within the Network of Competition Authorities (the “Network notice”) provides some further guidance on the division of work between the authorities.²³³ The criteria set out in the notice follow three main principles, referred as the three “e’s”: effect, end and evidence.²³⁴ In general, an NCA is considered “well placed” to deal with a case if the following cumulative criteria are met:

- The litigious conduct has substantial direct (actual or foreseeable) *effects* on markets in the Member State of the NCA;
- The NCA is effectively able to bring the conduct to an *end* by adopting a decision ordering the undertaking to terminate the infringement, and by imposing fines;
- The NCA is in a position that it can gather the requisite *evidence* to do so.²³⁵

The Commission itself is considered to be particularly well placed where more than three Member States are affected. It is important to note that the above criteria (which are purely indicative)²³⁶ do not so much apply to the allocation of cases, but rather to their *re-allocation*. According to the Network Notice (at point 6), “(i)n most instances the authority that receives a complaint or starts an ex officio procedure will remain in charge of the case. Re-allocation of a case would only be envisaged at the outset of a procedure where either that authority considered that it was not well placed.”

It follows from this that case allocation *strictu sensu* does not take place within the ECN; the division of the workload within the network is based on the premise that authority to deal with a case will *normally* be the first authority to be seized, or to commence proceedings *ex officio*. Re-allocation may, *exceptionally*, be considered within the ECN but cannot be enforced against an NCA, except by the Commission, if it decides to initiate an investigation.²³⁷

232 Along with a summary of the case, as well as the draft decision or any other documents which may provide insight into the direction of the decision (article 11(4) Regulation 1/2003).

233 See: para. 2 of the notice (“*Division of work*”).

234 Smits 2005, p. 179.

235 Smits 2005, p. 179.

236 Brammer 2005, p. 1387.

237 Brammer 2005, p. 1387.

In principle, each NCA therefore “retains full discretion in deciding whether or not to investigate a case”.²³⁸

Rizzuto has labeled the system of enforcement of Regulation 1/2003 as an “*emergent asymmetrical multi-level system of regulatory enforcement*”²³⁹ It is multilevel because, although the Commission lacks the power to direct the NCA’s, the empowerment of the NCA’s has not taken place at the expense of the Commission’s powers. The system is *asymmetrical* because only the Commission has the power to “displace the locus” of investigation (from an NCA to itself). Finally, the whole body of rules and principles involved in the enforcement of EC competition law *emerges* gradually in the case law of the Community courts, ensuring that the rule of law is respected by the Commission and the NCA’s through the application of procedural and evidential principles.²⁴⁰

3.10.7 The absence of a *ne bis in idem* provision from Regulation 1/2003

In spite of the differences between the Third Pillar and EC competition law, there are also some similarities apparent between the system of parallel competences of Regulation 1/2003 and the cooperation between the NCA’s and the Commission within the ECN on the one hand, and cooperation in police and judicial matters on the other. In both cases, the mechanisms of cooperation between authorities facilitate the cross-border sharing of information and gathering of evidence, and the enforcement of penalties. Furthermore, neither criminal law nor Regulation 1/2003 provides for the regulation of jurisdiction²⁴¹; with the exception of Article 11(6) Regulation 1/2003 there are no conflict of law rules in either field. This would normally give rise to an increased risk of parallel or consecutive prosecution by the authorities in several Member States in the same case. Needless to say, multiple prosecutions are nearly always undesirable; they are costly both for defendants as well as for authorities (and therefore for society), and increase the risk of conflicting decisions.²⁴²

The difference now is that, whereas Article 54 CISA provides for a transnational *ne bis in idem* rule in the framework of Third Pillar law, Regulation 1/2003 does not provide anything similar for EC competition law. The next question is whether there might be a specific *reason* for this omission.

Could the reason for this be that the *ne bis in idem* rule in Article 54 CISA is specifically linked to the objective of free movement within an area of

238 Para. 5 of the Network notice.

239 Rizzuto 2008, p. 296.

240 Rizzuto 2008, p. 297.

241 At least not in any unambiguous, or legally binding terms.

242 Wils 2003 I, p. 137.

Freedom, Security, and Justice, whereas the same objective does not (or to a lesser extent) apply in the context of EC competition law? This would not seem to be the case. As discussed in para. 3.9.3 of this study, free movement is also an important objective for EC competition law. Under the free movement provisions in the Treaty, undertakings have the right to buy and sell goods, provide services, and establish themselves in other Member States. If an undertaking runs the risk of being subjected to multiple prosecutions by different NCA's as a result of the fact that it has exercised its right to conduct its business in markets in other Member States, this would undermine the aim of free movement, in the same way as multiple prosecutions under criminal law would. Clearly, it can not be maintained that there is any difference between the Union's free movement aims in the First and Third Pillar,²⁴³ nor is there any difference between undertakings and natural persons on this point.

Could it then perhaps be argued that a *ne bis in idem* rule would not be appropriate in the context of competition law in general because of the different aims of competition law on the national and supranational level? After all, the EC competition rules are functionally linked to the objective of free movement and have as their aim to create a level playing for businesses throughout the Union, whereas free movement within the single market is not necessarily amongst the aims of *national* competition laws.

Again, the answer must be: no. National systems of criminal law do not count free movement amongst their objectives either, and yet article 54 CISA applies precisely to prosecutions under (national) criminal law. Clearly, the mere fact that a provision of national law does not *aim to serve the interests of the Community or the EU* does not mean that it cannot *fall within the scope of Community or EU law*.

If the objective of free movement is no reason for omitting a *ne bis in idem* rule in Regulation 1/2003, the next question could for example be: is there perhaps a link with the mutual recognition principle? As mentioned before, and in spite of continuing strong criticism, mutual recognition is the 'corner-stone' of cooperation in criminal matters. The *ne bis in idem* principle in Article 54 CISA is an instrument of mutual recognition, both by its nature as well as through its incorporation into the EU *acquis*. A striking difference between the Third Pillar and EC competition law is that Regulation 1/2003 does not provide for any mutual recognition obligations between the NCA's.

This point deserves some further discussion. It is well known that the mutual recognition principle finds its origins in the internal market. The principle derives from the ECJ's famous *Cassis de Dijon*-judgment²⁴⁴ and was further developed by the Commission and the Council, for the specific purpose

243 On the contrary, the free movement aims underlying the Third Pillar cannot *a fortiori* apply to a lesser extent or be given less consideration in Community law.

244 Case 120/78 *Rewe v. Bundesmonopolverwaltung für Branntwein* [1979] ECR 649.

of furthering the integration of the internal market, without the need to harmonise Member States' national legislation.²⁴⁵ The Commission and the Council have elaborated the principle of mutual recognition as an *alternative* to harmonisation, in those areas of EU law where measures are deemed necessary, but the desired result cannot be achieved through legislative means, or at least not without considerable delay.

EC competition law developed along different lines. The Commission's competences for the application of the competition provisions in the EC Treaty are quite unique in Community law. Whereas in most other policy areas, the Community relies on the Member States to implement and enforce Community measures, Regulation 17/62 enabled the Commission to implement the Community's competition policies directly, and to a considerable extent on its own accord. Because of these special Commission competences, there was initially considerably less *need* for the Community to rely on the Member States for the implementation of its competition policies, and therefore less need for harmonisation measures in the field of competition law. The question is therefore what (if any) conclusions could be drawn from the fact that the mutual recognition principle has not played a part in the development of EC competition law, if the main reason for this is found in the special competences which were given to the Commission in Regulation 17/62.²⁴⁶ The decentralisation of the enforcement of EC competition law "is nothing more than a "return to normal" for an area of law which was subject for an important part – the application of art. 81(3) EC – to exclusive enforcement by the Commission".²⁴⁷

This leads to the conclusion that there was simply *no specific reason* why a *ne bis in idem* rule was not provided for in Regulation 1/2003. Whilst Article 3 of Regulation 1/2003 establishes a level playing field as far as the *substantive* competition rules are concerned, the Commission did not deem it necessary to harmonize the *procedural* rules for their enforcement.²⁴⁸

245 See in particular the Commission's interpretative communication (Communication from the Commission concerning the consequences of the judgment given by the Court of Justice on 20 February 1979 in case 120/78 ('Cassis de Dijon') [1980] OJ C256/2), and Council Resolution of 28 October 1999 on mutual recognition [2000] OJ C141/5.

246 One could even speculate that if a different system would have been chosen, therefore a system in which the Community would have relied on the Member States to implement its competition policies, there would probably have been every reason to introduce a mutual recognition rule in EC competition law. In fact, the reasons for introducing a mutual recognition principle in EC competition law would probably have been rather similar to the reasons for introducing the mutual recognition principle in the internal market, and later on in the Third Pillar. In the same way as in the context of the internal market and the Third Pillar, obstacles to free movement would otherwise result from the existing differences between national systems of law which cannot (immediately) be removed through harmonisation.

247 Lenaerts & Gerard 2004, p. 318.

248 Waelbroeck 2004, pp. 472-473.

Whilst Regulation 1/2003 has as its objective that each case shall be handled by a single authority, several types of problem may occur if for any reason this objective is not met.²⁴⁹ As Waelbroeck and Wils already pointed out in 2002, when the proposal for Regulation 1/2003 was still being discussed in the Council, this lack of procedural regulation creates an “obvious risk of conflicting decisions and double jeopardy situations”.²⁵⁰ At the time the proposal for Regulation 1/2003 was drafted and adopted, the Council and the Commission may perhaps not have been fully aware or convinced of the need to include a *ne bis in idem* rule in Regulation 1/2003, or, alternatively, a deliberate choice may have been made to leave this matter in the hands of the Community courts. As I have remarked earlier on in this chapter, it would appear that Regulation 1/2003 still ‘leans’ on its predecessor to an extent, in the way it is drafted. It is therefore conceivable that the inclusion of a *ne bis in idem* rule was (initially) not considered, simply because Regulation 17/62 did not contain anything similar either. The difference is of course that there was considerably less need for a *ne bis in idem* principle under the old, centralized system of enforcement of Regulation 17/62, and this has –at least in theory- changed now that at least 27 NCA’s share full parallel competences in the field of EC competition law.

Furthermore, as Wils has rightfully pointed out, the application of the *ne bis in idem* principle has become “all the more obvious” now that Article 3 of Regulation 1/2003 stipulates that the NCA’s and the Commission must apply “nominally the same rule” when applying EC competition law and national competition rules.²⁵¹

3.10.8 Fining in EC competition law: fines imposed by the European Commission

Fines are the principal tool for the enforcement of the EC competition rules.²⁵² In the same way as penalties in criminal law, competition fines serve a double purpose: to punish and deter.²⁵³ It could be said that the legislative framework governing EC competition fines is rather sparse.²⁵⁴ Article 15(2) of Regulation 17/62 merely stated that the Commission “may by decision impose on undertakings (...) of from 1000 to 1.000.000 units of account, or a sum in excess thereof but not exceeding 10% of the turnover in the preceding business year of each of the undertakings participating in the infringement”, where under-

²⁴⁹ Wils 2004 II, pp. 445-446.

²⁵⁰ Waelbroeck 2004, pp. 472-473, Wils 2004 II, pp. 445-448.

²⁵¹ Wils 2004 II, p. 447.

²⁵² Völcker 2007, p. 1285; Gerardin & Henry 2005, p. 2.

²⁵³ Gerardin & Henry 2005, p. 2.

²⁵⁴ Völcker 2007, p. 1285; Gerardin & Henry 2005, p. 4.

takings intentionally or negligently infringe the Competition rules. Furthermore, the provision specifies that regard shall be had to both the *gravity*, and the *duration* of the infringement.²⁵⁵ In the *Pioneer*-case, the Court confirmed that this should be understood as meaning the companies' global turnover, both in terms of products as well as geographically.²⁵⁶

In the years before 1998, the Commission amply availed itself of the wide margin of discretion afforded by these flexible parameters. The Commission's freedom to set fines was only "circumscribed by the fundamental principle of Community law, such as the rule of proportionality, the principle of non-discrimination, and the principle of *ne bis in idem*".²⁵⁷ These limitations resulted entirely from the process of judicial review. The only statutory limitation was (and still is) 10% of the undertaking's worldwide turnover.

The Commission's fining policy was repeatedly criticized for its non-transparency,²⁵⁸ and was sometimes compared to a lottery, with random figures 'magically' appearing as the outcome in the decision.²⁵⁹ The only point of reference was formed by the undertakings *turnover*. This point of departure was criticized by Wils, who pointed out that in order to achieve effective deterrence, the fine should either reflect the harm caused by the infringement, or the profit yielded by the undertaking from its behaviour, plus a margin which takes into account the odds of being detected.²⁶⁰ Gyselen more generally suggested that the Commission "should take inspiration from the US experience and issue sentencing guidelines containing a transparent set of minimum tariffs for fines."²⁶¹

In 1998, the Commission published its first Guidelines on the setting of fines.²⁶² The 1998 Guidelines set out a four-step process for the determination of the fine. In the first step, the gravity and duration of the infringement is assessed. In this stage, the Commission would take into account the relative importance of the undertaking in the market concerned, amongst other things on the basis of its worldwide turnover, when establishing the basic amount of the fine.²⁶³ In the second step, the basic amount of the fine is increased or decreased, taking into account any aggravating or attenuating circumstances. In step three, cooperation under the leniency notice taken into account, which may lead to a reduction or even the non-imposition of a fine. In step 4, the Commission could increase or decrease the fine for various reasons, for

255 For comments, see: Gyselen 1993, pp. 70-75.

256 Cases C 100-103/80 *Pioneer* [1983] ECR 1825.

257 Gerardin & Henry 2005, p. 5.

258 Gyselen 1993, p. 63.

259 Gerardin & Henry 2005, p. 7.

260 Wils 1998, p. 255, Gyselen 1993 p. 69.

261 Gyselen 1993 p. 75.

262 Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty [1998] OJ C 9/3.

263 Gerardin & Henry 2005, p. 9.

example to reflect the gain that was had by the undertaking as a result of its infringement, or the circumstance that a firm may be in difficulty, and may not be able to pay its fine.

The geographical *scope* of the infringement was therefore not directly taken into account in any way, in setting the fine.²⁶⁴ The geographical scope of an infringement was only *indirectly* accounted for in the first ‘step’ of the setting of the fine, because the Commission would take into account the relative importance of an undertaking (which is, amongst many other factors, also determined by the size of the markets in which it operates).

The 1998 guidelines were widely criticized, for various reasons.²⁶⁵ Firstly, it must be said that they are linguistically rather vague. Secondly, although the guidelines for the first time provided some insight into the functioning of the ‘black box’ of fine-setting, it still remained impossible for undertakings to predict the fine they might incur for an infringement with any degree of certainty. A third point of criticism was that the Commission, in practice, set the basic amount of the fine (step 1) in a random and arbitrary manner (the so-called “lump sum-approach”),²⁶⁶ which effectively deprived the next three steps of any real meaning. The result was that the majority of fines were challenged before the Community courts. For the most part, and in spite of the fact that the Commission was very successful in defending the guidelines before the Community courts, the 1998 guidelines therefore fell short of achieving their aim of bringing transparency.²⁶⁷

In June of 2006, the Commission published new Guidelines, which were presented as a “refinement” of the 1998 guidelines.²⁶⁸ In reality, the new guidelines mark a significant change in the Commission’s fining practice. In addition to some minor amendments, the new guidelines introduce three major changes. Firstly, the “lump sum-approach” is replaced by an approach based

264 The only exception known to me is the fact that the Commission held, in several decisions, that an infringement was of a *serious* nature, due to its *limited* geographical scope. See, for example, Commission decisions *Industrial and medical gases*, (2003/207/EC, Case COMP/E-3/36.700, *Industrial and medical gases* [2003] OJ L84/1) and *Interbrew* (2003/569/EC, Case IV/37.614/F3 PO/*Interbrew and Alken-Maes* [2003] OJ L 200/1). The reasoning behind it is that an anticompetitive behavior can be particularly harmful in markets with a very small geographical scope, because the effect of the behaviour is acutely felt in such markets.

265 Völcker 2007, p. 1286.

266 Völcker 2007, p. 1287.

267 Gerardin & Henry 2005, p. 13-14.

268 Guidelines on the method of setting fines imposed on undertakings which infringe articles 81 and/or 82 EC [2006] OJ C210/2. See also the Commission’s press release (IP/06/857, ‘Competition: Commission revises Guidelines for setting fines in antitrust cases’). According to Competition Commissioner Neelie Kroes (from the press release): “(t)hese revised Guidelines will better reflect the overall economic significance of the infringement as well as the share of each company involved. The three main changes – the new entry fee, the link between the fine and the duration of the infringement, and the increase for repeat offenders – send three clear signals to companies. Don’t break the anti-trust rules; if you do, stop it as quickly as possible, and once you’ve stopped, don’t do it again”.

on the undertaking's *turnover* in the affected markets, the 'value of sales'. Secondly, the basic amount of the fine is increased by 100% for each year that the infringement continued. Thirdly, the Commission may increase the fine by up to 100% for each prior conviction for a similar infringement. Recidivism has therefore become a new factor, and one of considerable importance.²⁶⁹

Under the new guidelines, the fine is determined in two main steps. Firstly, the Commission determines the basic amount of the fine, which "will be related to a proportion of the value of sales, depending on the degree of gravity of the infringement, multiplied by the number of years of infringement."²⁷⁰ In the second step, this basic amount is increased or decreased, amongst other things taking into account aggravating or mitigating circumstance, deterrence, leniency, and the firm's ability to pay the fine.

The first step is therefore of primary importance. The basic amount of the fine takes into account the value of the undertaking's sales of goods or services to which the infringement directly or indirectly relates in the relevant geographic area within the EEA. The calculation of the 'value of sales' has three dimensions: that of the relevant product market, the relevant geographic market, and the duration of the infringement.²⁷¹ The 2006 Guidelines furthermore provide that "(w)here the geographic scope of an infringement extends beyond the EEA (e.g. worldwide cartels), the relevant sales of the undertakings within the EEA may not properly reflect the weight of each undertaking in the infringement. This may be the case in particular with worldwide market-sharing arrangements. In such circumstances, in order to reflect both the aggregate size of the relevant sales within the EEA and the relative weight of each undertaking in the infringement, the Commission may assess the total value of the sales of goods or services to which the infringement relates in the relevant geographic area (wider than the EEA), may determine the share of the sales of each undertaking party to the infringement on that market and may apply this share to the aggregate sales within the EEA of the undertakings concerned. The result will be taken as the value of sales for the purpose of setting the basic amount of the fine."²⁷² Völcker argues this may be motivated by "the Commission's desire to avoid arguments that it is seeking to punish undertakings for behavior that has an impact only outside the Commission's jurisdiction and may thus be subject to sanctions imposed by other competition authorities, notwithstanding the Community court's refusal to recognise the principle of non bis in idem in this context".²⁷³

269 This requires a *formal finding of an infringement*, rather than the imposition of a fine. In the case of a continued infringement, only the continuation of a cartel after an earlier finding of an infringement will be viewed as a repeat offence, for the imposition of a repeat offender charge. See: Völcker 2007, p. 1304.

270 Guidelines, at para.19.

271 Völcker 2007, p. 1293.

272 Guidelines, at pnt. 18.

273 Völcker 2007, p. 1295.

The geographic 'limitation' this suggests is something new, but does not offer any 'hard' guarantees; the Commission makes it abundantly clear that it will take into account the *worldwide* value of sales, were it feels that such is appropriate in view of the "weight of each undertaking in the infringement" (in particular where market sharing agreements exist between undertakings which operate in worldwide markets). In sum, it would appear from the Guidelines that the Commission, when establishing the basic amount of the fine, will *normally* take into account the value of sales in the EEA, but will not hesitate to take into account the *worldwide* value of sales if the infringement affects global markets. The Guidelines do not foresee the possibility of taking into account any penalties imposed by any authorities, other than the Commission.

3.10.9 Fining in EC competition law: fines imposed by NCA's

The procedural framework to which the NCA's are subject when imposing fines is primarily defined by national law.²⁷⁴ The nature of the bodies designated by national law to apply both the Treaty provisions as well as the corresponding provisions of national law varies from one Member State to the next. In some Member States, a single administrative body combines the functions of investigation, prosecution and decision making. In others (such as Ireland) the enforcement of competition law is entirely a matter of criminal law, and penalties are imposed by designated criminal courts. Yet other Member States have adopted a two tier approach, whereby administrative penalties are imposed by the national competition authority, and criminal sanctions may be sought by the public prosecutor.²⁷⁵

Although the NCA's have been granted full powers for the application of Articles 81 and 82 EC, any fines and penalties are determined by the NCA's in accordance with national law.²⁷⁶ Under national rules on jurisdiction, the NCA's ability to act is typically restricted to the national territory of the Member State in one way or another.²⁷⁷ In other words: the NCA's will typically only be willing and/or able to impose fines for anticompetitive behaviour taking into account the impact of the infringement on markets within their own territory, under the relevant provisions of national law.²⁷⁸ A clear example of this is found in the decision of the Dutch competition authority (*Nederlandse Mededingingsautoriteit*; the "NMa") in the shrimp cartel case.²⁷⁹ In that de-

²⁷⁴ Lenaerts & Gerard 2004, p. 319.

²⁷⁵ Lenaerts & Gerard 2004, p. 320.

²⁷⁶ Article 5 Regulation 1/2003, see: Lenaerts & Gerard 2004, p. 322.

²⁷⁷ Lenaerts & Gerard 2004, p. 319.

²⁷⁸ Lenaerts & Gerard 2004, p. 319.

²⁷⁹ NMa decision 2269/326, published in *Tractatenblad* 2003/947.

cision, the NMa imposed fines on eight shrimp wholesalers (all members of the same association of shrimp wholesalers) and on four Dutch and three German associations of shrimp producers, as well as one Danish association of shrimp producers. The associations of undertakings and their members had infringed Article 81 EC as well as the corresponding provision of the Dutch Competition act.²⁸⁰ By agreeing on fixed minimum prices and by limiting output of north sea shrimp. In calculating the fine, the NMa only taking into account the effect of the cartel on the Dutch shrimp market.²⁸¹

At first glance, it would seem that this approach to the “decentral application” of Article 81 EC by the NCA’s would result in a clear division of tasks between them. In reality however, this is not necessarily the case at all, because there are no rules for conflicts of jurisdiction between the Member States in competition cases. It is altogether possible that in a given case several competition authorities will impose penalties for the same anticompetitive conduct, because each NCA regards the conduct as primarily “affecting” or “having an effect on” its domestic markets.

Secondly, it is rather contradictory that under the system of enforcement of EC competition law established by Regulation 1/2003, the NCA’s are fully *competent* as well as legally obliged to apply EC competition law, but only *able to impose fines* taking into account the domestic ‘effects’ of the infringement. The competition provisions in the EC Treaty have as their very goal the protection of competition in markets *throughout the Community* (“*may affect trade between the Member States*”). In order to enable the NCA’s to apply Articles 81 and 82 in full in keeping with the general obligation of the Member States of Article 10 EC, fines imposed for breaches of EC competition law should therefore necessarily take into account the impact of anticompetitive behavior *throughout* the EEA, and not just in one Member State. Besides the question to what extent it is possible at all to clearly establish what the effects of anticompetitive behaviour are in one Member State, if one considers that the markets of the Member States are to a considerable extent integrated, EC competition law is *by its very nature* not intended ‘for domestic use only’. Such would seem to be contrary to the very nature and goals of Community law.

Contrarily, Lenaerts & Gerard argue that the NCA’s may not impose fines for “conduct or effects occurring outside their state”, because Regulation 1/2003 does not confer jurisdiction on NCA’s (or national courts) over conduct

280 Article 6 of the *Mededingingswet*.

281 Para. 304 of NMa decision 2269/326. According to this paragraph of the decision, “in applying the prohibition of Article 81 EC decentrally, the (Director General of the) NMa limits himself to actions which affect or may affect competition in the Dutch market when imposing sanctions” (translation by myself). This does not stand in the way of the NMa imposing a fine on an undertaking in another Member State, as long as anticompetitive conduct by those undertakings “has an effect on the competitive conditions in the Dutch market” (para. 305 of the decision).

or effects “occurring outside their state”.²⁸² This assessment is clearly wrong. As we have seen in chapter 3 of this study, Regulation 1/2003 simply does not regulate the procedural side of the application of EC competition law by the NCA’s. The question whether or not the NCA’s have jurisdiction to impose fines in certain cases is therefore a matter of national law. As we have just seen in the example of the shrimp cartel case, there is an important difference between anticompetitive “conduct” on the one hand, and the “effects” of anticompetitive conduct on the other, as far as the question whether these fall outside of the territory of a Member State is concerned. In the shrimp cartel case, the NMa reasoned that it was competent to impose fines on undertakings in other Member States for infringement committed outside of the Dutch geographical territory, if this conduct produced *effects* on the competitive conditions in Dutch markets. Along similar lines, it is very likely that most, if not all Member States exert “extraterritorial” jurisdiction in one form or another; it all depends on the definition of “territoriality” under national law. When the NCA’s apply the EC competition rules, their competence to impose fines “extraterritorially”, taking into account the impact of anticompetitive behaviour *throughout the EEA* will in my opinion necessarily follow from the very obligation of the NCA’s to apply the EC competition rules, laid down in Regulation 1/2003.

3.10.10 Leniency

Secret cartels²⁸³ can be hard to detect, but the odds of ‘getting caught’ will (at least in theory) increase over time. Leniency has proven to be a very effective way of using the incentive that this creates for cartel members to ‘get out while they can’, to the benefit of enforcers. The mechanism of leniency is simple; the first cartel member to ‘fink’ will (normally) receive full immunity from fines; some others may receive a reduction, depending on the order in which full disclosure is given by them, and their willingness to cooperate with the Commission’s investigation. In practice, this mechanism will often lead to a ‘race to confess’ between the members of a cartel; as soon as it is sufficiently clear that a cartel will be, or has been compromised, there is every reason for each of its members to come forward with as much information as possible, as quickly as possible. This possibility undermines the stability of cartels.

²⁸² Lenaerts & Gerard 2004, p. 322.

²⁸³ It would seem that the instrument of leniency is primarily aimed at secret, *horizontal* cartels. The reasoning behind this is that vertical agreements would be easier to detect, and there would therefore be less need for the instrument of leniency (ECN model leniency programme, available from http://ec.europa.eu/comm/competition/ecn/model_leniency_en.pdf, at para. 10.)

The main strength of leniency programs lies in the fact that by its nature, the future of a clandestine arrangement between competitors is uncertain. A leniency application on the other hand *does* offer a degree of certainty once it has been made, but only if it automatically *guarantees* immunity from fines. Both the US authorities as well as the Commission have recognised that the *predictability* of the mechanism of leniency, and more in particular the *certainty* of immunity from fines once an application has been made is vital to the overall success of the instrument of leniency. This is confirmed by the subsequent leniency notices, which are briefly discussed below.

The first leniency notice was the 1996 Commission 'Notice on the non-imposition or reduction of fines in cartel cases'.²⁸⁴ It was replaced with the 2002 Commission 'Notice on immunity from fines and reduction of fines in cartel cases'.²⁸⁵ The reason for replacing the 1996 notice with the 2002 notice was, according to the Commission, that the effectiveness of the its leniency program "would be improved by an increase in the transparency and certainty of the conditions on which any reduction of fines will be granted".²⁸⁶

Upon the entry into force of Regulation 1/2003, the Commission's 2002 Leniency notice remained unchanged. Instead, the ECN encouraged the NCA's to adopt leniency programs, and published an "ECN model leniency program" on its website.²⁸⁷ According to the first point of the introduction of the model leniency program, "an application for leniency to one authority is not to be regarded as an application for leniency to another authority. It is therefore in the interest of the applicant to apply for leniency to all competition authorities, which have competence to apply Article 81 of the EC Treaty in the territory which is affected by the infringement and which may be considered well placed to act against the infringement."

Undertakings can be discouraged from filing for leniency if they have to submit multiple filings to several NCA's. The aim of the ECN model leniency program is to minimize the discrepancies which may exist between the leniency programs of the NCA's, as well as the burden associated with multiple filings, by introducing a uniform model for applications. The model is not legally binding, but the NCA's "commit to use their best efforts" to align their programs with the ECN model. This is hardly a guarantee. Clearly, multiple leniency filing will remain a less attractive option for undertakings than single ones, even if the authorities concerned have brought their leniency programs in line with the ECN model.

284 Commission Notice on the non-imposition or reduction of fines in cartel cases [1996] OJ C207/4.

285 Notice on immunity from fines and reduction of fines in cartel cases [2002] OJ C45/3.

286 Pnt. 5 of the 2002 Commission notice.

287 ECN model leniency programme, available from http://ec.europa.eu/comm/competition/ecn/model_leniency_en.pdf.

Following a public consultation²⁸⁸ in 2006, the Commission published a third revised Leniency notice in that same year.²⁸⁹ In the 2006 Leniency notice, the thresholds for immunity are clarified, and a 'marker system' is introduced. Under the marker system, an application can be accepted on the basis of only limited information. A 'marker' may then be granted which protects the applicant's place in the 'queue' for a certain period, allowing it to gather the necessary information and evidence in order to qualify for immunity.²⁹⁰ Although many points were further clarified and specified, few material changes were made to the overall system.

Double jeopardy potentially poses a problem for undertakings when applying for leniency, and therefore a problem for the instrument of leniency itself. If undertakings may find themselves in the situation that immunity is granted by one NCA, but declined by another, they may choose not to apply for leniency at all. Furthermore, if the application is successful and immunity is granted by one or more NCA's, there is no guarantee that other NCA's or the Commission will refrain from taking further measures. This will undoubtedly undermine the willingness of cartel members to come forward at all. If the outcome of a leniency application is equally uncertain as the future of the cartel, this could very well strengthen the resolve of its members to keep it as quiet as possible.

Another, equally serious problem lies in the fact that some Member States²⁹¹ have introduced the (cumulative) possibility of criminal and administrative sanctions in competition cases, in case of particularly serious infringements of the competition rules; other Member States (such as The Netherlands) are considering it. If immunity from fines is granted by the NCA of one Member State, this does not necessarily lead to immunity from criminal law sanctions within one and the same state (as this is the prerogative of the Public Prosecutor and not of the competition authority), let alone criminal law penalties in another Member State. The risk of criminal sanctions, imposed on CEO's or other employees, may therefore discourage undertakings from making a leniency application in any Member State.

3.10.11 Settlements in EC competition law

The possibility of using settlements as an instrument for the enforcement of EC competition law has recently become available to the Commission. Two

288 Comments available at: http://ec.europa.eu/comm/competition/cartels/legislation/leniency_consultation.html.

289 Commission Notice on Immunity from fines and reduction of fines in cartel cases [2006] OJ C298/17.

290 Para. 15 of the Notice.

291 The UK, Ireland, and Germany.

types of settlements have been introduced in EC competition law (in 2004 and 2008, respectively):

- i. the commitments procedure laid down in Article 9 Regulation 1/2003; and
- ii. the settlement procedure which was introduced by Article 10a of Commission Regulation 773/2004, and by the Commission Notice on the conduct of settlement in cartel cases.

The main difference between the two is that the commitments procedure laid down in Article 9 of Regulation 1/2003 is a *substitute* for decision finding an infringement and imposing remedies for its termination under Article 7 of Regulation 1/2003, but not for a decision imposing a fine under Article 23 of Regulation 1/2003.²⁹² Under Article 9 Regulation 1/2003, the Commission may accept commitments from a party and adopt a decision, making those commitments binding, but a settlement procedure under Article 9 Regulation 1/2003 should not result in the imposition of a fine.

The procedure introduced by Article 10a of Commission Regulation 773/2004 on the other hand is based on Articles 23 and 7 of Regulation 1/2003 and *does* involve the imposition of a fine.²⁹³ Under this procedure, a small reduction of the fine (10%) may be offered in streamlined proceedings in exchange for a formal settlement submission from the undertaking containing a recognition of the infringement and a statement of acceptance of the range of fines, an a waiver of an oral hearing and the right to further access to the file.²⁹⁴

In both cases, there is a clear difference with the instrument of leniency. Settlement procedures will only take place after the Commission has collected the requisite knowledge and evidence of a cartel infringement, whereas leniency may apply situations in which a cartel member comes forward and provides the Commission with this information and evidence.²⁹⁵

An important difference between the settlement procedures laid down in Articles 9 Regulation 1/2003 and 10a of Commission Regulation 773/2004 is that it appears that the outcome of the procedure of Article 9 Regulation 1/2003 probably cannot become *final (res iudicata)*. Article 9(2) Regulation 1/2003 allows for the case to be reopened under certain circumstances, and it is expressly provided that a decision under Article 9 Regulation 1/2003 does not prevent the competition authorities and courts of the Member States to find an infringement in the same case.²⁹⁶ The outcome of the procedure of Article 10a of Commission Regulation 773/2004 on the other hand is simply

²⁹² Wils 2008, p. 338.

²⁹³ Wils 2008, p. 339.

²⁹⁴ Wils 2008, p. 340.

²⁹⁵ Wils 2008, p. 341.

²⁹⁶ Wils 2008, p. 346.

a fine based on Articles 23 and 7 of Regulation 1/2003, which will (eventually, after any appeals if those appeals were not successful) become *res iudicata*. As will be discussed later on in this study, this means is that a decision under Article 10a of Commission Regulation 773/2004 will eventually acquire *ne bis in idem* effect (in the same way as an “ordinary” fine imposed by the Commission), whereas a decision under Article 9 Regulation 1/2003 will *not*.

3.10.12 ‘Criminalization’ of competition law?

Although Article 23(5) Regulation 1/2003 stipulates that fines in competition cases “shall not be of a criminal law nature”, the possibility of enforcing Articles 81 and 82 EC by means of criminal law sanctions is foreseen in and accommodated by the Regulation in Article 5.²⁹⁷ By allowing for the possibility of criminal sanctions for breaches of the EC competition rules, the Council appears to have rejected the view that Articles 81 and 82 are somehow “inherently” not criminal in nature, and that criminal sanctions are thus excluded as a matter of principle.²⁹⁸

There is a tendency in the Member States to criminalize the enforcement of competition law.²⁹⁹ This may include criminal sanctions, imposed on undertakings (in Member States where criminal prosecution of legal entities is possible), as well as on against natural persons. This trend is “clearly inspired by the US example”.³⁰⁰ An important argument in favour of criminal law sanctions in EC competition law is that a sanction such as the imprisonment of directors and CEO’s is believed to produce a much stronger deterrent effect than an (administrative) fine, imposed on the undertaking itself.³⁰¹ Although

297 Article 5 of Regulation 1/2003 states that “the competition authorities of the Member States shall have the power to apply Articles 81 and 82 of the Treaty in individual cases. For this purpose, acting on their own initiative or on a complaint, they may take (...) decisions (...) imposing fines, periodic payments or any other penalty provided for in their national law”. According to Recital 8, Regulation 1/2003 does not apply to national laws “which impose criminal sanctions on natural persons except to the extent that such sanctions are the means whereby competition rules applicable to undertakings are enforced”.

298 Wils 2006, p. 16. According to Wils there is nothing in the EC Treaty to suggest that the Council could not allow for (or even require) criminal law penalties for the enforcement of the competition rules.

299 Wils 2006, p. 16. According to Wils, Estonia, Ireland, the United Kingdom, France, Cyprus, the Slovak Republic, Denmark, Greece, Germany, Austria, and Malta are among the Member States which have adopted the possibility of criminal law sanctions infringements of the Treaty competition provisions in their national legislation.

300 Wils 2006, p. 23.

301 See, amongst others, Wils 2006 p. 24. As Wils has argued on several occasions, the level of fines in EC competition law is presently too low to produce a sufficiently deterrent effect, which would require extremely high fines. Such high fines would be unacceptable, for several reasons. Wils’ arguments on this point find strong support in Motchenkova’s research. According to Motchenkova, sufficiently high fines are essential, both for compli-

there is, in my view, no single answer to the question what the optimal level of fines for the enforcement of EC competition law might be (because this depends on a number of variables, including the desired level of compliance, and the influence of leniency), there are strong indications that the current level of fines in EC competition law is set too low to produce a sufficiently deterrent effect, and the possibility of criminal prosecution may help to compensate this important shortcoming.³⁰²

Another advantage of criminal law enforcement is that it enables the authorities to use the corresponding criminal powers of investigation, and the undertakings to rely on the corresponding procedural safeguards, contained in national systems of criminal procedure.³⁰³ Finally, criminal law better serves to send the moral message of compliance in an effective, direct manner. As I will explain later on in this study, the *ne bis in idem* principle does not stand in the way of criminal sanctions imposed on the CEO's (or other employees) for anticompetitive behaviour for which the undertaking in question has already been fined, because the undertaking counts as a *separate culpable subjects* for the application of the *ne bis in idem* rule in Community law.

There is also a downside to criminal law enforcement of EC competition law. Article 12(3) of Regulation 1/2003 prevents information, coming from a Member State that does not provide for the possibility of imprisonment from being used as evidence in proceedings in another Member State to seek imprisonment for a breach of the competition rules. Because of this limitation, the enforcement of EC competition law through criminal law may only reach its full potential if all of the Member States decide to adopt it.

3.10.13 Private damages

The national courts of the Member State are solely entitled to decide on the civil consequences of infringements of the competition rules.³⁰⁴ One would therefore expect that national courts are an attractive forum to bring civil

ance as well as for the effective operation of leniency programs. If there is a leniency program in place, the penalties and the rate of law enforcement have to be sufficiently high in order for the leniency program to destabilize cartels. If either is too low, leniency may actually have the effect of making the cartel more stable. This is a surprising result, which more generally underlines the quintessential importance of sufficiently high penalties for effective competition law enforcement. See Motchenkova 2005, p. 119.

302 As the statutory limitations of 10% of the firms's turnover in the preceding business year drastically limits the possibility of imposing higher administrative fines on undertakings.

303 Wils uses the examples of Ireland and the United Kingdom. Under Irish law, violations of Articles 81 and 82 EC, as well as the corresponding provisions in national law, are criminal offences and there are no administrative sanctions available.

304 Lenaerts & Gerard 2004, p. 320.

claims for damages, based on violations of the EC competition rules.³⁰⁵ In contrast with the US, where private claims for damages in general and class actions in particular are a strongpoint of antitrust enforcement, such claims are however rarely brought before the courts in the EU Member States.³⁰⁶

One of the reasons why private actions before courts in the US are particularly attractive for parties is the possibility of treble damages awards. Under US statutes, treble damages are a multiple of the actual damages, and may be awarded to a plaintiff.³⁰⁷ In general, treble damages are awarded as *punishment* for wilful conduct. An important difference with 'normal' damages is therefore that treble damages are not (only) compensatory, but (also) *punitive* in nature.

In most of the EU Member States, awards for exemplary or punitive damages are not possible.³⁰⁸ It is believed, in particular by the Commission, that the possibility of obtaining compensatory damages is often not sufficient as an incentive for claimants to claim damages; EC competition law more often serves as a 'shield' than as a 'sword', in disputes between private parties.³⁰⁹ In 2005, the Commission launched a public consultation, in which the idea of introducing punitive damages for breaches of EC competition law was tested.³¹⁰

Various objections were raised against the idea of introducing punitive damages for breaches of EC competition law. Most of the respondents indicated that such would not be possible, under their national systems of civil law. Another point that was raised during the consultation was that, because of their punitive nature, exemplary or punitive damages could raise problems of *ne bis in idem*.

As for that last point, it appears from a recent judgment by the High Court (Chancery Division) in the case of *Devenish Nutrition Ltd. & others vs. Sanofi-Aventis SA & others* that there are good grounds for this.³¹¹ In that judgment, it was held that, because of the *punitive* nature of exemplary damages, "the

305 Lenaerts & Gerard 2004, p. 321.

306 Wils 2003 II, p. 477.

307 Treble damages are a matter for state law, and therefore vary from state to state.

308 With the exception of England and Wales, where exemplary damages may be awarded under the circumstances set out by Lord Partick Devlin in *Rookes v. Barnard* ([1964] AC 1129, [1964] 1 All ER 367). Amongst other things, this may be the case "where the defendant's conduct was 'calculated' to make a profit for himself".

309 Wils 2003 II, p. 473. According to an independent study by Ashurst (Waelbroeck *et al* 2004), "levels of private enforcement through damages claims in Europe are currently very low, and (...) this area is characterised by total underdevelopment and an astonishing diversity in the approaches taken by the Member States". (The study is available from: <http://ec.europa.eu/comm/competition/antitrust/actionsdamages/study.html>).

310 COM (2005) 672, Green Paper – Damages actions for breach of the EC antitrust rules.

311 High Court, judgment of 19 October 2007, [2008] 2 All ER 249, [2007] EWHC 2394 (Ch), [2008] 2 WLR 637.

principle of *non bis in idem* precludes the award of exemplary damages in a case in which the defendants have already been fined (or had fines imposed and then reduced or commuted) by the European Commission".³¹² It is worth noting that the High Court also based its findings on Article 16 of Regulation 1/2003. It considered that the imposition of a *second* penalty through the award of exemplary damages would run counter to the decision adopted by the Commission, in which the amount of the fine was already established.

In 2008, the Green Paper was followed by a White Paper³¹³ and a Commission Staff Working Paper.³¹⁴ From these, it is clear that the idea of introducing punitive damages has been dropped by the Commission, and that other ways of strengthening private enforcement are being contemplated.

3.11 THE INTERNATIONAL DIMENSION OF EC COMPETITION LAW

3.11.1 Introduction

The internationalisation of competition law is very much at the centre of attention of the global legal community.³¹⁵ As a result of the rapid internationalisation of economic activity, the economic effects of anticompetitive behaviour are no longer restrained by national boundaries. As the *Lysine*,³¹⁶ *Vitamins*³¹⁷ and *Graphite electrodes*³¹⁸ cases have demonstrated, global cartels are not uncommon, and surface regularly. Internationally, competition law has developed rapidly in response to the challenges of globalisation.³¹⁹ Worldwide, there are over 100 systems of competition law in existence in countries which are at different levels of economic development, and which have very different domestic concerns.³²⁰ The majority of nations have adopted competition rules that are (to some degree) modelled after the competition rules of the US and the EC; some others have competition rules that are fundamentally different from those adopted by other nations. Despite a number of proposals and initiatives, there is no harmonised standard for the regulation

312 Para. 52 of the judgment.

313 COM(2008) 165, White Paper on Damages Actions for Breach of the EC antitrust rules

314 SEC(2008) 404, Commission staff working paper accompanying the White paper on damages actions for breach of the EC antitrust rules.

315 Kerber 2003, p. 270, fnnt. 1.

316 Case T-224/00, T-220/00, T-223/00, and T-230/00 *Archer Daniels Midland and others v. Commission (Lysine)* [2003] ECR II-2597 5 CMLR 12.

317 2003/2/EC, Case COMP/E-1/37.512 – *Vitamins*, [2003] OJ L6/1.

318 Joined Cases T-236/01, T-239/01, T-244/01-246/01, T-251/01 and T-252/01 *Tokai Carbon (Graphite Electrodes)* [2004] ECR II-1181.

319 Internationally, the terms 'competition law' and 'antitrust' are normally used where systems of competition rules are referred to that are by and large similar in structure and purpose to US and EC antitrust systems.

320 Whish 2008, p. 1.

of competition on the international level. Internationally, “competition law” or “antitrust” has developed into a kaleidoscope of various rules and systems.³²¹

3.11.2 Extraterritoriality

The main response to the internationalisation of anticompetitive behaviour has been the extraterritorial application of domestic competition laws.³²² This approach, known in US law as the ‘effects doctrine’, was first adopted by the US courts in the *Alcoa and Hartford Fire Insurance* cases.³²³ EC competition law saw a very similar development.³²⁴ In the *Dyestuffs*-case, the ECJ based its jurisdiction on the fact that a subsidiary had its parent company within the EC.³²⁵ In the *Woodpulp*-case, it held that Article 81 EC applies in the situation in which a cartel was *implemented* in the EC.³²⁶ The interpretation usually given is that the ECJ did not embrace the US effects doctrine, but gave recourse to the universally recognised territoriality principle. The approach taken by the ECJ in *Woodpulp* was both criticized, as well as being interpreted in different ways by several authors.³²⁷ The discussion is primarily an academic one because, as Whish remarks, there “will be relatively few cases in which the pure effects doctrine is crucial in jurisdictional terms; in most cases the economic entity doctrine or the reasoning of the ECJ in *Woodpulp* will be sufficient to establish jurisdiction”.³²⁸

3.11.3 Convergence

Convergence is of key importance in international antitrust. In general, the term ‘convergence’ can be used to describe two different phenomena: firstly, the degree of similarity between systems of antitrust internationally, and secondly, the international development of competition rules and policies in a common direction.

321 Fox 2001, p. 597.

322 Drexel 2004, p. 452; Pallek 2004, p. 98.

323 “It is settled case law (...) that any State may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders which has consequences within its borders which the State reprehends”. *United States v. Aluminium Co of America*, 148 F 2d 416 (2nd Circuit 1945), p. 444. See also: Pallek 2004, pp. 100-104.

324 Pallek 2004, pp. 104-107.

325 Case 48/69, *ICI v. Commission (Dyestuffs)* [1972] ECR 619, paras. 661-663.

326 Joined Cases 89, 104, 114, 116, 117 and 125 to 129/85 *Ahlström Oy vs. Commission (Woodpulp)* [1988] ECR 5193 4 CMLR 901. See Whish 2008, p. 480.

327 Some others argue that the Court fully endorsed the effects doctrine. See: Zanettin 2002, p. 21.

328 Whish 2008, p. 480.

Most, if not all of the world's systems of 'antitrust', or 'competition law' share some common features. Some countries have laws against 'restrictive trade practices', others against 'unfair competition', and in a large number of jurisdictions these laws carry the title 'competition' or 'antitrust'. An important question is whether these laws have the same basic aim, and address the same types of situations, as other systems of antitrust in the world.³²⁹ There is no single answer to this (difficult) question. In fact, the various systems of competition laws in existence vary to such a degree, that it is even difficult (if not impossible) to answer the question how many states there are with systems of competition laws in place.³³⁰

The term 'convergence' is also commonly used in reference to the approach taken by governments and NGO's when discussing the further development of international antitrust. In this connection, a distinction is usually made between 'soft' and 'hard' convergence. Although soft and hard convergence both have the same, ultimate goal (that competition laws are applied in the same way as much as possible, minimizing potential conflicts and fostering further cooperation) they are generally seen as opposite approaches to international antitrust.³³¹

The term hard convergence is often used in reference to proposals for a multilateral competition framework, which would create an obligation for states under public international law to implement certain uniform competition provisions.³³² Several proposals of this kind have been made in the past, but the unwillingness of states to commit to binding rules of public international law that has so far proved impossible to overcome.³³³

Soft convergence on the other hand is used to describe the gradual and voluntary alignment of competition laws and policies, mainly through cooperation between enforcement agencies. It is widely believed that, by learning from each other in practice and building on each others' experience through forums

329 Dabbah 2003, pp. 2-4.

330 An international comparison between existing systems of competition law can therefore never demonstrate more than a *degree* of convergence.

331 It has also been argued that soft convergence would be a *prerequisite* to hard convergence (which only becomes an option when existing systems of domestic antitrust have converged to a sufficient degree), and that 'soft' and 'hard' convergence are therefore complementary in nature.

332 In the context of international antitrust, the terms 'harmonisation' and '(hard) convergence' are often used interchangeably; see: Finkentscher & Immenga 1995, p. 12, and Basedow 2002, p. 3. Tritell raises objections to the use of the term 'harmonisation', because it "implies uniformity of legal provisions or their application", which is according to him "impractical and, moreover, probably undesirable" (Tritell 2005, p. 1). In the context of the European Community, harmonisation is an important instrument to achieve the objectives of the single market. The frequent use of this term by the Commission in international antitrust matters reflects the approach of the European Commission to international antitrust in the second half of the 1990's.

333 Dabbah 2003, p. 285.

such as the ICN and the OECD, the international antitrust community is gradually progressing in a common direction. Contrary to hard convergence, soft convergence is a reality. One of the reasons for its success may be that governments and enforcers are inclined to share their views and experiences much more freely outside of the political pressure of negotiations and the possibility of ensuing public international law obligations. Soft convergence is widely advocated as a means of facilitating cooperation between authorities, creating a higher degree of legal certainty for businesses through the prevention of conflicting outcomes, and enhancing antitrust enforcement.

There is a high level of convergence between the EC and the US, especially if one takes into consideration the outcome in individual cases, rather than the particularities of each respective legal framework.³³⁴ Convergence between the US antitrust and EC competition law has been fostered by bilateral cooperation, and in turn, bilateral cooperation has prospered because of the high degree of convergence between the two.³³⁵

3.11.4 Multilateral initiatives

The globalisation of markets has made it necessary to address anticompetitive behaviour internationally. The possibility of harmful international cartels escaping punishment, limitations in information sharing, the lack of legal safeguards for businesses, the possibility of incompatible decisions from different authorities, and government restraints to competition are among the main issues that arise in the context of international antitrust enforcement.³³⁶

Chapter V of the 1947 Havana Charter contained the first proposal for an international antitrust code. The Havana Charter was never ratified, and neither GATT 1947, nor the WTO agreements from 1994 contained any of the competition provisions from the Havana Charter. At present, there are several actors active in the field of international antitrust. The WTO, UNCTAD, the OECD, and the ICN are amongst the most noteworthy.

The World Trade Organisation ("WTO")³³⁷ has from the onset been concerned with on the trade restricting effects of anticompetitive behaviour. It is believed by some that an international system of competition law would follow logically from, and be indispensable to the goals of the organization.³³⁸ Although the WTO does not contain a comprehensive antitrust code, the WTO

334 Tritell 2005, pp. 25-26.

335 Calvani 2003.

336 Whish 2008, pp. 470-471.

337 The WTO was established on January 1st, 1995, as a result of the Uruguay Round negotiations which ran from 1986 until 1994. At the time of writing this, the WTO has 147 members. Its greatest quality is (in the eyes of most) that it is rule bound, and in a position to enforce its members' commitments.

338 Drexel 2004, p. 424; Conrad 2003, p. 117, Chang 2004, p. 34.

agreements (as well as several other WTO documents) do contain competition-related provisions.³³⁹ The question is therefore not whether competition-related issues should be introduced within the WTO framework, but whether a comprehensive competition code should be introduced within WTO, and what it should look like.

From the second half of the 1990's on, the European Commission pushed for a multilateral agreement on competition within the framework of the WTO.³⁴⁰ In 1996, competition policy was placed on the list of potential future issues for trade negotiations at the Singapore Ministerial Conference and the WTO 'Working Group on the Interaction between Trade and Competition Policy' was established.³⁴¹ In 1999, the Commission sent a communication to the WTO Working Group on the Interaction between Trade and Competition Policy regarding the possibly contributions of competition policy towards the achievements of the goals of the WTO,³⁴² which was followed by a proposal for a 'Multilateral Framework Agreement of Competition Policy' in 2002.³⁴³ According to the Communication (annex A), the basic framework agreement envisaged by the Commission was not meant to provide a solution to all the issues that could arise from the internationalisation of competition policies. Rather, it should "establish a solid basis for multilateral cooperation on competition policies".³⁴⁴ No 'hard' rules on mutual acceptance of competition decisions, or allocation of cases were therefore envisaged. In essence, the proposal was therefore nothing more than an invitation to the other WTO members to enter negotiations on a competition agreement in the future.

The proposal was followed by a long list of articles, reports and other documents, in which a host of academics argued that a multilateral competition agreement would be beneficial for the achievement the goals of the WTO, and could solve many of the problems of international antitrust enforcement, such as divergence in substantive laws resulting in conflicting decisions, and the

339 Furthermore, the WTO has become increasingly active in competition-related matters.; Monti 2004.

340 See, in particular: Drexel 2004, pp. 423 and 431-435.

341 WT/MIN(01)/DEC/1, No. 20, Ministerial Declaration of December 13 1996 (available from http://www.wto.org/english/thewto_e/min96_e/wtodec_e.htm)

342 WT/WGTCP/W/130, Communication of 12 July 1999 from the European Community and its member states to the Working Group on the Interaction between Trade and Competition Policy.

343 Communication from the European Community and its Member States, Dispute Settlement and Peer Review: Options for a WTO Agreement on Competition Policy, WT/WGTCP/W/222, 19 November 2002; see also: WT/WGTCP/W/152, Communication of 21 September 2000 from the European Community and its member states to the Working Group on the Interaction between Trade and Competition Policy.

344 According to Annex A of the 2002 Communication, "once such a framework agreement has been established, a Competition Policy Committee would provide a forum for examining whether greater convergence can be promoted on other competition policy questions of importance for the trading system."

need for developing countries to set up effectively functioning systems of antitrust.³⁴⁵

The proposal also met strong criticism. Some argued that different geographical, political and other circumstances dictate that different substantive competition rules are appropriate in different states.³⁴⁶ Others pointed out that the mere existence of uniform antitrust rules offers no guarantee that these rules will in reality be applied in a uniform fashion.³⁴⁷ Furthermore, there was widespread concern that a multilateral system with substantive rules on antitrust could render national competition policy inflexible.

During the failed 2003 WTO Ministerial Meeting at Cancún, the Singapore-issues (amongst which competition) met resistance from developing countries.³⁴⁸ In response to the ensuing tension, the European Commissioner for Trade (Pascal Lamy) dropped the initiatives on competition and investment. After this, enthusiasm for the Commission proposal dwindled, and competition does not appear on the WTO agenda anymore at this time.³⁴⁹ Nevertheless, the Ministerial statement concluding the failed Cancún conference explicitly reaffirms the Doha declaration.³⁵⁰ The WTO Doha Declaration from 2001 therefore remains valid as a basis for possible future developments.

A number of authors speculated on the reasons for the failure of the Commission's proposal.³⁵¹ There appears to be general agreement that the main reason why the proposal failed has been that the unwillingness of many states, notably the US, to submit to binding rules of international public law proved to be too strong.³⁵² Furthermore, the debate surrounding the Commission's proposal exemplifies that there is little consensus between states on what it is precisely that competition law should *achieve* (from a legal perspective),

345 See, for some examples: Chang 2004, Drexl 2004, Stewart 2004, Schoneveld 2003, Pallek 2004. Furthermore, a number of speeches were delivered by Mr. Monti and other members of the European Commission, backing up the proposal. In hindsight, many of the arguments put forward in favour of the proposal appear more far-reaching than the proposal itself.

346 Kerber, 2003, pp. 292-294. This argument plays in the context of economic theory of federalism, where knowledge problems ("information asymmetries") play an important role.

347 See: Drexl 2003, pp. 269 *et seq.*; First 2003, p. 24 (fn. 2).

348 In particular African countries that had encountered harsh negotiations on trade in cotton. Peter 2003, p. 619.

349 It was removed from the Doha agenda on 31 July, 2003. For a comprehensive analysis of the developments within WTO in this respect see: Drexl 2004.

350 "We reaffirm all our Doha Declarations and Decisions and recommit ourselves to implementing them fully and faithfully". Ministerial Statement, adopted on 14 September 2003, WT/MIN(03)/20, 23 September 2003, No. 6.

351 Drexl 2004, pp. 435-437. For more examples see also Chang 2004, p. 5; and Stewart 2004, pp. 7-11.

352 See, for example, Hewitt Pate 2004, p. 23.

and what specific provisions it should contain.³⁵³ In spite of growing convergence between the various competition systems in existence in terms of outcome, agreeing on common standards remains extremely difficult. At any rate, it appears that the conclusion of a multilateral competition agreement within WTO is no longer an option, or at least not in the near future.

The 'soft approach' to international antitrust has been considerably more successful. The 'OECD recommendations' for example, adopted by the OECD Competition law and policy Committee, are aimed at soft convergence, and have played a prominent role in the development of international antitrust.³⁵⁴ The Competition Law and Policy Committee comprises of 30 developed countries and has accomplished a degree of convergence amongst its members.³⁵⁵ Although the Committee is involved in a degree of capacity building, it is not one of its main activities. Membership of OECD is limited to a select group of well-developed countries.³⁵⁶

The 1967 OECD recommendations laid down the basic principles of international antitrust cooperation; subsequent recommendations have clarified and elaborated them.³⁵⁷ Although the recommendations are intended as a basis for cooperation in themselves, the OECD member states have chosen to conclude bilateral cooperation agreements, based on the recommendations. The recommendations reflect the developments which have taken place in international antitrust over time, and in particular the success of bilateral cooperation between the US and the EU; many of the provisions of the 1995 recommendations for example are clearly inspired by the US-EU cooperation.

In 1980, the 'United Nations set of Multilaterally Equitable Principles and Rules for the Control of Restrictive Business Practices' (the "UNCTAD prin-

353 Basedow 2002, p. 57. Another example of this is that the OECD grappled with the task of drafting a definition on hard core restrictions (OECD, 20 June 2002, *Provisions on hardcore cartels: Background Note by the Secretariat*, WT/WGTCP/W/191, para. 3). A basic definition would seem like a logical point of departure for building broader consensus. The definition that came out of this in the end was only agreed on after much debate, and the inclusion of exemptions which are so vague in scope that this alone casts doubt on the usefulness of having it.

354 OECD, Council Recommendation Concerning Cooperation between Member Countries on Restrictive Business Practices Affecting International Trade, 5 October 1967, reprinted in A.V. Lowe (ed.), *Extraterritorial Jurisdiction*, Llandysul: Grotius 1983.

355 The Competition Law and Policy Committee allows for outside observers, for periods of time.

356 That is probably one of the main reasons that OECD has never achieved the desired degree of participation from non-member countries. Valentine 2003, p. 5.

357 The 1967 recommendations (laying down the basic principle of traditional comity in the context of antitrust) were adopted in a time when international antitrust and the extraterritorial application of U.S. antitrust law in particular, were raising concerns.

ciples")³⁵⁸ were adopted by the United Nations Conference on Trade and Development. As the name suggests, these principles form a voluntary code, containing rules addressing both governments and businesses. The UNCTAD principles, adopted by the UN General Assembly, are particularly aimed at dealing with developing countries' vulnerability to international anticompetitive practices by (Western) multinational firms.³⁵⁹ It is widely assumed that there are many international cartels aimed at jurisdictions where no competition law regime exists, or none is effectively enforced.³⁶⁰ Although the UNCTAD principles are a universally applicable multilateral instrument,³⁶¹ they have played only a limited role in practice.³⁶²

In 2000, Joel Klein, then Assistant Attorney General in the DOJ antitrust division, delivered a speech titled "Time for a Global Competition Initiative", launching the Global Competition Initiative ("GCI"). The initiative resulted from the final report by the International Competition Policy Advisory Group (ICPAC), formed in 1997 by the US Department of Justice, the ICPAC-report. The initiative marked a change in the US attitude towards multilateral initiatives in international antitrust. The initiative was interpreted by some as an acknowledgement by the US of the shortcomings of bilateral cooperation.³⁶³ It is also possible that the GCI was a strategic move, at a time when the Commission was pushing for a multilateral option within WTO.³⁶⁴ The ICPAC-report, on which the GCI was based, thwarts the European proposal for a multilateral system within WTO with binding rules and recourse to the WTO dispute settlement system. It proposes a more gradual and non-binding approach, through a forum for discussion, resulting in a gradual development towards convergence. The initiative expressly excluded binding rules, and dispute settlement. After initially expressing disappointment over the ICPAC report,³⁶⁵ the GCI-initiative was soon actively endorsed by the European Commission. It was officially launched in October 2001 under the name "International

358 Within UNCTAD, these principles are referred to as the "Set", 'Experiences gained so far on international cooperation on competition policy issues and the mechanisms used', TD/B/COM.2/CLP/21/Rev.1, p. 16. Available from: http://www.unctad.org/en/docs/c2clp21r1_en.pdf.

359 Zanettin 2002, p. 233.

360 One of the greatest challenges is weak enforcement in countries which already have competition laws in place. This weakness limits the potential for bilateral cooperation between developed and underdeveloped antitrust jurisdictions.

361 UNCTAD: "Experiences gained so far on international cooperation on competition policy issues and the mechanisms used", TD/B/COM.2/CLP/21/Rev.1 19 April 2002, p. 16.

362 An UNCNTAD instrument which has been of considerable importance for competition conditions in a specific, global market (liner shipping) is the 'United Nations Convention on a Code of Conduct for Liner Conferences'.

363 Zanettin 2002, p. 237. Zanettin's views met strong criticism from Parisi (see: Parisi 2003, pp. 715-717).

364 First 2003, p. 35.

365 Monti 2000 (speech).

Competition Network”, in order to avoid confusion with the Global Competition Forum.

The ICN is a virtual organization, without permanent staff or offices. Membership is open to any authority enforcing competition law, and capacity building and competition advocacy are amongst its topics.³⁶⁶ The ICN has no rulemaking or decision making authority, and its work is done through working groups, which consist of government officials and representatives from academic institutions, consumer groups, and trade associations.³⁶⁷ These working groups address specific topics, formulating ‘best practices’ recommendations.³⁶⁸ The role of the ICN was described by the US DOJ as “a venue where senior antitrust officials from developed and developing countries will work to achieve consensus on proposals for procedural and substantive convergence in antitrust enforcement”.³⁶⁹ It is open to membership for developing countries, and has become an important forum, with 86 members at the time of writing this.³⁷⁰

There is considerable overlap between the activities of these actors. The WTO and the OECD’s Global Competition Forum are the most vying. One feature that clearly distinguishes the ICN from other organizations is that, unlike WTO and OECD, it has a narrow focus on competition-related matters.

3.11.5 Bilateral cooperation agreements between the US and the EU

Over the years, bilateral cooperation between the EC and the US has proved very successful.³⁷¹ According to the Commission, “the cooperation continues to be of considerable mutual benefit to both sides, in terms of enhancing the respective enforcement activity, avoiding unnecessary conflicts or inconsis-

366 Schaub 2002 (speech).

367 Kovacic 2003, p. 6.

368 First 2003, p. 37.

369 US Department of Justice, ‘U.S. and Foreign Antitrust Officials launch International Competition Network New International Venue Will Assist in Global Convergence on Important Antitrust Enforcement Issues’, press release October 25, 2001, available from: http://www.usdoj.gov/atr/public/press_releases/2001/9400.htm.

370 In a farewell speech, Mr. Monti (then Commissioner for Competition) said that “I see the ICN as the central forum for multilateral discussion and convergence in this field”, Monti 2004 (speech).

371 It has established itself as an effective way to coordinate international enforcement efforts, even at a time when EU-US relations were “at their lowest ebb for at least a generation”. House of Lords: Select Committee on the European Union, session 2002-03, 30th report *A fractured Partnership Relations between the European Union and the United States of America*, HL paper 134 Ch. 1 Box 1.

encies between those enforcement activities, and in terms of better understanding each other's competition policy regimes."³⁷²

In general, the purpose of bilateral cooperation is for each of the parties to expound the enforcement of its domestic competition laws in international situations, which might otherwise escape any effective form of control. Bilateral cooperation partners and networks of antitrust enforcers have very little compulsion, other than their own enforcement interest, that requires them to cooperate.³⁷³ The driving force behind bilateral cooperation therefore stems from the "self-interest" of the authorities involved, and this has proven to be a strong and enduring incentive.

Several bilateral agreements existed before 1991: the agreement between the US and Germany from 1976,³⁷⁴ the agreement between the US and Australia from 1982, and the agreement between the US and Canada from 1984. These agreements did not lay down ambitious provisions for cooperation,³⁷⁵ and are either defensive in nature, or vague in wording, and lacking the instruments for effective cooperation (in particular the US-Germany agreement from 1976).³⁷⁶

The first agreement between the US and the EC on cooperation in the field of competition law dates from 1991 (hereafter: the 1991 Agreement).³⁷⁷ It forms a more advanced instrument than foreseen by the OECD recommendations (which only provided for a limited possibility to request consultation), and marks a clear departure from the first generation of agreements in that it reflects the necessity to coordinate antitrust policies at the international

372 COM (2003) 500 final, Report from the Commission to the Council and the European Parliament on the application of the agreements between the European Communities and the Government of the United States of America and the Government of Canada regarding the application of their competition laws 1 January 2002 to 31 December.

373 First 2003, p. 25.

374 Agreement between the Government of the United States of America and the Government of the Federal Republic of Germany Relating to Mutual Cooperation Regarding Restrictive Business Practices 23 June 1976, 4 Trade Reg. Rep. (CCH) Par. 13501 (www.usdoj.gov/atr/public/international/docs). The French government, supported by Spain and The Netherlands, challenged the legality of the agreement, arguing that the Council of Ministers should have been involved (Case C-327/91 *France vs. Commission* [1994] ECR I-3641, [1994] 5 CMLR 517). The challenge was successful, and eventually led to the adoption of a joint Decision of the Council and Commission on April 10, 1995 (Decision of the Council and the Commission 145/1995 of 10 April 1995 concerning the conclusion of the Agreement between the European Communities and the Government of the United States of America regarding the application of their competition laws [1995] OJ 95/45), and an exchange of letters of interpretation between the authorities.

375 Pallek 2004, p. 107.

376 Zanettin 2002, pp. 58-65.

377 Agreement between the Government of the United States of America and the Commission of the European Communities regarding the application of their competition laws – Exchange of interpretative letters with the Government of the United States of America, [1995] OJ 95/47 (the "1991 Agreement").

level.³⁷⁸ The 1991 agreement marks the beginning of what is commonly referred to as “soft cooperation” between the EU and the US. Both agreements are based on the OECD recommendations of 1967,³⁷⁹ 1973³⁸⁰ and 1986, although the introductory statement of the 1991 Agreement only refers to the OECD recommendations of 1986.

There are 3 basic principles at the heart of EC-US antitrust cooperation: notification, ‘negative’ or traditional comity, and positive comity. The 1991 Agreement states that each party shall notify the other when their enforcement activities “may affect important interests of the other party”.³⁸¹ This may be the case when enforcement activities of one party are relevant to enforcement activities of the other party,³⁸² or when the investigation involves anticompetitive activities carried out “in a significant part of the other Parties’ territory”.³⁸³ Furthermore, notifications are required where there is scope for conflict with enforcement decisions by the other party.³⁸⁴ The appropriate officials from the respective competition authorities are to meet at least twice a year to exchange information on their current enforcement activities and policies.³⁸⁵ Article IV states that each of the parties shall render the other assistance in enforcement activities; when anticompetitive activities occur in the territory of one party, that harm the interests of the other party (provided they infringe on the competition laws of the territory where they occur) one party may request the other parties competition authorities to “initiate appropriate enforcement action”. This form of assistance is known as “positive comity”. This provision is ‘mirrored’ by Article VI, where it is stated that “the general principle that a country should take another country’s important interests into account in its own law enforcement in return for their doing the same”.³⁸⁶ As regards confidential information, the agreements contains two basic rules: neither party is obliged under the Agreement to provide confidential information if such is either prohibited by law or is against the important interests of the party in question, and every party agrees to maintain, “to the fullest extent possible”, the confidentiality of any information provided to it in confidence by the other party.

378 Zanettin 2002, p. 65.

379 OECD, Council Recommendation Concerning Cooperation between Member Countries on Restrictive Business Practices Affecting International Trade, 5 October 1967, reprinted in A.V. Lowe (ed.) *Extraterritorial Jurisdiction* Llandysul: Grotius 1983, p. 243.

380 *Idem*, p. 244.

381 Article II par 1.

382 Article II par. 2 sub A.

383 Article II par. 2 sub B

384 Article II, paragraphs 3, 4, and 5 specify in what stage of the respective proceedings a notification should be made, and par. 6 specifies that notifications should contain sufficient information for the other party to “permit an initial evaluation”.

385 Article III.

386 Janow 2000, p. 33.

The 1998 agreement is highly similar to the 1991 agreement,³⁸⁷ but takes matters a step further.³⁸⁸ The core of the 1998 agreement is an enhanced version of the 1991 positive comity principle.³⁸⁹ Its scope is much broader, and includes the possibility that activities which do not violate the competition laws of the *requesting* party may form the subject of a request.³⁹⁰ Naturally, if the activities do not infringe upon the competition laws of the requested party, there is no legal basis for it to act.

Bilateral cooperation of this kind has since become a template for bilateral international antitrust cooperation with other states. The EC has since entered into bilateral cooperation agreements similar to the US-EU agreement with Canada and Japan.³⁹¹ The US has entered into bilateral agreements with Brazil, Mexico, Australia, and Canada.

In spite of its considerable success, bilateral cooperation is therefore not without its shortcomings. The fact that bilateral cooperation has nevertheless proved so successful in practice is perhaps due to the lack of real alternatives. Among its main weaknesses are the lack of a centralised system of oversight, the absence of a mechanism for the resolution of conflicts, and the impossibility of exchanging protected (or “confidential”) information bilaterally.³⁹² Furthermore, and in the same way as Regulation 1/2003, the US-EC agreements may undermine the effectiveness of leniency programs, and do not, for example, provide for mutual recognition of decisions by authorities.³⁹³

387 Agreement between the European Communities and the Government of the United States of America on the application of positive comity principles in the enforcement of their competition laws, [1998] OJ L173/28, [1999] 4 CMLR 502 (the “1998 Agreement”).

388 The 1998 agreement ‘shall supplement, and be interpreted consistently with the 1991 agreement, which remains fully in force’ (Article VI of the 1998 Agreement).

389 Whish 2008, p. 494; Galloway 2005, pp. 599-601; Conrad 2003, p. 108..

390 Positive comity is defined by the OECD as “the principle that a country should (1) give full and sympathetic consideration to another country’s request that it opens or expands a law enforcement proceeding in order to remedy conduct in its territory that is substantially and adversely affecting another country’s interests and, (2) take whatever remedial action it deems appropriate on a voluntary basis and in considering its own legitimate interests”, Committee on Competition Law and Policy, *Report on Positive Comity-Making International Markets more Efficient Through Positive Comity in Competition law enforcement*, DAFE/CLP(99)19, adopted 6-7 May 1999.

391 Council and Commission Decision of 29 April 1999 concerning the conclusion of the Agreement between the European Communities and the Government of Canada regarding the application of their competition laws, [1999] OJ L 175/50; Agreement between the European Community and the Government of Japan concerning cooperation on anti-competitive activities – Agreed minute, [2003] OJ L 183/12. Adopted by Council Decision 520/2003 of 16 June 2003 concluding the Agreement between the European Community and the Government of Japan concerning cooperation on anti-competitive activities OJ [2003] L183/11.

392 “The exchange of basic information, in the form of a notification or in less formal ways, is the clearest obligation stemming from the agreements” (Van Miert 1997, p.16).

393 Another shortcoming is the exclusion of merger control from the 1998 Agreement.

PROVISIONAL SUMMARY

The *ne bis in idem* principle comes into play in those areas of EU law, in which *penalties* can be imposed on subjects. Within the Area of Freedom, Security and Justice, instruments based on the mutual recognition principle bring national systems of criminal law within the scope of EU law. In the context of enhanced cooperation in criminal matters, a transnational *ne bis in idem* principle is a necessary instrument for the regulation of transnational justice, but additional coordination of law enforcement efforts between the Member States is necessary.

EC competition law is an important area of Community law in which the Community has the power to impose sanctions directly on undertakings. The decentralized system of enforcement of EC competition law introduced by Regulation 1/2003 leads to an increased risk of double jeopardy and conflicting decisions, as well as a loss of legal certainty for undertakings. If an undertaking runs the risk of being subjected to multiple prosecutions by different NCA's when exercising its right to conduct its business freely in the markets of other Member States, this creates as many obstacles to free movement between the Member States as there are competition authorities in those Member States.

The globalisation of anticompetitive behaviour has triggered two main responses: the extraterritorial application of domestic competition law, and bilateral cooperation. The purpose of bilateral cooperation is for each party to expound the enforcement of its domestic competition laws in international situations, which might otherwise escape any effective form of control. There are three basic principles at the heart of EC-US antitrust cooperation: notification, 'negative' or traditional comity, and positive comity.

4 | The case law of the European Court of Justice on the *ne bis in idem* principle

In this chapter, the body of case law of the European Court of Justice (ECJ) on the *ne bis in idem* principle is examined and discussed.

4.1 THIS CHAPTER

In this chapter, the substance, *rationale*, scope, and elements of Article 54 CISA as well as the *ne bis in idem* principle as a general principle of Community law as these have developed in the case law of the European Court of Justice (“ECJ”) and the Court of First Instance (“CFI”) (together: “the European Court of Justice”, or: “the Community courts”) are analysed and discussed. In keeping with the aim of this study, the aim of this chapter is to provide an overview on the main points of the case law before these courts on the *ne bis in idem* principle. The reader should be informed however that some cases which do not contribute to a better understanding of the interpretation and application of the *ne bis in idem* principle by the Community courts have been left out of the discussion in this chapter.¹

4.2 THE ROLE OF THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS IN THE CASE LAW OF THE EUROPEAN COURT OF JUSTICE

After the discussion and analysis of the case law of the European Court of Justice in this chapter, the case law of the European Court of Human Rights (“ECtHR”) on the point of Article 4P7 ECHR will be discussed in the next chapter

¹ In those cases, the *ne bis in idem* principle was, for instance, mentioned by the Court or by the CFI but no more than that (such as Case T-279/02, *Degussa AG v. Commission* [2006] ECR II-897), a plea based on the *ne bis in idem* principle was summarily rejected (Case C-182/99 P, *Salzgitter v. Commission* [2003] ECR I-10761) or the case was decided on a different point. In some other cases a plea of *ne bis in idem* was manifestly ill-founded. In case T-199/99, *Sgaravatti Mediterranea v. Commission* [2002] ECR II-3731 for example, the applicant complained that an order by the Commission to repay unlawful state aid did not take into account a *subsequent* penalty imposed on the national level. Another example is case T-333/99, *X. v. ECB* [2002] ECR II-3021, I-A-199, II-921, in which the applicant complained that the fact that he had been *fired* infringed the *ne bis in idem* principle. It is difficult to see how this could be the case.

of this study. In chapter 6, the combined findings from this analysis are further elaborated in the supranational context of the EU. Before embarking on the journey through the case law of these two courts, it is useful here to briefly provide some additional background information on the relationship between these two different 'European' courts, belonging to two different 'European' organizations with partially overlapping membership (the European Union and the Council of Europe).

In the absence of a legally binding Community catalogue of fundamental rights in general, and more in particular in the absence of a comprehensive procedural framework for the enforcement of EC competition law, the ECJ has in its case law developed a range of fundamental rights as 'general principles of Community law' (hereinafter: "general principles", or: "GPCL"),² amongst which the *ne bis in idem* principle.³ In formulating GPCL, the ECJ draws inspiration 'from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories, such as the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 (the ECHR).'⁴

The ECJ's "human rights jurisprudence" has been discussed and analysed at great length in academic writing. Numerous authors have expressed concern over a number of its potential shortcomings. Amongst other things, some fear that the co-existence of two separate lines of human rights jurisprudence before the courts in Luxemburg and Strasbourg could lead to confusion and conflict between them.⁵ Furthermore, general principles of Community law would offer too little legal certainty for subjects.⁶ For these and other reasons, there is strong support for the proposition that the EU should accede to the ECHR. According to the House of Lords Select Committee on the European Union (reporting on the European Union Charter of Fundamental Rights in May 2000): "(w)hile skilful drafting might side-step questions of potential conflict

2 In Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1134, para. 4 the Court held for the first time that the respect for fundamental rights forms part of the general principles of law whose observance is guaranteed by the Court. See also: Vervaele (2006), p. 168.

3 From the late 1960's on, the *ne bis in idem* principle has featured regularly in the case law of the Community courts in competition cases, as well as a (smaller) number of cases in other areas of Community law.

4 Case C-274/99 *P Connolly v Commission* [2001] ECR I-1611, paras. 37 and 38. On the interaction between GPCL and the rights contained in the ECHR, see (amongst others) Myjer 2006, p. 303.

5 See in particular: Lawson 1994.

6 See, amongst many others: Mendelson 1989, pp. 152-162; Coppel and O'Neill 1992, pp. 669-692; Lawson 1999, p. 15. Indeed, the number of cases in which the Community courts found a breach of a fundamental right (or, in the case of a preliminary procedure: the number of cases in which it is sufficiently clear from the Court's answers that a breach of a fundamental human right must be found by the referring court), is small.

with the ECHR and European Court of Human Rights, a non-binding Charter would not prevent alternative rights or interpretations of ECHR rights being adopted by the Community courts. Accession to the ECHR remains the crucial step required if the gap is to be closed. Accession of the EU to the ECHR, enabling the Strasbourg Court to act as an external final authority in the field of human rights, would go a long way in guaranteeing a firm and consistent foundation for fundamental rights in the Union. It would secure the ECHR as the common code for Europe.”⁷

After the negative outcome of the referenda on the Lisbon Treaty (which would have made accession of the EU to the ECHR possible) it has yet again become uncertain if EU accession to the ECHR is on the cards for the near future. Meanwhile, the ECHR plays a more and more important role in Community law. Increasingly, the Community courts treat the ECHR almost as if it were part of the EU’s legal system.⁸ Furthermore, in order to ensure consistency through a permanent exchange of information on matters of mutual interest, regular contacts have been established between the judges of the ECHR and the Community courts, and “there exists an atmosphere of close collaboration” between them.⁹

4.3 THE SUBSTANCE OF THE PROHIBITIONS

4.3.1 Introduction

As discussed para. 2.4 of this study, it is important to make a clear distinction between the prohibition of double prosecution (*Erledigungsprinzip*), and the prohibition of double punishment (*Anrechnungsprinzip*), when discussing the *ne bis in idem* principle. Although these two guarantees are often considered jointly, both in some of the cases as well as legal literature, they actually have considerably less in common than one would *prima facie* expect on several points. Firstly, the prohibition of double prosecution is essentially a procedural guarantee, whereas the prohibition of double punishment is (primarily) a substantive one. Secondly, by its very nature, the prohibition of double prosecution only applies in respect of the possibility of a *second* trial, whereas there appears to be no reason why the prohibition of double *punishment* would

7 Para. 154. See furthermore the 2007 ‘Comments on the accession of the European Union/ European Community to the European Convention on Human Rights’ by the European Commission for democracy through law (Venice Commission), available from: [http://www.venice.coe.int/docs/2007/CDL\(2007\)096-e.pdf](http://www.venice.coe.int/docs/2007/CDL(2007)096-e.pdf).

8 For this reason Jacobs argues that accession to the ECHR would by now have “rather limited concrete effects for the observance of human rights standards in the EU”. See his brief note on the subject, available from <http://www.statewatch.org/news/2007/sep/jacobs-eu-echr.pdf>.

9 Myjer 2006, p. 300.

not also prohibit a double penalty, imposed on a subject *within one and the same set of proceedings*.

A third difference between the two guarantees is that, whereas the *Erledigungsprinzip* counts the respect for *res iudicata*, legal certainty, as well as a number of other legal principles amongst its *rationale*, the same *rationale* do not necessarily apply to the prohibition of double punishment. The *rationale* underlying the prohibition of double punishment would generally seem to be that of proportionality, 'reasonableness', 'equity', or an equivalent or similar legal concept in any given domestic legal system.

Article 4P7 ECHR, Article 14(7) ICCPR, and Article 50 of the Charter all refer to both guarantees jointly, in the same sentence, which could convey the impression that the two guarantees form different aspects of the *ne bis in idem* principle. Only the CISA establishes the two prohibitions as distinct, complementary guarantees: Article 54 of the CISA lays down the prohibition of double prosecution ("*may not be prosecuted in another Contracting Party*"), whereas Article 56 CISA establishes the prohibition of prosecution (*Anrechnungsprinzip*) as a *separate* guarantee, which may apply in cases in which the *Erledigungsprinzip* laid down in Article 54 CISA does *not* apply.

There has been a clear development in the case law of the ECJ on the point of the substance of the prohibitions. In *Walt Wilhelm* the ECJ did not (yet) mention the *ne bis in idem* principle, but hinted that a prohibition of double *prosecution* could have logically resulted from the relationship between EC competition law and national competition laws, *if* this relationship had been regulated in a certain manner by Regulation 17/62. In *Boehringer*, the ECJ confirmed that prohibition of double *punishment* is a *general requirement of natural justice* but did not go into the question whether the same could apply where penalties, *imposed in third countries* were concerned. It took several decades before the ECJ clearly established, in the *PVC* case, that the prohibition of double prosecution (*Erledigungsprinzip*) must be seen as the *ne bis in idem* principle 'proper', when it stated that: "the principle of *non bis in idem*, which is a fundamental principle of Community law also enshrined in Article 4(1) of Protocol No 7 to the ECHR, precludes, in competition matters, an undertaking from being found guilty or proceedings from being brought against it a second time on the grounds of anti-competitive conduct in respect of which it has been penalised or declared not liable by a previous unappealable decision."¹⁰ In a later case, *Lysine*, the ECJ came full circle when it accepted that the prohibition of double *punishment* forms a *corollary* of the *ne bis in idem* principle. These developments will be discussed in more detail below.

¹⁰ In an earlier appeal in the same case, the CFI had coined *both* the prohibition of double punishment as well as the prohibition of double prosecution as "*ne bis in idem*".

4.3.2 The substance of the *ne bis in idem* principle in the case law of the European Court of Justice

Although hardly a landmark case, *Gutmann*¹¹ was the first case before the ECJ concerning the *ne bis in idem* principle. Mr. Gutmann, an official of the European Atomic Energy Community ("EAEC"), was accused of charging to the Community "the expense of repairs for a camera belonging to him and private telephone calls". A decision was reached to issue a reprimand, and the inquiry was terminated. After that further inquiries were launched "on the ground of certain irregularities which have been found and a complaint lodged by a head of division, without specifying whether these were new factors".

In its judgment, the ECJ held that it was not sufficiently clear from the file presented to it by the Commission what precisely the first proceedings were based on, and ordered the Commission to present the files integrally. When the Commission came forward with the files, the Court held that there were no grounds for finding that the two inquiries were based on different conduct, and that there were therefore no circumstances which could justify a second inquiry.¹² It appears from the judgment that the ECJ based its findings mainly on the Commission's inability to produce any convincing circumstances which could justify the second proceedings against Mr. Gutmann; the *ne bis in idem* principle as such was hardly given any consideration.

Walt Wilhelm,¹³ which was also discussed in para. 3.10.2, is undoubtedly a landmark judgment and has played a seminal role in the further development of the case law of the Community courts on the *ne bis in idem* principle. The German *Bundeskartellamt* had initiated proceedings against a cartel between a group of German undertakings under the relevant provisions of German competition law, after the Commission had done the same, in respect of the same agreement. The *Kartellsenat* of the *Kammergericht Berlin*¹⁴ stayed proceedings and referred preliminary questions to the ECJ, asking whether

11 Joined Cases 18/65 and 35/65 *Gutmann v Commission of the EAEC* [1966] ECR 103.

12 "Despite the opportunities given to the Commission to give details of the reasons for the fresh disciplinary inquiry, and to distinguish them from those given for the earlier proceedings, the vague terms of the contested decision of 20 and 21 January 1965 renders the Court unable to exercise its power of review. The position would have been different if the two disciplinary proceedings had been based, not on general complaints cabale of referring to an indeterminate and unverifiable number of reprehensible matters, but rather on facts which are themselves sufficiently clearly defined to make it possible to distinguish them from all other earlier or later grounds of complaint."

13 Case 14/68 *Walt Wilhelm and Others* [1969] ECR 1.

14 (a specialised court dealing with competition cases under German law).

national authorities are at liberty to “apply to the same facts the provisions of national law” after the Commission initiated proceedings.¹⁵

The ECJ held that Regulation 17/62 only dealt with the competence of the authorities of the Member States in so far as they are authorised to apply (now) Articles 81 (1) and 82 EC,¹⁶ and that it did not apply to situations in which national authorities apply *national* competition laws.¹⁷ According to the judgment, “Community and national law on cartels consider cartels from different points of view. Whereas article (...) 85 regards them in the light of obstacles which may result for trade between the Member States, each body of national legislation proceeds on the basis of the considerations peculiar to it and considers cartels only in that context.”

At this point it should be noted that these findings by the ECJ do not appear to build on the *ne bis in idem* principle as such, but follow directly from Regulation 17/62. Although the EC Treaty “authorizes the Council to determine the relationship between national laws and the Community rules on Competition”, the Council had not made use of this competence in Regulation 17/62.¹⁸ The ECJ could therefore only come to the conclusion that “*so long as* no regulation has been issued under article 87(2) (e), no means of avoiding such a possibility is to be found in the general principles of Community law”.¹⁹ In spite of the fact that the “economic phenomena and legal situations” concerned may well be “interdependent”, one and the same agreement may therefore “in principle, be the object of two sets of parallel proceedings”.²⁰

The ECJ furthermore held that, although Regulation 17/62 left the Member States free in the design and application of their national competition laws, this freedom is not unlimited. “If the ultimate general aim of the Treaty is to be respected, this parallel application of the national system can only be allowed in so far as it does not prejudice the uniform application throughout the common market of the Community rules on cartels and of the full effect of the measures adopted in implementation of those rules”. If there is a conflict between national law and Community law on this point, Community law will take precedence.²¹

15 Furthermore, the *Kartellsenat* asked whether “the risk of its resulting in a double sanction imposed by the Commission (...) and by the national authority with jurisdiction in cartel matters renders impossible the acceptance for one set of facts of two parallel procedures”. In essence, the *Kartellsenat* therefore asked whether this situation was capable of violating the *ne bis in idem* principle.

16 ...in situations in which the Commission has not stepped in and taken action.

17 Para. 3 of the judgment

18 Para. 4 of the judgment.

19 italics added.

20 Para. 3 of the judgment.

21 Para. 6 of the judgment, “so long as a regulation adopted pursuant to Article 87(2)(e) of the Treaty has not provided otherwise” (para. 9 of the judgment).

Turning to the question whether, alternatively, it could be that the risk of accumulation of *penalties* imposed “renders impossible the acceptance for one set of facts of two parallel procedures, the one Community and the other national”, the ECJ answered in the negative, but added that “a general requirement of natural justice” demands that, in determining the amount of a fine, the Commission must *take account* of any penalties already imposed by the authorities of the Member States, in respect of the same conduct..²²

It is important to note that the ECJ did *not* find that the *ne bis in idem* principle is not applicable *per se* in the relationship between the Member States and the Community; the judgment appears to leave this possibility open. Rather, it appears from the judgment that there must be a specific *ground* in Community law in order for the *ne bis in idem* principle to apply. In the context of competition law, this ground would lie in the regulation of the relationship between national and Community competition laws. It appears that the ECJ held that the prohibition of double prosecution could therefore, *in principle* have followed from the relationship between EC competition law and national competition laws, *if* this relationship had been the regulated by the Council in bringing about Regulation 17/62. This was, however, not the case.

If the prohibition of double prosecution is not *directly* applicable, and double punishment may result from double prosecution, could it then perhaps follow *indirectly* from the prohibition of double punishment that a second prosecution would be also barred? The ECJ answered this question in the negative. Although it expressly confirmed that the prohibition of double punishment is a *general requirement of natural justice*, and that the Commission must therefore take account of any penalties already imposed in respect of the same conduct, this is in itself insufficient to prevent a second *prosecution*.

Many questions concerning the interpretation of the *Walt Wilhelm* judgment have surfaced over the years in legal literature, Opinions of the AG's, and judgments of the Community courts. One point which has not received any attention so far is the fact that, in *Walt Wilhelm*, proceedings were still *pending* before the Commission. The outcome of these proceedings was therefore not yet *final*, and for this reason alone the *ne bis in idem* principle could not have applied in this instance. For whatever reason however, this instrumental issue was not raised in the proceedings.

The judgment of the ECJ in *Boehringer*²³ concerned the accumulation of fines imposed by the federal US authorities and the Commission for the same infringement of the competition rules. *Boehringer* requested the Commission by letter to take into account the amount paid by it to the authorities in the

22 “(T)he special system of sharing jurisdiction between the Community and the Member States with regard to cartels” does not preclude the possibility of different proceedings, each “pursuing distinct ends” (para. 11 of the judgment).

23 Case 7/72 *Boehringer v Commission* [1972] ECR 1281.

US, and to reduce the fine it had imposed accordingly.²⁴ The Commission refused, and Boehringer launched an appeal against the Commission's refusal, arguing that the Commission would have "violated a general principle of law prohibiting double penalties for the same action".²⁵

The ECJ confirmed that the Commission is under a general obligation to take into account the fines imposed by the authorities *in the Member States*, under national competition law. Therefore, "it is only necessary to decide the question whether the Commission may also be under a duty to set a penalty imposed by the authorities of a third State against another penalty if in the case in question the actions of the applicant complained of by the Commission, on the one hand, and by the American authorities, on the other, are identical".²⁶ Nevertheless, the ECJ held that although the actions brought by the Commission and the US authorities were based on the same agreements, the fines imposed by the Commission and the US authorities *targeted different factual aspects* of the cartel Boehringer was involved in.²⁷ For this reason, the ECJ found that the Commission had not infringed any duty to take into account the penalties imposed by the authorities in the US. It therefore appeared that the ECJ left the possibility that such a duty might exist open.

The decision of the ECJ in *Boehringer* raises many questions. It is not at all clear from the judgment how the Court determined which "factual aspects" of the cartel were "different". Furthermore, it is questionable whether this rather vague test is the most appropriate one, where an (international) cartel is concerned. It would have seemed more logical for the Court to ask the question whether the *same markets* were affected by the litigious conduct, during the same period of time.

In the *PVC* case,²⁸ the Commission had imposed fines on a number of undertakings for a breach of Article 81 EC. In appeal, the Commission's decision was declared 'non existent' by the CFI. In appeal the judgment of the CFI was set aside by the ECJ, and the Commission decision was annulled. After that, the Commission remedied the formal defects that had led to the annulment of its decision, and proceeded to adopt essentially the same decision a second time. The undertakings concerned brought another appeal. They

24 Meanwhile, Boehringer appealed the Commission's decision imposing the fine before the Court (Case 45/69), and the fine was reduced by the Court (on different grounds).

25 Para. 2 of the judgment.

26 Para. 3 of the judgment.

27 Para. 4 of the judgment. According to the Court, the fine imposed by the Commission was primarily directed against "a gentlemen's agreement dividing the Community and UK markets, and the restriction of synthetic quinidine agreed amongst three of the participants in the cartel", whereas US fines targeted, "amongst other things, also an agreement on 'quinquina' bark, the acquisition and division of the American strategic stock by the cartel, and the successive application of particularly high selling prices in the United States until the middle of 1966."

28 Joined Cases T-305/94, T-306/94, T-307/94, T-313/94, T-314/94, T-315/94, T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *PVC* [1999] ECR II-9931.

argued that the second Commission decision breach of the *ne bis in idem* principle, because the Commission had adopted the same decision a second time.

The CFI observed that the “the general legal principle of *non bis in idem*, (...) prohibits, first, the imposition of two penalties for the same offence and, secondly, the initiation of proceedings for infringement twice in respect of the same set of facts.”²⁹ The Commission cannot therefore bring proceedings or impose a fine for conduct which the CFI has already found to be *proven* or ‘*unproven*’ by the Commission.

However, according to the CFI the fact that the Commission adopted a second decision “did not result in the applicants’ incurring a penalty twice in respect of the same offence, and “when the Court of Justice annulled the 1988 decision in its judgment of 15 June 1994 it did not rule on any of the substantive pleas raised by the applicants”.³⁰ For this reason, the CFI held that the Commission’s second decision did not breach the *ne bis in idem* principle.

These considerations reveal some influence of the wording of Article 4P7 ECHR. The wording of that provision leads to a degree of confusion between the two prohibitions which is apparent from the judgment, and culminates in the fact that the CFI takes into consideration that the second Commission decision did not lead to the double imposition of a *fine*. Clearly, this is something which is, in itself, irrelevant for the application of the prohibition of double *prosecution*.³¹

In appeal in the same case,³² the applicants argued that “the Court of First Instance had made the application of the principle *non bis in idem* depend on the grounds on which the decision was annulled: the principle applies if the decision was annulled for lack of proof; on the other hand, it does not apply in any other circumstances, as in the present case, where there has been an infringement of essential procedural requirements”, when it stated that the Commission could not bring proceedings against an undertaking or penalise it for anti-competitive conduct which the CFI or the ECJ has already found to be either proven or unproven by the Commission, in relation to that undertaking.³³

29 Para. 95 of the judgment.

30 Para. 97 of the judgment.

31 Furthermore, the CFI mentions the prohibition of double punishment first, *before* that of double prosecution. This should be the other way around; the prohibition of double prosecution logically comes *before* the prohibition of double punishment.

32 Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *PVC (appeal)* [2002] ECR I-8375, para. 59.

33 According to the applicants “this legal assessment is misconceived because the principle *non bis in idem* is designed to protect the undertaking against which proceedings have been brought merely against second proceedings and penalties, irrespective of the reason why the first proceedings did not end in a conviction. This interpretation is confirmed by Article 4(1) of Protocol No 7 to the ECHR” (which had come into force in the meantime).

The ECJ held that “the principle of *non bis in idem*, which is a fundamental principle of Community law also enshrined in Article 4(1) of Protocol No 7 to the ECHR, precludes, in competition matters, an undertaking from being found guilty or *proceedings from being brought against it a second time* on the grounds of anti-competitive conduct in respect of which it has been penalised or declared not liable by a previous unappealable decision.”³⁴ In this sentence, the ECJ therefore clearly held for the first time that *only* the prohibition of double *prosecution*, and *not* the prohibition of double punishment, should be regarded as the *ne bis in idem* principle ‘proper’, thus putting an end to the confusion in the case law on this point.³⁵ Nevertheless, the ECJ found that the CFI was “correct in finding that the Commission, by adopting the PVC II decision after curing the defect formally declared unlawful, had neither penalised the undertakings twice *nor initiated a second procedure against them on the basis of the same facts*.”³⁶

A degree of confusion over the substance of the principle re-surfaced in the *Lysine*-case. The lysine cartel was a “classical” worldwide secret cartel between several producers of lysine, a food supplement. The cartel was discovered, and substantial fines were imposed both by the authorities in the US and in Canada, as well as by the Commission. In appeal before the CFI, the cartel members did not argue a breach of the prohibition of double prosecution, but ‘only’ complained that the Commission had refused to deduct the fines imposed by the US authorities, in setting the fine, and contended that it followed from *Boehringer* that the Commission was under an obligation to do so.³⁷ The CFI rejected their claims, and the cartel members launched an appeal, arguing that the Commission ought to have compensated for or taken account of the “fines paid to other authorities which sanctioned the same conduct”.³⁸

It appears from the judgment that the ECJ agreed with the applicants that the prohibition of double punishment, which they relied on in this instance,

³⁴ Para. 59 of the judgment, italics added.

³⁵ In the same sentence however, the ECJ also held that the *ne bis in idem* principle precludes an undertaking from *being found guilty* twice. It appears that what the ECJ meant here was merely that the second Commission decision did not contain a new finding of guilt, but merely remedied formal defects in the first Commission decision.

³⁶ Italics added.

³⁷ “(B)y refusing to deduct from the fine imposed by the Decision an amount corresponding to the fines already imposed on ADM Company in the United States and Canada, the Commission infringed the principle that a second penalty may not be imposed for the same offence. As the judgment in Case 7/72 *Boehringer v Commission* [1972] ECR 1281 shows, the Commission has a duty to set off a penalty imposed by the authorities of a third country against any other penalty if the facts alleged against the applicant by the Commission are the same as those alleged by those authorities.” (para. 77 of the judgment in Case T-224/00, T-220/00, T-223/00, and T-230/00 *Archer Daniels Midland and others v. Commission (Lysine)* [2003] ECR II-2597 5 CMLR 12).

³⁸ Case C-397/03 P *Lysine (appeal)* [2006] ECR I-4429.

is a corollary of the *ne bis in idem* principle, and not on the *ne bis in idem* principle *as such*.³⁹

In sum, it could be said that it is sufficiently clear by now from the case law of the ECJ in particular, that the *ne bis in idem* principle in Community law is the rule that no-one should be *tried* twice (within the Union, on the basis of the same facts).

The substance of the prohibition of double prosecution of Article 54 CISA has not been an issue in the case law. This is unsurprising; the provision avoids any confusion on this point by clearly stating that it prohibits a second *trial*.

In its case law on Article 54 CISA, the ECJ has taken a broad approach to the interpretation of the *ne bis in idem* principle contained in that provision, in keeping with its nature as a fundamental right, and the aim of “ensuring that no-one is prosecuted for the same acts in several Member States on account of the fact that he exercises his right to freedom of movement”.⁴⁰ It is worth mentioning that in his Opinion in the *Van Straaten* case, AG Colomer remarked that the *ne bis in idem* principle is a fundamental guarantee barring a second prosecution in line with the *Erledigungsprinzip*, and that there is a clear distinction between Article 54 CISA and the *Anrechnungsprinzip* which is an expression of the principle of proportionality.⁴¹

So far, there has been no case on the interpretation of the prohibition of double punishment contained in Article 56 CISA.

4.4 RATIONALE OF THE GUARANTEES

4.4.1 Introduction

As was explained in chapter 2, the *rationale* of the *ne bis in idem* principle which can be identified within national systems of law are manifold. In continental law traditions, a distinction is usually made between the principle’s role as an individual’s right, and its function as a guarantee for legal certainty by upholding the finality of judicial decisions. On the international level there is however no single common denominator, which could serve as a point of reference.

39 Para. 37 of the judgment. The Court found that the prohibition of double punishment did not apply here, because there is no *express provision of a convention* requiring the Commission to take into account penalties imposed “by the authorities or courts of a non-member country such as the United States of America or Canada” (para. 51 of the judgment). These findings were confirmed in Case C-308/04 P *SGL Carbon AG v Commission (Graphite Electrodes; appeal)* [2006] ECR I-5977, where it was held that bilateral cooperation in competition matters is “not in the least related to the offsetting or taking into account of penalties”.

40 See, for example, Case C-150/05 *Van Straaten* [2006] ECR I-9327, at para. 41.

41 Opinion of Advocate General Colomer 8 June 2006 in case C-150/05 at para. 58.

It has also been noted before (in chapter two) that the *rationale* underlying the prohibition of double prosecution are not necessarily the same as those underlying the prohibition of double punishment. In particular, the prohibition of double punishment does not count amongst its *rationale* the respect for *res iudicata*, and to a much lesser extent the interest of legal certainty. For this reason, the *rationale* of the prohibition of double punishment (*Anrechnungsprinzip*) and those of the prohibition of double prosecution (*Erledigungsprinzip*) as they appear from the case law will be discussed separately in the following paragraphs.

The case law of the ECJ is sparse on the point of the *rationale* of the guarantees, in particular where the *Erledigungsprinzip* is concerned. There are no cases in which the ECJ has stated in general terms what the decisive *rationale* of the *Erledigungsprinzip* in Community law would be. In its case law concerning Article 54 CISA, the ECJ has merely emphasized the free movement aims of that provision. As regards the prohibition of double punishment (*Anrechnungsprinzip*) in Community law, the ECJ has held that this prohibition forms an expression of the principle of *proportionality*. As is well known, the proportionality principle is an important principle of Community law, as well as a universally applicable legal principle which applies in criminal law as well as in other areas of law.

4.4.2 The *rationale* of the *Anrechnungsprinzip* in the case law of the European Court of Justice

As mentioned above, in *Walt Wilhelm* the ECJ referred to the prohibition of double punishment as “a principle of natural justice”. It is not clear from the judgment what the ECJ meant by this statement precisely. Could it perhaps mean that the logic underlying the prohibition of double prosecution should be considered so universal and self-evident (“natural”), that it may be held to apply in any given (legal) context?

In *Maizena*⁴² the ECJ was asked by the referring court to examine the legality of Commission Regulation EEC/3183/80, laying down a system of export licenses and security (payable for various risks), in the context of the export of agricultural products. If the conditions laid down in the Regulation are not met, (therefore: if the licensee does not export the goods within the prescribed time limits) the amount of the security paid by the applicant for obtaining an export license under the Regulation is forfeited, and becomes a fine. The referring court asked the ECJ to examine the possible (in-) compatibility of the Regulation with the criminal law principles of *nulla poena sine culpa*, *in dubio pro reo*, and –what the referring court considered as– *ne bis in idem*. It should

42 Case 137/85, *Maizena* [1987] ECR 4587.

be pointed out that in fact, the rule relied on by the plaintiffs in this instance was the prohibition of double *punishment*; the plaintiffs argued, amongst other things that, in respect of the same export transaction, two securities paid by the licensee could be forfeited under the system of the Regulation, both of which have as their object to ensure the export of the goods.

The ECJ observed that the penalty in question (the forfeiture of the security) is not of a criminal law nature, because of the fact that the traders *themselves* decide whether or not to take advantage of the 'special arrangements involving advanced release of their security'.⁴³ For this reason, "the two principles typical of criminal law referred to by the national court, namely the principles *nulla poena sine culpa* and *in dubio pro reo* are not applicable".⁴⁴

Calling to mind that "a penalty, even of a non-criminal nature, cannot be imposed unless it rests on a clear and unambiguous legal basis",⁴⁵ the ECJ, held that "the argument put forward by the plaintiffs in their oral argument before the ECJ to the effect that a double penalty was inflicted on them on the basis of the same facts, contrary to the principle *non bis in idem* (...) must be considered from the point of view of the principle of *proportionality*".⁴⁶

Similarly, in their Opinions in *Van Straaten* and *Kraaijenbrink*,⁴⁷ AG's Colomer and Sharpston argued that the "*Anrechnungsprinzip*" is an expression of the principle of *proportionality*,⁴⁸ which is both a general criminal law principle, as well as a general principle of Community law.⁴⁹

4.4.3 The *rationale* of the *Erledigungsprinzip* in the case law of the European Court of Justice

Although the relevance of the prohibition of double prosecution (*Erledigungsprinzip*) for the Community legal order was recognised by the ECJ⁵⁰ even before that of the prohibition of double punishment, the ECJ did not go in to the *rationale* of the guarantee, in any of the competition cases.

In *PVC*, the ECJ merely referred to the *ne bis in idem* principle as a "general legal principle", which is hardly saying much. In its case law on Article 54 CISA on the other hand, the ECJ has repeatedly emphasized the free movement

⁴³ Para. 13 of the judgment.

⁴⁴ Para. 14 of the judgment.

⁴⁵ Para. 15 of the judgment.

⁴⁶ Emphasis added, paras. 15 *et seq.* of the judgment.

⁴⁷ Case C-367/05 *Kraaijenbrink* [2007] ECR I-6619.

⁴⁸ Para. 58 of the Opinion of Advocate General Colomer 8 June 2006 in Case C-150/05 *Van Straaten* [2006] ECR I-9327.

⁴⁹ Paras. 57-60 of the Opinion of Advocate General Sharpston 5 December in Case C-367/05 *Kraaijenbrink* [2007] ECR I-6619.

⁵⁰ in *Gutmann and Walt Wilhelm* (Joined Cases 18/65 and 35/65 *Gutmann v Commission of the EAEC* [1966] ECR 103 and Case 14/68 *Walt Wilhelm and Others* [1969] ECR 1).

objectives of that provision within the context of Third Pillar law. In *Gözütok and Brügge*⁵¹, *Miraglia*,⁵² *Van Esbroeck*⁵³ and *Van Straaten*,⁵⁴ the ECJ explained that the objective of Article 54 of the CISA is “to ensure that no one is prosecuted for the same acts in several Contracting States on account of his having exercised his right to freedom of movement”. In *Miraglia*,⁵⁵ the ECJ pointed to the link between Article 54 CISA and the objectives “as set out in the fourth indent of the first subparagraph of Article 2 EU, namely: ‘to maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to ... prevention and combating of crime’.”⁵⁶

Rafaraci and Belfiore argue that this shows that “the ECJ has not recognised the significance of the *ne bis in idem* principle *per se*, i.e. as the expression of a fundamental right, but has regarded this principle merely as the underpinning principle of the freedom of movement of persons, one of the four freedoms of the Common Market”.⁵⁷ According to the authors, this approach could be seen as a byproduct of the insufficient nature of judicial protection in the Third Pillar, and in particular the total absence of *locus standi* for individuals to bring a direct action against Third Pillar measures.⁵⁸

Whether or not one agrees with the authors on this point, it must be said that the ECJ has not so far elaborated on more general *rationale* of the *ne bis in idem* rule contained in Article 54 CISA such as the respect for *res iudicata*, legal certainty, and due process. On the other hand, the ECJ has on several occasions emphasized the human rights nature of the prohibition in its case law on Article 54 CISA, and it cannot therefore be said that the ECJ has failed to acknowledge the fundamental human rights nature of that provision in its entirety, as Rafaraci and Belfiore contend. Finally it is worth mentioning that in his Opinion in *Gözütok and Brügge*, AG Colomer identified *legal certainty* and *equity* as the two main *rationale* of the *ne bis in idem* principle.⁵⁹

51 Joined Cases C-187/01 and C-385/01 *Gözütok and Brugge* [2003] ECR I-1345, para. 38.

52 Case C-469/03 *Miraglia* [2005] ECR I-2009, para. 32.

53 Case C-436/04 *Léopold Henri van Esbroek* [2006] ECR I-2333, para. 33.

54 Case C-150/05 *Van Straaten* [2006] ECR I-9327, para. 45.

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

56 Para. 34 of the judgment.

57 Rafaraci & Belfiore 2007, p. 26.

58 Rafaraci & Belfiore 2007, pp. 26-27.

59 According to Colomer, “the principle rests on two pillars found in every legal system. One is legal certainty and the other is equity. When the offender is prosecuted and punished, he must know that, by paying the punishment, he has expiated his guilt and need not fear further sanction. If he is acquitted, he must have the certainty that he will not be prosecuted again in further proceedings (Opinion of Advocate General Colomer 19 September 2002 in Joined Cases C-187/01 and C-385/01 *Gözütok and Brügge* [2003] ECR I-1345, para. 49).

4.5 OBJECTIVE SCOPE OF APPLICATION OF THE GUARANTEES

4.5.1 Introduction

As discussed in para. 2.2.3 of this study, it is clear from the wording of Article 4P7 ECHR that the prohibitions stated in that provision only apply *within one and the same state*. Conversely, the objective scope of application of Article 54 CISA is clearly limited to situations *between* the contracting states, and the provision does not therefore apply to double prosecutions within one and the same state, or in third countries.

It is less evident what the objective scope of application of the guarantees in Community law is or should be, and this question has surfaced regularly in the case law of the Community courts in competition cases. In *Walt Wilhelm*, the ECJ held that the *ne bis in idem* principle did not apply in the relationship between the Community and the Member States because EC competition law and national competition laws did not “pursue the same ends” (at least not around the time that the judgment was delivered). Amongst other things, the ECJ based its findings on the fact that Regulation 17/62 left the competition laws of the Member States outside of the scope of application of the legal system of the European Community. In that same judgment however, the ECJ referred to the prohibition of double *punishment* as a ‘general requirement of natural justice’, giving the impression that its application would be without restraints (and would therefore also apply in relation to sanction originating from outside of the EU). In all later cases however, the Community courts have consistently limited the scope of application of the prohibition of double punishment strictly to penalties, which originate from *within* the territory of the EEA. In doing so, the Community courts have stated a wide variety of reasons for this limitation, amongst which the wording of Articles 4P7 ECHR and Article 50 of the Charter, the content of the bilateral cooperation agreements in competition matters between the EC and the US, and the purpose of EC competition law as compared to that of the competition laws of third countries.

For several decades, the case law of the Community courts concerning the objective scope of application of the guarantees meandered in different, sometimes seemingly random directions, and the decisive considerations put forward by the ECJ and the CFI varied from case to case. The courts often considered the “protected legal interest” at stake, raising the suggestion that the question of the *scope of application* of the guarantees is somehow intertwined with (or even the same as) the question whether it concerned the same conduct or infringement (“*idem*”). This suggestion is clearly wrong; the question of the objective scope of application of the guarantees is separate and distinct from the question of *idem*. Furthermore, the *legal qualification* of the offence is not exactly the same thing as the ‘protected legal interest’ either, although it must be admitted that the underlying interest to be protected will necessarily find

its way into the legal qualification of the offence. As discussed in para. 2.6.2 of this study, the reason for this is that “offences” are generally speaking *essentially defined by a (possible) result*, rather than by an objectively identifiable, historical path of action.

It wasn’t until 2006 that the ECJ clearly established in the *Graphite Electrodes-judgments*⁶⁰ (see further below) that the objective scope of application of *both* prohibitions is defined by the *scope of application of the legal system of the European Community*. Under the decentralized system of enforcement of Regulation 1/2003, there can be little doubt that the ECJ’s statement has important implications for the application of the *ne bis in idem* principle between the Commission and the NCA’. In the following paragraphs, the case law of the Community courts concerning the objective scope of application of the *Anrechnungsprinzip* in Community law will be examined and discussed first, before continuing with the discussion of the case law of the Community courts concerning the objective scope of application of the *Erledigungsprinzip*.

4.5.2 The case law of the European Court of Justice concerning the objective scope of application of the *Anrechnungsprinzip* in Community law

In *Walt Wilhelm*, the ECJ held that the Commission must take into account any penalties already imposed by the authorities of a Member States for the same conduct. That the prohibition of double punishment applies in the relationship between the Commission and the authorities of the Member States has remained uncontested ever since.⁶¹ This left the question whether the Commission’s obligation to take into account any earlier penalty could also apply to penalties, imposed by the authorities outside of the EU, which was for the first time put before the ECJ in *Boehringer*.⁶²

Boehringer had been fined first by a court in New York and subsequently by the Commission, in respect of the same anticompetitive conduct. It made a request to the Commission in writing to take into account the amount of the fines already paid by it in the US, and to reduce the fine it had imposed

60 Cases C-298/04 P *Showa Denko KK v. Commission* [2006] ECR I-5859 and C-308/04 P *SGL Carbon AG v. Commission* [2006] ECR I-5977.

61 Although there is no case confirming this, it is generally assumed that the same obligation rests on the competition authorities in the Member States, where earlier penalties, imposed by the Commission for the same conduct are concerned. More generally, a duty for the NCA’s to take into account a Commission decision in respect of the same conduct follows from Article 10 EC. There is an obligation for the Member States to ensure that the Commission’s action is ‘effective’, while respecting the general principles of Community law (joined cases C-46/87 and 227/88 *Hoechst* [1989] ECR 2859, para. 33).

62 Case 7/72 *Boehringer v Commission* [1972] ECR 1281.

accordingly. The Commission refused.⁶³ Boehringer brought an appeal against the Commission's refusal, on the grounds that the Commission had "violated a general principle of law prohibiting double penalties for the same action".⁶⁴

The ECJ held that "it is only necessary to decide the question whether the Commission may also be under a duty to set a penalty imposed by the authorities of a third State against another penalty if in the case in question the actions of the applicant complained of by the Commission, on the one hand, and by the American authorities, on the other, are identical", but almost immediately came to the conclusion that there was *no* need to answer this question.⁶⁵ Although the actions brought by the Commission and the US authorities are based on the same agreements, the Court (somewhat loosely) argued they differed "essentially as regards both their object and their geographical emphasis".⁶⁶ The ECJ therefore did not confirm that the Commission is under any duty to take into account penalties imposed by the authorities in non-member states, but did not rule this possibility out either. It is therefore perhaps surprising that reference was made to the *Boehringer* judgment so often, both in judgments by the Community courts, as well as in legal writing. After all, no decision was reached by the ECJ at all in *Boehringer* on the point of the scope of application of the prohibition of double punishment.

Nearly three decades passed before the question whether or not the Commission could be under a duty to take into account fines imposed by authorities in third countries was brought before the Community courts again, in a case concerning a secret world-wide cartel between several producers of lysine.^{67/68} The US Department of Justice ("DoJ") followed the members of the cartel⁶⁹ closely, and the Federal Bureau of Investigations ("FBI") secretly recorded the meetings with a camera, hidden in a lamp in the corner of the

63 Meanwhile, *Boehringer* brought an initial appeal against the Commission's decision (Case 45/69 *Boehringer Mannheim v Commission* [1970] ECR 769).

64 Para.2 of the judgment.

65 Para.3 of the judgment. As discussed in para. 4.3.2 (*supra*), the Court's approach appears questionable. It would have been more logical for the Court to examine whether the *same markets* were affected by the litigious conduct, during the same period of time.

66 Para.4 of the judgment.

67 Case T-224/00, T-220/00, T-223/00, and T-230/00 *Archer Daniels Midland and others v. Commission (Lysine)* [2003] ECR II-2597 5 CMLR 12, see also: N1 58/03, 'A cartel on the Lysine market gives the Court of First Instance an opportunity to clarify the criteria for fixing the amount of fines' (press release) available from: <http://curia.europa.eu/en/actu/communiques/cp03/aff/cp0358en.htm>.

68 Lysine is an essential amino-acid which is not produced by the human or animal body. Worldwide sales of lysine were over \$600 million annually between 1992 and 1995 (the time the cartel was active).

69 Cheil Jedang Corporation, Kyowa Hakka, Archer Daniels Midland, Ajinomoto and Daesang-Sewon.

meeting room with the help of a cooperating witness.⁷⁰ The investigations triggered inquiries into a chain of cartel in the chemical sector. Various cartels were uncovered for a number of products, involving several of the same firms which formed part of the lysine-cartel: citric acid,⁷¹ sodium gluconate,⁷² sodium erythorbate, and maltol.⁷³

The Commission proceeded on the basis of the information directly conferred to it by its US counterparts under the bilateral cooperation agreements between the Commission and the US authorities, and imposed a considerable fine on the members of the cartel.⁷⁴ The cartel members brought an appeal against the Commission's decision on various grounds, *inter alia* arguing that the Commission had acted in breach of its alleged duty to deduct or take into account the fines imposed by the US authorities, and that the Commission had not limited itself to the turnover generated from sales of lysine in the EEA in setting the fines.

The CFI⁷⁵ first observed that "it is settled case-law that under Regulation No 17 the Commission has a margin of discretion when fixing fines, in order that it may direct the conduct of undertakings towards compliance with the competition rules." The way in which the fines were set by the Commission as laid down in the Commission Guidelines on the method of the setting of fines, are "calculated according to the two criteria referred to in Article 15(2) of Regulation No 17, namely the gravity of the infringement and its duration, subject to the upper limit determined by reference to the turnover of each undertaking, as laid down in that provision." The upper limit referred is 10 % of the *world wide* turnover in the preceding business year, and the CFI found

70 Copies of a secret tape-recordings and transcripts of several meetings and phone calls between the cartel members are available (at no charge) from the United States Department of Justice, Antitrust Division, Freedom of Information Act Unit, 325 Seventh Street, NW, Suite 200, Washington, D.C., 20530.

71 Case T-43/02 *Jungbunzlauer v. Commission* [2006] ECR II-3435 and case T-59/02 *Archer Daniels Midland Co. v Commission (Citric acid)* [2006] ECR II-3627.

72 Case T-314/01 *Avebe v. Commission* [2006] ECR II-3085, Case T-322/01 *Roquette Frères v Commission* [2006] ECR II-3137, Case T-329/01 *Archer Daniels Midland Co. v Commission (Sodium Gluconate)* [2006] ECR II-3255 and Case T-330/01 *Akzo Nobel v. Commission* [2006] ECR II-3389.

73 In all, 10 companies and 11 individuals from 7 different countries were convicted and paid over \$225 million in criminal fines in the United States alone. The three U.S. executives representing Archer Daniels Midland at the meetings, Mr. Andreas, Mr. Wilson, and Mr. Whitacre, were convicted by a jury of violating the Sherman Antitrust Act (15 U.S.C. § 1) and were sentenced to lengthy terms of imprisonment.

74 One of the cartel members (Ajinomoto) offered its cooperation in the Commission investigation in exchange for immunity from fines.

75 It concerns Case T-224/00, T-220/00, T-223/00, and T-230/00 *Archer Daniels Midland and others v. Commission (Lysine)* [2003] ECR II-2597 5 CMLR 12 and Case T-223/00 *Kyowa Hakko Kogyo v. Commission* [2003] ECR II-2553.

that the Commission was therefore not restricted by the EEA turnover in setting the fines.⁷⁶

As mentioned before, one of the applicants (ADM) argued that by refusing to deduct from the fine imposed “an amount corresponding to the fines already imposed on ADM Company in the United States and Canada, the Commission infringed the principle that a second penalty may not be imposed for the same offence.”⁷⁷ ADM furthermore argued that, contrary to the situation in *Boehringer*, the cartel sanctioned by the American and Canadian authorities on the one hand and the Commission on the other was clearly the same in object, geographical extent and duration, and that it was sufficiently clear that the US and Canadian authorities as well as the Commission had imposed particularly large penalties, specifically taking into account the *worldwide* scope of the cartel.⁷⁸

The CFI however ruled out the possibility that the ECJ seemed to leave open in *Boehringer* when it held that the *ne bis in idem* principle “*a fortiori*” could not apply in a situation such as the one at hand, as the penalties imposed by the authorities in the EEA, the US and Canada “pursued different ends”.⁷⁹ The elaborate reasoning given by the CFI on this point deserves some further discussion here.

Firstly, the CFI pointed to the wording of Articles 4P7 ECHR, 54 CISA and 50 of the Charter, in order to demonstrate that the scope of the *ne bis in idem* principle is generally confined to the level of the state, and that the principle does not preclude a person from being tried more than once in different states.⁸⁰

76 “It should be borne in mind that the only express reference to turnover in Article 15(2) of Regulation No 17 concerns the upper limit which a fine may not exceed. Moreover, according to settled case-law, turnover is to be understood as meaning the total turnover of the undertaking concerned”.

77 “As the judgment in Case 7/72 *Boehringer v Commission* [1972] ECR 1281 shows, the Commission has a duty to set off a penalty imposed by the authorities of a third country against any other penalty if the facts alleged against the applicant by the Commission are the same as those alleged by those authorities.” Para. 77 of the judgment in Case T-224/00, T-220/00, T-223/00, and T-230/00 *Archer Daniels Midland and others v. Commission (Lysine)* [2003] ECR II-2597 5 CMLR 12.

78 The Commission on the other hand contended that “the United States and Canadian authorities took account of the anti-competitive effects of the cartel only in the area of their jurisdictions”, para. 78 of the judgment in Case T-224/00, T-220/00, T-223/00, and T-230/00 *Archer Daniels Midland and others v. Commission (Lysine)* [2003] ECR II-2597 5 CMLR 12.

79 “The aim of the first was to preserve undistorted competition within the European Union and the EEA, whereas the aim of the second was to protect the American and Canadian markets” (para. 90 of the judgment in *Lysine*).

80 “That conclusion is supported by the scope of the principle that a second penalty may not be imposed for the same offence, as laid down in Article 4 of Protocol 7 to the ECHR and applied by the European Court of Human Rights. It is clear from the wording of Article 4 that the intended effect of the principle is solely to prevent the courts of any given State from trying or punishing an offence for which the person concerned has already been acquitted or convicted in that same State. On the other hand, the *non bis in idem* principle does not preclude a person from being tried or punished more than once in two or more

Secondly, the CFI observed that there is no principle of public international law, laying down a *ne bis in idem* rule, and that “such a rule could arise today only through very close international cooperation leading to the adoption of common rules such as those contained in the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders.”⁸¹

Thirdly, the CFI ‘admitted’ that “Article 50 of the Charter of fundamental rights of the European Union (OJ 2000 C 364, p. 1) proclaimed in Nice on 7 December 2000 provides that no one may be tried or punished again in criminal proceedings for an offence of which he has already been finally acquitted or convicted within the Union in accordance with the law.” However, according to the CFI, this provision “is clearly intended to apply only within the territory of the Union and the scope of the right laid down in the provision is expressly limited to cases where the first acquittal or conviction is handed down within the Union”, which would exclude the possibility of its application in relation to penalties imposed by authorities in third countries.

Fourthly, the CFI rightfully pointed out that in *Boehringer* the ECJ had stopped short of answering the question whether or not the Commission would be under a duty to deduct any fines imposed by authorities in third countries, as the ECJ found that the fines imposed by the authorities in the US on the one hand and the Commission on the other concerned *different aspects of the cartel*.⁸² Furthermore, the CFI added that the ECJ held in *Walt Wilhelm* “that it was in view of the particular situation which arises from the close interdependence between the national markets of the Member States and the common market and from the special system for the division of jurisdiction between the Community and the Member States with regard to cartels on the same territory, namely the common market, that the ECJ, having acknowledged the possibility of dual sets of proceedings and having regard to the possibility of double sanctions flowing from them, held it to be necessary, in accordance with a requirement of natural justice, for account to be taken of the first decision imposing a penalty”.⁸³

For all of the above reasons, and for the reason that there is “no express provision of a convention requiring the Commission, when determining the amount of a fine, to take into account penalties already imposed on the same

different States for the same conduct”; para. 91 of the judgment in *Lysine*.

81 Para. 92 of the judgment in *Lysine*.

82 “the Court merely regarded the identity of the facts alleged by the Commission and by the authorities of the non-member country as being a precondition of the said question.” (Para. 93 of the *Lysine* judgment).

83 Para. 99 of the *Lysine* judgment. According to the CFI, the factual circumstances in the present case are therefore “obviously different” from the ones in *Walt Wilhelm* (Case 14/68 *Walt Wilhelm and Others* [1969] ECR 1).

undertaking in respect of the same conduct by the authorities or courts of a third country”, the CFI found that the Commission had not infringed any obligation to take into account the fines imposed by the authorities in the US and Canada, because there existed no such obligation. In appeal, these findings were expressly confirmed by the ECJ.⁸⁴

Similar reasoning as that found in *Lysine* was applied by the CFI in the *Graphite Electrodes* case.⁸⁵ The case concerned a worldwide cartel of producers of graphite electrodes, an essential component used in the production of new steel from iron scrap. In a concerted investigative effort between the Commission and the authorities in the US, dawnraids were carried out on the same day and at the same time in the US and Europe, and the authorities on both sides had proceeded on the basis of information which they shared with their counterparts. The cartel members complained that the Commission had not taken into account the fines imposed by the authorities in the US and Canada, in setting the fine, and that the Commission had thereby breached the rule prohibiting concurrent sanctions for the same infringement. For all the same reasons as in the *Lysine*-cases, the CFI again held that the possibility of concurrent sanctions is justified in the relation to third countries, this time adding that the proceedings in the US, Canada, and the EU “pursued different ends”. Two of the cartel members, SGL Carbon and Showa Denko, lodged an appeal before the ECJ against the judgment of the CFI on various grounds, including a breach of the *ne bis in idem* principle.⁸⁶

In his Opinion, the AG argued amongst other things that the requirement of the *unity of the legal interest protected*, which would form the *third* requirement for the application of the *ne bis in idem* principle in Community law, is by definition not met where penalties from third countries are concerned.⁸⁷ The ECJ agreed with the AG, and observed that “the exercise of powers by the authorities of those States responsible for protecting free competition under their territorial jurisdiction meets requirements specific to those States. The

84 Case C-397/03 P *Lysine (appeal)* [2006] ECR I-4429.

85 Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01 *Tokai Carbon (Graphite Electrodes)*, [2004] ECR II-1181.

86 Case C-289/04 P *Showa Denko KK v Commission* [2006] ECR I-5859, and Case C-308/04 P *SGL Carbon AG v Commission (Graphite Electrodes; appeal)* [2006] ECR I-5977. SGL relied primarily on a breach of the principle of *ne bis in idem*, whereas Showa Denko relied primarily on the way the Commission had set the fine, and subsidiarily on an infringement of the *ne bis in idem* principle. The relevant considerations in the two judgments are however identical.

87 “I agree with the Commission and the Court of First Instance that the third condition, the same legal interest, is not satisfied. A cartel commits infringements in each of the jurisdictions in which it functions. Thus, the fact that a cartel operates on a worldwide scale does not alter the fact that United States antitrust law and Community competition law are primarily concerned with the effects of the cartel on their respective territories.” Opinion of Advocate General Geelhoed, 19 January 2006 in Case C-308/04 P *SGL Carbon AG v Commission (Graphite Electrodes; appeal)* [2006] ECR I-5977, paras. 48-50.

elements forming the basis of other States' legal systems in the field of competition not only include specific aims and objectives but also result in the adoption of specific substantive rules and a wide variety of legal consequences, whether administrative, criminal or civil, when the authorities of those States have established that there have been infringements of the applicable competition rules."⁸⁸

In order to further substantiate its findings on this point, the ECJ compared this situation to that *within* the EEA: "(o)n the other hand, the legal situation is completely different where an undertaking is caught exclusively – in competition matters – by the application of Community law and the law of one or more Member States on competition, that is to say, where a cartel is confined exclusively to the *territorial scope of application of the legal system of the European Community*,"⁸⁹ and the appeal was therefore rejected.⁹⁰

Although perhaps seemingly simple and self-evident, the importance and likely implications of the Courts' statement (that the scope of application of the guarantees is defined by the scope of application of the legal system of the European Community) should not be underestimated. It is highly reminiscent of the relevant consideration of the judgment of the Court in *ERT*.⁹¹ As is well known, it was held in that case law that both the Community as well as the Member States are bound by general principles of Community law when acting 'within the scope of Community law'. What the ECJ has confirmed in the *Graphite Electrodes* judgments is simply this: that the *ne bis in idem* principle is no exception to the rule. There can be little or no doubt that this statement has important implications for the application of the *ne bis in idem* principle in the relationship between the Commission and the NCA's under the decentralized system of enforcement of EC competition law introduced by Regulation 1/2003. As we have seen in the previous chapter of this study, Article 3 of Regulation 1/2003 has brought instances in which the NCA's apply national competition law alongside EC competition law *within the scope* of Community law, in situations which may (appreciably) affect trade between the Member States. In my opinion, there can no longer be any doubt that those instances, the *ne bis in idem* principle will apply. Walt Wilhelm is therefore no longer 'good law', on this specific point.

At the same time, the *Graphite Electrodes* judgments leads to the conclusion that there is *no* obligation under Community law to take sanctions imposed by competition authorities in third countries into account. This seems somewhat disappointing, especially if one considers that in many instances it will

⁸⁸ Para. 53 of the *Showa Denko* judgment; para. 29 of the *Graphite Electrodes*; appeal – judgment.

⁸⁹ italics added. Para. 53 of the *Showa Denko* judgment; para. 30 of the *Graphite Electrodes*; appeal – judgment.

⁹⁰ Case C-328/05 *SGL Carbon AG v Commission (Specialty Graphite; appeal)* [2007] ECR I-3921.

⁹¹ Case C-260/89 *ERT* [1991] ECR I-2925, para. 41. For further comments see, in particular, Gaja 1994.

concern exactly the same infringement, and furthermore that the Commission takes into account the *worldwide* turnover of the undertaking in calculating the fine.

4.5.3 The case law of the European Court of Justice concerning the objective scope of application of the *Erledigungsprinzip* in Community law

As mentioned before, the ECJ held in *Walt Wilhelm* that “one and the same agreement may, in principle, be the object of two sets of parallel proceedings”.⁹² Among the reasons stated by the ECJ were the fact that Regulation 17/62 did not regulate the relationship between Community competition rules and national law.⁹³ It could not, therefore, be said that the EC competition rules and national competition laws in the Member States “pursued the same ends” or at least not at the time that the judgment was delivered, because Regulation 17/62 *did not bring the competition laws of the Member States within the scope of application* of the legal system of the European Community. The facts underlying the 1995 judgments of the CFI in the welded steel mesh-cartel, *Sotralentz*⁹⁴ and *Tréfileurope*,⁹⁵ more or less ‘mirrored’ those in *Walt Wilhelm* on several points.

The French Competition Commission had imposed fines on several French producers of steel mesh (in 1985), amongst which *Sotralentz* and *Tréfileurope*. The same undertakings were later also fined by the Commission (along with 12 other producers of welded steel mesh) for infringing (now) Article 81 EC.^{96,97} Two of the applicants (*Sotralentz* and *Tréfileurope*) brought an appeal against the Commission’s decision, *inter alia* arguing a breach of *ne bis in idem*.

Although the cartel consisted of a complex network of agreements, it appears from the judgments that the question whether the fines imposed by the French competition authority and the Commission essentially concerned the same infringement was not seriously in dispute.⁹⁸

92 Para. 3 of the judgment (Case 14/68 *Walt Wilhelm and Others* [1969] ECR 1).

93 Para. 4 of the judgment (Case 14/68 *Walt Wilhelm and Others* [1969] ECR 1).

94 Case T-149/89 *Sotralentz SA v Commission of the European Communities* [1995] ECR II-1127.

95 Case T-141/89 *Tréfileurope SARL v. Commission of the European Communities* [1995] ECR II-791.

96 ‘Welded steel mesh’ consists of steel wires welded together to form a network, the purpose of which is to reinforce concrete construction.

97 The various agreements between producers of welded steel mesh were more or less restricted to one of the member States, but the cartel on the whole nevertheless affected trade between Member States “because undertakings established in various Member States participated in them” (Case T-149/89 *Sotralentz SA v Commission of the European Communities* [1995] ECR II-1127, para. 7). See also the Commission decision: 1989/515/EC, Case IV/31.553 – *Welded steel mesh* [1989] OJ L260/1.

98 There was no general agreement between all of the cartel members, but a complex network of different agreements, which affected a substantial part of the common market because undertakings established in various Member States participated in them.

Contrary to the decision by the German *Bundeskartellamt* in *Walt Wilhelm*, the previous decisions by the French competition authority in the welded steel mesh cases took into account the fact that the cartel affected trade between the Member States. Although the French competition law on which the decision was based dated back to 1945, it was applied by the French Competition Commission while ‘implicitly but necessarily’ taking EC competition law into account.

Nevertheless, the ECJ considered that the French Competition Commission had taken action only in relation to the effects of the agreements on the domestic market, and that the Commission was entitled to arrive at its own conclusions, without being ‘bound by the conclusions reached by the national authorities’. Although the factual point of departure differed, the outcome in *Sotralenz* and *Tréfileurope* was therefore the same as in *Walt Wilhelm*. What is particularly interesting here is that the fact that French competition law, in the way it was applied by the French competition authority, clearly “pursued the same ends” as those pursued by EC competition law, did not make any difference for the outcome of the judgment. This outcome seems to be on tense footing with the prevailing interpretation of *Walt Wilhelm*, that the question whether or not domestic laws pursue “the same ends” as EC competition is a ‘test’ for the application of the *ne bis in idem* principle.⁹⁹

In its judgment in *Cement* however, the ECJ formulated a “threefold condition” for the application of the *ne bis in idem* principle, taking into account amongst other things the nature of the protected *legal interest* (and therefore the purpose of competition laws in the Member States).¹⁰⁰ This case will be examined in somewhat more detail here. The facts of the case were the following. In 1994, the Commission imposed fines on 42 undertakings active in the production of grey cement, and 6 undertakings producing white cement for infringements of Article 81 EC.¹⁰¹ Several members of the cartel appealed the Commission’s decisions, on various grounds. Two of the companies, Buzzi Unicem and Italcementi argued that the Commission’s decision breached the *ne bis in idem* principle, because the relevant agreements had already been the subject of an investigation and a subsequent decision by the Italian competition

⁹⁹ The reason why the ECJ merely stressed the fact that German competition law pursued different ends than EC competition law could just as well be that it sought to provide some further *explanation* for the non-application of the *ne bis in idem* principle in the relationship between Community law and domestic law.

¹⁰⁰ Joined cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and others vs. Commission (Cement; appeal)* [2004] ECR I-123. The applicants did not argue a breach of the *ne bis in idem* principle before the CFI (Joined cases T-25, 26, 30 to 32, 34 to 39, 42 to 46, 48, 50 to 65, 68 to 71, 87, 88, 103 and 104/95 *Cement* [2000] ECR II-491).

¹⁰¹ Between 1989 and 1990, the Commission investigated a number of producers of cement throughout the Community.

authority.¹⁰² The Italian competition law in question was (and still is) identical in wording to Articles 81 and 82 of the EC Treaty, except that the Italian provisions do not refer to the 'Community'.¹⁰³

According to the AG, "there are three identities, (...) which must be present in order for the principle to apply: the same facts, the same offender and a single legal right to be protected".¹⁰⁴ The AG however added that in the relationship between the competition laws of the Member States and EC competition law "the unity of the legal right to be protected is beyond doubt. The rules which guarantee free competition within the European Union do not allow a distinction to be drawn between separate areas, the Community area and the national areas, as though there were watertight compartments. Both sectors are concerned with the supervision of free and open competition in the common market, one contemplating it in its entirety and the other from its separate components, but the essence is the same."¹⁰⁵ Furthermore, the Commission and the NCA's fulfil a similar task "and when they sanction anti-competitive conduct their aim is to protect a single legal right."¹⁰⁶

The AG rejected the ECJ's reasoning in *Walt Wilhelm*, for the following reasons: "In *Wilhelm*, cited above, the ECJ of Justice held that [w]hereas Article 85 regards [collusive practices] in the light of the obstacles which may result for trade between Member States, each body of national legislation proceeds on the basis of the considerations peculiar to it. (...) (W)hen the collusive activity does not extend beyond the borders of a Member State, it does not for that reason cease to affect competition within the common market. The test of the territorial extent of the unlawful conduct is not substantive, but adjectival, since it does not affect the nature of the infringement, but only its intensity. If those three identities are present, when conduct contrary to Article 81 EC has been investigated and sanctioned by the Commission, it cannot then be punished by the competent national competition authority, and vice versa. The solution whereby the second authority to become involved reduces the penalty owing to the amount of the fine imposed by the first authority, which was adopted by the ECJ of Justice in *Wilhelm*, does not satisfy the requirements of the principle *ne bis in idem*. That principle is not a procedural rule which

102 According to the applicants, "the re-exhumation of certain contracts and agreements already examined by the Italian competition authority (would) result in its being held responsible twice for the same act, contrary to the principle *ne bis in idem*." Opinion of Advocate General Colomer 11 February 2003 in Case C-217/00 P, *Buzzi Unicem vs. Commission* [2004] ECR I-123, para. 160.

103 A difference which, according to the Opinion of the AG, is "adjectival and has no substantive character."

104 Para. 171 of the Opinion.

105 "On this point, the national legislation must properly transpose the provisions set out in Articles 81 EC and 82 EC and, in order to implement them, by secondary legislation" (para. 173 of the Opinion).

106 Para. 175 of the Opinion.

operates as a palliative for proportionality when an individual is tried and punished twice for the same conduct, but a fundamental guarantee for citizens. In reality, *Wilhelm* did not constitute an application of that principle, since it involved two parallel proceedings pursuing different ends, in other words, in which different assets or legal values were being protected. (footnote: I disagree with that approach since, as I have just pointed out, the national authorities and the Commission supervise the same values when they punish the same conduct by applying competition law, whether national or Community.) The identity of protected objective required for the application of the *ne bis in idem* rule is absent. That judgment shows that, so far as the Community case-law is concerned, even where that principle does not apply and the double punishment is lawful, a general requirement of natural justice... demands that any previous punitive decision must be taken into account in determining any sanction which is to be imposed."¹⁰⁷

In this case however, the AG came to the conclusion that there had been no breach of the *ne bis in idem* principle because the Italian authorities and the Commission had imposed penalties in respect of different agreements.

Following the Opinion of the AG, the ECJ held that "the application of that principle is subject to the threefold condition of identity of the facts, unity of offender and unity of the legal interest protected."¹⁰⁸ In this instance, the ECJ held that the CFI had not erred in finding that the agreements sanctioned by the Commission and those sanctioned by the Italian competition authority were different agreements, and that consequently there had been no breach of the *ne bis in idem* principle.

It is worth noting that in the case law concerning the prohibition of double punishment in Community law, the Community courts often appear to consider the scope of application of both prohibitions jointly, as that of "the principle *ne bis in idem*" in general. In the *Graphite Electrodes* case, the ECJ generally held that "the exercise of powers by the authorities of those States responsible for protecting free competition under their territorial jurisdiction meets requirements specific to those States", and that the CFI was therefore "fully entitled to hold in paragraph 134 of the judgment under appeal that the principle of *non bis in idem* does not apply to situations in which the legal systems and competition authorities of non-member states intervene within their own

107 Paras. 176-179 of the Opinion. The AG furthermore argues that "in (*Maizena*), the Court of Justice held that there was no infringement of the principle *ne bis in idem* because the two securities required from the same person in respect of the same facts did not have the same purpose (paragraphs 22 and 23)." (footnote 111 of the Opinion). I beg to disagree with him on this point. In my opinion, it would appear that the Court essentially held in *Maizena* that the forfeiture of the securities did not constitute a *penalty* in the ordinary sense, because the applicants were free in their choice whether or not to make use of the relevant arrangements under Community law.

108 Para. 338 of the judgment in *Cement*; *appeal*.

jurisdiction".¹⁰⁹ It appears, therefore, that the ECJ make no distinction between the two prohibitions on the point of their scope of application.

The ECJ did not go so far as to expressly confirm the AG's contention that there is no question that EC competition law and the competition laws of the Member States protected the same legal interest. What it did do however is hint that the legal situation would be "*completely different* where an undertaking is caught exclusively – in competition matters – by the application of Community law and the law of one or more Member States on competition, that is to say, where a cartel is confined exclusively to the territorial scope of application of the legal system of the European Community."¹¹⁰ As I have mentioned in the previous paragraph, there can in my opinion no longer be any doubt that under the vigour of Regulation 1/2003 the *ne bis in idem* principle will apply in competition matters in the relationship between the NCA's and the Commission, in situations which may (appreciably) restrict trade between the Member States. *Walt Wilhelm* is therefore no longer 'good law', on this specific point. These points will be further elaborated in chapter 6 of this study.

4.6 SUBJECTIVE SCOPE OF APPLICATION OF THE GUARANTEES

4.6.1 Introduction

The subjective scope of application of the guarantees regards the question *who can rely* on the prohibitions of double prosecution and double punishment. Although there has been no case concerning the subjective scope of Article 4P7 ECHR before the ECtHR, it would appear that the answer to this question is rather straight-forward: only someone who has *actually been subjected* to a previous *trial* (and who has been finally acquitted or convicted) can invoke the right not to be *tried* twice, for the same act, and this has been confirmed by the ECJ. There is reason to make any distinction between the prohibitions of double prosecution and double punishment on this point; only someone who has actually been *punished* before should be able to invoke the right not to be *punished* twice.

Questions of the subjective scope of application of the prohibitions may arise in particular in legal systems in which undertakings as well as legal persons can be prosecuted under criminal law. In those situations, the criminal liability of the legal entity is usually regarded as a liability distinct from that of its executives or employees.

Another, different issue is that Article 81(1) EC prohibits "decisions by associations of undertakings" (*etc.*). In situations in which both associations

¹⁰⁹ Case C-289/04 P *Showa Denko KK v Commission* [2006] ECR I-5859, paras. 53 and 56.

¹¹⁰ (*Italics added*). Para. 54 of the judgment in *Cement appeal*.

of undertakings as well as their individual members were involved in an infringement of Article 81 EC, this may lead to fines, imposed on both subjects, in respect of the same infringement. In its case law, the CFI has held that the decisive question is whether these form *legal entities*, separate from the members of those associations, even if the members of an association of undertakings are also associations of undertakings.

4.6.2 The subjective scope of application of the guarantees in the case law of the European Court of Justice

In the context of Article 54 CISA, *Gasparini*¹¹¹ has so far been the only case before the ECJ in which questions regarding the subjective scope of application of that provision were raised by the referring court.

The case concerned the import of several shipments of low-grade olive oil from Tunisia and Turkey through the port of Setubal (Portugal), at an unspecified time between 1993 and 1997 by a Spanish company, Minerva SA, active in the business of refining and marketing olive oil. The oil was not, or only partially, declared to the customs authorities in Portugal, and transported by road to Malaga (Spain). A system of false invoicing was devised to create the impression that the oil originated from Switzerland.¹¹²

In the main proceedings, the shareholders and directors of the company were prosecuted before the Provincial court at Malaga for these facts, only after the Portuguese Supreme Court of Justice had acquitted two of the same defendants on the grounds that their prosecution was time-barred. The other defendants were never prosecuted in Portugal. The Spanish court stayed the proceedings, in order to ask the ECJ, among other things, whether a finding that the prosecution of an offence is time-barred is binding on courts in other Member States, and furthermore whether an acquittal for reasons of a time-bar could benefit the other defendants, who had *not* been prosecuted in Portugal, by extension.

In her Opinion, the AG argued that it is clear from the wording of Article 54 CISA that only the *subject in question* should benefit from the protection afforded by it, and not others against whom the similar proceedings, although they could have been brought, were *not* brought.¹¹³ The ECJ agreed with the

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

112 In terms of the factual backgrounds of the case, this is as much as appears certain because there were several inaccuracies and contradictions in the order for reference.

113 Opinion of Advocate General Sharpston 15 June 2006: "Article 54 of the CISA explicitly states that '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'. It follows from a literal reading of that provision that it benefits only the specific individual or individuals who have been finally acquitted or convicted. On its face, that provision does not therefore cover

Opinion on this point, and answered that it is clear from the wording of Article 54 CISA that only those persons *who have actually been prosecuted* and have had their trial disposed of may benefit from the principle. Others therefore do not benefit from the principle by extension, or from the fact that proceedings can no longer be brought against them.¹¹⁴

In the context of Article 81 EC, the only case so far concerning the subjective scope of application of (in this case) the prohibition of double prosecution has been the *Fédération nationale de la coopération bétail et viande* case.¹¹⁵ In that case, the CFI faced the question whether the imposition of fines on several associations of undertakings could infringe the *ne bis in idem* principle. In brief, the facts of the case were as follows. Several French associations of undertaking had been a party of an agreement, infringing Article 81 EC. Three of the associations involved were, in turn, a member of the fourth association; all four associations were a party to the litigious agreement. The Commission imposed fines on all four associations, but no fines were imposed on any individual members of the associations (although their turnover was taken into account in setting the fine).

In appeal before the CFI, two of the associations complained that they had effectively been fined twice: once directly, and once through their membership of the fourth association. The CFI rejected this plea. It held that, although the four associations had acted in close coordination with each other in this instance, they nevertheless formed four independent bodies with their own separate budgets, and their own, sometimes conflicting, interests. It could therefore not be said that the associations essentially formed a single subject, which had been fined repeatedly.

It therefore appears that the question whether or not it concerns separate legal entities is decisive in determining who can rely on the prohibition, notwithstanding the fact that three of the associations involved actually did end up paying “double” fines (through their membership of the fourth association).

4.7 SCOPE OF APPLICATION *RATIONE MATERIAE* OF THE GUARANTEES

4.7.1 Introduction

By its nature, the *ne bis in idem* principle falls to be applied in those areas of law in which *penalties* may be imposed on subjects. Whilst in most legal

other individuals who may have been involved in the same acts but who have not yet been tried” (para. 123 of the Opinion).

114 Para. 37 of the *Gasparini* judgment.

115 Joined cases T-217 and 245/03, *Fédération nationale de la coopération bétail et viande* (*Fédération nationale CBV*) [2006] ECR II-4987.

traditions the *ne bis in idem* principle applies exclusively in the field of criminal law, its scope of application is increasingly expanding into other punitive areas of law (in particular administrative law; see also chapter 2.5.4 of this study).

As we have seen in chapter 3 of this study, the EU as such 'has' no system of criminal law, at least not in the way that it is traditionally understood within domestic legal systems. It is therefore up to the Community courts to determine whether or not, by their nature (*ratione materiae*), fundamental rights such as the *ne bis in idem* principle fall to be applied in certain areas of Community law.

Although there is little jurisprudence available on this point, it is sufficiently clear from the cases that the Community courts do *not* require a certain area of Community law to be 'of a criminal law nature' *strictu sensu* for the application of the *ne bis in idem* principle, it is sufficient that penalties which may be imposed under Community law are *punitive* in nature.

There has been no case addressing the question whether Article 54 CISA may apply to proceedings of an administrative law nature. At first glance, it this would not appear to be the case. Article 54 CISA was drafted for criminal law purposes, something which is also evidenced by the wording of the provision.¹¹⁶ According to Article 2 of Decision 1999/436, Articles 34 and 31 EU form the appropriate legal basis for the *ne bis in idem* provision in Article 54 CISA. Title VI of the TEU (containing Article 34 TEU) is entitled "provisions on police and judicial cooperation in *criminal* matters". It would therefore seem that, by its nature, the scope of application of Article 54 CISA is restricted to the sphere of criminal law. On the other hand, it is a fact that in many Member States administrative law plays an important role in penalising various (types of) conduct. Furthermore, whereas certain types of acts are a matter of criminal law in one Member State, those same acts fall within the realm of administrative law in another Member State. Such differences on the national level could partially undermine the protection offered by Article 54 CISA, which may (perhaps) necessitate a broad interpretation of the provision on this point.

4.7.2 The case law of the European Court of Justice concerning the scope of application *ratione materiae* of the guarantees

Article 23 of Regulation 1/2003 states that fines, imposed by the Commission on undertakings for infringements of the EC competition rules, "shall not be of a criminal law nature." In their case law, the Community courts have emphasized the non-criminal nature of fines imposed by the Commission for infringements of the EC competition rules,¹¹⁷ and taken care not to refer to

¹¹⁶ English: "trial", Dutch: "*berecht*", German: "*abgeurteilt*", French: "*jugée*".

¹¹⁷ Case T-109/02 *Bolloré v. Commission* [2007] ECR II-947 is one example.

the rights of defendants in competition cases as ‘criminal law principles’, but as “general principles and fundamental rights, which are an integral part of the Community legal order ” instead.¹¹⁸

Although both principles find their origins in criminal law, it is therefore clear that both the prohibition of double punishment as well as that of double prosecution are applicable in EC competition law. For the prohibition of double punishment, this was already held by the ECJ in *Walt Wilhelm* (and has been confirmed in several other judgments); for the prohibition of double prosecution, this can be inferred from the judgments of the ECJ in, amongst others the *PVC* (appeal)-, *Cement*-, *Danone*-, and, in particular, *Graphite Electrodes*-cases.¹¹⁹

In its case law on the *ne bis in idem* principle, the ECJ has not explained how, or on the basis of which criteria, it determines whether or not certain legal principles such as the *ne bis in idem* rule fall to be applied in certain areas of Community law. However, in a case concerning a different legal principle, *Hüls*,¹²⁰ the ECJ held that “given the nature of the infringements in question and the nature and degree of severity of the ensuing penalties, the principle of the presumption of innocence applies to the procedures relating to infringements of the competition rules applicable to undertakings that may result in the imposition of fines or periodic penalty payments”.¹²¹ Clearly, where the ECJ refers to the ‘nature’ of the infringements and the ensuing penalties, this can only mean: the *punitive and deterrent* nature of the infringements and the ensuing penalties.

A similar approach to that found in *Hüls*, but with particular emphasis on the link between the prohibition of double punishment and the principle of *proportionality*, is also found in an earlier judgment on the *ne bis in idem* principle, *Maizena*.¹²² The case concerned Commission Regulation EEC/3183/80, laying down a system of export licenses and security for the export of agricultural products. Under the system of the Regulation, two securities paid by the licensee can be forfeited in respect of the same shipment. Both of those securities have as their object to ensure the export of the goods.

In preliminary proceedings, the *Verwaltungsgericht* (administrative court) in Frankfurt am Main (Germany) referred several questions before the ECJ regarding the system of said Regulation. In particular, the *Verwaltungsgericht* asked the ECJ whether the Regulation infringed “superior rules of Community law inasmuch as it is to be regarded as a measure imposing a sanction”, in

118 See, for instance, Case T-474/04 *Pergan Hilfsstoffe für industrielle Prozesse GmbH v Commission* [2007] ECR n.y.r., para. 75.

119 Para. 53 of the judgment of the Court in *Showa Denko* (Case C-289/04 P *Showa Denko KK v Commission* [2006] ECR I-5859).

120 Case C-199/92 P *Hüls v Commission* [1999] ECR I-4287.

121 Para. 150 of the *Hüls* judgment.

122 Case 137/85 *Maizena* [1987] ECR 4587.

the light of the legal principles of *in dubio pro reo*; *nulla poena sine culpa*, *ne bis in idem*, *nulla poena sine lege*, and the principle of proportionality.

In his Opinion, the AG argued that the *ne bis in idem* principle did not apply here, because the first security is intended to guarantee repayment of that refund if at the end of the day the goods are not exported, whereas the aim of the second security is “to prevent the exporter concerned obtaining undue benefit. Under the arrangements for advance payment, traders would obtain undue interest-free credit if it subsequently emerged that the refund should not have been granted.”¹²³

The ECJ agreed with this, and held that the second security, although a penalty of sorts, was not of a criminal law nature, because the traders themselves can decide whether or not to take advantage of the “special arrangements involving advanced release of their security” under the system of the Regulation.¹²⁴ The two principles of criminal law referred to by the national court, namely the principles *nulla poena sine culpa* and *in dubio pro reo* were therefore not applicable here.¹²⁵

Turning to the prohibition of double punishment, the ECJ called to mind that “fundamental rights are an integral part of the general principles of Community law”¹²⁶ and that “provisions of Community law must comply with the principle of proportionality.”¹²⁷ The ECJ considered the pleas relating to the *ne bis in idem* principle “from the point of view of the principle of proportionality”, and held that there had not been a breach of that principle, because the purpose of the two securities was not the same. Whereas the function of the first security is to ensure repayment of the export refund (which is paid in advance under the system of the Regulation) if no exportation takes place, the second security “is intended to ensure that the undertaking to export during the validity of the licence will be honoured”.¹²⁸

The question whether or not the penalties concerned could be seen as ‘criminal’ in nature therefore made no difference for the applicability of the prohibition of double punishment which, according to the ECJ, more generally forms an expression of the principle of proportionality.

In two judgments, *Commission v. Italy*¹²⁹ and *Commission v. Spain*,¹³⁰ the ECJ was faced with the question whether the *ne bis in idem* principle could apply in the context of infringement procedures, launched by the Commission against a Member States under Article 226 EC. Both cases concerned infringe-

123 Opinion of Advocate General Mischo 11 June 1987 in Case 137/85 *Maizena* [1987] ECR 4587, para. 2.

124 Para. 13 of the *Maizena* judgment.

125 Para. 14 of the *Maizena* judgment.

126 Para. 15 of the *Maizena* judgment.

127 Para. 15 of the *Maizena* judgment.

128 Para. 22 of the *Maizena* judgment.

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

130 Case C-416/02 *Commission v. Spain*, [2005] ECR I-7487.

ments of (amongst others) Council Directive 91/676/EEC of 12 December 1991, concerning the protection of waters against pollution caused by nitrates from agricultural sources.¹³¹

In *Commission v Italy*, the ECJ had given a first ruling on the Italian Republic's non-compliance with Articles 3(2) and 12(1) of the Directive.¹³² After that the Commission turned to the ECJ a second time, this time requesting a declaration that the Italian Republic had failed, firstly, to establish the requisite action programmes as prescribed by the Directive in order to protect the water against nitrates, secondly, to report back to the Commission, and thirdly, to carry out the required monitoring activities, in contravention of Articles 5, 6, and 10 of the Directive. The Italian Republic argued that the Commission had breached the *ne bis in idem* principle by initiating two separate, 'identical' infringement proceedings before the ECJ.

In the Opinion in this case, AG Geelhoed argued that the "Italian Government's submission that the present proceedings are substantively identical to those which gave rise to the judgment of 25 February 1999 is (...) unsustainable. The obligations laid down in Article 3 of the Directive are not substantively identical to those in Articles 5, 6 and 10."¹³³ The ECJ agreed with the AG on this point, and held that it was clear from the operative part of the judgment in case C-195/97 that this judgment related solely to the obligations arising under Article 3(2) and Article 12(1) of the Directive. The second proceedings "concerned solely the provisions that were not called in question in the case culminating in the judgment in Case C-195/97 *Commission v Italy*, namely Articles 5, 6 and 10 of the directive, and thus does not violate the non bis in idem rule."¹³⁴ In reaching these findings, the ECJ did not go into the question whether the *ne bis in idem* principle could apply at all in an infringement procedure under Article 226 EC, by first examining whether there was identity of the grounds for the respective proceedings. Although both proceedings concerned the same Directive, and the same general reluctance on the part of the Italian Republic to comply with that Directive, the ECJ nevertheless found that this was not the case.

The case of *Commission v. Spain* concerned infringements of several Community Directives pertaining to the protection of the environment, the pro-

131 Council Directive 91/676/EEC of 12 December 1991, concerning the protection of waters against pollution caused by nitrates from agricultural sources [1991] OJ L375/1.

132 "By failing to adopt and to communicate to the Commission within the prescribed period the laws, regulations and administrative provisions necessary to implement the Directive and, in particular, by failing to comply with the obligation laid down in Article 3(2) thereof, the Italian Republic has failed to fulfil its obligations under Article 12(1) of the Directive." Case C-195/97 *Commission v Italy* [1999] ECR I-1169.

133 Para. 46 of the Opinion of Advocate General Geelhoed 31 May 2001 in Case C-127/99 *Commission v. Italy*, [2001] ECR I-8305.

134 Paras. 27-29 of the *Commission v. Italy* judgment.

tection of groundwater against pollution, and the treatment of waste.¹³⁵ The Commission brought proceedings against the Kingdom of Spain under Article 226 EC. The Spanish government argued that the *ne bis in idem* principle had been breached, because “another letter of formal notice from the Commission had already been sent to it in different proceedings for failure to fulfill its obligations under the Treaty before the proceedings were instituted in this case; that letter of formal notice referred to the same complaint as in these proceedings so that the Commission is therefore in breach of the *ne bis in idem* principle.”¹³⁶ In her Opinion, the AG argued that “proceedings for failure to fulfill obligations under Article 226 EC simply lead to an objective finding that the Member State – according to the situation applicable on the date of relevance to the judgment – has failed to fulfil its obligations under the Treaty. These proceedings are not sanction proceedings as such so that for this reason alone I can assume that the *ne bis in idem* principle is not relevant in this context.”¹³⁷

The ECJ agreed with the Opinion of the AG, and held that “*even if the principle non bis in idem applies to proceedings for failure to fulfill obligations, it is sufficient to state that fact is, in the present case, irrelevant to the admissibility of the complaint. If the ECJ were to find the complaint to be well founded, the sole consequence of the Spanish Government’s argument would be that the Commission would possibly have to abandon the procedure for failure to fulfil obligations which it has initiated*”.¹³⁸

It therefore follows from the case law that the *nature* of the infringements and the *degree of severity of the ensuing penalties* under Community law are criteria according to which the scope of application *ratione materiae* of the *ne bis in idem* are determined by them. More generally, AG Ruiz Jarabo Colomér argued in his Opinion in Case C-176/03 the *ne bis in idem* principle is among “the safeguards which govern the exercise of any power to impose penalties.”¹³⁹

135 Case C-416/02 *Commission v. Spain* [2005] ECR I-7487. The pollution was caused by a pig farm in Andalusia, which released its waste into two nearby rivers directly entering into the Mediterranean sea.

136 Para. 149 of the Opinion of Advocate General Stix-Hackl 12 May 2005 in Case C-416/02 *Commission v. Spain* [2005] ECR I-7487.

137 Para. 155 of the Opinion.

138 Para. 65 of the *Commission v. Spain* judgment italics added.

139 Para. 33 of the Opinion of AG Colomer in Case C-176/03 *Commission of the European Communities v Council of the European Union* [2005] ECR I-7879.

4.8 SCOPE OF APPLICATION *RATIONE TEMPORIS* OF THE GUARANTEES

4.8.1 Introduction

Within national legal systems, the scope of application *ratione temporis* of the *ne bis in idem* principle raises few (if any) problems in practice, because the principle has been an integral part of those legal systems for centuries. If the question of the temporal scope of application of Article 54 CISA could have raised any issues or problems within the supranational context of EU law, the ECJ has avoided this by taking a clear and consistent approach to the issue of the temporal scope of Article 54 CISA, based on the purpose and function of the provision within the EU legal order.

It is established case law before the ECJ that only the *second* prosecution (being the prosecution which triggers the application of the guarantee) must be taken into account for the application of Article 54 CISA. Therefore, if the *first* proceedings were brought at a point in time when the CISA was not yet in force in the state where the *second* proceedings were subsequently brought, but the CISA entered into force in that state in the meanwhile, Article 54 CISA will apply in that situation.

4.8.2 The case law of the European Court of Justice concerning the scope of application *ratione temporis* of the guarantees

Although there has not been a case before the Community courts concerning the temporal scope of application of the *ne bis in idem* principle in Community law, one of the considerations from the *Walt Wilhelm* judgment may perhaps provide an indication on this point. In that case, the ECJ held that ‘consequently, and *so long as* a regulation adopted pursuant to article 87(2)(E) of the Treaty has not provided otherwise, national authorities may take action against an agreement in accordance with their national law, even when an examination of the agreement from the point of view of its compatibility with Community law is pending before the Commission.’¹⁴⁰

It would seem obvious (“*so long as*”), that the starting point should be that the scope of application *ratione temporis* follows the objective scope of application of the guarantees in Community law. In other words: the guarantees apply as from the moment that Community law applies, in a specific legal context.

A different question is whether the temporal scope of application of the *ne bis in idem* principle is the same for *both* sets of proceedings, or whether only the *second* proceedings (which, after all, are the proceedings that trigger

140 Para. 9 of the *Walt Wilhelm* judgment (italics added; Case 14/68 *Walt Wilhelm and Others* [1969] ECR 1).

the application of the principle) should be taken into account. In the context of Article 54 CISA, the ECJ has dealt with this question for the first time in its judgment in *Van Esbroeck*.¹⁴¹

Mr. Van Esbroeck was convicted in Norway on October 2, 2000 – a time, at which the CISA was not yet in force in that country- by a criminal court, for smuggling a shipment of various narcotics from Belgium into Norway, arriving there on the 1st of June 1999. He was released on probation on February 8, 2002 and returned to Belgium, where he faced another trial, this time for smuggling the same shipment of narcotics out of Belgium on the 31 May 1999. He was sentenced to a year in prison, which sentence was upheld in appeal. Mr. Van Esbroeck appealed on a point of law before the Belgian court of cassation, arguing that the second proceedings had been brought in contravention of Article 54 CISA. The court of cassation stayed the proceedings, and asked the ECJ whether Article 54 CISA applied in this instance, in view of the fact that the CISA was not yet in force in Norway at the time of the first set of proceedings.

In his Opinion, the AG argued that Article 54 CISA would apply under these circumstances because the CISA *was* in force in Belgium at the time of commencement of the second proceedings and furthermore because it is a basic principle of criminal law that in case of doubt the defendant should benefit from the rule which is most favourable for the subject.

The ECJ agreed with the Opinion, and held that, given that the second proceedings brought are the proceedings that trigger the application of the principle, it was irrelevant that Article 54 CISA was not in force in Norway when the first proceedings were brought against Mr. Van Esbroeck. He could therefore rely on Article 54 CISA in order to a second conviction in Belgium.

The decision of the Court in *Van Esbroeck* was confirmed in a second, similar case: *Kraaijenbrink*.¹⁴² In that case the ECJ further specified that the CISA must have entered into force in *both* states concerned, by the time the second proceedings were brought. It must be said that this requirement seems self-evident. A third case concerning (amongst other things) the temporal scope of application of Article 54 CISA has been *Bourquain*.¹⁴³ Mr. Bourquain, a German national, served in the French foreign legion in North Africa at the time around 1960. He was stopped by a fellow serviceman (also a German national) during an attempt to desert the colours. He shot his comrade dead with a pistol and escaped to the German Democratic Republic. On 26 January 1961 he was

141 Case C-436/04 *Léopold Henri van Esbroek* [2006] ECR I-2333. Mr. Van Esbroeck (*alias* "Popolino") is a Belgian gangster and author who is something of notoriety in his native country. A translation into English of selections from the books published by Mr. Van Esbroeck entitled '*Popolino: memoirs of an ex-gangster*' was published in 2001 by Vincent Noben (Antwerp).

142 Case C-367/05, *Kraaijenbrink* [2007] ECR I-6619, para. 22.

143 Case C-297/07 *Staatsanwaltschaft Regensburg v. Klaus Bourquain* (n.y.r.).

sentenced to death *in absentia* by the French Permanent Military Court ‘zone Est Constantinoise’ at Bône for the murder of a fellow *legionnaire*.

After the German reunification, Mr. Bourquain was again prosecuted for the same murder, this time by the German authorities. In the proceedings, Mr. Bourquain relied (amongst other things) on his previous French conviction from 1961. The German court contacted the authorities in France, and the public prosecutor of the *Tribunal aux armées de Paris* confirmed that the criminal conviction had acquired the force of *res iudicata*, and that the sentence could no longer be executed in France, amongst other things because the time bar for the execution of his sentence had expired. Another interesting point from the case was that a general pardon had since been issued by the French Republic for *all* crimes committed in Algeria(!). The Landesgericht Regensburg referred several questions to the ECJ for a preliminary ruling.

Notwithstanding the fact that the CISA was never in force at all in Algerian territory where Mr. Bourquain was sentenced to death, and was not in force in France at the time that sentence was passed by a competent authority of that state, the ECJ held that Article 54 CISA applies *ratione temporis* to criminal proceedings such as those at issue in the main proceedings because the CISA had entered into force in both Germany as well as France by the time the second proceedings were brought against Mr. Bourquain.¹⁴⁴

4.9 FINALITY (*RES IUDICATA*)

4.9.1 Introduction

As we saw in para. 2.6.1 of this study it follows from the *ne bis in idem* principle’s purpose of promoting legal certainty and upholding the respect for *res iudicata* that the outcome of the first proceedings must have become *final*, in order to have the legal effect of barring a second prosecution. In general, a judicial decision acquires *finality (res iudicata)* when there is no possibility of *appeal*. This is the case where the law does not provide for the possibility of appeal, where all appeals are exhausted, where the time limits for appeal have expired, where the appeal was withdrawn, or where the right to appeal was waived.¹⁴⁵

In general, the *ne bis in idem* principle (in the ‘proper’ sense: that of the prohibition of double prosecution) therefore only prohibits *consecutive* pro-

¹⁴⁴ Paras 27-29 of the judgment.

¹⁴⁵ See also the Opinion of AG Colomer 8 April 2008 in Case C-297/07, *Staatsanwaltschaft Regensburg against Klaus Bourquain* at para. 58: ‘Dans l’idéal, la *res iudicata* confère au jugement un état juridique non modifiable par quelque moyen que ce soit, faute de voie de recours ou parce que le recours n’a pas été introduit dans le délai légal’.

secutions, and not, as such, *parallel* proceedings (*i.e.* proceedings conducted *at the same time*). The same follows from the wording of the provisions.¹⁴⁶

What is not clear from the wording of the provisions is whether the principle also prohibits the *continuation* of an ongoing (parallel) prosecution, when the other prosecution comes to a (final) end. On the basis of the wording of the provisions one could perhaps argue that if the outcome of one of the two proceedings becomes final before the other proceedings have come to an end, the further continuation of those proceedings would automatically infringe the *ne bis in idem* principle because this could be seen as a (continued) ‘prosecution’, which takes place after an earlier prosecution has come to a final end. This would mean that the ongoing proceedings would have to be discontinued, as soon as the outcome of the first set of proceedings becomes final.¹⁴⁷

Unlike the prohibition of double prosecution, the prohibition of double punishment does *not* count legal certainty and the respect for *res iudicata* amongst its *rationale*. Nevertheless (and perhaps remarkably) Articles 56 CISA and 4P7 ECHR require that any earlier prosecution must have been *finally* disposed of, in order for the prohibition of double punishment contained in those provisions to apply in the context of any subsequent proceedings. So far however, there has not been a case before the ECJ or the ECtHR, concerning this issue.

It is settled case law before the ECJ that the principle of *res judicata* extends only to ‘the matters of fact and law actually or necessarily settled by the judicial decision in question’. In order for a decision to become final, there must have been a *substantive determination* of the facts and the pleas of the case, regardless of the nature or content of the decision. Acquittals for lack of evidence and out of court settlements constitute decisions ‘finally disposing of someone’s trial’ for the purposes of Article 54 CISA. The ECJ has held that a finding by a ECJ in a Member State should also be regarded as a decision ‘finally disposing of’ a person’s trial for the purposes of Article 54 CISA. The requirement that there must have been a substantive determination of the case does not apply to a finding by a court that further proceedings are time-barred.

In the following paragraphs, the case law of the Community courts on the point of the requirement of finality of the outcome of the first proceedings will be examined and discussed.

146 For example: Article 54 CISA does not, as such, prohibit the possibility of parallel proceedings, as long as the outcome of neither set of proceedings has become final (“*a person whose trial has been finally disposed of..(etc.)*”).

147 It should be pointed out that here, the “first” and “second” set of proceedings, refers to the order in which the respective proceedings result in a final outcome within the meaning of Article 54 CISA (and not the order in which the proceedings were brought).

4.9.2 The case law of the European Court of Justice concerning the finality of the outcome of proceedings

In the *PVC* case¹⁴⁸ (which was also discussed in para. 4.3.2), the Commission had imposed fines on a number of undertakings for an infringement of Article 81 EC. After the annulment of this decision in appeal before the ECJ¹⁴⁹ on grounds of defects in the pre-litigation stage of the proceedings,¹⁵⁰ the Commission remedied the formal defects and adopted a second decision. In appeal, the applicants argued amongst other things that the second Commission decision infringed the *ne bis in idem* principle.

The CFI held that under the *ne bis in idem* principle the Commission cannot bring proceedings or impose a fine for conduct which the Community courts have already found to be *proven* or *'unproven'* by the Commission. In this case however, "when the Court of Justice annulled the 1988 decision in its judgment of 15 June 1994 it did not rule on any of the substantive pleas raised by the applicants."¹⁵¹ The CFI therefore found that the Commission's second decision had not breached the *ne bis in idem* principle, and the cartel members lodged an appeal against the judgment of the CFI.¹⁵²

In his Opinion,¹⁵³ AG Mischo argued that the second Commission decision did not infringe the *ne bis in idem* principle because "there was no final decision on the substance of the dispute, but only a judgment finding a formal defect. It is not possible to place these two on the same footing, any more than it is possible to treat an acquittal in the same way as a judgment annulling a measure for a formal defect, to take up the analogy with criminal law, on which the appellant seems to insist. An acquittal, once final, makes it impossible to bring further proceedings, whereas annulment for a formal defect simply means that the accused will be judged again."¹⁵⁴ The AG therefore argued that the two decisions adopted by the Commission must be regarded as having been taken *in the course of one and the same* proceedings. When the first decision taken by the Commission "disappeared following its annulment,

148 Joined Cases T-305/94, T-306/94, T-307/94, T-313/94, T-314/94, T-315/94, T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *PVC* [1999] ECR II-9931.

149 In appeal, the CFI had erroneously declared the first Commission decision 'non-existent'. In appeal before the Court, the judgment of the CFI was set aside, and the Commission decision was annulled.

150 In particular, the Court found the Commission decision was not adequately reasoned, that the rights of defence had not been properly observed by the Commission, and that the legal basis for the Decision was 'questionable'.

151 Para. 97 of the *PVC* judgment.

152 Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij (PVC; appeal)* [2002] ECR I-8375.

153 Opinion of Advocate General Mischo 25 October 2001 in *PVC; appeal (supra)*.

154 Para. 56 of the Opinion in *PVC; appeal*.

it was replaced, without a new procedure being opened, by another decision, which is the only measure penalising the set of facts in question.”¹⁵⁵

The ECJ agreed with the Opinion of the AG, and held that “since the annulment decision cannot in such circumstances be regarded as an acquittal within the meaning given to that expression in penal matters.” The CFI was therefore, according to the ECJ, “correct in finding that the Commission, by adopting the PVC II decision after curing the defect formally declared unlawful, had neither penalised the undertakings twice nor initiated a second procedure against them on the basis of the same facts.”

The general rule which follows from the *PVC* judgment is that a mere annulment on procedural grounds by the Community courts of a Commission decision, without considering any of the *substantive* pleas raised by defendants does not constitute a *final* acquittal (*res iudicata*) for the application of the *ne bis in idem* principle. The answer to the question whether a judgment in a competition case should be regarded as a final decision in that case therefore depends on the content of the judgment itself. A judgment only precludes a second decision by the Commission if it is clear from the judgment that the ECJ has considered the substantive pleas, and has dealt with the case in a final manner.

In a recent case which did not concern the *ne bis in idem* principle, *Commission v. Portugal*,¹⁵⁶ the ECJ summarised its case law on the point of *res iudicata* as follows: “(i)t is clear from settled case-law that the principle of *res iudicata* extends only to the matters of fact and law actually or necessarily settled by the judicial decision in question (Case C-281/89 *Italy v Commission* [1991] I-347, paragraph 14; Order in Case C-277/95 P *Lenz v Commission* [1996] I-6109, paragraph 50, and Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others v Commission* [2002] I-8375, paragraph 44).”¹⁵⁷

There have been several judgments by the ECJ concerning the question of what types of judicial decisions could be seen as ‘finally disposing’ of one’s trial within the meaning of Article 54 CISA. The first was the landmark *Gözütok and Brügge* judgment, which was also the first judgment on the *ne bis in idem* principle in Article 54 CISA, as well as the first preliminary ruling on the Schengen-acquis.¹⁵⁸ This judgment (which has proved highly important for the further development of the case law on Article 54 CISA) will be examined and discussed here in more detail.

Although the cases *Gözütok* and *Brügge* were joined, they were actually unrelated. Both cases concerned out-of-court settlements for criminal offences. The first case concerned Mr Gözütok, a Turkish national living in The Nether-

155 Para. 54 of the Opinion (*idem*).

156 Case C-462/05 *Commission v. Portugal* [2008] ECR n.y.r.

157 Para. 23 of the judgment.

158 Joined Cases C-187/01 and C-385/01 *Gözütok and Brugge* [2003] ECR I-1345. See also the case note by Vervaele: 2004.

lands, who was charged with several counts of illegal possession of narcotics. Proceedings were terminated by way an out of court settlement with the public prosecutor and Mr. Gözütok paid a fine of 3750 Dutch guilders. He was subsequently apprehended and prosecuted by the German authorities on essentially the same grounds, namely dealing in narcotics in the Netherlands on at least two occasions in the same period of time. The 'Higher Regional Court' at Cologne stayed proceedings in order to refer several questions to the ECJ, essentially asking whether the Dutch out-of-court settlement would have the effect of barring the second set of proceedings in Germany.

The second case concerned Mr. Brügge, a German national, who had been charged with intentionally assaulting and wounding a Belgian woman in Belgium. Proceedings against him in Germany had been terminated after he had paid the amount of 1000 German marks as part of an out-of-court settlement with the public prosecutor in Bonn. The court in Belgium stayed proceeding in order to refer the question whether in view of Article 54 CISA, the German prosecutor's settlement with Mr. Brügge barred his prosecution in Belgium.

In the Opinion, AG Colomer observed that "it is necessary to bear in mind two facts which appear contradictory and yet are complementary, the two sides of a single phenomenon. The first is that criminal law within the European Union is fragmented into as many different systems as there are Member States. The second is that, however different the national criminal justice systems are, the aim is to achieve closer and closer cooperation within the framework of the third pillar."

The AG argued that, although the systems of criminal law of the Member States differ on this point, out-of-court settlement are generally enforceable, and therefore constitute *res judicata*. Settlements should therefore be seen as a decisions 'finally disposing of' someone's trial within the meaning of Article 54 CISA.¹⁵⁹

The ECJ agreed with the Opinion of the AG on this point. It held that, if subsequent to an out-of-court settlement, further prosecution is definitively barred, the prosecution has been 'finally disposed of', and the outcome must be seen as having been 'enforced' within the meaning of Article 54 CISA.¹⁶⁰ Summarizing its findings, the ECJ stated that "article 54 of the CISA cannot play a useful role in bringing about the full attainment of that objective unless it also applies to decisions definitively discontinuing prosecutions in a Member State, even where such decisions are adopted without the involvement of a court and do not take the form of a judicial decision".

159 The AG argued that "in an integrated Europe, which is openly undergoing a process to promote ever closer cooperation between the Member States, it would be unacceptable if a person could be troubled for a second time", after someone trial was discontinued by way of an out-of-court-settlement (Para. 121 of the Opinion).

160 Para. 30 of the judgment.

In the *Miraglia*¹⁶¹ case, the ECJ was faced with the question of whether a *voluntary discontinuation of proceedings* by a national court, on the sole ground that proceedings had been brought in another Member State should be seen as a decision finally disposing of someone's trial within the meaning of Article 54 CISA. In brief, the facts of the case were the following.

Mr. Miraglia, an Italian national, was prosecuted in Italy for having organized the transport from the Netherlands to Italy of approximately 20 kilograms of heroin. In concurrent proceedings in The Netherlands (where he was apparently residing at the time of the prosecutions), his prosecution was discontinued by the public prosecutor, on the sole grounds *that a prosecution in respect of the same facts* had been brought in Italy.

Somewhat remarkably, the Dutch authorities refused judicial assistance to the Italian Republic, for the reason that the discontinuation of Mr. Miraglia's trial constituted '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, unless new evidence should be produced against Mr Miraglia", and adding that any request for assistance would run contrary to Article 54 of the CISA.¹⁶²

The Italian court stayed proceedings and referred a question to the ECJ, essentially asking whether Article 54 CISA applies to a situation in which the public prosecutor has discontinued proceedings on the sole ground that criminal proceedings had been started in another Member State, "without any determination whatsoever as to the merits of the case".¹⁶³

The ECJ observed that in a case such as this one, a strict interpretation of Article 54 CISA would undermine the objective of effectively combating crime, by allowing Mr Miraglia to get away with not having stood trial at all. This would "run counter to the very purpose of the provisions of Title VI of the Treaty on European Union, as set out in the fourth indent of the first subparagraph of Article 2 EU, namely: 'to maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to ... prevention and combating of crime'.¹⁶⁴

Consequently, a judicial decision declaring a case to be closed on the sole ground that criminal proceedings against the same subject for the same facts were initiated in another Member State, *without any determination whatsoever as to the merits of the case* can not be seen as a decision ' finally disposing of' someone's case.¹⁶⁵

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

162 Paras. 20-22 of the judgment.

163 Para. 27 of the judgment.

164 Para. 34 of the judgment.

165 Para. 35 of the judgment.

The findings of the ECJ in *Miraglia* are therefore fully consistent with the considerations from *PVC*, where it was held that a mere annulment on procedural grounds by the Community courts of a Commission decision, without considering any of the *substantive* pleas raised by defendants does not constitute a *final* acquittal (*res judicata*). It can be inferred from this that there must have been some substantive determination of the case, in order for its outcome to become final for the purposes of the *ne bis in idem* principle in European law.

It is therefore perhaps unsurprising that in her Opinion in *Gasparini* (which case was discussed in para. 4.6.2 of this study) AG Sharpston took the view that the prohibition of Article 54 would not apply to judicial decisions discontinuing the proceedings on the grounds that the prosecution is time-barred, *if* this did not involve any substantive considerations of the case.¹⁶⁶ As mentioned before, the *Gasparini* case concerned the prosecution in Spain of several shareholders of the Spanish company Minerva SA, after an earlier prosecution of two of the same subjects in Portugal was discontinued because of the existence of a time bar.

The ECJ disagreed with the AG, for the reason that the wording of the first sentence of Article 54 CISA makes no reference to the *content* of the judicial decision.¹⁶⁷ The ECJ held that a judicial decision finally disposing of someone's trial for reasons of the prosecution being time-barred should therefore not be treated any different from a finding of guilt, or an acquittal for lack of evidence, regardless of the question whether there has been any substantive determination of the case.¹⁶⁸ Along similar lines, the ECJ pointed to the fact that the FDEAW does not preclude the application of the *ne bis in idem* rule to situations in which the prosecution is time-barred.¹⁶⁹

In *Van Straaten*, the ECJ was faced with the question whether an *acquittal for reasons of lack of evidence* should be seen as a decision, finally disposing of someone's trial for the purposes of Article 54 CISA. Following the Opinion of the AG, the ECJ found this to be the case. It held that "(b)ringing a second prosecution in respect of the same, inextricably linked, facts after the subject has been acquitted for reasons of lack of evidence would undermine the "principles of legal certainty and of the protection of legitimate expectations."¹⁷⁰ An acquittal for lack of evidence cannot be treated as a decision without any determination whatsoever of the merits of the case. Article 54

166 "In my view, however, discontinuance of criminal proceedings through the application of a time-bar without any assessment of the merits should not be covered by the principle of *ne bis in idem* in Article 54 of the CISA" (para. 90 of the Opinion.).

167 Para. 24 of the judgment.

168 Para. 33 of the judgment.

169 Para. 31 of the judgment.

170 Para. 59 of the judgment.

CISA therefore falls to be applied in respect of decision finally acquitting someone for lack of evidence.

The case of Turanský concerned a Slovak national, who was suspected of having robbed and seriously injured someone in Vienna (Austria).¹⁷¹ The Austrian authorities instigated proceedings, and a warrant was put out for his arrest, but according to information received by the Austrian authorities Mr. Turanský had by then returned to his native country. The Austrian authorities requested the Slovak authorities to bring proceedings against him in that country in accordance with Article 21 of the European Convention on Mutual Assistance in Criminal Matters, and the Austrian court stayed the proceedings pending the final decision by those authorities. However, on the basis of Mr. Turanský's testimony, the Slovak police decided to terminate the investigation "since the act does not constitute a crime and there is no reason to continue the case", and furthermore because the time bar for prosecution under Slovak law would have expired. The Austrian court was now faced with the question whether under Article 54 CISA the decision of the Slovak police could have the effect of barring the further continuation of the preliminary proceedings which were stayed in Austria. The referring court decided to further stay the proceedings and to refer a question to the ECJ for a preliminary ruling. The ECJ held that "a decision which does not, under the law of the first Contracting State which instituted criminal proceedings against a person, definitively bar further prosecution at national level cannot, in principle, constitute a procedural obstacle to the opening or continuation of criminal proceedings in respect of the same acts against that person in another Contracting State".¹⁷² In this case, the decision of the Slovak police did not bar further prosecution under Slovak law. The ECJ came to the conclusion that decision suspending further prosecution, even if there *has* been some consideration of the merits of the case, does not have *ne bis in idem* effect under Article 54 CISA if that decision "does not preclude new criminal proceedings, in respect of the same acts, in that State".¹⁷³

4.10 'IDEM': THE SAME ACT OR OFFENCE

4.10.1 Introduction

As we saw in para. 2.6.2 of this study, it is commonly believed that there are two different ways of approaching the question of whether the basis for the prosecution is "the same": by taking into account the *historical facts* (the "act"), or the *legal qualification* ("offence") of the conduct at issue in the first and second

171 Case C-491/07 *Criminal proceedings against Vladimir Turanský* (n.y.r.).

172 Para. 36 of the judgment.

173 Para. 45 of the judgment.

proceedings (the “natural” or “legal” unity of conduct).¹⁷⁴ The approach based on the objective, historical facts offers the most protection and is therefore the most beneficial for the defendant. The approach based on the legal qualification of those facts (the “offence”), “would almost entirely obliterate the protection afforded by the principle” because it would allow the prosecution to circumvent the prohibition by prosecuting under a different, but similar charge.¹⁷⁵ It appears that the majority of national systems of law emphasize the actual, historical event as the decisive element for the determination of *idem*.¹⁷⁶ Articles 14(7) ICCPR, 4P7 ECHR, and 50 of the Charter however all refer to the “offence”; only Article 54 CISA refers to “the same acts”.

In the same paragraph I have also argued that this distinction is flawed. In the context of legal proceedings, no distinction between the historical facts and their (legal) qualification can be made in absolute terms. Before and during the trial certain facts have been selected, presented, and emphasised, whereas others were omitted, and this process of selection and presentation constitutes a kind of (preliminary) legal qualification of the original event in itself, before the ‘actual’ legal qualifications by the court. A degree of distortion of the historical event in the light of its subsequent legal qualification is therefore inevitable, and this results in a sliding scale of degrees of objectivity in the appreciation of the historical event which led to the prosecution, instead of a clear distinction between “the facts” and “the offence”. Nevertheless, the interest of legal certainty requires that emphasis is placed on the ‘facts’ rather than the ‘offence’ in as much as possible, when applying the *ne bis in idem* principle. If regard is had to the legal qualification of the offence for a finding of *idem*, the outcome becomes difficult to predict or even random. In the absence of the harmonization of the systems of criminal law of the Member States, this would be particularly problematic for the application of Article 54 CISA.

It appears that the ECJ fully understood this risk when it held in *Van Esbroeck* that “the same acts” (*idem*) is to be understood solely as the “identity of the material acts, understood in the sense of the existence of a set of concrete circumstances which are inextricably linked together”.¹⁷⁷ The legal classification of the act(s) and the nature of the ‘protected legal interest’ are therefore not relevant. This inextricable link does not depend solely on the *intentions* of the defendant; furthermore, the ECJ does not require that the identities of the accomplices, or (in the case of the smuggling of narcotics) the quantities of the illegal substances are identical.

174 Van den Wyngaert & Stessens 1999, p. 789; Klip & van der Wilt 2004, p. 1095; Trechsel 2005, p. 393.

175 Van der Wilt 2005, p. 111.

176 De la Cuesta 2002, p. 711; Van den Wyngaert & Stessens 1999, p. 789.

177 See the discussion of this case in the following paragraph (below).

The case law of the Community courts in competition matters however reveals a somewhat different picture on the point of *idem*. Firstly, the fact that the Community courts have formulated a “threefold condition” for the application of the *ne bis in idem* principle in Community law raises the question how the third condition (the ‘identity of the protected legal interest’) relates to the element of *idem*. Secondly, for a finding of *idem* in the context of Article 81 EC regard is primarily had by the Community courts to the rather general question whether it concerns the same *agreements*. Where the actions on which several fines or decisions for infringements of Article 81 EC are based arise out of the same agreements, but differ as regard their *object and geographical emphasis*, this will not infringe the *ne bis in idem* principle. Where complex and continuous cartels with many participants are concerned, the Community courts have taken into account the participants, the nature of the agreements, and the nature of the products, in assessing which aspects of the cartel are to be regarded as separate infringements. Although all these factors are essentially factual in nature, the approach taken by the Community courts to a finding of *idem* in competition cases is less clear and precise than that taken by the ECJ in *Van Esbroeck*. It must be said that it is remarkable that the Community courts do not appear to take into account the question which *markets* are affected by the infringement.

In the following paragraphs, the case law of the Community courts on the interpretation of the element of *idem* will be examined and discussed.

4.10.2 The case law of the European Court of Justice concerning the interpretation of the element of *idem*

From the very beginning, the Community courts have taken a piecemeal approach to the question whether it concerned ‘the same’ conduct, where infringements of Community law were concerned. In competition cases the Community courts have taken into account whether it concerned the same *agreement or agreements*, and furthermore whether it concerned the same *aspects* of the litigious cartel.

In *Boehringer*¹⁷⁸ (also discussed in para. 4.3.2), the ECJ held that although the actions brought by the Commission and the US authorities were based on the same agreements, they differed essentially “as regards both their object and their geographical emphasis”.¹⁷⁹ According to the ECJ, the fines imposed by the Commission and the US authorities targeted different aspects of the cartel *Boehringer* was involved in. In the case of the Commission fine, it was primarily directed against a gentlemen’s agreement dividing the Community

¹⁷⁸ Case 7/72 *Boehringer v Commission* [1972] ECR 1281.

¹⁷⁹ Para. 4 of the judgment.

and UK markets, and the restriction of synthetic 'quinidine' agreed amongst three of the participants in the cartel. Although the ECJ admitted that the facts partially overlapped, it nevertheless held that the facts against which the US sanction was directed were wider in nature, and involved amongst other things also an agreement on 'quinquina' bark, the acquisition and division of the American strategic stock by the cartel, and the successive application of "particularly high selling prices in the United States until the middle of 1966."¹⁸⁰

The case of *Commission v Italy*¹⁸¹ which was also discussed in para. 4.7.2 concerned an infringement of several provisions of Council Directive 91/676/EEC of 12 December 1991 on the protection of waters against pollution caused by nitrates from agricultural sources.¹⁸² After an earlier ruling in which the ECJ had held that Italy's had failed to comply with Articles 3(2) and 12(1) of the Directive,¹⁸³ the Commission brought a second action under Article 226 EC, seeking a declaration that the Italian Republic had failed to establish the requisite action programmes as prescribed by the Directive in order to protect the water against nitrates, to report back to the Commission, and to carry out the required monitoring activities in breach of Articles 5, 6, and 10 of the Directive. Before the ECJ the Italian Republic argued that it was tried twice in proceedings which were substantively identical

In his Opinion, AG Geelhoed argued that the Italian Government's submission that the present proceedings are substantively identical was unsustainable because the obligations laid down in Article 3 of the Directive are not substantively identical to those in Articles 5, 6 and 10.¹⁸⁴

The ECJ agreed with the Opinion, and held that "an examination of the pleas and forms of order sought by the parties and of the reasons expounded by the ECJ in support of the operative part of the judgment (in case C-195/97, *ed.*) clearly shows that the judgment relates solely to the obligations arising under Article 3(2) and Article 12(1) of the directive" whereas the second proceedings "concerned solely the provisions that were not called in question in the case culminating in the judgment in Case C-195/97 *Commission v Italy*,

180 Para. 5 of the judgment. Before the US court, however, the defendants had entered a plea of *nolo contendere* which means that the defendant neither admits nor disputes a charge, which has similar consequences as a guilty-plea. This plea is subject to all forfeits, penalties, and other procedural consequences as a guilty plea under US federal law, and may serve as an aggravating circumstance in later proceedings. For reasons of US procedure, this plea meant that only the indictment was available, which made it impossible for defendants to prove that the conduct on which the US conviction was based was identical to that in respect of which the Commission had imposed a fine.

181 Judgment of the Court of 8 November 2001 in Case C-127/99, *Commission v. Italy*, [2001] ECR I-08305.

182 OJ 1991 L 375, p. 1.

183 Case C-195/97 *Commission v Italy*.

184 Para. 46 of the Opinion of Advocate General Geelhoed (delivered on 31 May 2001).

namely Articles 5, 6 and 10 of the directive, and thus does not violate the non bis in idem rule.”¹⁸⁵

The *Cement*¹⁸⁶ case, which was also discussed in para. 4.5.4 concerned a cartel between producers of cement throughout the Community. The Commission imposed fines on 42 undertakings active in the production of grey cement, and 6 undertakings producing white cement. In appeal before the ECJ, two of the undertakings involved complained that the Commission investigation had led to the “the re-exhumation of certain contracts and agreements already examined by the Italian competition authority result in its being held responsible twice for the same act, contrary to the principle *ne bis in idem*.”¹⁸⁷

In his Opinion, the AG observed that “there are three identities, therefore, which must be present in order for the principle to apply: the same facts, the same offender and a single legal right to be protected”.¹⁸⁸ At this point, it is worth pointing out once more that, according to the AG “the unity of the legal right to be protected is beyond doubt. The rules which guarantee free competition within the European Union do not allow a distinction to be drawn between separate areas, the Community area and the national areas, as though there were watertight compartments. Both sectors are concerned with the supervision of free and open competition in the common market, one contemplating it in its entirety and the other from its separate components, but the essence is the same.”¹⁸⁹ According to the AG, the ‘identity of the protected legal interest’ is therefore not an ‘identity’ of in the sense of *idem*, but a *question of the scope of application* of the *ne bis in idem* principle in Community law. The AG found that there had been no breach of the *ne bis in idem* principle because the sanctions imposed by the Italian authorities concerned different agreements than those for which the Commission has imposed fines. Following the Opinion, the ECJ held that there had been no breach of the *ne bis in idem* principle because it concerned different agreements.

The *Speciality Graphite*-case¹⁹⁰ was closely related to the *Graphite Electrodes*-case, which was discussed in para. 4.5.2 of this study. It concerned a cartel which involved many of the same undertakings as the graphite electrodes cartel, but different graphite products: isostatic graphite, extruded graphite and moulded graphite. The members of the cartel fixed prices for these products on a worldwide scale between 1993 and 1998; worldwide specialty graphite sales around the time the cartel was ended were about EUR 900

185 Paras. 27-29 of the judgment.

186 Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 PC-217/00 P, and C-219/00 P, *Aalborg Portland and others vs. Commission* [2004] ECR I-123.

187 Opinion of Advocate General Colomer delivered on 11 February 2003 in case C-217/00 P, *Buzzi Unicem vs. Commission* [2004] ECR I-123, para. 160.

188 Para. 171 of the Opinion.

189 Para. 173 of the Opinion.

190 Judgment of the Court of First Instance of the European Communities of 15 June 2005 in Joined Cases T-71/03, T-74/03, T-87/03 and T-91/03 *Tokai Carbon and Others v Commission*.

million. It is important to note that the Commission decision imposing fines on the members of the cartel did *not* include price fixing practices in the market for graphite electrodes, precisely because this would have run counter to the *ne bis in idem* principle.

In appeal, one of the cartel members (SGL) argued that the Commission decision infringed upon the *ne bis in idem* principle, firstly because the anticompetitive conduct in question had already been subjected to criminal and civil law (treble damages) proceedings in the US. SGL pointed to the 'Agreement between the European Communities and the Government of the United States of America on the application of positive comity principles in the enforcement of their competition laws' (the so-called positive comity agreement, which was discussed in para. 3.11.5 of this study¹⁹¹), arguing that the competition laws of the US and the EC pursue the same "ends".¹⁹² Secondly, SGL argued that the Commission decision had infringed the *ne bis in idem* principle because the Commission had imposed a fine for two different cartels (isostatic graphite and extruded graphite) in one and the same decision, "in view of the similarity of the methods used and the fact that the two offences concerned related products". The same could, according to SGL, also be said with regards to the cartel for graphite electrodes, because "the market for graphite electrodes and the market for specialty graphite were closely connected and similar by reason of their structure and the main economic operators active in those markets." SGL therefore argued that the Commission's procedure relating to graphite electrodes and that to specialty graphite were based on the same conduct, so that the Commission had penalised the same conduct twice, by opening two different procedures.¹⁹³ In both instances, it concerned a continuous and interrelated infringement.

The CFI observed that "it is settled case-law that where the facts on which two offences are based arise out of the same set of agreements but they never-

191 OJ 1998 L 173/28; see paragraph X of this chapter (above).

192 According to SGL, "(t)his agreement brings together, under the definition of 'competition law' or 'competition rules', Articles 81 and 82 EC as well as sections 1 to 7 of the Sherman Act and sections 17 to 27 of the Clayton Act. The division of tasks between the Community authorities and the American authorities in connection with the prevention of international infringements of cartel law which have concentrated geographic effects can only be envisaged if, on both sides, the elements of the offences and objectives of the proceedings are consistent and if the matters in question are identical. If the powers of the Community and the American authorities did not overlap, there would not have been an administrative agreement on the alternative intervention of the investigating authorities." (Para. 106 of the judgment).

193 According to SGL, "(t)he agreements concerning graphite electrodes and specialty graphite "had the same objective, were adopted and implemented in the same way and had the same grounds". In particular, "the agreements relating to graphite electrodes and those relating to specialty graphite followed the same model and were based on the global plan established by SGL, UCAR and Tokai for extending the existing cartel for graphite electrodes to specialty graphite." (Para. 109 of the judgment).

theless differ as regards both their object and their geographical scope, the principle of *ne bis in idem* does not apply (see Case 7/72 *Boehringer v Commission* [1972] ECR 1281, paragraphs 3 and 4, and *Graphite electrodes*, paragraph 133).¹⁹⁴

The CFI therefore rejected SGL's arguments based on the positive comity agreement, and found that there was no legal obligation for the Commission to take into account the fines imposed on SGL in the US. Turning to the SGL complaint that the Commission imposed several fines in related markets, in respect of the same conduct, the CFI found that the Commission was entitled to impose three separate fines on SGL, because it considered that SGL had committed "three separate infringements of Article 81(1) EC"¹⁹⁵ In particular, the CFI found that the different cartels "varied sufficiently as to their participants, the nature of the agreements, and the nature of the products". The fact that the Commission had, earlier on, imposed two fines in one single decision was, according to the CFI "a purely procedural necessity", which did not make any difference on this point. There had consequently been no breach of the *ne bis in idem* principle.

In *Speciality graphite* the CFI examined whether in the case of three closely related cartels the Commission was entitled to impose *three different fines* in two different decisions. The CFI found that this was the case, because the litigious conduct constituted *three separate counts of an infringement* of Article 81 EC. In reaching these findings, the CFI took into account the extent to which the products, agreements, and participants varied between the cartels.

In the context of Article 54 CISA, the ECJ has stressed that it takes into account strictly the *facts*, and not the offence. In *Van Esbroeck*,¹⁹⁶ also discussed in para. 4.8.2, the ECJ was for the first time faced with the interpretation of Article 54 CISA on this point. The case concerned the smuggling a shipment of various narcotics from Belgium into Norway, the Belgian court of cassation stayed the proceedings, and asked the ECJ (amongst other things) whether the export and import of illicit substances should be considered as "the same acts" for the purposes of Article 54 CISA.

In his Opinion, AG Colomer "admitted" that he was tempted to formulate "a number of autonomous guidelines on the basis of which to put forward a general criterion" for the interpretation of the element of *idem*. However, according to the AG, "to carry out such a task is not merely presumptuous; it is also impossible. That is because the contingent nature of criminal law policies and the characteristics of criminal proceedings are not conducive to the creation of universally valid rules."¹⁹⁷ The Opinion identified three possible approaches to a finding of the element of *idem*: "(1) by assessing the

194 Para. 113 of the judgment.

195 Para. 118 of the judgment.

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

197 Para. 39 of the Opinion.

acts to the exclusion of all other considerations; (2) by focusing on the legal classification of the acts; and (3) by having regard to the interests protected by the classification of the offence¹⁹⁸ The AG argued that the wordings of Article 54 CISA itself would give sufficient cause for an interpretation of the element of *idem* on the (factual) basis of the historical acts alone. "If, instead of the acts alone, account were taken of the offences or of the rights protected by the prohibition of the said acts, the *ne bis in idem* principle would never function at the international level"¹⁹⁹ No other interpretation would produce a result, in keeping with the nature and purpose of Article 54 CISA within the framework of the EU. In this case, there was, according to the Opinion "no question that, from a material point of view, the act on account of which Mr Van Esbroeck was punished in Norway is the same as the act in respect of which he was prosecuted and convicted in Belgium, in other words the illegal trafficking from one country to the other of a quantity of drugs between 31 May and 1 June 1999."²⁰⁰ As these facts carry different legal classifications in Belgium and Norway, the legal classification of these acts can therefore not in any way be taken into account, as this would cancel out the protection afforded by Article 54 CISA.

The ECJ first rephrased the questions posed by the Belgian court as follows: "(b)y the second question the national court is effectively asking what the relevant criterion is for the purposes of the application of the concept of 'the same acts' within the meaning of Article 54 of the CISA and, more precisely, whether the unlawful acts of exporting from one Contracting State and importing into another the same narcotic drugs as those which gave rise to the criminal proceedings in the two States concerned are covered by that concept."²⁰¹ Following the Opinion of the AG, the ECJ held that "the wording of Article 54 of the CISA, 'the same acts', shows that provision refers only to the nature of the acts in dispute and not to their legal classification".²⁰² According to the ECJ, it follows from this that "the possibility of divergent legal classifications of the same acts in two different Contracting States is no obstacle to the application of Article 54 of the CISA."²⁰³ Furthermore, "the criterion of the identity of the protected legal interest cannot be applicable since that criterion is likely to vary from one Contracting State to another." The only relevant criterion for the application of Article 54 of the CISA is the "identity of the material acts, understood in the sense of the existence of a set of concrete circumstances which are inextricably linked together in time, in space and by their subject-matter."²⁰⁴ The ECJ therefore held that "import" and "export"

198 Para. 43 of the Opinion.

199 Para. 47 of the Opinion.

200 Para. 51 of the Opinion.

201 Para. 25 of the judgment

202 Para. 27 of the judgment

203 Para. 31 of the judgment.

204 Paras. 36-38 of the judgment.

of illegal substances should in principle be seen a set of facts which are 'inextricably linked' together in an area without internal borders such as the EU.

The rule from *Van Esbroeck* is that the element of *idem* is to be understood solely as the "identity of the material acts, understood in the sense of the existence of a set of concrete circumstances which are inextricably linked together". The legal classification of the act(s) and the nature of the 'protected legal interest' are therefore of no consequence.

This was confirmed by the ECJ another case concerning the smuggling of narcotics between the Schengen-states, *Van Straaten*.²⁰⁵ The background of this case was as follows. By verdict of 23 June 1983, Mr. Van Straaten had been acquitted (for reasons of lack of evidence/the inadmissibility of certain pieces of evidence²⁰⁶) by a Dutch criminal court from charges of importing into the Netherlands the amount of approximately 5500 grams of heroin from Italy on or around 26 March, 1983. He was found guilty of (amongst other things) "having had in his possession during a certain period of time of the amount of approximately 1000 grams of heroin, together with one Mr. Yilmaz" from the time on or around 27 March until around 30 March, 1983, and served 20 months in prison. On 22 November 1999, Mr. Van Straaten was sentenced *in absentia* by the district court at Milan (Italy) to 10 years imprisonment, and a fine of 50 million Italian lira for exporting on several occasions an amount of approximately 5 kilograms of heroin from Italy into The Netherlands on or around 27 March, 1983, together with a certain Mr. Karakus Coskun. An alert was entered into the SIS by the Italian authorities in 2002, requesting his arrest and surrender. The Dutch authorities 'flagged' his alert, on the grounds that Mr. Van Straaten had already been finally convicted for the same act, and had served his sentence.²⁰⁷ When Mr. Van Straaten was informed of the alert in 2003, he unsuccessfully requested that the alert be deleted from the SIS by the Italian authorities. He then turned to the Dutch police, who informed him that under Article 106 CISA only the Member State who issues an alert is authorized to delete it. An application filed by Mr. Van Straaten before the local district court at Den Bosch for the Dutch authorities to delete his alert was treated by that court as an application for the Italian authorities to delete the alert, and the Italian Republic subsequently joined in the proceedings. The court at Den Bosch stayed the proceedings in order to refer several questions to the ECJ in preliminary proceedings, amongst other things the question whether the act of exporting and importing as well as having in one's possession a shipment of narcotics should be understood as being "the same

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

206 Unfortunately, the *Rechtbank 's-Hertogenbosch* (local district Court at Den Bosch) provided the Court with very little background information in this case.

207 If a SIS-entry is 'flagged' by a Member State, this means that the request for the arrest and surrender of the subject in question will not be enforced by that state. This flag is, however, only legally binding on the state who entered it into the SIS (see also chapter 3).

acts” within the meaning of Article 54 CISA, even if the quantities, and the identities of accomplices to the acts do not match.

In his Opinion, AG Colomer reiterated that in *Van Esbroeck*, the ECJ had held that “the same acts” must be understood as meaning: “one single time-frame, one single space, but also one single intent”, which must be inextricably linked.²⁰⁸ According to the AG, the objective element of *idem* therefore refers both to the relevant space and time where the facts took place, as well as to the subjects’ intentions.

The AG argued that it would follow from this that not all facts have to be *exactly identical*; the fact that the quantities as well as the identities of the accomplices varied would not change the objective action itself. As regards the identity of the accomplices, the AG observed that the principle is only concerned with the identity of the *subject* relying on it, and therefore not necessarily with the identities of any of the accomplices.

Following the Opinion, the ECJ called to mind the relevant considerations from *Van Esbroeck* that “the wording of Article 54 of the CISA, ‘the same acts’, shows that that provision refers only to the nature of the acts in dispute and not to their legal classification” which confirmed by the nature of Article 54 CISA as a fundamental right and its purpose within the context of the Schengen-*acquis* and that the central question is whether a situation constitutes a set of facts which are inextricably linked together.²⁰⁹ The ECJ therefore held that in the case of narcotic drugs, the *quantities* are not required to be identical, in order for there to be identity of *facts*. As regards the identities of accomplices, the ECJ applied the same reasoning and held that they need not be identical either.

In *Kraaijenbrink*,²¹⁰ the ECJ was asked firstly to provide guidance on the question to what extent the *intentions* of the subject are relevant for a finding of “*idem*”. The facts of the case were as follows. In 1998, Mrs. Kraaijenbrink was sentenced by the local district court at Middelburg (Netherlands) for “several offences under Article 416 of the Netherlands Penal Code of receiving and handling the proceeds of drug trafficking between October 1994 and May 1995 in the Netherlands” as well as for acting in breach of the *Opiumwet* (the Dutch Opium law). Three years later, she was sentenced by the criminal court at Ghent (Belgium) for the offence of “exchanging in Belgium sums received from trading narcotics in the Netherlands between November 1994 and February 1996”, which sentence was upheld in appeal. Mrs. Kraaijenbrink appealed before the Belgian court of cassation, which stayed proceedings in order to ask the ECJ, firstly, whether the conduct on the basis of which Mrs. Kraaijenbrink was convicted in Belgium and The Netherlands should be regarded as “the same acts” within the meaning of Article 54 CISA in view

208 Para. 81 of the Opinion

209 Para. 41 of the judgment

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

of the fact that the underlying intentions were the same, and secondly, whether this would bar a second conviction on a “subsidiary” basis, taking into account therefore earlier convictions for different acts, committed with the same intentions. Furthermore, the court asks whether acts which are unknown to the prosecuting authorities are nevertheless relevant in this regard.

In her Opinion, AG Sharpston remarked that it is unclear from the order for reference whether the sums of money deriving from the illicit trafficking of drugs Mrs. Kraaijenbrink was prosecuted for in The Netherlands and Belgium were actually the same.²¹¹ However, the Belgian court of cassation had submitted that if the defendant had been prosecuted for these acts in Belgium, instead of both the Netherlands and Belgium, these acts would have been interpreted as a “single act” under Belgian criminal law. The AG argued that it was sufficiently clear from *Van Esbroeck* that “the same acts” must be interpreted as meaning ‘the existence of a set of concrete circumstances which are inextricably linked together’, and that the (criminal) intention of the subject is therefore not in itself decisive, as the resulting acts must also be linked together (in time and space). This could be the case “where the money laundered in the second Member State formed part of the original proceeds of the illicit drug trafficking in the first Member State, but at a later stage in the laundering chain”, but not if “the ‘dirty’ money which Mrs. Kraaijenbrink laundered in Belgium is unrelated to the ‘dirty’ money handled in the Netherlands.”²¹² The AG therefore argued that “acts which are ancillary or additional to the main acts forming the subject of the earlier proceedings, but which were not themselves considered in those proceedings, fall within the concept of ‘same acts’ for the purposes of Article 54 of the CISA if all the acts are inextricably linked together in time, in space and by their subject-matter.”²¹³

The ECJ observed that the questions posed by the referring court “must be understood as seeking, in essence, to ascertain whether the notion of ‘same acts’ within the meaning of Article 54 of the CISA must be construed as covering different acts 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, where the national court before which the second criminal proceedings are brought finds that those acts are linked together by the same criminal intention.”²¹⁴ Following the Opinion of the AG, the ECJ reiterated that the “same acts” within the meaning of Article 54 CISA must be understood as a set of concrete circumstances which are inextricably linked together, and held that this inextricable link does not depend solely on the intentions of the defendant; the same criminal intention “does not suffice to indicate that there

211 Para. 23 of the Opinion.

212 Paras. 31-33 of the Opinion.

213 Para. 52 of the Opinion.

214 Para. 25 of the judgment.

is a set of concrete circumstances which are inextricably linked together covered by the notion of ‘same acts’ within the meaning of Article 54 of the CISA.”²¹⁵

The rule from *Kraaijenbrink* is that, where the historical facts may provide the *objective* link between a given set of circumstances, the intentions of the subject may provide a *subjective* link. The mere fact that there is a *subjective* link between a set of concrete circumstances is however in itself insufficient for a finding of *idem*.

4.10.3 The requirement of enforcement of the penalty

As discussed in para. 2.6.3 of this study, only Article 54 CISA requires 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. Furthermore I have pointed out in the same paragraph that it is remarkable that Articles 4P7 ECHR, 14(7) ICCPR, and 50 of the Charter do not require that the penalty has been enforced. In its case law, the ECJ has interpreted this requirement broadly and generously, in keeping with the aim and purpose of the provision in EU law.

4.10.4 The case law of the European Court of Justice concerning the requirement of enforcement of the penalty

In *Gözütok & Brügge*,²¹⁶ the ECJ held that if the conditions of an out-of-court settlement are met, this will be considered as a ‘penalty which has been enforced’, for the purposes of Article 54 CISA. In *Kretzinger*, the ECJ was faced (amongst other things) with the question whether a *suspended* custodial sentence must be treated as a penalty, which has been enforced or is actually in the process of being enforced. The ECJ considered that it would be “inconsistent, on the one hand, to regard any deprivation of liberty actually suffered as enforcement for the purposes of Article 54 of the CISA and, on the other hand, to rule out the possibility of suspended sentences, which are normally passed for less serious offences, satisfying the enforcement condition in that article, thus allowing further prosecutions.”²¹⁷ The ECJ therefore 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.

²¹⁵ Para. 29 of the judgment.

²¹⁶ Joined Cases C-187/01 and C-385/01 *Gözütok and Brugge* [2003] ECR I-1345.

²¹⁷ Para. 43 of the judgment.

PROVISIONAL SUMMARY

In its case law, the ECJ has recognised that the prohibition of double *prosecution* or '*Erledigungsprinzip*' and not that of double punishment or '*Anrechnungsprinzip*' forms the *ne bis in idem* principle 'proper'. The prohibition of double punishment is a *corollary* of the *ne bis in idem* principle, which is an expression of the principle of *proportionality*.

In its case law concerning Article 54 CISA, the ECJ has mainly emphasized the provision's function of *promoting free movement* and not the more general *rationale* of the *ne bis in idem* principle such as legal certainty, the right to a fair trial, and the respect for *res iudicata*.

The objective scope of application of both the prohibitions of double prosecution as well as double punishment in Community law is defined by the scope of application of the legal system of the European Community. The question whether the *ne bis in idem* principle applies in the relationship between national law follows from the manner in which the relationship between national law and Community law is regulated by Community law.

In determining the scope of application *ratione materiae* of the *ne bis in idem* principle in Community law, the Community courts take into account the punitive and deterrent nature and the degree of severity of the penalties which may be imposed under Community law. The Community courts do not require that an area of Community law must be 'of a criminal law nature', for the application of the *ne bis in idem* principle in that area of law.

According to established case law before the Community courts, the principle of *res judicata* extends only to the matters of fact and law actually or necessarily settled by the judicial decision in question.. In order for a decision to become final, there must have been a *substantive determination* of the facts and the pleas of the case, regardless of the nature or content of the decision. A decision to discontinue the proceedings for reasons of a time-bar, acquittals, and out-of-court settlements should all be seen as decisions 'finally disposing of someone's trial' for the purposes of Article 54 CISA.

In the context of Article 54 CISA, the ECJ has clearly held "the same acts" (*idem*) is to be understood solely as the "identity of the material acts, understood in the sense of the existence of a set of concrete circumstances which are inextricably linked together". Other consideration such as legal classification of the act(s) and the nature of the 'protected legal interest' are therefore *not* relevant. In competition cases however, the Community courts have taken a somewhat different approach. For a finding of *idem* in the context of Article 81 EC, the Community courts primarily take into account whether it concerns the same *agreements*. According to established case law, if the actions on which several fines or decisions for infringements of Article 81 EC are based arise out of the same agreements, but differ as regard their *object and geographical emphasis*, this will not infringe upon the *ne bis in idem* principle. Where complex and continuous cartels with many participants are concerned, the Community

courts furthermore take into account the participants, the nature of the agreements, and the nature of the products, in assessing which *aspects* of the cartel must be regarded as separate infringements of Article 81 EC for the purposes of the *ne bis in idem* principle. This piecemeal approach to a finding of *idem* in competition cases is less clear and precise than that taken by the ECJ in the context of Article 54 CISA. It must be said that it is remarkable that the Community courts do not appear to take into account which *markets* are affected by anticompetitive behaviour.

5 | The case law of the European Court of Human Rights on the *ne bis in idem* principle in art 4 of Protocol 7 ECHR

In this chapter, the body of case law of the European Court of Human Rights (ECtHR) on the *ne bis in idem* principle is examined and discussed.

5.1 THIS CHAPTER

In this chapter, the substance, *rationale*, scope, and elements of the *ne bis in idem* principle, as well as the exceptions to that principle as these have developed in the case law of the ECtHR are analysed and discussed. In keeping with the aim of this study, the aim of this chapter is to provide an overview on the main points of the case law on the *ne bis in idem* principle.

During the entire time of writing this study, the Grand Chamber proceedings in the case of *Zolotukhin v. Russia* were pending.¹ There was a fair chance that it would prove to be an important, perhaps even ground-breaking judgment. All the while, work on this study had to continue. At times this was something of a test of faith, but it was certainly rewarded when, on February 10, 2009 at 10 o'clock in the morning, the long-awaited judgment appeared. This key judgment, which proved to be everything one could have hoped for, marks a clear departure from the earlier case law of the ECtHR on several important points. Amongst other things, the ECtHR has followed the example of the case law of the ECJ concerning Article 54 CISA by adopting a broad and objective approach to the interpretation of “the same offence” in article 4P7 ECHR.

5.2 THE SUBSTANCE OF THE RULES CONTAINED IN ARTICLE 4P7 ECHR

5.2.1 Introduction

As discussed para. 2.2.3 of this study, Article 4P7 ECHR is so worded that it mentions both the prohibition of double prosecution (*Erledigungsprinzip*) as well as that of double punishment (*Anrechnungsprinzip*). The provisions refers to these two distinct prohibitions in the same sentence, giving the impression

1 ECtHR (Grand Chamber), *Sergey Zolotukhin v. Russia* 10 February 2009 (Appl. No. 1493/03).

that the two prohibitions form different aspects of the *ne bis in idem* principle. The fact that Article 4P7 is worded in this particular manner places the ECtHR in a somewhat different position from that of the ECJ.² Nevertheless, the ECtHR has increasingly distinguished between the prohibitions of double prosecution and double punishment.

In several later cases, the ECtHR has introduced a distinction between *three* guarantees contained in Article 4P7 ECHR: the right not to be *liable* to be tried twice, the rights not to be tried twice, and the right not to be punished twice. This 'threefold distinction' was upheld by the Grand Chamber in *Zolotukhin*.

5.2.2 The substance of the *ne bis in idem* principle in the case law of the European Court of Human Rights

In *Gradinger*³ the ECtHR briefly stated that "the aim of Article 4 of Protocol No. 7 is to prohibit the repetition of criminal proceedings that have been concluded by a final decision".⁴ In *Franz Fischer*,⁵ the ECtHR added that "(a)rticle 4 of Protocol No. 7 is not confined to the right not to be punished twice but extends to the right not to be tried twice. What is decisive in the present case is that, on the basis of one act, the applicant was tried and punished twice, since the administrative offence of drunken driving under sections 5 (1) and 99 (1)(a) of the Road Traffic Act, and the special circumstances under Article 81 § 2 of the Criminal Code, as interpreted by the courts, do not differ in their essential elements."⁶ In the case of *Zigarella*,⁷ the ECtHR more elaborately reasoned "that paragraph 1 of Article 4 of Protocol No. 7 applies not only to cases where defendants are convicted twice, but also to cases where they are prosecuted twice. Were this not the case, it would not have been necessary to add the word "punished" to the word "tried" since this would be mere duplication. This provision applies even where the individual has merely been prosecuted in proceedings that have not resulted in a conviction. In criminal cases the *non bis in idem* principle applies whether the person has been con-

2 The question whether the prohibition of double punishment or that of prosecution must be considered by the ECtHR will simply depend on the question which one of the two guarantees is relied on, by the applicant. Whereas the ECJ was soon faced the question which one of the two guarantees is the 'real' *ne bis in idem* principle, there was no need for the ECtHR to address this question, because it could refer to the wording of Article 4P7 ECHR.

3 ECtHR, *Gradinger v. Austria*, 23 October 1995 (Appl. No. 15963/90).

4 Para. 53 of the judgment.

5 ECtHR, *Franz Fischer v. Austria* 29 May 2001 (Appl. No. 37950/97).

6 Para. 29 of the judgment.

7 ECtHR, *Zigarella v. Italy* (admissibility) 3 October 2002 (Appl. No. 48154/99). In this case, proceedings were brought for a second time in error, and the proceedings against Mr. Zigarella were terminated as soon as the national court became aware of this error. The Court therefore held that there had been no breach of Article 4P7 ECHR.

victed or not.”⁸ In *Nikitin v. Russia*,⁹ the ECtHR attempted to explain its decision in *Oliveira* (which will be further discussed in para. 5.3.2) by reasoning that in that case, there had been no breach of the prohibition of double *prosecution* contained in Article 4P7 ECHR, because the *penalties* imposed in the two sets of proceedings were not cumulative.¹⁰ The ECtHR added that the *repetitive aspect* of trial or punishment is central “to the legal problem addressed by Article 4 of Protocol No. 7” and that “(i)n *Oliveira v. Switzerland* the fact that the penalties in the two sets of proceedings were not cumulative was relevant to the finding that there was no violation of the provision where two sets of proceedings were brought in respect of a single act”.¹¹ What remained wholly unclear after this was *how* the question whether a second *penalty* was imposed could have any relevance for the question whether there was a breach of the prohibition of double *prosecution*.

It was in that same case that the ECtHR introduced a distinction between the situation that an applicant was tried again, and the situation that an applicant became *liable to be tried* again “by virtue of the Procurator General’s request”.¹² In the Chamber judgment in *Zolotukhin v. Russia*,¹³ the ECtHR confirmed that Article 4P7 “contains three distinct guarantees and provides that no one shall be (i) liable to be tried, or (ii) tried, or (iii) punished for the same offence”.¹⁴

In the judgment of the Grand Chamber in *Zolotukhin v. Russia* this threefold distinction was upheld.¹⁵ The case concerned a Russian national who had displayed disorderly behavior towards several public officials. He was placed in detention for three days for the administrative offence of “minor disorderly acts”. Shortly afterwards, he was prosecuted for the criminal offences of “disorderly acts”, “use of violence against a public official”, and “insulting a public official” on the basis of the same facts. He lodged an application with the European Court of Human Rights on 22 April 2003, which was declared (partly) admissible on 8 September 2005. In its Chamber judgment of 7 June 2007, the Court held unanimously that there had been a violation of Article 4 of Protocol No. 7. At the request of the Russian government, the case was referred to the Grand Chamber for review. Amongst other things, the Grand

8 Applying a teleological explanation of the purpose of the provision the Court found that “only new proceedings brought in the *knowledge* that the defendant has already been tried in previous proceedings contravene this provision.” For this reason, Zigarella’s application was rejected as manifestly ill-founded.

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

10 ECtHR, *Grading v. Austria*, 23 October 1995 (Appl. No. 15963/90), para. 53.

11 ECtHR, *Oliveira v. Switzerland*, 30 July 1998 (Appl. No. 25711/94), paras. 27 and 35. See also: ECtHR, *Bolat v. Russia* 5 October 2006 (Appl. No. 14139/03), and ECtHR, *Isaksen v. Norway* (admissibility) 2 October 2003 (Appl. No. 13596/02).

12 Para. 36 of the judgment.

13 ECtHR, *Zolotukhin v. Russia* 7 June 2007 (Appl. No. 14939/03).

14 Para. 34 of the judgment.

15 ECtHR (Grand Chamber), *Sergey Zolotukhin v. Russia* 10 February 2009 (Appl. No. 1493/03).

Chamber held 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.”¹⁶ The question whether the subject will be *punished* twice as a result of the second prosecution or trial, and the question whether the offences overlap in their essential elements is therefore henceforth irrelevant; it is the bringing of a new prosecution or new proceedings *as such* which is caught by the prohibition of Article 4P7 ECHR. Further down in the judgment, the Grand Chamber reiterated and confirmed that “Article 4 of Protocol No. 7 contains three distinct guarantees and provides that no one shall be (i) liable to be tried, (ii) tried or (iii) punished for the same offence”.¹⁷

This “threefold distinction” raises some questions. On the one hand, it makes sense that the scope of application of the *ne bis in idem* principle in Article 4P7 ECHR extends to the pre-trial stages of the prosecution. It must be born in mind that during the investigative stages of prosecution, interrogations may take place and the subject may even be restrained in the interest of the investigation, placing a burden on the subject. The pre-trial stages of the investigation do not necessarily differ all that much from the subsequent trial from the perspective of the subject, and the *ne bis in idem* principle would lose much of its protective force if it would not prevent someone from being *prosecuted* time and again for conduct for which he or she has already stood trial and has been finally acquitted or convicted, even if that prosecution is not followed by an actual trial.

For all the same reasons however, it could just as well be argued that the right not to be *liable* to be tried again merely forms a logical extension of the basic right not to be *tried* twice itself. There seems to be no particular reason why should the right not to be *prosecuted* or to be “*liable* to be tried twice” should form a separate, independent guarantee under Article 4P7 ECHR. A possible problem with this approach is that if the right not to be *liable* to be tried twice is treated as a separate guarantee, this could raise the question whether this guarantee is subject to the same conditions as the *ne bis in idem* principle itself. Such uncertainty seems unnecessary, and could easily be avoided. Furthermore it raises the question why the ECtHR did not distinguish between *four* guarantees contained in Article 4P7 ECHR: 1.) the right not to be *tried* twice, 2.) the right not to be *liable* to be tried twice, 3.) the right not to be punished twice, and 3.) the right not to be *liable* to be punished twice.

16 Para. 82 of the judgment.

17 Para. 110 of the judgment.

5.3 THE RATIONALE OF THE GUARANTEES LAID DOWN IN ARTICLE 4P7 ECHR

5.3.1 Introduction

On the point of the *rationale* underlying the prohibitions contained in Article 4P7 ECHR, the ECtHR has only provided very few indications in its case law. Amongst those are the ‘general guarantee of a fair hearing in criminal proceedings’, and the ‘principles governing the proper administration of justice’. Furthermore, the ECtHR has considered the *ne bis in idem* principle in the context of the principle of *legal certainty* on two occasions.

5.3.2 The case law of the European Court of Human Rights concerning the *rationale* of the guarantees laid down in Article 4P7 ECHR

In *Oliveira*,¹⁸ the ECtHR held that, although there had been no violation of art 4P7 ECHR, it would have been more consistent with “the principles governing the proper administration of justice” if both charges against Mrs. Oliveira would have been brought within the same proceedings.¹⁹ It could therefore perhaps be argued that in *Oliveira*, the ECtHR established an link between the prohibition double prosecution, and the “principles governing the proper administration of justice” without however explaining what those principles might be, and how they would relate to the prohibition of double prosecution precisely.

Although it has held that the *ne bis in idem* principle does not form an aspect of the right to a fair hearing in Article 6 ECHR, the ECtHR did state, in *Nikitin v. Russia*,²⁰ that “the protection against duplication of criminal proceedings is one of the specific safeguards *associated with the general guarantee of a fair hearing in criminal proceedings*” italics added.²¹ In the case of *Fadin v Russia*²² which concerned the exception to the *ne bis in idem* principle contained in Article 4(2)P7 ECHR, the ECtHR observed that the authorities should *in principle* respect the binding nature of a final judicial decision, and should allow a reopening of the case only if serious legitimate considerations outweigh the principle of *legal certainty*.²³

In the aforementioned Grand Chamber judgment in the case of *Zolotukhin v. Russia* the Court also emphasized the fundamental importance of legal certainty when it held that the existence of several different approaches in

18 ECtHR, *Oliveira v. Switzerland*, 30 July 1998 (Appl. No. 25711/94).

19 Para. 27 of the judgment.

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

21 Para. 35 of the judgment.

22 ECtHR, *Fadin v. Russia* 27 July 2006 (Appl. No. 58079/00).

23 Para. 33 of the judgment italics added.

its case law “to ascertaining whether the offence for which an applicant has been prosecuted is indeed the same as the one of which he or she was already finally convicted or acquitted engenders legal uncertainty incompatible with a fundamental right, namely the right not to be prosecuted twice for the same offence”.²⁴

5.4 THE SCOPE OF APPLICATION *RATIONE MATERIAE* OF ARTICLE 4P7 ECHR

5.4.1 Introduction

It is established case law before the ECtHR that “the legal characterisation of the procedure under national law cannot be the sole criterion of relevance for the applicability of the principle of *non bis in idem* under Article 4 § 1 of Protocol No. 7. Otherwise, the application of this provision 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.”²⁵

Before the Grand Chamber judgment in the case of *Zolotukhin v. Russia* appeared however, the case law of the ECtHR concerning the scope of application *ratione materiae* of Article 4P7 ECHR was not entirely consistent. On the one hand, the ECtHR held in several cases that the meaning of what constitutes a ‘penalty’ or a ‘criminal charge’ “cannot vary as from one provision of the Convention to another”. At the same time however, the ECtHR held in *Haarvig v. Norway* that the criteria which determine the scope of application of Article 4P7 ECHR were *wider* than the so-called ‘Engel-criteria’, which determine the scope of application *ratione materiae* of Article 6 ECHR. Although the list of criteria from *Haarvig*²⁶ was rather long in comparison with the three basic criteria from *Engel*, the case did not provide further guidance on how these various criteria would have to be applied in practice. In *Zolotukhin* however, the Grand Chamber appears to have put an end to any possible uncertainty which could have resulted from *Haarvig* by applying (only) the *Engel*-criteria.

24 ECtHR (Grand Chamber), *Sergey Zolotukhin v. Russia* 10 February 2009 (Appl. No. 1493/03), para. 78.

25 ECtHR (Grand Chamber), *Sergey Zolotukhin v. Russia* 10 February 2009 (Appl. No. 1493/03), para. 52.

26 Being: 1.) the legal classification of the offence under national law; 2.) the nature of the offence; the national legal characterisation of the measure; 3.) its *a.*) purpose, *b.*) nature and *c.*) degree of severity; 4.) whether the measure was imposed following conviction for a criminal offence, and, finally 5.) the procedures involved in the making and implementation of the measure. See also: ECtHR, *Storbråten v. Norway* (admissibility) 1 February 2007 (Appl. No. 12277/04); ECtHR, *Malige v. France* 23 September 1998 (case no. 68/1997/852/1059); ECtHR, *Nilsson v. Sweden* (admissibility) 9 March 1989 (Appl. No. 73661/01).

5.4.2 The case law of the European Court of Human Rights concerning the scope of application *ratione materiae* of Article 4P7 ECHR

In *Hangl v. Austria*,²⁷ the applicant was convicted of exceeding the speed limit by more than 40 km/h, and was fined 3000 shillings by penal order issued by the Innsbruck Federal Police Authority. The applicant abstained from filing an objection to the penal order, which henceforth became final. The same Federal Police Authority subsequently issued a decision in summary administrative proceedings, ordering the withdrawal of the applicant's driving licence for a period of two weeks. The applicant unsuccessfully filed an objection and an appeal against the withdrawal of his licence, and brought his case before the Austrian constitutional court. In the proceedings before that court, the applicant argued a breach of Article 4P7 ECHR, because the fine and the subsequent withdrawal of the license had the same factual basis. The constitutional court refused to hear the case and referred it back to the administrative which dismissed the appeal as unfounded. The applicant lodged a complaint with the ECtHR on grounds of a breach of Article 4P7 ECHR, because the two measures were imposed on the same factual basis.

The ECtHR deemed it necessary to examine "whether the proceedings for the temporary withdrawal of the applicant's driving licence constituted criminal proceedings within the meaning of Article 4 of Protocol no. 7 or Article 6 of the Convention, respectively".²⁸ It recalled that in an earlier case, *Escoubet v. Belgium*, it had held that the withdrawal of a driving licence for a period of time not exceeding 15 days was a preventive measure and not a 'criminal penalty'. The ECtHR took into account that the Austrian authority had to consider whether the offence was committed under particularly dangerous circumstances, and whether the offender had demonstrated particular recklessness towards other road users. Given these circumstances, the ECtHR held that the withdrawal of the applicant's licence was a preventive measure for the safety of other road users, which fell outside of the scope *ratione materiae* of Article 4P7 ECHR.²⁹

The case of *Mishel Manasson v. Sweden*³⁰ concerned a tax audit as part of a large-scale investigation into taxicab operators by the Tax Authority of the County of Stockholm. Certain irregularities were discovered in the books, and the applicant was charged with a bookkeeping offence, levied with tax surcharges, and his 'traffic licence' (the right to run a taxi business under Swedish law³¹) was revoked. After exhausting the available remedies under Swedish

27 ECtHR, *Hangl v. Austria* (admissibility) 7 July 1997 (Application no. 38716/97).

28 Para. 1 of the law, *Hangl v. Austria*

29 Para. 1 of the law, *Hangl v. Austria*

30 ECtHR, *Mishel Manasson v. Sweden* 17 February 1998 (Application no. 41265/98).

31 Para. 4 of part B of the *Mishel Manasson v. Sweden* judgment.

law, he filed a complaint with the ECtHR. Amongst other things, Mr. Manasson asserted that he had been punished three times for the same offence.

The ECtHR considered that the revocation of the licence did not constitute a determination of a criminal charge against the applicant. Although a severe measure, the licence is based on provisions of administrative law, determining one's suitability to run a commercial taxi business. Thus, the revocation of the licence could therefore not be characterised as a penal sanction, "and the nature of the relevant proceedings accordingly cannot be regarded as criminal."³²

As regards the proceedings concerning bookkeeping offences and those involving tax surcharges, the ECtHR did find that both proceedings were criminal in nature, and concerned offences "with the same essential elements".³³ However, the bookkeeping offence was imposed for the applicant's general disregard of his obligation to enter the correct information into the books of the company, whereas the tax surcharges resulted specifically from the fact that the applicant had subsequently supplied the Tax Authority with incorrect information. The ECtHR held that this was sufficient to distinguish between the tax law infringement and the bookkeeping offence, and declared the application manifestly ill-founded.

The case of *Göktan v France*³⁴ concerned Mr. Göktan, a Turkish national who was arrested in France while concluding a drug deal. He was sentenced to 5 years imprisonment, a customs fine, and permanent expulsion from France. This sentence was upheld in appeal, and Mr. Göktan dropped his case before the Court of Cassation. After completing his prison sentence, he was held in custody for non-payment of the customs fine. He lodged a complaint with the ECtHR, arguing that the custodial sentence violated the principles of fair trial and *non bis in idem* contained in Articles 6(1) and 4P7 ECHR. Although it was noted in the judgment that the French Court of Cassation has "consistently held that orders for imprisonment in default are not penal in nature, but constitute a means of enforcement", the ECtHR found otherwise. It held that "imprisonment in default of payment of the customs fine was not a means of enforcing the fine, but a penalty, both within the meaning of Article 7 of the Convention (...) and of Article 4 of Protocol No. 7. The notion of what constitutes a "penalty" cannot vary from one Convention provision to another. It therefore finds that the applicant's imprisonment in default amounted to criminal punishment and that the applicant had previously been subjected to criminal punishment for both the drug-trafficking offence (by the prison sentence – and the order excluding him from French territory) and the customs offence of illegally importing goods (by the customs fine)."³⁵

32 Para. 5 of the law, *Mishel Manasson v. Sweden* judgment.

33 Para. 5 of the law, *idem*.

34 ECtHR, *Göktan v. France*, 2 July 2002 (Appl. No. 33402/96).

35 Para. 48 of the judgment (the law).

*Rosenquist v. Sweden*³⁶ was another case concerning tax evasion. After supplying the tax authority with inaccurate information, the applicant had been charged with additional income tax, as well as a tax surcharge. Furthermore, the applicant was prosecuted in criminal proceedings on grounds of “aggravated tax fraud”, and sentenced to two years imprisonment. After exhausting the remedies available to him under Swedish law, the applicant filed a complaint with the ECtHR, *inter alia* relying on an alleged breach of Article 4P7 ECHR. The ECtHR confirmed its earlier findings in *Göktan v. France* ‘that the notion of penalty should not have different meanings under different provisions of the Convention’, and held that the proceedings relating to the tax surcharge ‘were “criminal”, although the surcharges cannot be said to belong to criminal law under the Swedish legal system’, under Articles 6 and 4P7 ECHR.³⁷

The case of *Haarvig v. Norway*³⁸ concerned a medical doctor who was found guilty of incidents involving an attempted burglary, violence against the police, and the consumption of hashish and ecstasy. He was sentenced to five months’ imprisonment, and his medical license was temporarily suspended pending a request by the public prosecutor to revoke the applicant’s right to practice as a doctor, which was rejected by the Swedish court. The suspension of his licence was later repealed by the Health Inspectorate, which no longer considered that the applicant was unsuited to perform his profession. The applicant claimed compensation for the reason that the suspension of his licence had violated Article 4P7 ECHR, but this claim was successively rejected by the Swedish court, high court, and supreme court, after which Dr. Haarvig lodged a complaint with the ECtHR.

In the judgment, the ECtHR explained that in determining the nature of a measure in the light of Article 4P7 ECHR, it will have regard “to such factors as the legal classification of the *offence* under national law; the nature of the offence; the national legal characterisation of the *measure*; its purpose, nature and degree of severity; whether the measure was imposed following conviction for a criminal offence and the procedures involved in the making and implementation of the measure”.³⁹ Interestingly, the ECtHR added that ‘this is a wider range of criteria than the so-called “*Engel* criteria” formulated with reference to Article 6 of the Convention.’⁴⁰ This statement contradicted the *Göktan* and *Rosenquist* judgments, in which it was held that ‘the notion of penalty should not have different meanings under different provisions of the Convention’

36 ECtHR, *Nils-Inge Rosenquist v. Sweden* (admissibility) 14 September 2004 (Appl. No. 60619/00).

37 Para. 7 of the law, *Nils-Inge Rosenquist v. Sweden*.

38 ECtHR, *Knut Haarvig v. Norway* (admissibility) 11 December 2007 (Appl. no. 11187/05).

39 Para. 4 of the Court’s assessment in *Haarvig v. Norway*.

40 Para. 4 of the Court’s assessment, *idem*.

The ECtHR observed that the relevant provision of national law set out a 'broadly worded professional standard', and made no reference to provisions of criminal law. The ECtHR furthermore found that it was sufficiently clear that the purpose of the provision in question is not to punish the subject, but merely to prevent further damage to his or her patients, or to the confidence of the public in the legal profession. Thirdly, the suspension of the licence only deprived the subject from the right to perform duties as a medical doctor in a hospital, and not from performing other professional activities. For all of the above reasons, the ECtHR did not find "that what was at stake for him was sufficiently important to warrant classifying it as "criminal", and the application was rejected as manifestly ill-founded. Similarly, in *Storbråten v. Norway*,⁴¹ the ECtHR found that a disqualification order to enter into any business enterprises during two years, imposed on a restaurant owner who had entered into a series of business ventures which all ended in bankruptcy, did not "constitute a "criminal" matter for the purposes of Article 4 of Protocol No. 7 of the Convention".⁴²

In the case of *Zolotukhin*,⁴³ the Grand Chamber did not elaborate further on the various criteria from *Haarvig*. Instead, it held that "established case-law sets out three criteria, commonly known as the "Engel criteria" (...), to be considered in determining whether or not there was a "criminal charge". The first criterion is the legal classification of the offence under national law, the second is the very nature of the offence and the third is the degree of severity of the penalty that the person concerned risks incurring. The second and third criteria are alternative and not necessarily cumulative. This, however, does not exclude a cumulative approach where separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a criminal charge".⁴⁴ From this consideration, it is sufficiently clear that the criteria for determining the scope of application *ratione materiae* of Article 4P7 ECHR are indeed the *Engel*-criteria and *not* the criteria from *Haarvig* insofar as those criteria are wider in scope.

The Grand Chamber found that Article 4P7 ECHR was applicable in this instance, because "the offence of "minor disorderly acts" in the Code of Administrative Offences served to guarantee the protection of human dignity and public order, values and interests which normally fall within the sphere of protection of criminal law." The primary aims of the administrative offence of 'minor disorderly acts' "were punishment and deterrence, which are recognised as characteristic features of criminal penalties".⁴⁵ The Grand Chamber reiterated and emphasized the rule from *Engel* that "there is a pre-

41 ECtHR, *Storbråten v. Norway* (admissibility) 1 February 2007 (Appl. No. 12277/04).

42 P. 19 of the judgment.

43 ECtHR (Grand Chamber), *Sergey Zolotukhin v. Russia* 10 February 2009 (Appl. No. 1493/03).

44 Para. 53 of the judgment.

45 Para. 55 of the judgment.

sumption that the charges against the applicant are “criminal”, a presumption which can be rebutted entirely exceptionally, and only if the deprivation of liberty cannot be considered “appreciably detrimental” given their nature, duration or manner of execution”.⁴⁶ It is therefore not certain whether the Grand Chamber would have arrived at the same findings if the offence of “minor disorderly acts” had been punishable only by a fine under Russian administrative law, instead of a penalty which involved the deprivation of the liberty of the subject.

Furthermore, the Grand Chamber confirmed that it is (primarily) the *maximum* potential penalty for which the relevant law provides which must be taken into account here. The actual sentence which was imposed is not entirely irrelevant, “but it cannot diminish the importance of what was initially at stake”.⁴⁷ It would for example follow from this that the mere fact that a case ended in a settlement and a reduction of the sentence or even immunity was granted, this will not in itself be sufficient to remove the case from the ambit of Article 4P7 ECHR.

5.5 THE SCOPE OF APPLICATION *RATIONE TEMPORIS* OF ARTICLE 4P7 ECHR

5.5.1 Introduction

Because of its late inclusion in the Convention, one might perhaps have expected that the question of the scope of application *ratione temporis* of Article 4P7 ECHR would have raised some issues. This has however not been so; there has been only one case in which the ECtHR was faced with this issue: the case of *Gradinger v. Austria*.⁴⁸ In its judgment in that case the ECtHR held that it only takes into account the *second* prosecution, in determining whether Article 4P7 ECHR is applicable *ratione temporis*. Article 4P7 ECHR applies if the second proceedings have reached their conclusion in a decision later in date than the entry into force of Article 4P7 ECHR. As we saw in the previous chapter of this study, this approach is materially the same as that taken by the ECJ.

5.5.2 The case law of the European Court of Human Rights concerning the scope of application *ratione temporis* of the guarantees

The ECtHR was faced with the issue of the temporal scope of application of Article 4P7 ECHR in the case of *Gradinger v. Austria*.⁴⁹ In brief, the facts of the

⁴⁶ Para. 56 of the judgment.

⁴⁷ Para. 56 of the judgment.

⁴⁸ Case 33/1994/480/562; Series A, No 328-C.

⁴⁹ Case 33/1994/480/562; Series A, No 328-C.

case were as follows. Mr. Gradinger, an Austrian citizen, caused an accident killing a cyclist while driving his car under the influence of alcohol. He was convicted by the St Pölten regional court (a criminal law court) for the offence of causing death by negligence, and ordered to pay a fine. He could not be convicted for the offence of causing death by negligence while driving under the influence of alcohol, because his blood alcohol levels were too low to meet the requisite standard.

After this, an administrative law body (the “district authority”) issued a “sentence order” imposing on Mr. Gradinger a second fine, this time for the offence of drunk driving. This second fine was based on a different medical report which suggested a higher blood alcohol level at the time of the accident. After having exhausted the legal remedies available to him under Austrian law, Mr. Gradinger lodged a complaint with the ECtHR, amongst other things on grounds of a breach of Article 4P7 ECHR.

Before the ECtHR, the Austrian government argued amongst other things that Article 4P7 ECHR was not applicable *ratione temporis*, because both the conviction by the St. Polten criminal court as well as the sentence order were rendered prior to the date of entry into force of Article 4P7 ECHR (November 1, 1988).⁵⁰ The ECtHR however held that Article 4P7 ECHR applies if the second proceedings “have reached their conclusion in a decision later in date than the entry into force of Article 4P7 ECHR.”⁵¹ In this instance, the administrative proceedings had reached their conclusion in the judgment of the administrative court of 29 March 1989. Article 4P7 was therefore applicable *ratione temporis*.

5.6 FINALITY

5.6.1 Introduction

According to Article 4P7 ECHR, “no-one shall be liable to be tried or punished again in criminal proceedings (...) for an offence for which he or she has been *finally* acquitted or convicted”. It is established case law before the ECtHR that a judicial decision is *final* when it has acquired *res iudicata* in reference to the applicable rules under national law.⁵² Before the judgment of the Grand Chamber in *Zolotukhin* however, the ECtHR only appeared to apply this rule where it concerned *consecutive* prosecutions,⁵³ but not where it concerned pro-

⁵⁰ Para. 52 of the judgment.

⁵¹ Para. 53 of the judgment.

⁵² *Nikitin, Storbraten*; see the discussion of the cases in the following paragraph (below).

⁵³ *Franz Fischer, Sailer v. Austria*; see the discussion of the cases in the following paragraph (below).

secutions which were conducted (more or less) *at the same time*.⁵⁴ In *R.T. v. Switzerland* for example the ECtHR considered that two consecutive sanctions which were imposed on a subject within a month from each other were imposed “at the same time”, without having regard to the precise point in time at which those measures became *final*, under national law.

There may have been a good reason why the ECtHR initially applied Article 4P7 ECHR in this way. In the ‘old’ case law (before the judgment of the Grand Chamber in *Zolotukhin*) the ECtHR interpreted the notion of ‘the same offence’ autonomously, by examining whether two offences at issue shared the same *essential elements*. This allowed for multiple prosecutions, where the offences with which the defendant was charged in the proceedings did *not* share the same essential elements, an important weakness in the protection afforded by the provision. In my opinion, the ‘old’ case law of the ECtHR on this point could perhaps be understood as requiring the authorities to bring any proceedings as much as possible around the same time, even if the offences concerned did not overlap in their essential elements.⁵⁵

Now that the Grand Chamber has held (in *Zolotukhin*) 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”,⁵⁶ there is no longer any need for such an approach. The *ne bis in idem* principle therefore applies from the point in time *at which the outcome of the first prosecution acquires finality* onward. The order in which the proceedings are brought or conducted is therefore irrelevant.

5.6.2 The case law of the European Court of Human Rights concerning the finality of the outcome of the first proceedings

There have been several judgments by the ECtHR concerning the question what constitutes a ‘final acquittal or conviction in accordance with the law and penal procedure’ of a state within the meaning of Article 4P7 ECHR. The first case in which this point was dealt with by the ECtHR was the case of *Smirnova and Smirnova v. Russia*.⁵⁷ In that case, the ECtHR dismissed the claim that a decision by a public prosecutor to re-open proceedings after they had been discontinued would constitute a violation of Article 4P7 ECHR. The reason given by the Russian Federation in the proceedings before the ECtHR in Strasbourg for the discontinuation and subsequent resumption of the proceedings was that the

54 *Oliveira v. Switzerland, R.T. v. Switzerland*; see the discussion of the cases in the following paragraph (below)

55 In this way, the ECtHR may have sought to (partially) remedy the limited protection offered by Article 4P7 ECHR, in keeping with the nature and purpose of the *ne bis in idem* principle.

56 Para. 82 of the judgment.

57 Application nos. 46133/99 and 48183/99.

Russian constitutional court had ruled that a law which was at issue in the proceedings was unconstitutional. The ECtHR held that, under these circumstances, the discontinuation of the proceedings did not have *ne bis in idem*-effect: "(t)he discontinuance of criminal proceedings by a public prosecutor did not amount to either conviction or an acquittal, and therefore Article 4 of Protocol No. 7 finds no application to the second applicant's situation either."

It is worth noting that in an earlier case, *Oliveira v. Switzerland*,⁵⁸ the issue of the finality of the outcome of the first prosecution may have been side-stepped, or perhaps even overlooked by the ECtHR although it was certainly relevant in that case. The case concerned a Portuguese national living in Switzerland, who had lost control over her vehicle on an icy road in Zurich, causing serious injuries to another road user. She was convicted and fined by the Police Magistrates Office (*Polizeirichteramt*) for the offence of "not controlling her vehicle by failing to adequately adapt her speed to the road conditions" under the Swiss Federal Road Traffic Act. The Zurich District Attorney's office (*Bezirkanwaltshaft*) subsequently issued a penal order imposing a second fine on Mrs. Oliveira for the offence of "negligently causing physical injury" under the Swiss Criminal Code.⁵⁹ It is clear from the judgment that Mrs. Oliveira never brought an appeal against the first fine (imposed by the Police Magistrates Office). It must therefore be assumed that her first conviction became *final* at some point in time, most likely prior to or during the proceedings concerning the second fine. The ECtHR however left this matter aside, and merely observed that it would have been "more consistent with the principles governing the proper administration of justice" if the Police Magistrate had sent the file to the District Attorney to rule on both offences "to have been passed by the same court in a single set of proceedings", as one of the offences (causing serious injury) was outside of his jurisdiction. The ECtHR found no infringement of Article 4P7 ECHR.

The decision on admissibility in the case of *R.T. v. Switzerland*⁶⁰ again concerned a road traffic offence. The applicant had been stopped by the police while driving under the influence of alcohol. His driving licence was withdrawn for a period of four months by the Road Traffic Office at St. Gallen, and a suspended prison sentence as well as a fine was imposed on him by the District Office at Gossau. He unsuccessfully brought appeals against both measures, and lodged a complaint with the Court in Strasbourg, arguing that he had been punished twice in two separate proceedings for the same conduct. The ECtHR held that "the Swiss authorities were merely determining the three

58 ECtHR, *Oliveira v. Switzerland*, 30 July 1998 (Appl. No. 25711/94).

59 This second fine (which was not an 'acquittal or conviction' before a criminal law court, but a sentence order imposed by the public prosecutor) was challenged by Oliveira before the Zurich District Court (*Bezirksgericht*) and it was reduced (to 1500 CHF).

60 ECtHR, *R.T. v. Switzerland* (admissibility) 30 May 2000 (Appl. No. 31982/96).

different sanctions envisaged by law for such an offence, namely a prison sentence, a fine, and the withdrawal of the driving licence". Because these sanctions "were issued at the same time by two different authorities", it could not, according to the ECtHR, "be said that criminal proceedings were being repeated contrary to Article 4 of Protocol No. 7 within the meaning of the Court's case-law."⁶¹ The ECtHR did *not* examine at what precise point in time each of the sanctions imposed on the applicant had become final, but deemed it sufficient that the sanctions in question were *issued* at the same time (which, in fact, they were *not*: the applicants driving license was suspended by decision of May 11, 1993, and the prison sentence and the fine were imposed on him by decision of 9 June of the same year). The ECtHR held that application was manifestly ill-founded.

The case of *Franz Fischer*⁶² also concerned a road traffic offence. Mr. Fischer was convicted by an Austrian criminal court for 'causing death by negligence under the influence of alcohol', following an administrative conviction for the offence of 'driving under the influence of alcohol'. Mr. Fischer complained that he had been tried and convicted twice for the same offence. The ECtHR emphasized that "the wording of Article 4 of Protocol No. 7 does not refer to 'the same offence' but rather to trial and punishment 'again' for an offence for which the applicant has already been finally acquitted or convicted", and held that "where different offences based on one act are prosecuted consecutively, one after the final decision of the other, the Court has to examine whether or not such offences have the same essential elements."⁶³ The ECtHR found that the second prosecution violated Article 4P7 ECHR. The rule from *Franz Fischer* appeared to be that the bringing of a second prosecution after the outcome of the first prosecution has become final may violate the *ne bis in idem* principle, but only if the offence in respect of which the second prosecution is brought has the same 'essential elements' as the offence at issue in the first prosecution. The protection afforded by Article 4P7 ECHR was therefore made conditional upon the *order* in which the proceedings are *conducted*.⁶⁴ Afterwards, the ECtHR repeated and confirmed its decision in *Franz Fischer* in a highly similar case, *Sailer v. Austria*.⁶⁵

The admissibility decision in the case of *Garaudy v. France*⁶⁶ concerned five different sets of criminal proceedings, brought in respect of different editions of and different passages from a book, written by the applicant who is a French philosopher and author. The proceedings were conducted at the

61 Para. 3 of the law.

62 ECtHR, *Franz Fischer v. Austria* 29 May 2001 (Appl. No. 37950/97)

63 Para. 25 of the judgment.

64 See also: ECtHR, *Storbråten V. Norway* (admissibility) 1 February 2007 (Appl. No. 12277/04), under B.

65 ECtHR, *Sailer v. Austria* 6 June 2002 (Appl. No. 38237/97).

66 ECtHR, *Garaudy v. France* (admissibility) 24 June 2003 (Appl. No. 65831/01).

same time, and at each stage of the proceedings the same court gave several judgments on the same day, and during the same hearing. Despite his requests, the French authorities refused to join the proceedings, and the applicant was convicted five times on the same day. Mr. Garaudy complained to the ECtHR that the 5 separate sets of proceedings were an artificial exercise, undertaken to secure multiple convictions. The ECtHR reiterated that “the aim of Article 4 of Protocol No. 7 is to prohibit the repetition of criminal proceedings that have been concluded by a final decision. That provision does not therefore apply before new proceedings have been opened (see *Gradinger v. Austria*, judgment of 23 October 1995, Series A no. 328-C, p. 65, § 53). In the instant case the proceedings were conducted concurrently, so it cannot be alleged that the applicant was prosecuted several times “for an offence for which he has already been finally acquitted or convicted”, as required by that very provision.”⁶⁷

In the case of *Nikitin v. Russia*,⁶⁸ the applicant was prosecuted by the Russian state for the offences of ‘treason through espionage’ and ‘aggravated disclosure of an official secret’. It appears from the judgment that the only reason for his prosecution was that he was working for a Norwegian NGO⁶⁹ on a report concerning radioactive contamination through accidents on nuclear submarines forming part of the Russian Northern Fleet. The St. Petersburg court found the indictment to be vague, and ordered further expert examination, which order was appealed against by the prosecution. The order was upheld in two consecutive appeals, which ended before the Russian constitutional court. The proceedings were resumed, and the applicant was acquitted of all charges, as the St. Petersburg court found that the prosecution was based on the basis of “secret and retroactive” decrees. In appeal, the Russian Supreme Court upheld the acquittal, and the Procurator General filed a request with the presidium of the Supreme Court to review the case in supervisory proceedings, which request was refused. The applicant himself challenged the legislation allowing for a re-examination of a case and the quashing of an acquittal, in case of a fundamental defect in the proceedings, and this legislation was declared unconstitutional by the constitutional court. The applicant complained to the ECtHR that the mere request for supervisory review proceedings by the Procurator General breached Article 4P7 ECHR because it had rendered him *liable* to be tried again, by creating the *potential* for a new prosecution. The Russian Federation argued that supervisory review proceedings did not constitute a second trial.

The ECtHR reiterated that a decision is final ‘if, according to the traditional expression, it has acquired the force of *res iudicata*. This is the case when it

67 P. 26 of the judgment.

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

69 Bellona. For comments and some additional background information concerning the Nikitin-case, see the organisation’s website: www.bellona.org.

is irrevocable, that is to say when no ordinary remedies are available or when the parties have exhausted such remedies or have permitted the time-limit to expire without availing themselves of them.”⁷⁰ The ECtHR noted that, within the Russian legal system at the time, an acquittal such as that in the present case did not become ‘final’ until the time-limit for a request for supervisory review (1 year) had expired. However, because supervisory review could be seen as an extraordinary appeal in that it is not accessible to the defendant in a criminal case, and its application is dependant on the discretion of the authorised official, the ECtHR decided to ‘assume’ that the acquittal had become final for the purposes of Article 4P7 ECHR, in order to consider the various other aspects of the case.⁷¹ The ECtHR observed that Article 4P7 ECHR “draws a clear distinction between a second prosecution or trial, which is prohibited by the first paragraph of that Article, and the resumption of a trial in exceptional circumstances, which is provided for in its second paragraph. Article 4 § 2 of Protocol No. 7 expressly envisages the possibility that an individual may have to accept prosecution on the same charges, in accordance with domestic law, where a case is reopened following the emergence of new evidence or the discovery of a fundamental defect in the previous proceedings.”⁷² The ECtHR however held that, in this instance, the mere *attempt* by the prosecution to secure a supervisory review is in itself not sufficient to consider that it had rendered the applicant liable to be tried again. After all, this request was refused. Furthermore, the prosecution’s request should be seen as an attempt to have the proceedings reopened, rather than an attempt to hold a second trial.⁷³ The mere request by the prosecution for supervisory review therefore did not infringe upon Article 4P7 ECHR.

The *Storbråten* case⁷⁴ concerned a Norwegian restaurant owner (Mr. Storbråten), who ran a restaurant which had to be closed, and the subject was bankrupted. It was the fifth time in a row that a business ran by him failed in this way. The tax authorities imposed a 30% tax surcharge on him, and the bankruptcy administrator recommended that Mr. Storbråten be disqualified from entering into any further business enterprises. The request was granted by the court and the applicant was disqualified for a period of two years, amongst others for reasons that the applicant was suspected of committing criminal offences in connection with his restaurant.

He was subsequently convicted by a criminal court on three counts, all connected to the bankruptcy: failure to keep the books, failure to declare turnover, and failure to submit tax declarations. In appeal he was partially acquitted of the bookkeeping offences, but still served 15 days imprisonment.

70 Para. 37 of the judgment.

71 Para. 39 of the judgment.

72 Para. 45 of the judgment.

73 Para. 47 of the judgment.

74 ECtHR, *Storbråten V. Norway* (admissibility) 1 February 2007 (Appl. No. 12277/04).

Before the Norwegian supreme court, the applicant argued a breach of the *ne bis in idem* principle, which was rejected. The applicant lodged a complaint with the ECtHR, arguing that the two convictions breached Article 4P7 ECHR. The ECtHR observed that the applicant had been subjected to two different measures, in consecutive and separate proceedings, and that the question whether a measure has become 'final' and has acquired the force of *res iudicata* is one which must be 'assessed in reference to national law'.⁷⁵ The case was however decided on a different point, as the ECtHR found that the imposition of a disqualification order does not constitute a criminal matter for the purpose of Article 4P7 ECHR. As a consequence, there had been no breach of the *ne bis in idem* principle contained in that provision.

In the case of *Zolotukhin*,⁷⁶ the Grand Chamber first reiterated and summarized the main points from the body of case law which has accumulated before the ECtHR. It held that in general, a decision is *res iudicata* if it is *irrevocable*, "that is to say when no further ordinary remedies are available or when the parties have exhausted such remedies or have permitted the time-limit to expire without availing themselves of them".⁷⁷ Decisions against which an ordinary appeal may still be brought are therefore excluded from the application of the *ne bis in idem* principle; the possibility of bringing extraordinary remedies under national law however does *not* affect the final nature of the decision.⁷⁸ The question whether it concerns an acquittal or conviction is irrelevant; the only relevant question is whether the decision has become final.⁷⁹

It appears that only one important question remains, which has not been addressed by the Grand Chamber in *Zolotukhin*. Will the continuation of an *ongoing* prosecution, after the time at which the outcome of an earlier (or concurrent) prosecution has become final, also infringe Article 4P7 ECHR? In my opinion there can be little or no doubt that this is, or should be the case. There is nothing in the wording of Article 4P7 ECHR to suggest that there should be any distinction between the *continuation* of existing prosecution, or the *bringing of a new* prosecution in this regard. As I will argue in the next chapter, the issue is therefore one which must be considered entirely in the context of the *finality* of the outcome of the first proceedings. The only question should therefore be whether a subject is prosecuted, after the outcome of another set of proceedings has become *final*, regardless of whether it concerns the bringing of new proceedings or the continuation of ongoing proceedings.

⁷⁵ P. 17 of the judgment.

⁷⁶ ECtHR (Grand Chamber), *Sergey Zolotukhin v. Russia* 10 February 2009 (Appl. No. 1493/03).

⁷⁷ Para. 107 of the judgment.

⁷⁸ Para. 107 of the judgment.

⁷⁹ Para. 111 of the judgment.

5.7 IDEM

5.7.1 Introduction

Before the judgment of the Grand Chamber in *Zolotukhin*, the case law of the ECtHR on the interpretation of the notion of ‘the same offence’ contained in Article 4P7 ECHR was riddled with questions and uncertainties.⁸⁰ Several different approaches to the interpretation of *idem* could be identified in the case law. After the initial, vying decisions in *Gradinger* and *Oliveira*, the ECtHR adopted an autonomous approach to the interpretation of ‘the same offence’, by taking into account the question whether two or more offences share the same *essential elements*. This approach not only weakened the protection offered by the *ne bis in idem* principle contained in Article 4P7 ECHR to an important extent, but also left a considerable degree of legal uncertainty for subjects. In particular, it was far from clear from cases how the phrase “the same essential elements” should be interpreted and applied, although it appeared from some cases that the ECtHR adhered to a rather restrictive approach on this point.

One of the many other questions raised by the case law was why it was that the ECtHR repeatedly emphasized that a *concoures ideal d’infractions* was not contrary to Article 4P7 ECHR, as there seemed to be no reason (neither in the wording of Article 4P7 ECHR, nor elsewhere) to assume that this could be any different. After all, the *ne bis in idem* rule does not prohibit the bringing of several charges against a subject, if there is no *final* decision in the same case. Furthermore, it was initially not clear from the case law of the ECtHR whether the concepts of “*concoures ideal d’infractions*” and “the same offence” under Article 4P7 ECHR could be seen as the same legal concept, or whether there could be some kind of distinction between the two. In later judgments and admissibility decisions however (*Hauser Sporn*, *Stempfer*, *Schutte*), the ECtHR only used the term “offence” instead of the concept of “*concoures ideal d’infractions*”, which seemed to indicate that it concerned the same legal concept.

In *Zolotukhin*, the Grand Chamber expressly denounced the earlier case law on this point, considering that “the existence of a variety of approaches to ascertaining whether the offence for which an applicant has been prosecuted is indeed the same as the one of which he or she was already finally convicted or acquitted engenders legal uncertainty incompatible with a fundamental right”.⁸¹ Following the case law of the ECJ on Article 54 CISA, the Grand

⁸⁰ According to AG Colomer, “the case-law of the European Court of Human Rights is contradictory” on the point of *idem*. In *Gradinger*, the ECtHR “upheld the concept of the same act, irrespective of its legal classification”, whereas in *Oliveira*, it “took the other approach”. *Franz Fischer* “appeared to reconcile those two precedents, taking as its basis the facts” whereas in *Göktan* the ECtHR “relied again on the legal definition of *idem*” (Opinion of Advocate General Colomer in case C-436/04 *Van Esbroeck*, ft.nt. 19).

⁸¹ Para. 78 of the judgment.

Chamber embraced a broad, objective approach to the interpretation of the element of *idem*. It held 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.”⁸²

5.7.2 The case law of the European Court of Human Rights concerning the interpretation of ‘the same offence’ in Article 4P7 ECHR

The case of *Gradinger v. Austria*⁸³ was also discussed in para. 4.8.4. In the proceedings before the Strasbourg Court, the Austrian government argued that two provisions at issue in the proceedings would pursue *different aims*. Whereas one provision (Article 81 para. 2 of the Austrian Criminal Code) is designed to protect ‘public safety’, the other (section 5 of the Austrian Road Traffic Act) was “primarily concerned with the regulation of traffic”.⁸⁴ It must be said that this argument seems unrealistic. As the case itself (rather ironically) illustrates, the regulation of traffic is *almost by definition* a matter of public safety. Although it does not appear from the judgment that the ECtHR disagreed with the Austrian government (the ECtHR expressly noted that it was “fully aware” that the two provisions pursued ‘different ends’), it held that “the offence provided for in section 5 of the Road Traffic Act represents only one aspect of the offence punished under Article 81 para. 2 of the Criminal Code. Nevertheless, both impugned decisions were based on the same *conduct*.”⁸⁵ For this reason, the ECtHR (unanimously) found a breach of Article 4P7 ECHR.

The case of *Oliveira v. Switzerland*,⁸⁶ was also discussed in para. 4.9.4 of this chapter. It concerned a Portuguese national living in Switzerland, who had lost control over her vehicle on an icy road in Zurich, causing serious injuries to another road user. She was convicted by the Police Magistrates Office (*Polizeirichteramt*) for the offence of “not controlling her vehicle by failing to adequately adapt her speed to the road conditions” under the Swiss Federal Road Traffic Act and was fined 200 Swiss francs (CHF). The Zurich District Attorney’s office (*Bezirkanwaltshaft*) subsequently issued a penal order, fining Oliviera 2000 CHF for “negligently causing physical injury” under the Swiss Criminal Code. Only the second fine was challenged by Mrs. Oliveira before the Zurich district court (*Bezirksgericht*), and it was reduced to 1500 CHF. In a subsequent appeal, the court of appeal held that the police magistrate has erred in imposing a fine for a minor misdemeanour, without taking onto

⁸² Para. 82 of the judgment.

⁸³ ECtHR, *Gradinger v. Austria*, 23 October 1995 (Appl. No. 15963/90).

⁸⁴ Para. 54 of the judgment.

⁸⁵ Para. 55 of the judgment italics added.

⁸⁶ ECtHR, *Oliveira v. Switzerland*, 30 July 1998 (Appl. No. 25711/94).

account the fact that the victim was actually seriously injured,⁸⁷ and ruled that the fine of 200 CHF had to be deducted from the 1500 CHF fine. In a subsequent appeal before the Swiss federal court, it was held that the effect of punishing the offender twice had thus been duly avoided, *because the original fine had been deducted from the second one*.

Contrary to what one might perhaps have expected after *Gradinger*, the ECtHR held that the facts of the case concerned “a typical example of a single act constituting various offences (*concoures idéal d’infractions*). The characteristic feature of this notion is that a single criminal act is split up into two separate offences, in this case the failure to control the vehicle and the negligent causing of physical injury. In such cases, the greater penalty will usually absorb the lesser one.”⁸⁸ Whilst the ECtHR observed that it would have been “more consistent with the principles governing the proper administration of justice” if the Police Magistrate had sent the file to the District Attorney to rule on both offences “to have been passed by the same court in a single set of proceedings”, there had consequently been *no* infringement of Article 4P7 ECHR. Afterwards, several commentators criticized the lack of consistency between *Gradinger* and *Oliveira*.⁸⁹

In the admissibility decision in *Ponsetti and Chesnel*,⁹⁰ the ECtHR faced the question whether two prosecutions for infringements of two different provisions of French Tax Code infringed Article 4P7 ECHR. Both applicants had failed to file income tax returns for several fiscal years. The tax authorities conducted audits, and sought recovery of unpaid income tax. At the same time, the tax authorities lodged criminal complaints against the applicants, alleging tax evasion. Both applicants were convicted by a criminal court. The applicants lodged a complaint with the Court in Strasbourg on the grounds that the conviction by a criminal court amounted to a violation of Article 4P7 ECHR. The ECtHR distinguished between the two provisions of the Tax Code

87 ...which fact was at the time not known to the Police Magistrate, because it was not included in the available file.

88 Para. 26 of the judgment.

89 Although the reasoning of the Court in *Oliveira* was clearly flawed, none of the commentators pointed this out at the time. Trechsel merely observed that the relationship between *Gradinger* and *Oliveira* was “puzzling”, and that the two judgments were difficult to reconcile with each other; Trechsel 2005, p. 394. In his Opinion in *Van Esbroeck*, AG Colomer argued that “the case-law of the European Court of Human Rights is contradictory” on the point of *idem*, because in *Gradinger*, the ECtHR “upheld the concept of the same act, irrespective of its legal classification”, whereas in *Oliveira*, it “took the other approach”. Similarly: U.K. Law Report Commission, Law Com. No. 267, Cm. 5048 (London: The Stationery Office, 2001), pp. 29-32, paras. 3.10-3.21, and Second Report from the U.K. joint Commission on Human Rights (available from: <http://www.publications.parliament.uk/pa/jt200203/jtselect/jtrights/40/4004.htm>). It is perhaps worth noting that none of the judges sitting on *Gradinger* sat again on *Oliveira*.

90 ECtHR, *Ponsetti and Chesnel v. France* (admissibility) 14 September 1999 (Appl. nos. 36855/97 and 41731/98).

at issue, and found that “the constitutive elements” differed.⁹¹ The two provisions therefore did not relate to “the same offence” for the purposes of Article 4P7 ECHR, and the application was rejected as manifestly ill-founded.⁹²

In a later case, *Isaksen v. Norway*⁹³ the ECtHR reiterated and confirmed its findings from *Ponsetti and Chesnel*. The case concerned tax fraud, committed by the applicant in respect of a business owned and managed by him, as well privately. He was tried and punished separately for these offences, and complained to the ECtHR that this would have violated Article 4P7 ECHR. The ECtHR however found that one prosecution related to the business owned by him, whereas the other concerned offences from which he benefited personally. Although the ECtHR noted that there was a “close nexus” between the company’s and his own tax evasion, it held that the two offences were entirely separate and differed in their essential elements.

In *Franz Fischer*,⁹⁴ the ECtHR for the first time admitted that the *Gradingner* and *Oliveira* judgments were “somewhat contradictory”. The case concerned an Austrian citizen (living in the same municipality as Mr. Gradingner) who had fatally injured a cyclist while driving under the influence of alcohol. He had driven off without stopping to assist his victim, but later turned himself in with the police. It should be pointed out that, other than was the case in *Gradingner*, the St. Pölten District Administrative Authority (and not the St. Polten regional court) was the first to impose a fine for driving under the influence of drink this time. A second penalty (imprisonment) was subsequently imposed by the St. Pölten regional court, for the offence of “causing death by negligence”. An appeal against this decision was brought by Mr. Fischer, and the Vienna court of appeal distinguished the *Gradingner* judgment on the ground that in that case the administrative proceedings had been after the criminal proceedings, whereas in the present case, the order was reversed. The Vienna court of appeal explained that double punishment was possible

91 Under the first provisions at issue (Article 1728 of the General Tax Code) anyone who is required to file a tax return and fails to do so within the prescribed time may be subjected to an increase of the payable amount (surcharge). The second provision (Article 1741 of the General Tax Code) requires that the accused must have *wilfully* failed to make his returns within the prescribed time (para. 2 of the judgment).

92 It is remarkable that in *Ponsetti and Chesnel*, the ECtHR did *not* examine whether the applicant’s failure to file their tax returns constituted a *concoures ideal d’infractions*, but relied on a narrow interpretation of the wording of Article 4P7 ECHR (*the same “offence”*) instead. On the one hand, it should be pointed out that whereas the *Oliveira* case concerned an *action* by the applicant who, as the driver of a vehicle, injured another road-user the *Ponsetti and Chesnel* case concerned a *failure to act*, in which case the concept of *concoures ideal d’infractions* seemed less appropriate. On the other hand, it is not clear why the ECtHR, in *Oliveira*, did not apply the same reasoning as it did later on in *Ponsetti and Chesnel*, as this would have led to the same result.

93 ECtHR, *Isaksen v. Norway* (admissibility) 2 October 2003 (Appl. No. 13596/02)

94 ECtHR, *Franz Fischer v. Austria* 29 May 2001 (Appl. No. 37950/97).

because there was no provision of Austrian law which provided for a principle of “subsidiarity” between the administrative and the criminal proceedings.

In a second appeal before the Austrian Constitutional Court, it was held that “it was not contrary to Article 4 of Protocol No. 7 if a single act constituted more than one offence. This was a feature common to the criminal law of many European countries. However, it was also accepted in criminal law doctrine that sometimes a single act only appeared to constitute more than one offence, whereas interpretation showed that one offence entirely covered the wrong contained in the other so that there was no need for further punishment. Thus, Article 4 of Protocol No. 7 prohibited the trial and punishment of someone for different offences if interpretation showed that one excluded the application of the other. Where, as in the present case, the law explicitly provided that one offence was not subsidiary to another, it had to be guided by Article 4 of Protocol No. 7. The ECtHR’s *Gradinger* judgment of 23 October 1995 had shown that there was a breach of this Article if an essential aspect of an offence, which had already been tried by the courts, was tried again by the administrative authorities.”⁹⁵

The judgment requires close reading, but it appears that the ECtHR agreed with the Austrian Constitutional Court. It held that “the wording of Article 4 of Protocol No. 7 does not refer to “the same offence” but rather to trial and punishment “again” for an offence for which the applicant has already been finally acquitted or convicted. Thus, while it is true that the mere fact that a single act constitutes more than one offence is not contrary to this Article, the Court must not limit itself to finding that an applicant was, on the basis of one act, tried or punished for nominally different offences. The Court, like the Austrian Constitutional Court, notes that there are cases where one act, at first sight, appears to constitute more than one offence, whereas a closer examination shows that only one offence should be prosecuted because it encompasses all the wrongs contained in the others (...). An obvious example would be an act which constitutes two offences, one of which contains precisely the same elements as the other plus an additional one. There may be other cases where the offences only slightly overlap. Thus, where different offences based on one act are prosecuted consecutively, one after the final decision of the other, the Court has to examine whether or not such offences have the same essential elements.”⁹⁶ Further down in the judgment, the ECtHR distinguished *Gradinger*, arguing that “the administrative offence of drunken driving did not differ from those constituting the special circumstances of Article 81 § 2 of the Criminal Code namely driving a vehicle while having a blood alcohol level of 0.8 grams per litre or more. However, there was no

95 Para. 14 of the judgment.

96 Para. 25 of the judgment.

such obvious overlap of the essential elements of the offences at issue in the *Oliveira* case.”⁹⁷

The rule from *Franz Fischer* appears to be that a second prosecution on the basis of the same facts does not breach Article 4P7 ECHR if two offences only *partially overlap*. However, where two offences share identical elements but, for example, one of the offences requires proof of an additional element that the other does not, a second prosecution would breach Article 4P7 ECHR. The ECtHR stressed that the operative term is not “*offence*”, but “*again*”.⁹⁸

The cases of *Sailer v. Austria*⁹⁹ and *W.F. v. Austria*¹⁰⁰ also concerned alcohol-related road traffic accidents. Both applicants were ordered by the Braunau District Administrative Authority to pay a fine, against which they did not bring an appeal. A district court subsequently convicted the applicants of causing injury by negligence under the relevant provisions of the Austrian penal code.

In both cases, the Strasbourg Court again found that there was nothing to distinguish the present case from the *Franz Fischer* case (while, in the case of *Sailer v. Austria*, expressly noting that the parties had not advanced any new arguments).¹⁰¹ It therefore concluded that there had been violations of Article 4P7 ECHR.

In the case of *Göktan v France*,¹⁰² the ECtHR applied the rule from *Oliveira* to a very different set of facts. This time, it concerned a situation in which the subject was convicted several times *in the same* proceedings (and the applicant complained that he had been *punished* instead of tried twice for the same offence), whereas in *Gradinger*, *Oliveira*, and *Franz Fischer* two different public bodies had imposed subsequent penalties in separate proceedings. The subject (Mr. Göktan) had been arrested in France while concluding a drug deal and was sentenced to 5 years imprisonment, a customs fine, and permanent expulsion from France, which sentence was upheld in appeal. Mr. Göktan thereupon dropped the case before the court of cassation. After completing his prison sentence, he was held in custody for non-payment of the fine. In the proceedings before the Strasbourg Court, Mr. Göktan argued that the

97 The Court furthermore held that the *order* in which the criminal and the administrative proceedings took place could not be decisive; the decisive element was the connection between the two offences with which Mr. Fischer was charged. It added that “the legal situation in Austria has changed following the constitutional court’s judgment of 5 December 1996, so that nowadays the administrative offence of drunken driving under sections 5 (1) and 99 (1)(a) of the Road Traffic Act will not be pursued if the facts also reveal the special elements of the offence under Article 81 § 2 of the Criminal Code.”

98 See also Trechsel 2005, p. 396; Opinion of AG Colomer in case C-436/04 *Van Esbroeck*, ft.nt. 19.

99 ECtHR, *Sailer v. Austria* 6 June 2002 (Appl. No. 38237/97).

100 ECtHR, *W.F. v. Austria* 30 May 2002 (Appl. No. 38275/97).

101 Para. 27 of the judgment in *Sailer v. Austria*, para. 28 of the judgment in *W.F. v. Austria*.

102 Judgment of 2 July 2002, *Göktan v. France*, (Case 33402/96, Reports of Judgments and Decisions 2002-V).

custodial sentence, which he eventually served in full, violated the principles of fair trial and “*non bis in idem*” (Articles 6(1) and 4P7 ECHR). The ECtHR found that imprisonment “in default” (*in lieu* of the payment of a fine constitutes a “penalty”, and that the definition thereof cannot vary as from one provision of the ECHR to another. In the same proceedings Mr. Göktan had been tried for two separate offences: an offence under (general) criminal law (dealing in narcotics) and a customs offence (importing illegal narcotics). Somewhat surprisingly, the ECtHR held that this did not differ substantially from the facts in the *Oliveira* case (a *conours idéal d’infractions*) and that there had been no violation of Article 4P7 ECHR.¹⁰³ The judgment raised questions. Looking at the rule from *Franz Fischer* it was far from obvious why no breach of Article 4P7 ECHR was found here. Couldn’t it be said that the offences of “dealing in narcotics” and “importing illegal narcotics” share the same essential elements, but one of the offences requires proof of an additional element (importation) that the other does not?¹⁰⁴

The admissibility decision in the case of *Garaudy v. France*¹⁰⁵ (also discussed in para. 4.9.4, above) concerned five different sets of criminal proceedings, brought in respect different editions of and different passages from a book, “The Founding Myths of Israeli Politics”, written by the applicant who is a French philosopher and author. He was charged with denying crimes against humanity, publishing racially defamatory statements, and inciting to racial or religious hatred or violence. The five sets of proceedings were conducted at the same time, and at each stage of the proceedings the courts gave judgment on the same day, and during the same hearing. Furthermore, the five courts consisted of the same judges (who delivered five different decisions on the same day). Despite his requests, the French authorities refused to join the proceedings, and the applicant was eventually convicted five times on the same day.

103 “As in *Oliveira*, this might also be seen as an example of the same act being caught by various statutory definitions (*conours idéal de qualifications*), and there is all the more reason to transpose that precedent to the present case (since in *Oliveira* the defendant was convicted by two courts; although the Court found that to be regrettable since it was inconsistent with the proper administration of justice, it nevertheless went on to hold that there had been no violation)” (para. 50 of the judgment).

104 It must be noted here that France has made a reservation on ratifying Protocol No. 7, limiting its scope of application to cases that fall within the jurisdiction of the French criminal courts. In the judgment, the ECtHR found that customs fines are ‘hybrid’ in nature because they contain elements of criminal as well as administrative law. By consequence, the ECtHR could perhaps do little more than to express “reservations” concerning imprisonment by default, stating that “it constitutes an archaic custodial measure available only to the Treasury”. The French reservation may perhaps have played a role of considerably more importance than what can be inferred directly from the judgment. Interestingly, Austria appears to have made a similar type of reservation, which for some reason never came to the fore in *Gradinger*, *Oliveira* or *Franz Fischer*.

105 ECtHR, *Garaudy v. France* (admissibility) 24 June 2003 (Appl. No. 65831/01).

Amongst other things, Mr. Garaudy complained that the five separate sets of proceedings were an artificial exercise, undertaken to secure multiple convictions. In this connection, it is worth noting that three of the proceedings were based on the same criminal classification of the publication. The ECtHR briefly held that “(a)rticle 4 of Protocol No. 7 does not come into play unless *the same offence* is punished two or more times. Such is not the case here: as has been stated above, on the subject of the decision not to join the proceedings, there were *separate* offences (see, *mutatis mutandis*, *Oliveira v. Switzerland*, judgment of 30 July 1998, *Reports* 1998-V). Accordingly, Article 4 of Protocol No. 7 is not applicable in the present case.”¹⁰⁶

The reasoning of the ECtHR in *Garaudy* appears far from convincing. Clearly, the *only* reason why the fact that 5 separate sets of proceedings were conducted at the same time did not breach Article 4P7 ECHR must be that there was no *final* decision in any of them, during the time that they took place. Furthermore, counting different *chapters* of the same *book* as separate “offences” under Article 4P7 ECHR seems rather arbitrary, and raises the question where the line will be drawn: paragraphs, pages, sentences or even words, or perhaps the number of copies sold?. What the *Garaudy* judgment best illustrates is that the *legal qualification* of the facts (“offence”) inevitably leads to a random, haphazard approach to the interpretation of the most important element of the *ne bis in idem* principle.

The decision on admissibility in *Asci v. Austria*¹⁰⁷ concerned a ‘misunderstanding’ between the applicant and two police officers. The applicant had been stopped on account of a minor traffic offence. This resulted in a violent dispute between the officers and the applicant, who snatched his car documents from one of the agents, and bruised the other with his car keys. The Vienna Federal Police Directorate issued a penal order in which the applicant was sentenced to a small fine for displaying aggressive behaviour towards a police officer, as well as another small fine for an offence of the Austrian Road Traffic Act and for having caused noise disturbance. The Vienna regional court subsequently convicted the applicant for attempting to resist public authority and for having caused bodily harm to a police officer. He was sentenced to four months’ imprisonment, suspended on probation. In the proceedings before it, the ECtHR distinguished both *Gradinger* as well as *Oliveira*. According to it, both of those cases concerned instances in which the applicant had committed a *single* act constituting different offences, whereas in the present case the aggressive behaviour towards one of the officers, and the causing of bodily harm towards the other did not constitute a *single* act, but several acts. The application was therefore rejected.

¹⁰⁶ P. 26 of the judgment.

¹⁰⁷ ECtHR, *Asci v. Austria* (admissibility) 19 October 2006 (Appl. No. 4483/02).

In the case of *Hauser Sporn v. Austria*,¹⁰⁸ the applicant had received a so called “provisional penal order” (*Strafverfügung* in German), having been found guilty by a court of having negligently caused bodily harm and having abandoned the victim when he knocked over a pedestrian while driving in reverse gear. A hearing was held, after which the applicant was acquitted of charges of having abandoned the victim, and the fine imposed on him was reduced. In the meanwhile, the Salzburg Federal Police Authority issued a penal order, after finding the applicant guilty of not informing the closest police station about the accident, and a second fine was imposed on him. Reiterating its findings in *Franz Fischer*, the ECtHR held that “the mere fact that one act constitutes more than one offence is not contrary to Article 4 of Protocol No. 7. However, where different offences based on one act are prosecuted consecutively, one after the final decision of the other, the ECtHR has to examine whether or not such offences have the same essential elements.”¹⁰⁹ Applying this rule to the present case, the ECtHR did not find that the offence of negligently causing bodily harm related to the same act or omission as the “administrative criminal offence” of failure to inform the police, or abandoning the victim. The applicant had therefore not, according to the ECtHR, been ‘tried or punished again for the same offence for the purposes of Article 4P7 ECHR. In a very similar case, *Stempfer v. Austria*,¹¹⁰ the ECtHR reached the same findings.

In the case of *Schutte v. Austria*,¹¹¹ the applicant had ignored a stop sign given to him by the police, and “drove on, obliging the police officers to step aside”. He was charged with resisting the exercise of public authority, but was acquitted. Neither party appealed, and the judgment became final. He was subsequently charged in administrative proceedings with the offence of “failing to comply with request to stop for the purpose of a traffic control, and a penal order was imposed on him. In the admissibility decision, the ECtHR again reiterated its considerations from *Franz Fischer*.¹¹² It held that, in this instance, it could not be said that essential elements of the offence from which the applicant had been acquitted in criminal proceedings were the same as those at issue in the administrative proceedings. In particular, an essential element of the offence under the criminal code was the use of “dangerous threat or use of force” as a means of resisting the exercise of official authority,

108 ECtHR, *Hauser-Sporn v. Austria* 7 December 2006 (Appl. No. 37301/03).

109 Para. 42 of the judgment.

110 ECtHR, *Stempfer v. Austria* 26 July 2007 (Appl. No. 18294/03).

111 ECtHR, *Schutte v. Austria* 26 July 2007 (Appl. No. 18015/03).

112 (That “the mere fact that one act constitutes more than one *offence* italics added is not contrary to Article 4 of Protocol No. 7. However, where different offences based on one act are prosecuted consecutively, one after the final decision of the other, the Court has to examine whether or not such offences have the same essential elements, para. 41 of the decision on admissibility).

whereas the administrative proceedings “punished a simple omission”, namely the failure to stop.¹¹³

As discussed at the beginning of this chapter, much changed when the judgment of the Grand Chamber in the case of *Zolotukhin v. Russia* came out.¹¹⁴ The case concerned a Russian national who had displayed disorderly behavior towards several public officials. He was placed in detention for three days for the administrative offence of “minor disorderly acts”. Shortly afterwards, he was prosecuted for the criminal offences of “disorderly acts”, “use of violence against a public official”, and “insulting a public official” on the basis of substantially the same facts. He lodged an application with the European Court of Human Rights on 22 April 2003, which was declared (partly) admissible on 8 September 2005. In its Chamber judgment of 7 June 2007, the Court held unanimously that there had been a violation of Article 4 of Protocol No. 7. At the request of the Russian government, the case was referred to the Grand Chamber for review. Citing amongst other things the case law of the ECJ concerning the interpretation of Article 54 CISA on this point, the Grand Chamber held that:

“81. The Court considers that the use of the word “offence” in the text of Article 4 of Protocol No. 7 cannot justify adhering to a more restrictive approach. It reiterates that the Convention must be interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. (...)”

82. The Court further notes that the approach which emphasises the legal characterisation of the two offences is too restrictive on the rights of the individual, for if the Court limits itself to finding that the person was prosecuted for offences having a different legal classification it risks undermining the guarantee enshrined in Article 4 of Protocol No. 7 rather than rendering it practical and effective as required by the Convention (...).

83. Accordingly, 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.”

These clear and powerful statements are mostly self-explanatory; the Grand Chamber has overruled the earlier case law on this point in no uncertain terms¹¹⁵ (with the exception only of *Gradinger*), and has taken a broad, *functional* approach to the interpretation of the same “offence”. No doubt this approach is the most beneficial for legal certainty, and therefore for the subject.

113 Para. 42 of the decision on admissibility.

114 ECtHR (Grand Chamber), *Sergey Zolotukhin v. Russia* 10 February 2009 (Appl. No. 1493/03).

115 “While it is in the interests of legal certainty, foreseeability and equality before the law that the Court should not depart, without good reason, from precedents laid down in previous cases, a failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement” (para. 78 of the judgment).

The Court provided some further guidance on how this rule must be applied by national courts by explaining that the statements of fact from the previous decision will form “an appropriate starting point” in determining “whether the facts in both proceedings were identical or substantially the same” and went on to emphasize “that it is irrelevant which parts of the new charges are eventually upheld or dismissed in the subsequent proceedings, because Article 4 of Protocol No. 7 contains a safeguard against being tried or being liable to be tried again in new proceedings rather than a prohibition on a second conviction or acquittal”.¹¹⁶

As always where the *ne bis in idem* principle is concerned, the next question will be: how must it be determined that a given set of facts is ‘identical or substantially the same’? As discussed at several points in this study, there can be no single answer to this fundamental question, nor can the objective facts be seen entirely in isolation from the legal qualification of those facts where legal proceedings are concerned. In the end, the question what must be considered as “the same” facts can only be decided on a case-by-case basis, although some general guidelines can be distilled from the case law of the ECJ concerning Article 54 CISA by now. Undoubtedly, these guidelines will be further developed and refined in the case law which is to appear in the year to come.

Although it appears sufficiently clear from the judgment that it was the intention of the Grand Chamber to align its case law with that of the ECJ concerning Article 54 CISA on this point, the former does not require there to be an ‘inextricable link’ between the facts for a finding that they are “the same”. Although we can only speculate what the reasons for this difference could be, it should perhaps be born in mind that this requirement was formulated by the ECJ in several cases concerning the cross-border smuggling of narcotics between the Schengen-states. It would be contrary to aim of free movement between the Member States if “import” and “export” of those substances would be tried and punished as separate offences. Needless to say, the Grand Chamber was not faced with any similar problem in *Zolotukhin*, and this alone could suffice to explain the difference in the case law on this point. All things aside, it seems doubtful whether this difference in the case law will also lead to a difference in the application of the *ne bis in idem* principle (or, in other words: whether there can be any real difference between facts which are ‘inextricably linked’ to each other and facts which are ‘substantially the same’).

116 Para. 83 of the judgment.

5.8 EXCEPTIONS

5.8.1 Introduction

As was mentioned in chapter 2 (para. 2.7), the guarantee of *ne bis in idem* is generally speaking not absolute. In many jurisdictions, a re-trial may take place under certain conditions, in particular in case of newly discovered evidence (*novum*), or in case of a mistrial or other defects in the proceedings. In general, the reasons for providing for exceptions include the interests of material justice, and the need to correct “mistakes” in the first proceedings.¹¹⁷ Out of the provisions discussed in chapter 2 however, only Article 4P7(2) ECHR allows for “the reopening of the case (...) if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings”.¹¹⁸ A different question, but one which could also be seen as a kind of “exception” to the *ne bis in idem* principle, is whether the bringing of new proceedings will automatically infringe Article 4P7 ECHR, even if the authorities were unaware of (the final outcome of) any earlier proceedings.

In its case law the ECtHR has examined whether the power to reopen the case “was exercised by the authorities so as to strike, to the maximum extent possible, a fair balance between the interests of the individual and the need to ensure the effectiveness of the system of criminal justice.” This approach by the ECtHR highlights the central importance of the *ne bis in idem* principle as a fundamental human right and its function as a guarantee of legal certainty. In the following paragraph, the case law of the ECtHR on the point of the exceptions to Article 4P7 ECHR will be examined and discussed.

5.8.2 The case law of the European Court of Human Rights concerning Article 4(2)P7 ECHR

In *Nikitin v. Russia*¹¹⁹ the ECtHR observed that “the requirements of legal certainty are not absolute. In criminal cases, they must be assessed in the light of, for example, Article 4 § 2 of Protocol No. 7, which expressly permits a State to reopen a case due to the emergence of new facts, or where a fundamental defect is detected in the previous proceedings, which could affect the outcome of the case.”¹²⁰ The ECtHR however held that, in order for this provision to

¹¹⁷ De la Cuesta 2004, p. 714.

¹¹⁸ Article 55 CISA also allows for certain exceptions to the prohibition of double prosecution contained in Article 54 CISA, conditional upon a previous declaration by the state. Those exceptions are however of a different nature than those contained in Article 4(2)P7 ECHR, and generally relate to situations which a second trial for the same facts is deemed necessary in order to protect the ‘essential interests’ of a Member State.

¹¹⁹ ECtHR, *Nikitin v. Russia* 20 July 2004 (Appl. No. 50178/99).

¹²⁰ Para. 56 of the judgment.

apply, it must first be examined whether the power to reopen the proceedings (in this case: to launch supervisory proceedings) “was exercised by the authorities so as to strike, to the maximum extent possible, a fair balance between the interests of the individual and the need to ensure the effectiveness of the system of criminal justice.”¹²¹ The ECtHR held that the Presidium of the supreme court, in considering the request of the Procurator General to reopen the case, did not fail to strike a fair balance between the interests of the applicant and the need to ensure the proper administration of justice. It should be called to mind that the request of the procurator general was refused by the presidium of the supreme court.

In the admissibility decision in *Bratyakin v. Russia*,¹²² the ECtHR added that, in the specific context of supervisory review, “the Convention requires that the authorities respect the binding nature of a final judicial decision, and allow the resumption of criminal proceedings only if serious legitimate considerations outweigh the principle of legal certainty”. Again in the specific context of supervisory review, these considerations were also reiterated and applied by the ECtHR in *Fadin v. Russia*.¹²³ In both cases, the ECtHR found that supervisory review constituted “a reopening of the case owing to the fundamental defect in the previous proceedings, within the meaning of Article 4 § 2 of Protocol No. 7”. Accordingly the proceedings did not infringe upon Article 4(1)P7 ECHR.

Finally it is worth noting that in the admissibility decisions in the cases of *Zigarella v. Italy*¹²⁴ and *Falkner v. Austria*,¹²⁵ a second prosecution was brought by the authorities in error. It had not come to their attention that the defendant had already been tried; the second trial was therefore an “honest mistake”.¹²⁶ The ECtHR held that Article 4P7 only falls to be applied where proceedings are brought *in the knowledge* that the defendant has already been tried. In both cases, the authorities were unaware of this fact, and terminated the proceedings as soon as they “became aware of their error”. Under these circumstances, the ECtHR found that there had been no infringement of Article 4P7 ECHR.

PROVISIONAL SUMMARY

In its case law on Article 4P7 ECHR, the ECtHR has distinguished between three separate rights contained in that provision: 1. the right not to be *liable* to be

121 Para. 57 of the judgment.

122 ECtHR, *Bratyakin v. Russia* (admissibility) 9 March 2006 (Appl. No. 72776/01).

123 ECtHR, *Fadin v. Russia* 27 July 2006 (Appl. No. 58079/00).

124 ECtHR, *Zigarella v. Italy* (admissibility) 3 October 2002 (Appl. No. 48154/99).

125 ECtHR, *Falkner v. Austria* (admissibility) 30 September 2004 (Appl. No. 6072/02).

126 The Bravery, “*Honest Mistake*”, from the album: The Bravery, Island Records (2005).

tried twice, 2. the right not to be *tried* twice, and 3. the right not to be *punished* twice, for the same offence. The ECtHR held that the *ne bis in idem* principle is a safeguard which is associated with the general guarantee of a fair hearing in criminal proceedings, and has placed the principle in the context of the principle of legal certainty. The criteria for determining the scope of application *ratione materiae* of Article 4P7 ECHR are the same as those for Article 6 ECHR (the ‘Engel-criteria’).

It is established case law before the ECtHR that a judicial decision is final when it is *irrevocable*, that is to say when there are no ordinary remedies available and the decision has acquired *res iudicata* in reference to the applicable rules under national law. If certain extraordinary remedies such as ‘re-view’ are open under national law, this does not affect the final nature of the decision for the purposes of Article 4P7 ECHR.

The judgment of the Grand Chamber in *Zolotukhin* marked a clear departure from the earlier case law of the ECtHR concerning the interpretation of the notion of the ‘same offence’ in Article 4P7 ECHR. In that judgment, it was held 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.” It appears from this that the Court has fully aligned its approach with that of the ECJ in the case law concerning Article 54 CISA on this point.

In its case law concerning the exception contained in Article 4(2)P7 ECHR, the ECtHR has examined whether the power to reopen the case “was exercised by the authorities so as to strike, to the maximum extent possible, a fair balance between the interests of the individual and the need to ensure the effectiveness of the system of criminal justice.”

6 | Analysis: the *ne bis in idem* principle in the legal order of the EU

In this chapter, the findings from chapters 2, 3 and 4 are brought together, and the reader is presented with an integrated outline of the various aspects of the *ne bis in idem* principle in EU law.

6.1 THIS CHAPTER

The purpose of this chapter is to ‘bring together’ (synthesis) the findings from chapters 2, 3, 4 and 5, and to arrive at an integrated outline of the *ne bis in idem* principle in the legal order of the EU *as it is* (*lex lata*), or *as it ought to be* (*lex ferenda*).

6.2 A SINGLE *NE BIS IN IDEM* PRINCIPLE WITHIN THE EU LEGAL ORDER?

6.2.1 General

As discussed in chapter 2 of this study, there are several differently worded *ne bis in idem* provisions in a number of instruments which exist within the framework of the Council of Europe or that of the EU. This poses a “major problem in discussing the principle from the European perspective”, and creates scope for confusion and conflict between the provisions.¹ Article 50 of the Charter can not solve these problems, and is present not legally binding. It can therefore be said that the legislative framework for the enforcement of the *ne bis in idem* principle on the level of the EU leaves something to be desired. Two main issues can be identified in this connection: that of the comparative scope of the provisions, and that of the textual differences between the provisions.

The case law of the Community courts has not, so far, provided a solution for these problems either. Although the ECJ has consistently recognised and applied the *ne bis in idem* principle in its case law since the early 1970’s (long

1 Bartsch 2002, p. 1167.

before any of the *ne bis in idem* provisions considered in this study were drafted) two different 'lines' have developed in the case law of the ECJ on the *ne bis in idem* principle.² One line of case law concerns the application of the *ne bis in idem* principle in Community law (mostly in competition cases), the other line of case law concerns Article 54 CISA. Although there are indications in the cases that the ECJ is gradually bringing these two lines of case law together, the interpretation given by the ECJ to the *ne bis in idem* principle in Article 54 CISA still is not fully consistent with that given by it to the *ne bis in idem* principle in competition cases.

As discussed in para. 2.2.6 of this study, a solution to these problems could be to recognise that the various provisions must be considered as mere attempts at codifying a single, pre-existing and overriding ("core") understanding of the *ne bis in idem* principle within the legal order of the EU. As AG Sharpston argued her Opinion in *Gasparini*, "the specific application of the principle in particular areas (be these competition law or through Article 54 of the CISA) should form part of a core understanding of what that fundamental principle means (or ought to mean) within the Community legal order."³ In order to further substantiate this, the AG furthermore argued that *ne bis in idem* principle is a principle *propriae naturae*, or a 'free-standing principle' of Community law, which "is therefore to be refined and developed by the ECJ in the exercise of its 'hermeneutic monopoly' on such key concepts of EU law".⁴ Furthermore, it would follow logically from the *nature* of the principle *as a fundamental right* that it must be given an autonomous and uniform interpretation "throughout the Community", whilst fully taking into account the specific features of each area of Community law.⁵

6.2.2 Evidence from the case law

There is evidence in the case law to suggest that the ECJ recognises that, regardless of whether the *ne bis in idem* principle is applied in Community law or in Third Pillar law, it concerns one and the same legal principle. In

2 Article 50 of the Charter is therefore merely an attempt to codify a pre-existing principle of Community law.

3 Para. 80 of the Opinion.

4 Para. 80 of the Opinion.

5 According to the AG "it is now settled case-law that the need for uniform application of Community law (...) requires that the terms of a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the Community. (ftnt. 69 of the Opinion). See also para. 103 of the Opinion of AG Sharpston in case C-467/04 *Gasparini*: "I can not see how a core element of a fundamental principle could vary substantially in its content depending on whether *ne bis in idem* is being applied under Article 54 of the CISA or generally as a fundamental principle of Community law (for example, within competition law)."

several cases concerning Article 54 CISA, the ECJ has referred to cases concerning the *ne bis in idem* principle in Community law, and *vice versa*. In the *Van Esbroeck* case⁶ for example, the ECJ observed that “(a)rticle 54, (...) enshrines, within the Schengen territory, the *ne bis in idem* principle, which is recognised in the case-law as a fundamental principle of Community law (see, to that effect, Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others v Commission* [2002] ECR I-8375, paragraph 59).” From these considerations, it appears that the ECJ regards Article 54 CISA as merely *one specific expression* of a generally applicable legal principle of law within the legal order of the EU.⁷ Not only does it appear that the ECJ is thus bringing the two ‘lines’ of case law on the *ne bis in idem* principle together, it appears more in general from recent judgment like *Pupino*,⁸ that the ECJ is ‘bridging the gap’ between the First and the Third Pillar, and easing some of the tension between the two.⁹

As we have seen in the previous chapter the Grand Chamber of the ECtHR has, in the groundbreaking judgment of in *Zolotukhin v. Russia* brought its interpretation of ‘the same offence’ in Article 4P7 ECHR in line with the interpretation given by the ECJ to ‘the same facts’ in Article 54 CISA.¹⁰ In the judgment, the Grand Chamber referred both to the case law of the ECJ concerning Article 54 CISA, as well as to the case law concerning the *ne bis in idem* principle as a general principle of Community law.¹¹ It is sufficiently clear from this that the ECtHR recognises that, in spite of the considerable differences in the way Article 54 CISA and Article 4P7 ECHR are drafted, both provisions codify the same legal principle. Now that the case law of the ECtHR and that of the ECJ has been aligned with each other on this point, and in view of the ‘special significance’ that the ECJ attributes to the rights contained in the ECHR in formulating and interpreting general principles of Community law, it would seem that the Community courts cannot stay behind, and must proceed to adopt the same interpretation of the *ne bis in idem* principle in the context of Community law.

6 Case C-436/04 *Criminal proceedings against Van Esbroeck*. It is worth pointing out that the Court’s judgment in *Van Esbroeck* was delivered several months *before* the AG’s Opinion in *Gasparini*.

7 Para. 40 of the judgment.

8 Case C-105/03 *Criminal proceedings against Maria Pupino* [2005] ECR I-5285.

9 In *Pupino*, the ECJ applied reasoning based on Article 10 EC and the ‘*effet utile*’ of Community measures to a Third Pillar measure.

10 ECtHR (Grand Chamber), *Sergey Zolotukhin v. Russia* 10 February 2009 (Appl. No. 1493/03).

11 Paras. 34-38 of the judgment.

6.2.3 What if the Charter becomes legally binding?

As discussed in chapter 2 of this study, Article 50 of the Charter was drafted with Article 4P7 ECHR and Article 54 CISA in mind, but differs from both in the way it is worded (in particular from Article 54 CISA). Before the judgment of the Grand Chamber of the ECtHR in *Zolotukhin v. Russia* this could raise concerns, even more so because of the different interpretations initially given by the ECJ and the ECtHR to those provisions.¹²

In an article from 2008, Dougan argued that if the Charter would to become legally binding, this would raise several questions and issues in view of the Charter's 'well known drafting deficiencies', and the author speculated on several possible scenarios in that respect.¹³ Amongst other things the author contended that it would be *constitutionally indefensible* for the ECJ to ignore the will of the Treaty drafters "to furnish the Union with a written bill of rights, intended to act as the primary repository of fundamental rights protection, and capable of having direct legal effects of its own, though only within the limits negotiated and agreed by the Union institutions and the Member States", by ignoring the drafting of Article 50 of the Charter.¹⁴

For the *ne bis in idem* principle at least, the judgment of the Grand Chamber of the ECtHR in *Zolotukhin v. Russia* may well have solved this problem. There would seem to be no reason for the Community courts to interpret Article 50 of the Charter any differently from the way the ECtHR has interpreted Article 4P7 ECHR, and this interpretation is now substantially the same as that given by the ECJ to Article 54 CISA. It can therefore be said that, for the *ne bis in idem* principle in EU/Community law, it should not make any difference anymore whether the Charter will eventually become legally binding or not.

More in general, it seems questionable whether it would be, as Dougan contended, "constitutionally indefensible" for the ECJ to ignore deficiencies in the drafting of provisions of the Charter. After all, the purpose of the Charter is precisely to *reaffirm* the rights contained in it by creating a minimum

12 If the Charter would have become legally binding, Article 50 could have found itself on tense footing with the core understanding of the *ne bis in idem* rule as it is or ought to be applied within the EU legal order, as envisaged by AG Sharpston.

13 Dougan argues that it would be "theoretically possible" for the ECJ "to decide that its case law will continue to evolve much as it does now", and the drafting flaws and faults could therefore be "safely ignored because they are not directly relevant to determining the scope or effects of the case law itself". Another possibility envisaged by Dougan would be for the ECJ to manage two separate but parallel fundamental rights regimes, one based on the Charter, and one on general principles of Community law. The third and final possibility foreseen by him is for the ECJ to overcome the Charter's textual deficiencies 'by sheer interpretative perseverance', amongst other things by interpreting the rights contained in the Charter consistent with the spirit behind the bungled drafting; Dougan 2008, pp. 663-664.

14 Dougan 2008, p. 664.

level of protection of fundamental rights in the EU.¹⁵ If a considerable degree of interpretation, or even an interpretation *contra legem* is necessary in order to achieve this goal, this would ultimately be fully in keeping with the very aim of the Charter. Analogously, if a general principle of Community law provides for a higher level of protection than *national constitutional law*, the higher standard also applies.¹⁶ This should not be any different in situations in which a general principle of *Community law* provides for a higher level of protection than a provision in the Charter.

6.2.4 Findings: a single, autonomous, and uniformly applicable general principle of Community law

It follows from the nature of the *ne bis in idem* principle as a fundamental right and a fundamental principle of Community law that there should be a single, overriding (“core”) understanding of the *ne bis in idem* principle in EC and EU law, irrespective of the specific area of EU or EC law in which it is applied, and notwithstanding the differences between the drafting of the provisions. This proposition finds support in several recent cases before the ECJ and the ECtHR.

6.3 THE SUBSTANCE OF THE *NE BIS IN IDEM* PRINCIPLE

6.3.1 Introduction

As was discussed in para. 2.2.6 of this study, Articles 14(7) ICCPR, Article 4P7 ECHR, and Article 50 of the Charter refer to both the prohibition of double prosecution as well as that of double punishment in the same sentence (“*tried or punished*”). Only Articles 54 and 56 CISA establish the two prohibitions as separate and distinct guarantees. This raises the question how the two prohibitions relate to each other, and which of the two forms the ‘real’ *ne bis in idem* principle.

This question is not merely an academic one, but is of key importance for the interpretation and application of the *ne bis in idem* principle. As was discussed in para. 2.4.2.3 of this study, the underlying problem is that one of the two rules (the prohibition of double punishment) in principle *allows* for a second prosecution, whereas the other (the prohibition of double prosecution) does *not*.

¹⁵ Evidently, the Charter should not have the effect of setting level of protection established by general principles of Community law at a lower level.

¹⁶ Spaventa 2007, p. 18.

6.3.2 Analysis

The conclusion from this study is that only the prohibition of double prosecution or *Erledigungsprinzip* should be seen as the ‘real’ *ne bis in idem* principle in EC and EU. This finding is primarily based on the nature and purpose of the principle itself, and is evidenced by the wording of Articles 54-56 CISA and by the judgment of the ECJ in *PVC*,¹⁷ in which it was held that the *ne bis in idem* principle in Community law is the rule which prohibits a second *prosecution* on the grounds of conduct in respect of which a subject has been “penalised or declared not liable” by a previous unappealable decision. Further evidence is found in the case law of the ECtHR. In *Zolotukhin*, the Grand Chamber held that “Article 4 of Protocol No. 7 must be understood as prohibiting the *prosecution or trial*” (etc.)¹⁸

If the prohibition of double prosecution (*Erledigungsprinzip*) forms the “real” *ne bis in idem* principle, and the prohibition of double punishment is a rule which -more generally- derives from the proportionality principle, it follows directly from this that the prohibition of double punishment applies where the conditions for the application of the prohibition of double prosecution are, for whatever reason, not met. The *ne bis in idem* principle (*Erledigungsprinzip*) therefore *takes precedence* over the prohibition of double punishment (*Anrechnungsprinzip*), and the latter can only come into play if it has been established first that *there has been no breach of the former*. This is also evidenced by the decision of the ECJ in *Lysine*¹⁹ case. In that case, the ECJ accepted that the prohibition of double punishment (*Anrechnungsprinzip*) is a *corollary* of the *ne bis in idem* principle. Furthermore, in *Maizena*, the ECJ held that the prohibition of double punishment forms an expression of the principle of *proportionality*.²⁰ The wording of Articles 54-56 CISA reveals the same position. In her Opinion in *Kretzinger*,²¹ AG Sharpston argued that the prohibition of double punishment contained in Article 56 CISA applies *whenever Article 54 CISA does not apply*, for whatever reason. According to the AG, “the broad drafting of Article 56 of the CISA indicates that it applies when, for whatever reason, a prosecution against the same defendant is initiated in a Member State despite the fact that his trial for the same acts has been disposed of in another Member State. One can see that might happen either where one of the derogations in Article 55 of the CISA applies, or where the trial has been ‘disposed of’ but the enforcement condition in Article 54 of the CISA has not been ful-

17 Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij (PVC; appeal)* [2002] ECR I-8375.

18 Para. 82 of the judgment.

19 Case C-397/03 P *Lysine (appeal)* [2006] ECR I-4429.

20 Case 137/85 *Maizena* [1987] ECR 4587, para. 15.

21 Case C-288/05 *Kretzinger* [2007] ECR I-6441, Opinion of Advocate General Sharpston 5 December 2006.

filled. In other circumstances, the principle of *ne bis in idem* in Article 54 of the CISA would apply.”²² In its case law, the ECtHR has confirmed that Article 4P7 ECHR contains three distinct guarantees (the right not to be tried twice, the right not to be liable to be tried twice, and the right not to be punished twice), but the cases do not provide much guidance on how these three rights relate to each other.

What is not certain on the basis of the available case law is whether the phrase “a second prosecution” would also include the *continuation* of an *ongoing* prosecution, after the outcome of an earlier prosecution has become final. In my opinion, there can be little doubt that this would be the case. All of the provisions generally refer to the possibility of a subject being ‘tried’ or ‘prosecuted’, subsequent to an unappealable decision on the basis of the same acts or offence. There appears to be no reason to assume that this must be understood solely as the *bringing* of proceedings after that time. It could equally be said that the subject in question is tried/prosecuted after the time that outcome of the first proceedings became final where it concerns the continuation or that person’s trial or prosecution.

6.3.3 Findings

The prohibition of double prosecution (“*ne bis in idem*-principle” or *Erledigungsprinzip*”) and that of double punishment (“*Anrechnungsprinzip*” or “accounting principle”) in EC/EU law are distinct, complementary, and mutually exclusive guarantees. The *ne bis in idem* principle is the rule which prohibits a second *prosecution* on the grounds of conduct in respect of which a subject has been previously prosecuted, once the outcome of the previous prosecution has become final. The prohibition of double punishment (*Anrechnungsprinzip*) is the rule which prohibits a second *punishment* for the same conduct. Although it appears from the provisions that the requirement of the finality of the outcome of the first proceedings (which, in the case of the prohibition of double punishment can only mean: punishment) equally extends to this prohibition, the ECJ has held that the prohibition of double punishment forms an expression of the more generally applicable principle of *proportionality* in Community law. The possible implications hereof will be further discussed later on in this chapter.

So far, the question whether the *continuation* of an *ongoing* prosecution (after the outcome of an earlier prosecution has become final) will also violate the *ne bis in idem* rule (in the same way as the bringing of a *new* prosecution would) has not surfaced in the case law before the Community courts and the ECtHR. In my opinion, there can be little or no doubt that this is, or should

22 Para. 72 of the Opinion.

be, the case. There is nothing in the wording of Articles 4P7 ECHR and Article 54 CISA to suggest that the terms 'tried' or 'prosecuted' contained in those provisions must be understood solely as the *bringing of new* proceedings.

It may be useful to give some examples. Taking the case of an undertaking which has been prosecuted and fined by the NCA of Member State A, for an infringement of EC competition law as well as an infringement of the corresponding provisions of national competition law. In calculating the fine, the NCA has only taken into account the impact of the infringement on markets within the territory of Member State A. After the point in time at which the outcome of the first set of proceedings has become final under the law of Member State A, a second NCA in Member State B instigates proceedings and imposes a second fine. In doing so, it only takes into account the effects of the infringement on markets within the territory of Member State B. In appeal, the undertaking argues that the bringing of the second prosecution breached the *ne bis in idem* principle. The NCA (citing, amongst other things, the wording of Article 4P7 ECHR and Article 50 of the Charter, but not that of Articles 54-56 CISA) argues that the second proceedings did not lead to the result that the undertaking was *punished* twice, because each NCA only took into account the impact of the infringement in its own domestic markets, and that the *ne bis in idem* principle has therefore not been violated.

Assuming that this situation will fall within the objective scope of application of the *ne bis in idem* principle in Community law (which will be discussed later on in this chapter), the argument put forward by the NCA of Member State B (that the second proceedings did not lead to the result that the undertaking was *punished* twice) is immaterial. The *ne bis in idem* principle in Community law only prohibits a second *prosecution*, and not a second *penalty*. The prohibition of double punishment does not come into play until it is established that the conditions for the application of the *ne bis in idem* principle are not met, and that there is consequently no violation of that principle. In this case the answer would have to be that there has been a violation of the *ne bis in idem* principle; the fact that this will not lead to the result that the undertaking was *punished* twice is therefore by definition irrelevant.

A second example could be the case of a subject who is charged with a crime, and who is held in custody for an some time in Member State A while the authorities of that Member State try to decide whether to further pursue the prosecution or to surrender the subject to Member State B, in view of the fact that the latter Member State also has an interest in pursuing the same case. In the end, the authorities in Member State A decide to (voluntarily) discontinue proceedings, and the subject is transferred to Member State B in order to stand trial there. In the preliminary phase of the proceedings in Member State B, the defendant argues that the proceedings are inadmissible as a matter of *ne bis in idem*, because they could lead to the result that is punished twice for the same conduct, in view of the time already spent in custody by him in Member State A.

Again, the question whether there has been a breach of the *ne bis in idem* principle must be decided *first*, before considering the possibility of a breach of the prohibition of double *punishment*. The prohibition of double punishment can only be relied on by the defendant once it has been firmly established that the *ne bis in idem* principle was *not* breached. Leaving aside the question whether custody will constitute ‘punishment’ here, it appears that there has been no violation of the *ne bis in idem* principle, because the mere discontinuation of proceedings by the authorities of Member State A cannot be seen as a *final* outcome of the proceedings in that Member State. This leads to the result that the proceedings in Member State B can go ahead, but also that any time served by the defendant in Member State A will have to be deducted from the sentence.

6.4 OBJECTIVE SCOPE OF APPLICATION OF THE GUARANTEES IN COMMUNITY LAW

6.4.1 Introduction

Developments such as globalisation and European integration pose new challenges for systems of law in general, and for some of the age-old legal principles which form the foundations of those systems in particular. The *ne bis in idem* principle is a clear example of this; it is a principle which is traditionally strictly limited in its scope of application to one and the same state, and therefore to a single legal system. It is evident that within the supranational context of the EU, this traditional limitation of the scope of application of the principle can no longer be maintained. For one, it no longer adequately reflects the situation that businesses and private individuals alike find themselves in, in an area comprising of 27 Member States that is characterized by the right to move freely between those states. Furthermore, the *ne bis in idem* principle would hardly offer any real protection from double jeopardy anymore for European citizens and businesses, if its scope of application would not extend to cover the Union as a whole.

It would therefore seem obvious to state that the appropriate scope of application of the *ne bis in idem* principle in EU law would have to be: the (territorial) scope of application of the legal system of the EU. As we have seen however the seeming simplicity of that statement is rather deceptive, and the Community courts have grappled with the issue of the objective scope of application of the *ne bis in idem* principle in Community law for several decades.

6.4.2 Analysis

The question of the objective scope of application of the *ne bis in idem* principle and the prohibition of double punishment has been a recurring theme in the case law of the Community courts. In *Walt Wilhelm*²³ the ECJ held that although one and the same agreement may be the object of two sets of parallel proceedings (one before the Commission, and one before the authorities in the Member States), the Commission is nevertheless obliged to *take into account* any penalty already imposed by the authorities in the Member States, in respect of the same infringement. In *Boehringer*²⁴ the ECJ left the possibility that the Commission could be under an obligation to deduct any fines imposed by the US authorities open. In a number of cases following *Walt Wilhelm* and *Boehringer*, the Community courts were faced time and again with the question whether the Commission would also be under an obligation to take into account any fines, imposed by the authorities in third countries for the same infringement.²⁵ Although the Community courts consistently held that there is no obligation for the Commission to do so where penalties are concerned from outside of the EU, the reasoning which they applied varied almost from case to case. Amongst the reasons found in the cases are the wording of Articles 4P7 ECHR and 50 of the Charter, the nature of the bilateral cooperation agreements in competition matters between the EC and the US, and in particular: the *purpose* of, or 'legal interest' protected by EC competition law (as compared to the purpose of the systems of competition law of third countries).

That the Community courts have often considered whether the same "protected legal interest" is at stake seems understandable. Intuitively, it seems only fair that the *ne bis in idem* principle should apply in situations where both proceedings essentially pursue the same ultimate *goal*. In those cases, the authorities involved will normally apply very similar legal rules as well, especially in competition cases. If one assumes that the interest at stake is adequately protected by the outcome of the first proceedings, there is no need to conduct a second set of proceedings anymore. All that could come out of those proceedings is undue financial harm for society in general and for the undertaking in question in particular, and the risk of conflicting decisions.

A fundamental problem with the concept of the protected legal interest however is that it is extremely flexible in its application, and the case law of the Community courts itself provides us with some clear examples of this. The Community courts sidestepped the issue of the possible application of the *ne bis in idem* principle and the prohibition of double punishment in relation to fines imposed in third countries in a number of cases, by almost casually arguing that the fines imposed by the US authorities 'primarily concerned' the

23 Case 14/68 *Walt Wilhelm and Others* [1969] ECR 1.

24 Case 45/69 *Boehringer Mannheim v Commission* [1970] ECR 769.

25 See paras. 4.5.2 and 4.5.3.

harmful effects of anticompetitive behaviour in US markets, whereas the Commission applies the Community competition rules more specifically with markets within the EEA in mind. Bearing in mind that in many of those cases the markets affected were worldwide in scope, and furthermore that the Commission takes into account the *worldwide* turnover of the undertakings in setting the fine, these arguments appear rather unconvincing, perhaps even evasive. Furthermore, the case law of Community courts seems to suggest that the question of the *scope of application* of the guarantees is somehow linked to, or even the same as the question whether it concerned the same conduct or infringement (“*idem*”). This suggestion is clearly wrong. The question of the *scope of application* of the guarantees is separate and distinct from the question of *idem*.

All this leads to the conclusion that the ‘protected legal interest’ (or any similar concept) is not suitable as a legal test for the objective scope of application of the *ne bis in idem* principle in Community law, because of its vagueness and flexibility. Although in theory it would seem to make sense to apply the *ne bis in idem* principle and/or the prohibition of double punishment where the same legal interest is at stake and essentially the same legal rule is consequently applied, in practice the application by the Community courts of the concept of the “protected legal interest” as a test for the application of the *ne bis in idem* principle has so far had the effect of obliterating any protection that the guarantees might (perhaps) have offered.

As for the question how the scope of application of the *ne bis in idem* principle in Community law is determined, it appears from the *Graphite Electrodes*-cases²⁶ that the scope of application of the *ne bis in idem* principle must be considered in the context of the scope of application of the general principles of Community law as a whole. As is well known, the scope of application of the general principles of Community law is defined by the *scope of application of the legal system of the Community*.²⁷ The Member States are similarly bound by general principles of Community law, insofar as they act within the scope of Community law.²⁸ It is sufficiently clear from the judgments in *Graphite Electrodes*-cases²⁹ that the *ne bis in idem* principle is simply no exception to this rule. In those judgments, the ECJ considered the scope of application of the guarantees in the context of the “*territorial scope of application of the legal system of the European Community*.”³⁰ Considerations such as the

26 Cases C-289/04 P *Showa Denko KK v Commission* [2006] ECR I-5859 and C-308/04 P *SGL Carbon AG v Commission* [2006] ECR I-5977 (*Graphite Electrodes*; appeal).

27 Case C-260/89 *ERT* [1991] ECR I-2925, paras. 41 *et seq.*

28 Case 5/88 *Wachauf* [1989] ECR 2609. For further comments see (amongst others) De Witte 1999.

29 Cases C-289/04 P *Showa Denko KK v Commission* [2006] ECR I-5859 and C-308/04 P *SGL Carbon AG v Commission* [2006] ECR I-5977 (*Graphite Electrodes*; appeal).

30 Italics added; para. 53 of the *Showa Denko* judgment; para. 30 of the *Graphite Electrodes* judgment.

'protected legal interest' are therefore adjectival to, and not decisive for the scope of application of the *ne bis in idem* principle and the prohibition of double punishment in Community law.³¹

The next question is *how* the scope of application of the guarantees follows from Community law *where the relationship between national law and Community law is concerned*, and furthermore whether there is (or should be) any difference between the *ne bis in idem* principle and the prohibition of double punishment on this point. As for the prohibition of double punishment, the ECJ already held in *Walt Wilhelm* that the Commission must take into account any penalties already imposed by the authorities of the Member States in respect of the same infringement, and this rule has remained undisputed ever since. There can be no doubt that the same obligation rests on the authorities in the Member States where a previous fine, imposed by the Commission or by another NCA is concerned. However (as further discussed below) under the system of enforcement of EC competition law laid down in Regulation 1/2003 the application of the *ne bis in idem* principle leads to the result that the NCA's are not able to impose a second fine at all, in respect of the same conduct. What is sufficiently clear is that the mere fact that a previous penalty was imposed by an authority within the EU is sufficient for the application of the prohibition of double punishment in Community law, regardless of the regulation (if any) of the relationship between national law and Community law. These findings are in keeping with the fact that, according to the case law of the ECJ, the prohibition of double punishment forms an expression of the principle of *proportionality* in Community law, which is an autonomous and generally applicable general principle of Community law.³²

As for the *ne bis in idem* principle itself, the ECJ came to the conclusion in *Walt Wilhelm*³³ the ECJ that "so long as" no regulation of the relationship between national and Community law "has been issued under article 87(2) (e)" EC, no means of avoiding such a possibility" (*i.e.* the possibility of parallel proceedings) is to be found in the general principles of Community law".³⁴ *A contrario* it follows that the *ne bis in idem* principle will apply in the relation between national law and Community law, if this *follows logically* from the regulation of the relationship between national law and Community law in Community law. To be precise: the *ne bis in idem* principle will apply where

31 Similar arguments such as the level of convergence in international competition law must meet the same fate. There is no single answer the question what the nature or purpose of competition law could be or ought to be. Like any other area of law, competition law forms an expression of the *values and aims of society* as a whole. The question whether systems of competition law pursue "the same ends" cannot therefore serve as a 'legal test' of any kind.

32 De Witte 1999, p. 861.

33 Case 14/68 *Walt Wilhelm and Others* [1969] ECR 1.

34 ...in spite of the fact that the "economic phenomena and legal situations" concerned may well be "interdependent" (para. 3 of the judgment).

the regulation of the relationship between national law and Community law does not to allow national law to *deviate* from the standard prescribed by Community law on a certain point. It makes sense that there should not be a second prosecution, if that prosecution is brought with a view to securing a second conviction, after an earlier instance in which Community law was applied to the same situation has already resulted in a final outcome. In those circumstances, any further prosecution would automatically and necessarily jeopardize the uniform application of Community law.

Needless to say, the *legal interest* protected under national law and Community law is by definition also identical under those circumstances. On a more fundamental level the protected legal interest therefore certainly reflects some of the logic underlying the application of the *ne bis in idem* principle in Community/EU law; the problem with this concept is that it is not suitable as a *test* for the application of the *ne bis in idem* principle in Community law.

If however Community law prescribes a *minimum* standard, and the Member States are free to adopt and implement *more stringent* rules, there would seem to be no reason to disallow a second prosecution if this is necessary in order for the Member State to enforce the higher (national) standard.

When applied to EC competition law, these findings can only lead to one result. As discussed in para. 3.10.7 of this study, an important difference between that Regulation 1/2003 and its predecessor Regulation 17/62 is found in Article 3(1) of the former Regulation, where it is stated that the NCA's, when applying their national laws to agreements, decisions or concerted practices which may affect trade between the Member States, the NCA's *must also* apply the Treaty rules to those agreements, decisions, and concerted practices. Furthermore, according to art 3(2) Regulation 1/2003, the application of national competition law may *not lead to the prohibition* of agreements (*etc. etc.*) which do not infringe Article 81 EC. Although Regulation 1/2003 does not *harmonize* national competition laws, art 3(2) of the Regulation has brought the national competition laws of the Member States within the scope of Community law, in such a way that it requires that national competition laws do not in any way *deviate* from the standard laid down by Article 81 EC, in situations which may affect trade between the Member States. Furthermore, the NCA's are obliged to apply Article 81 EC alongside their national competition laws in those situations. If national competition law is less strict than Article 81 EC, the application of Article 81 EC will nevertheless still lead to a prohibition. The (substantive) standard of Article 81 EC therefore applies across the board. Furthermore, under Regulation 1/2003 the NCA's and the Commission share full parallel competences for the application of Articles 81 and 82 EC, and there is therefore no reason to make any distinction between the NCA's and the Commission as far as the application of the guarantees is concerned. In situations falling under the application of Article 81 EC, the *ne bis in idem* principle in Community law therefore fully applies between the NCA's, and between the Commission and the NCA's. If an NCA has for example by imposed

a fine on a cartel member for an infringement of Article 81 EC and the equivalent provision of national competition law, any further action by any the other NCA's or the Commission for the same conduct will violate the *ne bis in idem* principle in Community law and is therefore barred, once the outcome of the proceedings have become final.

Article 82 EC however is a different matter, because the Member States are not, under Article 3(2) of Regulation 1/2003, precluded from adopting "stricter national laws", prohibiting unilateral behaviour. As discussed in the previous paragraph of this study, if under Community law national law may deviate from the standard prescribed by it, and the national legislature has availed itself of this possibility, there would seem to be no reason to disallow a second prosecution, if the national authorities deem this necessary in order to enforce the higher national standard. It would follow from this that the *ne bis in idem* principle would *not* apply if a first prosecution took place under the application of Article 82 EC (on its own, or applied alongside an equivalent provision of national law), and the second prosecution (by a different NCA) is based on a provision of national law, which is more stringent than Article 82 EC. The same would apply to the exception contained in Article 3(3) of Regulation 1/2003, in which it is stated that Regulation 1/2003 shall not preclude "the application of provisions of national law that predominantly pursue an objective different from the Treaty provisions". In all of those situations, the prohibition of double *punishment* nevertheless applies in full (see above). The 'identity' of the "aims" and "legal interests" concerned is therefore not an *identity* in the sense of *idem*.

6.4.3 Findings

The scope of application of both the *ne bis in idem* principle as well as the prohibition of double punishment is the same as that of the general principles of Community law on the whole, namely: the scope of application of the legal system of the Community. The suggestion that the scope of application of the guarantees is somehow linked to, or even the same as the question whether it concerned the same conduct or infringement ("*idem*") is wrong; the question of the *scope of application* of the guarantees is separate and distinct from the element of *idem*. Although the concept of the *protected legal interest* reflects some of the fundamental logic underlying the application of the *ne bis in idem* principle in Community/EU law, it is not suitable as a legal test for the scope of application of the *ne bis in idem* principle in Community law.

The prohibition of double punishment applies in respect of all earlier penalties, originating from within the EEA. The scope of application of the *ne bis in idem* principle in the relationship between national law and Community law is narrower; the principle applies there where the regulation of the relationship between national law and Community law does not to allow national

law to *deviate* from Community law on a certain point. The logic behind this is that there should be no possibility of bringing a second prosecution, if earlier instance in which Community law was applied to the same situation has already resulted in a (final) outcome. Conversely, there is no reason to disallow a second prosecution if Community law only prescribes a minimum standard and a second prosecution is necessary to enforce a higher national standard.

In situations under Article 81 EC, there can be little or no doubt that the *ne bis in idem* principle in Community law applies between the NCA's, and between the Commission and the NCA's. The *ne bis in idem* principle will however *not* apply if a first conviction was based on Article 82 EC, and a second prosecution is based on a provision of national law which is more strict than Article 82 EC in as far as the second prosecution is needed to enforce the higher national standard. The reason for this is that Regulation 1/2003 allows the Member States to adopt laws prohibiting unilateral behaviour which are more strict than Article 82 EC. By consequence, the Member States must also be allowed to bring further proceedings in order to enforce those laws.

6.5 SUBJECTIVE SCOPE OF APPLICATION OF THE GUARANTEES

6.5.1 Introduction

In general, the answer to the question *who* can rely on the *ne bis in idem* principle and the prohibition of double punishment is very straight-forward: only those persons *who have actually been prosecuted* and have had their trial finally disposed of benefit from the protection afforded by the principle.³⁵ Questions concerning the question of the subjective scope of application of the guarantees will therefore mainly arise in connection with legal persons. There are two types of questions conceivable here: firstly, the question where legal persons should be seen as separate culpable subjects for the application of the guarantees, and secondly whether there should be any difference in the way the principle is applied to natural persons on the one hand and legal persons on the other.

6.5.2 Analysis

As we have seen in chapter two of this study, in those states where undertakings are potentially liable under criminal law, the criminal liability of the

35 Case C-467/04 *Gasparini* [2006] ECR I-9199. Although there has been no case before the ECtHR addressing this issue, it may similarly be assumed that only someone who has actually stood trial or has been punished will benefit from the protection afforded by Article 4P7 ECHR.

legal entity is considered as one that is distinct from that of its executives and/or employees. The reason for this is simply that the instrument of criminal liability of legal persons would otherwise fail to produce the desired result. If the legal person and its executives or employees are *not* considered as separate culpable subjects, the charge would simply shift from the legal entity to its executives or *vice versa*, precisely because of the application of the *ne bis in idem* principle. This leads to the conclusion that legal persons must therefore be seen as separate culpable subjects, for the application of the *ne bis in idem* principle and the prohibition of double punishment.

As for the question whether several undertakings, belonging to the same group of undertakings can be seen as separate culpable subjects for the application of the guarantees, the basic rule in the context of Article 81 EC is that if the undertakings “form an economic unit within which the subsidiary has no real freedom to determine its course of action on the market”, Article 81 EC does not apply.³⁶ Under those circumstances, the subsidiary cannot be seen as a separate culpable subject for the application of the *ne bis in idem* principle or the prohibition of double punishment either. Along similar lines, when the CFI was faced with the question whether several undertakings, who are members of the same association of undertakings with mutual membership relations between them can be seen as separate culpable subjects in the case of *Fédération nationale CBV*,³⁷ it held that the test for the subjective scope of application is whether these associations of undertakings can be seen as *separate legal entities* with their own budgets, and their own separate interests.

As for the question whether there should be any difference between natural and legal persons in the way the *ne bis in idem* principle is applied, the answer follows directly from the nature of the principle itself. Where many, if not most fundamental human rights (such as for example the right to a fair trial) are essentially *qualitative* in nature and can therefore be applied somewhat less stringently by the courts where legal persons are concerned, offering a somewhat lower level of protection,³⁸ this is not the case for the *ne bis in idem* principle and the prohibition of double punishment. These two guarantees are by definition *quantitative* in nature, as they literally prohibit that a subject is tried or punished *twice*. By their very nature, such guarantees cannot therefore be applied less stringently; one cannot be tried twice a little bit (or a little bit twice).

36 Case 30/87 *Corinne Bodson v Pompes Funèbres des Régions Libérées SA* [1988] ECR 2479, para. 19.

37 Joined cases T-217 and 245/03 *Fédération nationale de la coopération bétail et viande (Fédération nationale CBV)* [2006] ECR II-4987.

38 ...for example because legal persons do not face the same hardship from prosecution and trial as natural persons do.

6.5.3 Findings

Only those persons who have *actually been prosecuted* (and who have had their trial finally disposed of and/or who have been punished) will benefit from the protection afforded by the *ne bis in idem* principle and the prohibition of double punishment. The liability of the legal entity must be considered as one that is distinct from that of its executives and/or employees for the purposes of the application *ne bis in idem* principle and the prohibition of double punishment in Community law. There would seem to be no reason to make any distinction between the *ne bis in idem* principle and the prohibition of double punishment on this point; the underlying logic is the same.

To give an example from EC competition law: supposing the Commission has imposed a fine on undertaking A for an infringement of Article 81 EC. Subsequently, the NCA of the Member State where undertaking A has its place of business decides to bring proceedings against several CEO's of that undertaking for the same infringement. Under those circumstances the CEO's of undertaking A will not be able to rely on the *ne bis in idem* principle in Community law in the proceedings against them, because they count as separate culpable subjects for the application of that principle. In other words: they are not the ones who have been *previously prosecuted*; it was the *undertaking* which was prosecuted. There is nothing to prevent the authorities in the Member State from bringing proceedings against the executives or employees of an undertaking after that undertaking has been fined by the Commission or by another NCA in respect of the same infringement, nor is there any general duty to deduct any fines, previously imposed on the undertaking. Where associations of undertakings, or several undertakings belonging to the same group are concerned, the decisive test on this point must be the question whether those companies or association can be seen as *separate legal entities*.

6.6 THE SCOPE OF APPLICATION *RATIONE MATERIAE* OF THE GUARANTEES

6.6.1 Introduction

As was discussed in para.'s 2.5.3 and 4.7.1 of this study, the application of the *ne bis in idem* principle and the prohibition of double prosecution is gaining ground in punitive areas of law which do not belong to the domain of criminal law in the *traditional sense* (in particular administrative law). Due to the rather diverse nature of the criminal law 'dimension' of the EU legal order; this traditional distinction between criminal law and administrative law is considerably less relevant for EU law. In the context of the EU legal order, it cannot be maintained, at least not in full. The question of its scope of application *ratione materiae* is therefore of considerable importance for the *ne bis in idem* principle in Community/EU law.

6.6.2 Analysis

In the case law, the Community courts have held that the punitive and deterrent *nature* of the measure and the *degree of severity of the ensuing penalties* under Community law are criteria which determine the scope of application *ratione materiae* of the guarantees. From the very beginning it has been clear that the Community courts do not require that an area of Community law must be “of a criminal law nature” *strictu sensu*, for the application of the *ne bis in idem* principle and the prohibition of double punishment.³⁹ It is clear from the cases that EC competition law is an area of Community law in which both the *ne bis in idem* principle and the prohibition of double punishment apply. Whether the same could be said for infringement proceedings, brought by the Commission under Article 226 EC is not yet certain.

As discussed in the previous chapter, the case law of the ECtHR initially raised some questions on this point. The ECtHR held in *Haarvig v. Norway*⁴⁰ that the criteria taken into account by it in determining the scope of application of Article 4P7 ECHR were *wider* than the so-called ‘Engel-criteria’, which determine the scope of application *ratione materiae* of Article 6 ECHR. In *Zolotukhin* however the Grand Chamber put an end to any possible uncertainty on this point by applying only the *Engel*-criteria.

6.6.3 Findings

According to settled case law before the Community courts, the *nature of the measure* and the *degree of severity of the ensuing penalties* under Community law are criteria which determine the scope of application *ratione materiae* of the guarantees. Before the ECtHR, “established case-law sets out three criteria, commonly known as the “Engel criteria” (...), to be considered in determining whether or not there was a “criminal charge”.⁴¹ The first criterion is the legal classification of the offence under national law, the second is the very nature of the offence and the third is the degree of severity of the penalty that the

39 It does not appear from the cases that the Community courts make any distinction between the *ne bis in idem* principle and the prohibition of double punishment on this point, although it should be pointed out again that the ECJ has emphasized that the prohibition of double punishment forms an expression of the *proportionality principle* in Community law, see Case 137/85 *Maizena* [1987] ECR 4587. It could perhaps follow from this that, similar to its objective scope of application, the scope of application *ratione materiae* of the prohibition of double punishment in Community law may also be *wider* than that of the *ne bis in idem* principle, because the proportionality principle is a principle which applies in all areas of Community law. There is however no further case law available, confirming this.

40 ECtHR, *Knut Haarvig v. Norway* (admissibility) 11 December 2007 (Appl no. 11187/05).

41 ECtHR (Grand Chamber), *Sergey Zolotukhin v. Russia* 10 February 2009 (Appl. No. 1493/03), para. 53.

person concerned risks incurring. The second and third criteria are alternative and not necessarily cumulative. This, however, does not exclude a cumulative approach where separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a criminal charge".⁴²

It therefore appears that the criteria as they appear from the case law before both courts all relate to the *nature and severity* of the measure and penalties at issue. The answer to the question whether it could be said that the case law of the ECJ and the ECtHR on the point of the scope of application *ratione materiae* of the guarantees is fully *consistent* with each other therefore depends to a considerable extent on how these criteria will be applied by these courts in practice.

The fact that Regulation 17/62 stipulated that EC competition law 'shall not be of a criminal law nature' has not stopped the Community courts from applying the *ne bis in idem* principle in competition cases. That the nature and severity of the potential penalties in EC competition law are sufficient for both guarantees to apply is therefore (implicitly) clear from the case law of the Community courts.

6.7 THE SCOPE OF APPLICATION *RATIONE TEMPORIS* OF THE GUARANTEES

6.7.1 Introduction

As we have seen in paras. 4.8. and 5.5 of this study, the scope of application *ratione temporis* of the *ne bis in idem* principle and the prohibition of double punishment has not given rise to many problems in the case law. So far. Both the ECJ as well as the ECtHR have held that only the point in time at which the second prosecution is brought "counts", for the purposes of those provisions.

6.7.2 Analysis

In the *Van Esbroeck*,⁴³ the ECJ held that only the *second* prosecution must be taken into account, in determining the scope of application *ratione temporis* of Article 54 CISA. If the first prosecution was brought before the entry into force of the CISA in that Member State, but the CISA was in force in the Member State where the *second* prosecution was brought *by the time it was brought*, Article 54 CISA will apply *ratione temporis*. The reason for this appears to be that it is the *second* prosecution which triggers the prohibition contained in Article 54 CISA. Similarly, the ECtHR held in *Gradinger*⁴⁴ that Article 4P7 ECHR

⁴² Para. 53 of the judgment.

⁴³ Case C-436/04 *Léopold Henri van Esbroek* [2006] ECR I-2333.

⁴⁴ ECtHR, *Gradinger v. Austria*, 23 October 1995 (Appl. No. 15963/90).

applies if the second proceedings *reached their conclusion* at a later date than the entry into force of Article 4P7 ECHR. A possible difference between the case law of the ECJ and the ECtHR may be that in *Van Esbroeck*, the ECJ took into account the time at which the second proceedings were *brought*, whereas the ECtHR in *Gradinger* held that Article 4P7 applied if the second proceedings *reached their conclusion* after the date of entry into force of that provision.

Although in both cases this was sufficient for the result at which the Court arrived, it may nevertheless still be of some interest to further consider this apparent difference in the case law of the ECJ and the ECtHR. In the way they are worded, Articles 4P7 and Article 54 CISA both appear to prohibit the second trial as a whole, and *not* just the bringing or the *conclusion* of the trial (“no one shall be (...) tried (...) again/”a person (...) may not be prosecuted”). It therefore seems that the *whole period during which the second proceedings are conducted*, and not just the specific point in time at which the second proceedings were brought infringes the *ne bis in idem* principle, and the case law would appear to confirm this position. In determining whether the *ne bis in idem* principle is applicable *ratione temporis*, the whole of the duration of the second proceedings must therefore be taken into account, and not just the bringing or the conclusion of those proceedings.

6.7.3 Findings

In determining the temporal scope of application of the both the *ne bis in idem* principle as well as the prohibition of double prosecution in EC/EU law, only the second prosecution “counts”. If, by the time that the second prosecution was brought, conducted or reached its outcome, the *ne bis in idem* principle had entered into force in both jurisdictions, the principle is applicable *ratione temporis*.

6.8 FINALITY (*RES IUDICATA*)

6.8.1 Introduction

It follows from the *ne bis in idem* principles’ *rationale* of upholding the respect for *res iudicata* and promoting legal certainty that the outcome of the first proceedings must have become *final*, in order to bar a second prosecution. The requirement of the *finality* of the outcome of the first proceedings is therefore of central importance to the application of the *ne bis in idem* principle.

There are three types of problems of problems associated with the requirement of the finality of the outcome of the first prosecution which can be identified in this connection. The first is that some types of judicial decision do not, *by their nature*, acquire finality for the purpose of the application of

the *ne bis in idem* principle. The second is the question *when* it is that a decision or a judgment should be considered as ‘final’ by reference to an autonomous concept of *res iudicata* in Community law. Finally, as argued before a third issue is that in Community law, the requirement of finality probably does not apply (or at least not in full) where the prohibition of double punishment is concerned, because this prohibition forms an expression of the principle of proportionality in Community law.

6.8.2 Analysis

Although Article 50 of the Charter only mentions “acquittal” or “conviction” as possible outcomes of the previous trial, the wording of that provision cannot be decisive on this point. It is sufficiently clear, amongst other things from the fact that the Community courts have considered *ne bis in idem* arguments put forward by appellants in competition cases, that the phrase “acquittal or conviction” must be interpreted broadly. It includes other types of decisions which are not acquittals or convictions *strictu sensu*, such as for example Commission decisions imposing fines on undertakings. Similarly, in its case law concerning Article 54 CISA, the ECJ has held that out-of-court settlements also constitute decisions ‘finally disposing of someone’s trial’ for the purposes of the *ne bis in idem* principle, and that a settlement becomes *final* if the conditions of the settlement are met. For the application of the *ne bis in idem* principle in EC/EU law, the central question is therefore whether a decision will (eventually) become *final*, and not whether it concerns a decision by a (criminal) court which constitutes an acquittal or conviction *strictu sensu*.

What types of judicial decision can, *by their nature*, acquire finality? In its case law, the ECJ has not laid down a general rule on this point, but it has provided a number of indications. Regardless of the nature or content of the decision, the ECJ has held that there must have been a *substantive determination* of the facts and the pleas of the case in order for a judicial decision to be able to acquire finality⁴⁵, regardless of whether it concerns a conviction or an acquittal for lack of evidence. At the same time the mere fact that there has been some determination of the facts of the case is *in itself* not sufficient. In *Turanský* for example⁴⁵ the ECJ found that the decision by the Slovak police authority to discontinue of the prosecution, although it was taken on the merits of the case, did not have *ne bis in idem* effect. The reason given by the ECJ for this was that the decision did not have the effect of barring any further prosecution under Slovak law.

The case law of the ECtHR provides some further guidance. In the *Zolotukhin* judgment (Grand Chamber), it was held that in general, a decision is *res*

45 Case C-491/07 *criminal proceedings against Vladimir Turanský* (n.y.r.)

iudicata if it is *irrevocable*, “that is to say when no further ordinary remedies are available or when the parties have exhausted such remedies or have permitted the time-limit to expire without availing themselves of them”.⁴⁶ Decisions against which an ordinary appeal can be brought do not have *ne bis in idem* effect; the possibility of bringing extraordinary remedies under national law however does *not* affect the final nature of the previous decision.⁴⁷ The question whether a judicial decision can be classified as an *acquittal or conviction* under the applicable rules of national procedure is therefore irrelevant. The only relevant question in this connection is whether the decision has become *final*.⁴⁸

As discussed in para. 4.9 of this study, it is established case law before the Community courts that the force of *res judicata* extends only to ‘the matters of fact and law actually or necessarily settled by the judicial decision in question’. A decision by the Commission or the Community courts will therefore by its nature, become final if it *settles* a matter of fact or law definitively. If a provision of Community law provides that proceedings may be re-instigated or continued after the decision, the decision will not acquire finality.

Applying this general rule to the existing instruments of settlements and leniency in EC competition law, it is sufficiently clear that not all types of settlements in competition proceedings before the Commission will lead to a final decision. As discussed in paras. 3.10.10 and 3.10.11 of this study, both the settlement procedure which was introduced by Article 10a of Commission Regulation 773/2004 (and the Commission Notice on the conduct of settlements in cartel cases), as well as the instrument of leniency lead to decisions by the Commission which are conditional and enforceable against the subject and which bar further prosecution if the applicable conditions are met. The commitments procedure under Article 9 Regulation 1/2003 however does not lead to a final outcome. Although commitments can be made binding on the undertaking by a Commission decision, that decision is not a substitute for a decision by the Commission imposing a fine. Furthermore, Article 9(2) Regulation 1/2003 provides that the case may be reopened by the Commission under certain conditions, and that the NCA’s or national courts may subsequently find of an infringement in respect of the same conduct. Taken together, this provides sufficient evidence that the commitments procedure does not lead to a final outcome under Community law.

As for the question *when* it is that a decision or a judgment should be considered as ‘final’, the general doctrine is that a judicial decision acquires

46 ECtHR (Grand Chamber), *Sergey Zolotukhin v. Russia* 10 February 2009 (Appl. No. 1493/03), para. 107.

47 Para. 107 of the judgment. There are no extraordinary judicial remedies available before the Community courts. It is therefore unlikely that extraordinary judicial remedies will ever give rise to any problems in Community/EU law.

48 Para. 111 of the judgment.

the force of *res iudicata* where there is no possibility of *appeal*.⁴⁹ There is no possibility of appeal where national law does not provide for the possibility of appeal, where all appeals have been exhausted, where the time limits for filing an appeal have expired and no appeal was brought, where the appeal was withdrawn, or the right to an appeal was waived.⁵⁰ If there is no possibility of appeal a decision will therefore acquire finality as soon as it is officially announced or published and becomes enforceable, depending on the applicable requirements under national rules of procedure. If there was a possibility of appeal, the decision will acquire finality as soon as the time limit has expired or at the time that the right to an appeal was waived, if this was done after the decision was taken. The Grand Chamber of the ECtHR took the same approach in the *Zolotukhin* judgment, where it was held that the administrative measure “acquired the force of *res iudicata* after the expiry of that time-limit.”⁵¹ Although there is no case law available yet on this point, there would seem to be no reason why the Community courts wouldn’t take the same approach.

For the prohibition of double punishment, this could be another matter. The prohibition of double punishment forms an expression of the principle of proportionality in Community law. It could be argued that this means that the requirement of finality does not apply⁵² for the prohibition of double punishment, because *finality* is not necessarily a requirement for the application of the proportionality principle in Community law. Similarly, most authors seem to assume that it follows from *Walt Wilhelm* that the prohibition of double punishment will also apply within a single set of proceedings, for example in situations in which an NCA applies its national competition law alongside EC competition law to a single infringement, in order to ensure that the undertaking is fined only once for the same conduct. If the requirement that the decision must be *final* would apply in full to the prohibition of double punishment, this wouldn’t be the case. It therefore appears highly likely that the requirement of finality only applies to the *ne bis in idem* principle, and not to the prohibition of double punishment in Community law. For some reason however, Article 56 CISA expressly requires that the first prosecution must have been *finally* disposed of.⁵³

As for the issue of time-bars, it is by now established case law before the ECJ that a finding by a court in a Member State that the prosecution is time-barred must be treated as a decision ‘finally disposing of’ a person’s trial within the meaning of Article 54 CISA. The requirement that there must have been a ‘substantive determination’ of the case does not apply in that case.

49 Trechsel 2005, p. 389.

50 Trechsel 2005, p. 389.

51 Para. 109 of the judgment.

52 ...or at least not in full.

53 Why the provision was so drafted is not known.

On the one hand, one could argue that there would be no reason why a finding that the prosecution is time-barred in one Member State must also bar further prosecution in *another* member State, where this time bar does *not* apply under national law on procedure. On the other hand it was discussed in para. 3.5.4 of this study that the fact that the *ne bis in idem* rule in Article 54 CISA is an instrument based on mutual recognition within the EU means that it must be applied *between* the Schengen states in the same way as the equivalent legal rule would be applied *within* one and the same state. As we have seen, the underlying logic of mutual recognition plays an important role in the case law of the ECJ concerning Article 54 CISA.

6.8.3 Findings

A judicial decision is final when it is irrevocable, that is to say when no *ordinary* remedies are available anymore under the law, where all remedies were exhausted, or where the time-limit for those remedies has expired. If a provision in Community law provides, in respect of certain types of decisions, that proceedings may be continued or new proceedings may be brought after a decision of that type was taken, those decisions will not become final.

In EC competition law, Commission decisions in settlement proceedings under Article 10a of Commission Regulation 773/2004 and decisions granting leniency will by their nature, acquire finality. Decisions under the commitments procedure of Article 9 Regulation 1/2003 are *not* final in nature, amongst other things because Article 9(2) Regulation 1/2003 provides that the case may be reopened under certain circumstances, and because the NCA's and national courts are fully at liberty to proceed in the same case.

It can be argued that the finality requirement should only apply to the *ne bis in idem* principle in Community law, and not to the prohibition of double punishment. The reason for this is that this prohibition forms an expression of the principle of proportionality in Community law, and finality is not a requirement for the application of the latter principle. In consequence, the prohibition of double punishment would equally apply within one and the same set of proceedings.

To give some examples of how these findings will lead to in the context of EC competition law: let's assume that undertaking A in Member State A is the subject of an investigation by the NCA in that Member State. Within the system of enforcement of Regulation 1/2003, that NCA will normally "take the lead". A case can however be reallocated, if for some reason another NCA is in a better position to proceed in that case.⁵⁴ Article 13 Regulation 1/2003

54 For further comments see, amongst others: Calvani 2003, p. 422.

provides that “the fact that one authority is dealing with the case shall be sufficient grounds to suspend the proceedings before them or to reject the complaint”. If the NCA does so, for the reason that the NCA in Member State B has taken on the case, the undertaking is not able to rely on the *ne bis in idem* principle in Community law, because the possibility of suspending or terminating proceedings for the reason that another NCA is dealing with the case is not a *final* decision in reference to the autonomous concept of finality in Community law discussed above.

Another example could be that of a cartel member who applies for leniency in Member State A only. Leniency is granted; the undertaking in question receives immunity from fines. Based on the information provided by its counterpart in Member State A, the NCA of Member State B ‘goes it again’, and proceeds to impose a fine in respect of the same infringement of Article 81 EC (as well as the equivalent provision of national competition law) as that which was the subject of the leniency application in Member State A. In appeal against that decision, the undertaking argues before an administrative court in Member State B that the fine imposed by the NCA of Member State B infringes the *ne bis in idem* principle in Community law. The NCA will probably argue that there is no infringement of that principle for the reason that the undertaking was never *punished* but received immunity from fines, and furthermore because the NCA of Member State A only took into account the harmful effects of the cartel in its own domestic markets, when it imposed fines on the other members of the cartel.

First off, the question whether the undertaking was punished or not is irrelevant. It must first be decided whether there is an infringement of the *ne bis in idem* principle, before the prohibition of double punishment can be considered. Furthermore, as discussed in para. 4.9 of this study, not only acquittals or convictions but also other types of decisions bringing proceedings to an end may acquire finality under Community law. The central question here is therefore: can a decision granting leniency be seen as *final*? If it would have concerned a Commission decision granting leniency there would have been no doubt on this point. Such decision are clearly final in nature, and therefore have *ne bis in idem* effect. In this case however it concerns a leniency program which is operated by an NCA. The instrument of leniency is not regulated by Community law, and the question whether such a decision is final depends on the applicable rules of national law. It must therefore be assumed that a leniency decision by an NCA is final, but it cannot be excluded *a fortiori* that national law expressly provides that the case may subsequently be reopened (and that such a decision cannot by consequence be seen as a final decision). Needless to say however, this would drastically limit the attractiveness of entering into that particular leniency program, for undertakings.

Like the instrument of leniency, the method the NCA’s set their fines is also entirely a matter for national law. If under the applicable national rules the

NCA is only able to impose fines taking into account the harmful effects of a cartel within its own territory, that decision will nevertheless have *ne bis in idem* effect under Community law, because it acquires *finality* in due course. The Member States are therefore well advised to legally enable their NCA's to impose sufficiently punitive and deterrent fines in competition cases, by recognizing the competence of the NCA's to take into account the harmful effects of cartels in markets *throughout* the EEA.

To give one final example: let's assume, in the situation described in the first example, that the NCA in Member State B starts dealing with the case, but the NCA in Member State A decides that it does not want to suspend or terminate proceedings. Will this situation infringe the *ne bis in idem* principle? The answer here is simply: no, because there has been no final decision in any of the proceedings yet. It is a common misconception that the *ne bis in idem* principle would also prohibit *parallel* prosecutions. As discussed in para. 4.9.1 of this study however, it must be assumed that the *continuation* of an ongoing prosecution after a (parallel) prosecution has resulted in a final outcome *does* infringe the *ne bis in idem* principle in Community law, in the same way as the bringing of new proceedings would. The situation that two parallel prosecutions are conducted will therefore inevitably lead to an infringement of the *ne bis in idem* principle, but only at a later point in time.

What this last example illustrates is that the principle is not directly related to the problem of positive jurisdiction conflicts at all. This certainly poses a problem, because the possibility of parallel prosecutions in different Member State also places an unreasonable burden on a subject, probably no less so than several *consecutive* prosecutions. This problem however cannot be solved though the *ne bis in idem* principle in Community law, but requires legislative intervention in the form of the regulation of positive law conflicts between the Member States.

6.9 IDEM (THE SAME)

6.9.1 Introduction

As discussed in para. 2.6.2 of this study, it is accepted wisdom that there are two opposite and mutually exclusive approaches to the interpretation of the element of *idem*: on the basis of the *historical conduct* (the 'act'), or on the basis of its *legal qualification* (the 'offence'). Although the interest of legal certainty demands that the actual historical event rather than its legal qualification is emphasized as much as possible, these two approaches should not be seen as opposite or mutually exclusive interpretations of *idem* but rather as different points on a sliding scale of objectivity in the appreciation of the historical event that led to the prosecution. If the element of *idem* is determined predominantly by reference to the legal qualification of the historical event, the outcome

becomes harder to predict or even random, offering less protection for subjects. What this means in practice is that the legal qualification of the litigious conduct will (and should!) always play some role in a finding of *idem*, but it should be applied as much as possible as a guiding principle in determining and selecting the appropriate facts, rather than as the decisive test for the application of the *ne bis in idem* principle.

6.9.2 Analysis

The element of *idem* is usually regarded as the most difficult aspect of the *ne bis in idem* principle. In the absence of the harmonization of the systems of criminal law of the Member States, Article 54 CISA would have lost much if not all of its useful effect if the ECJ would have chosen an approach based on the legal qualification of 'the same acts' under the laws of the Member States. The ECJ fully understood this when it held in *Van Esbroeck* that "the same acts" is to be understood solely as the "identity of the material acts, understood in the sense of the existence of a set of concrete circumstances which are inextricably linked together". In the cases that followed, the ECJ has further explained that this inextricable link does not depend solely on the *intentions* of the defendant; nor do for example the identities of the accomplices, or the quantities of the illegal substances have to be precisely identical. The basic rule laid down by the ECJ is sound and clear, and the case law will undoubtedly provide us with an increasing number of specific examples on how it must be applied in practice in the years to come.

Following the approach taken by ECJ on this point, the Grand Chamber of the ECtHR has recently adopted a broad, *functional* approach to the interpretation of the same "offence" in Article 4P7 ECHR. Although the judgment makes no mention of the requirement of an 'inextricable link' between the facts, it appears that the Grand Chamber has otherwise fully brought its interpretation of Article 4P7 ECHR in line with the interpretation given by the ECJ to Article 54 CISA on this point. Clearly, the Community courts will not be able to stay behind where the *ne bis in idem* principle as a general principle of Community law is concerned.

Should the legal qualification of the facts (the 'offence') be discarded altogether after these important developments in the case law? In my opinion, the legal qualification of the offence is still of considerable importance, but only as a *guiding principle* in determining and selecting the *appropriate* facts for a finding of *idem*. The abovementioned case law does not tell us *which* facts must be taken into consideration, in determining whether, as the Grand Chamber held, a second prosecution is based on "identical facts or facts which are substantially the same" and not all facts will be equally relevant for such a finding. If there is no *guiding principle* available on this point, it can therefore be difficult to select the *appropriate* facts. To give a simple example: let's say

that a person killed someone, with two bullets from the same gun. He is tried and convicted for manslaughter, but the judgment only mentions the *first* bullet he fired. If, after having served his sentence he finds himself on trial again for the same crime but this time on the basis of the forensic report concerning the *second* bullet, the decisive test for the application of the *ne bis in idem* principle must surely be whether it concerns the same *victim*, and not whether it concerns the same *bullet*. If we take into account the *legal qualification* of the offence, and use it as a guiding principle in selecting the right historical facts, this result becomes self-evident. If there is no guiding principle available, it would be difficult to argue *why* it is, that the second bullet should not be seen as a separate 'fact'. The appropriate facts cannot therefore be selected randomly, but must be determined according to a uniform principle. That principle should, in my opinion, be the *result* of the litigious act, as reflected by the legal qualification of the offence under the law.

Where the case law of the ECJ concerning Article 54 CISA deserves the utmost praise on this point, the case law of the Community courts in competition cases reveals a somewhat different picture. The Community courts appear to have sidestepped these and other tricky issues, amongst other things by arguing that the US authorities are 'primarily concerned' with the harmful effects of anticompetitive behaviour in US markets when imposing penalties on undertakings, whereas the Commission applies the Community competition rules more specifically with markets within the EEA in mind. Bearing in mind that in many of those cases the markets affected were worldwide in scope, and furthermore that the Commission takes into account the *worldwide* turnover of the undertakings in setting the fine, these and similar arguments seem evasive and unconvincing. Even worse, many of these cases conveyed the impression that the question of the *scope of application* of the guarantees would somehow be linked to, or even the same as the question whether it concerned the same conduct or infringement ("*idem*"). As noted before however this is clearly wrong. The question of the *scope of application* of the guarantees is separate and distinct from the question of *idem*, even if one were to emphasize the legal qualification over the underlying historical event for a finding of *idem*. In other words: the requirement of the 'identity of the legal right to be protected' can not be seen as an 'identity' in the sense of *idem*. As we have also seen in chapter 4 however, there are strong indications that the Community courts increasingly distinguish between the *scope of application* of the guarantees and the element of *idem*.

The criteria according to which the Community courts approach a finding of *idem* in competition cases are considerably less clear and precise than those laid down by the ECJ in *Van Esbroeck*. It appears from the cases that in the context of 81 EC regard is primarily had to the general question whether it concerns the same *agreements*, and whether various aspects of the same cartel "differ as regard their object and geographical emphasis". Where complex and continuous cartels with many participants are concerned, the Community

courts have furthermore taken into account the participants, the nature of the agreements, and the nature of the products, in assessing which aspects of the cartel are to be regarded as separate infringements. These broad and vague criteria offer little guidance in concrete cases.

What is striking about the case law of the Community courts in competition matters is that there does not appear to be a single case in which the Community courts have taken into account which *markets* were affected by the infringement, for a finding of *idem*. As discussed in para. 2.6.2 of this study, for the purpose of criminal proceedings, historical events are forged into an artificial legal unity which is essentially defined by the *result* rather than by the objective historical event. EC competition law is no exception: Article 81 for example prohibits agreements which prevent, restrict or distort competition *within the common market*. An obvious starting point for a finding of *idem* in competition cases would therefore be the question whether the same *markets* are affected by a cartel. Taking again the example from criminal law of a person who killed someone, with two bullets from the same gun, and after a previous conviction finds himself on trial again, this time for firing the second bullet. Although perhaps seemingly relevant at first, the bullet-criterion would actually be entirely arbitrary, because it is the result (the death of a person) that must be decisive. It is, in my opinion, no different with the question various aspects of the same cartel “differ as regard their object and geographical emphasis”. It must surely be the question whether the same *markets* are affected, which deserves primary consideration.

6.9.3 Findings

Whereas the case law of the ECJ and the ECtHR on Article 54 CISA and Article 4P7 ECHR respectively is consistent and clear on the point of *idem* (the “identity of the material acts, understood in the sense of the existence of a set of concrete circumstances which are inextricably linked together” / “identical facts, or facts which are substantially the same”), the criteria to which regard is had by the Community courts in a finding of *idem* in competition cases are considerably less clear and precise. In several cases, the Community courts made it seem as if the question of the *scope of application* of the guarantees would somehow be linked to, or even the same as the question whether it concerned the same conduct or infringement (“*idem*”). This is however not so.

Now that the Grand Chamber of the ECtHR has brought its interpretation of Article 4P7 ECHR fully in line with the interpretation given by the ECJ to Article 54 CISA, the Community courts cannot stay behind where the *ne bis in idem* principle in Community law is concerned. It would therefore seem that a change of direction in the case law, has become nearly inevitable after the judgment of the Grand Chamber in *Zolotukhin*.

Not every “concrete circumstance” is relevant or appropriate for a finding of *idem*. For the purpose of criminal proceedings, historical events are forged into an artificial legal unity which is essentially defined by the *result* rather than by the objective historical event. It follows from this that in selecting the appropriate facts, regard must primarily be had to the *result* of the act, as it is reflected by the legal classification of the offence. In the case of a person who killed someone with a pistol-shot, this is the death of the victim in question. In the context of EC competition law, it is the primarily question whether the same *markets* not the question whether it concerns the same agreements or participants.

6.10 THE REQUIREMENT OF ENFORCEMENT

6.10.1 Introduction

As discussed in chapter two, only Article 54 CISA requires 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. Articles 4P7 ECHR, 14(7) ICCPR, and 50 of the Charter do not require that the penalty has been enforced.

6.10.2 Analysis

Little or nothing is known of the reasons (if any) for which Articles 4P7 ECHR, 14(7) ICCPR, and 50 of the Charter do not require anything on the point of the enforcement of the sentence. It is perhaps surprising, considering that it can be difficult for a state to enforce a penalty against a subject, in particular where the surrender of that subject cannot be effectuated, or where a foreign sentence cannot be enforced through judicial recognition of that sentence by another state. Under those circumstances, it would be reasonable to allow for a second prosecution, because justice was not fully done if the sentence was not enforced.

It appears however that the ECJ interprets the enforcement condition broadly. In keeping with the principle of mutual recognition between the Member States, and Article 54 CISA’s aim of promoting free movement out-of-court settlements and suspended sentences are to be considered as penalties which are actually in the process of being enforced or which have been enforced. In *Bourquain*, the ECJ held that it was sufficient that the penalty could no longer be enforced, regardless of the fact that the penalty could never have been executed.

6.10.3 Findings

The enforcement requirement has so far received very little attention in the case law and in legal writing. This is understandable because of the absence of this requirement from Articles 4P7 ECHR, 14(7) ICCPR, and 50 of the Charter, and the very broad way in which this requirement is stated in Article 54 CISA.

The suggestion I would like to make here is that there is a possibility that the importance of this requirement in EU and Community law has so far been underestimated, and that this aspect of the *ne bis in idem* principle requires further study.

6.11 EXCEPTIONS

6.11.1 Introduction

As discussed in para. 2.8, some legal systems allow for exceptions to the *ne bis in idem* principle in case of newly discovered evidence (*novum*), or in case of a mistrial or other fundamental defects in the proceedings. Some of the reasons for these exceptions are the interests of material justice, and the need to correct “mistakes” in the first proceedings.⁵⁵

6.11.2 Analysis

Out of the provisions discussed in chapter 2, only Article 4P7 ECHR, in para. 2 of that provision, allows for “the reopening of the case (...) if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings”. Article 55 CISA also allows for certain exceptions to Article 54 CISA, but those exceptions are a different nature than those contained in Article 4(2)P7 ECHR (the ‘essential interests’ of a Member State).

The Community courts have, so far, not been faced with the question whether the *ne bis in idem* principle in Community law could also be derogated from, in the case of new evidence or fundamental defects in the procedure. Although Article 50 of the Charter does not mention anything on this point, the possibility that certain exceptions may apply to the *ne bis in idem* principle in Community law can not a fortiori be excluded.

As discussed in para. 5.8.2, the ECtHR has, in its case law on Article 4(2)P7 ECHR, examined whether the power to reopen the proceedings “was exercised by the authorities so as to strike, to the maximum extent possible, a fair balance between the interests of the individual and the need to ensure the effectiveness

⁵⁵ De la Cuesta 2004, p. 714.

of the system of criminal justice.” Although this would seem to leave a considerable margin of discretion for the state, it also could be seen as confirming the central importance of the *ne bis in idem* principle as a fundamental human right and its function as a guarantee of legal certainty.

6.11.3 Findings

It is within the application of the *ne bis in idem* principle that the tension between “the interests of the individual and the need to ensure the effectiveness of the system of criminal justice” often become particularly apparent. The possibility of an *exception* to the *ne bis in idem* principle can therefore be seen as an important and necessary instrument to achieve a fair balance between those two fundamental interests. Although the provisions of the Charter and the CISA do not mention any such possibility, it cannot *a fortiori* be excluded that the Community courts will introduce an exception to the *ne bis in idem* principle in Community law in the case law at some point in the future. The possibility of exceptions to the *ne bis in idem* principle may therefore be another aspect of the principle which as so far received too little attention, and which merits consideration as well as further study, and the case law of the ECtHR provides further guidance here.

An exception to the *ne bis in idem* rule in Community law should only apply in rare and exceptional circumstances such as the surfacing of new and previously undiscovered evidence, and a mistrial or other fundamental defects in the proceedings. Under such rare circumstances an exception to the *ne bis in idem* rule will enable the Community courts to follow the example of the ECtHR, which in its case law strikes “a fair balance between the interests of the individual and the need to ensure the effectiveness of the system of criminal justice.”

7 | Conclusions

This chapter presents an summary on the main points of the analysis carried out in this study.

Developments in globalization and European integration pose new challenges for systems of law, and for the age-old legal principles that lie at the heart of those systems. The *ne bis in idem* principle in the legal order of the EC/EU provides us with a clear example of this. Where the scope of application of the principle within national systems of law is traditionally limited to the territory of that state, it is clear that within the supranational context of the EU such a limitation would no longer be realistic. In order to adequately reflect the position European citizens find themselves in in an area comprising of 27 Member States that is characterized by the right to move freely between those states, the scope of application of the *ne bis in idem* principle must extend to cover the Union as a whole. It is perhaps somewhat ironic that there is a provision in Third Pillar law which adequately reflects this (Article 54 CISA), but no equivalent provision in Community law.

More in general it is evident that the universal logic underlying the *ne bis in idem* principle reaches across the borders of sovereign states. Against the background of globalisation, the artificial nature of the international non-application of the *ne bis in idem* principle seems increasingly clear and poignant in international situations everywhere, not just within the EU. The ECJ has not shown any willingness to remedy this problem, at least not where penalties originating from third countries are concerned. Although the ECJ has in its case law heralded that “the European Community is based on the rule of law”,¹ it must be said that it has not practiced all that it is preaching here in its case law concerning the *ne bis in idem* principle. The possibility of an internationally applicable *ne bis in idem* rule therefore deserves to be given serious consideration, and merits further study.

This study has however set itself a less ambitious goal; it has focused exclusively on the *ne bis in idem* principle in the legal order of the Community/ EU. In spite of the clear necessity of a strong and precise EU-wide *ne bis in idem* rule the legal framework for the enforcement of the *ne bis in idem* principle within the EU is weak, in spite of – as well as precisely due to – the fact that several *ne bis in idem* provisions exist on the level of the legal order of the EU.

1 Joined Cases C-402/05 P and C-415/05 P *Kadi and El Barakaat*, para. 281.

At present, the provisions do not equally guarantee the principle's application in all areas of Community and EU law. The purpose of this study has been to contribute to the application of the *ne bis in idem* principle in the legal order of the EU not by proposing legislative intervention, but by providing further *clarification* on several important points of what must be seen as a single autonomous 'European' *ne bis in idem* principle, designed to meet the specific needs and objectives of the Community/EU.

As we have seen in chapters 4 and 5 of this study, the European Court of Justice and the European Court of Human Rights have, in their case law, initially grappled with the fundamental misconceptions that the prohibition of double prosecution (or "*Erledigungsprinzip*") and the prohibition of double punishment or ("*Anrechnungsprinzip*") could be seen as different aspects of the same legal rule, and furthermore that the identity of the 'protected legal interest' would somehow be linked to, or even be the same things as the identity of the act in the sense of *idem*.

The *ne bis in idem* principle in EC/EU law is a single and indivisible legal principle which must be understood solely as the rule that no-one must be further *prosecuted*, once the outcome of earlier proceedings have become final (*Erledigungsprinzip*). The prohibition of double punishment or *Anrechnungsprinzip* is a distinct legal rule which forms an expression of the proportionality principle in Community law. The two principles are mutually exclusive in their application. The *ne bis in idem* principle necessarily takes *precedence* over the prohibition of double punishment; the latter only comes into play if the conditions for the application of the former are for whatever the reason not met, and there is therefore no breach of the *ne bis in idem* principle. This relationship between the two prohibitions is sufficiently clear from the wording of Articles 54 and 56 CISA, but not necessarily from the wording of Articles 14(7) ICCPR, 4P7 ECHR, or 50 of the Charter. It must be emphasized that the *ne bis in idem* principle in Community law not only prohibits the bringing of a new prosecution, but also the *continuation* of an ongoing prosecution after the outcome of an earlier one has become final.

The suggestion that the scope of application of the guarantees ("protected legal interest") would somehow be linked to, or even the same as the question whether it concerned the same conduct or infringement ("*idem*") is wrong; the question of the *scope of application* of the guarantees is separate and distinct from the element of *idem*. The (objective, or 'territorial') scope of application of both guarantees is no different from that of the general principles of Community law in general: the (territorial) 'scope of application of the legal system of the Community'. The concept of the 'protected legal interest' which was introduced by the ECJ in its case law is not an appropriate test for the scope of application of the *ne bis in idem*. It is too vague and too flexible to serve as a legal test of any kind, and the case law of the Community courts offers several examples of this.

The prohibition of double punishment applies in respect of all earlier penalties, imposed by authorities originating from within the EEA. The scope of application of the *ne bis in idem* principle in the relationship between Community law and national law is narrower; it only applies if Community law does not allow national law to *deviate* from the norm or standard set by Community law on a certain point. There should be no possibility of securing a second conviction, if an earlier instance in which the standard set by Community law was applied to the same situation already resulted in a final outcome. In those circumstances, any further prosecution would automatically and necessarily jeopardize the uniform application of Community law. If however Community law prescribes a minimum standard, and the Member States are free to adopt and implement more stringent rules, there is no longer any reason to disallow a second prosecution if this is necessary in order for the Member State to enforce the higher (national) standard.

The idea that there is a clear distinction between ‘facts’ and ‘offences’ for a finding of *idem* is flawed. These two approaches should not be seen as opposite or mutually exclusive interpretations of *idem*, but rather as different points on a sliding scale of objectivity in the appreciation of the historical event that led to the prosecution.² The interest of legal certainty however demands that the actual historical event rather than its legal qualification is emphasized as much as possible; if the element of *idem* is determined predominantly by reference to the legal qualification of the historical event, the outcome becomes harder to predict or even random, offering less protection for subjects.

Nowadays, the case law of the ECJ and the ECtHR on Article 54 CISA and Article 4P7 ECHR respectively is consistent and clear on the point of *idem* (the “identity of the material acts, understood in the sense of the existence of a set of concrete circumstances which are inextricably linked together”/ “identical facts, or facts which are substantially the same”). The criteria to which regard is had by the Community courts in a finding of *idem* in competition cases are considerably less clear and precise. Now that the Grand Chamber of the ECtHR has brought its interpretation of Article 4P7 ECHR fully in line with the interpretation given by the ECJ to Article 54 CISA, the Community courts cannot stay behind where the *ne bis in idem* principle in Community law is concerned.

For the purpose of criminal proceedings, historical events are forged into an artificial legal unity which is essentially defined by the *result* rather than by the objective historical event. What this means in practice is that the legal qualification of the litigious conduct will and should always play some role in a finding of *idem*, but it should be applied as much as possible as a *guiding* principle in determining and selecting the appropriate facts, rather than as the decisive test for the application of the *ne bis in idem* principle.

2 Para. 2.6.2.

It is striking that there does not appear to be a single case in which the Community courts have taken into account which *markets* were affected by the infringement, for the application of the *ne bis in idem* principle in Community law. Article 81 EC prohibits agreements which prevent, restrict or distort competition *within the common market*. An obvious starting point for a finding of *idem* in competition cases would therefore seem to be the question whether the same *markets* were affected by the infringement. Some of the criteria which have been applied by the Community courts in their case law (such as the “geographical emphasis” of different aspects of a cartel) appear rather arbitrary. In stead of this it should be the *result*, the distortion of competition in a certain market, which should serve as a guiding principle.

A judicial decision is final when it is irrevocable, that is to say when no *ordinary* remedies are available anymore under the law, where all remedies were exhausted, or where the time-limit for those remedies has expired. If a provision in Community law provides, in respect of certain types of decisions, that proceedings may be continued or new proceedings may be brought after a decision of that type was taken, those decisions will not become final. It may be assumed that the finality requirement only applies to the *ne bis in idem* principle in Community law, and not to the prohibition of double punishment. The reason for this would be that the latter forms an expression of the principle of *proportionality* in Community law, and finality is not a requirement for the application of the proportionality principle. The significant advantage from this for the subject will be that the prohibition of double punishment equally applies *within* one and the same set of proceedings.

Two aspects of the *ne bis in idem* principle have so far received very little attention, and certainly merit further study: the requirement that a penalty must have been *enforced* for the *ne bis in idem* principle to apply, and the exceptions possibilities to the *ne bis in idem* principle. The importance of these two issues for the *ne bis in idem* principle in Community law has perhaps been underestimated. It is, after all, within the application of the *ne bis in idem* principle that the tensions between “the interests of the individual and the need to ensure the effectiveness of the system of criminal justice” often become particularly apparent. The requirement of the enforcement of the sentence as well as the possibility of an *exception* to the *ne bis in idem* principle are both necessary to achieve a fair balance between those two fundamental interests. For this reason, it cannot *a fortiori* be excluded that the Community courts will introduce an exception to the *ne bis in idem* principle in Community law following the example of the case law of the ECtHR concerning Article 4(2)P7 ECHR.

Should further legislative intervention be considered, in order to strengthen the position and the application of the *ne bis in idem* principle in the EU? All other considerations aside, it would appear that the chances of success of any proposal may be slim. As discussed before in para. 3.5.2 of this study, Article 54 CISA can be seen as an “added bonus” that came along with the incorpor-

ation of the Schengen *acquis* as a whole. There are indications that it might have been considerably more difficult, if not impossible to reach agreement on a provision like Article 54 CISA, if the Schengen *acquis* had been *concluded* within the EU framework, instead of incorporated into that framework later on. The fact that the 1987 Convention between the Member States of the European Communities on Double Jeopardy (which was highly similar in wording to Articles 54-58 CISA, but did not contain a derogation similar to Article 55 CISA) was only ratified by 6 Member States, and never entered into force may provide a first indication on this point.³ A further indication may be that other initiatives such as the Greek proposal and the Green Paper also met with criticism and resistance. It is therefore altogether likely that any further proposals to strengthen the position of the *ne bis in idem* rule within the EU will befall a similar fate. It may therefore be that the Commission and the Council are well advised to let the further development and refinement of the principle in the case law of the Community courts take its course, before considering any further steps.

3 Brussels 25 May 1987 OJ 1987, L 167.

Samenvatting

HET *NE BIS IN IDEM*-BEGINSEL IN DE RECHTSORDE VAN DE EUROPESE UNIE *Een conceptuele en jurisprudentiële analyse*

HET PROBLEEM

De dynamiek van het Europese integratieproces stelt vaak nieuwe eisen aan aloude nationale rechtsbeginselen. Het beginsel *ne bis in idem*, de regel die een tweede vervolging voor een feit waarover reeds onherroepelijk door een rechter is beslist verbiedt, is daar een voorbeeld van. Hoewel de uitlegging en toepassing van dit fundamentele rechtsbeginsel van oudsher sterk nationaal is bepaald, kan deze inmiddels niet meer los worden gezien van de rechtsontwikkeling binnen de juridische kaders van de Europese Unie, de Raad van de Europa, en het Schengen-*acquis*. Door het toegenomen belang van justitiële samenwerkings- en erkenningsmodaliteiten binnen de Europese Unie, alsmede door de invoering van een gedecentraliseerd systeem van mededingingstoezicht, is het belang van het *ne bis in idem*-beginsel voor de EU-rechtsorde de afgelopen jaren sterk toegenomen.

Aan deze 'Europese' invulling van het *ne bis in idem*-beginsel ligt echter geen eenduidige gemeenschappelijke standaard ten grondslag. Hoewel er inmiddels wel kan worden gesproken van een gemeenschappelijke ontwikkeling in de rechtspraak van het Hof van Justitie EG en het Europees Hof voor de Rechten van de Mens over het *ne bis in idem*-beginsel (waarover hieronder meer), vertonen beiden zowel samenhang als divergentie. Daarnaast dienen er bij de uitlegging en toepassing van het *ne bis in idem*-beginsel binnen de rechtsorde van de EU verschillende bepalingen in aanmerking genomen te worden, en ook tussen deze bepalingen bestaan diverse onderlinge verschillen. De toepassing van het *ne bis in idem*-beginsel binnen de EU rechtsorde is dan ook niet eenvormig geregeld.

Er zijn in de afgelopen jaren verschillende initiatieven en voorstellen geweest, erop gericht om de positie van het *ne bis in idem*-beginsel binnen de Europese rechtsorde te versterken. Deze hebben tot dusverre niet tot concrete maatregelen geleid, en het vraagstuk van harmonisatie van de uitlegging en toepassing van het *ne bis in idem*-beginsel binnen de rechtsorde van de EU is dan ook onverkort relevant.

DEZE STUDIE

Deze studie stoelt op de aanname dat een van de belangrijkste problemen voor de toepassing van het *ne bis in idem*-beginsel in de EU is dat er op belangrijke punten onduidelijkheid bestaat over de inhoud, reikwijdte en uitlegging van dit beginsel *zelf*. De hoofddoelstelling van het onderzoek is dan ook om op die hoofdpunten de benodigde duidelijkheid te verschaffen. Die duidelijkheid is niet alleen nodig omdat de rechters in de lidstaten in toenemende mate zullen worden geconfronteerd met vragen van *ne bis in idem* in situaties die binnen het toepassingsbereik van het EU recht liggen, maar ook omdat een helder uitgangspunt een noodzakelijke voorwaarde is voor het welslagen van mogelijke verdere voorstellen die erop gericht zijn om de positie van het *ne bis in idem*-beginsel in het Europese recht te versterken.

Omdat er voor het *ne bis in idem*-beginsel geen gemeenschappelijke internationale standaard bestaat die als uitgangspunt zou kunnen dienen voor een studie als deze, wordt in hoofdstuk 2 een algemene conceptuele analyse van het *ne bis in idem*-beginsel uitgevoerd. Het doel van deze analyse is om de inhoud, *rationale*, elementen, en verschillende aspecten van de reikwijdte van het *ne bis in idem*-beginsel aan een eerste, verkennend onderzoek te onderwerpen, welk onderzoek het analytisch raamwerk zal vormen voor de rest van dit onderzoek.

Alvorens de rechtspraak van de Gemeenschapsrechter over het *ne bis in idem*-beginsel aan een kritische beschouwing te onderwerpen in hoofdstuk 4, wordt de achtergrond waarbinnen die rechtspraak tot stand is gekomen besproken in hoofdstuk 3 van deze studie. Het gaat daarbij om het landschap van de Justitiële en Politie samenwerking tussen de lidstaten (de zogeheten ‘Derde Pijler’ van de EU), en dat van het EG mededingingsrecht. Beide rechtsgebieden hebben in de afgelopen jaren aanzienlijke ontwikkelingen doorgemaakt, en een goed begrip van diverse aspecten van deze ontwikkelingen is nodig om de rechtspraak van Hof van Justitie EG en het Gerecht van Eerste Aanleg in de juiste context te kunnen bespreken.

De rechtspraak van het Hof van Justitie EG en het Gerecht van Eerste Aanleg wordt besproken en geanalyseerd in hoofdstuk 4. Het *ne bis in idem*-beginsel deed al vroeg in de geschiedenis van de Gemeenschap zijn intrede in de rechtspraak van het Hof van Justitie EG (HvJEG) over het Europese kartelrecht. In 1969 kwam het HvJEG in de zaak *Walt Wilhelm* tot de slotsom dat het *ne bis in idem*-beginsel geen toepassing kon vinden in de verhouding tussen het EG mededingingsrecht en het Duitse mededingingsrecht, omdat de beide mededingingsregimes niet hetzelfde *rechtsbelang* zouden dienen.¹ In vergelijkbare zin formuleerde het Hof later, in het arrest *Cement* een drievoudig vereiste voor de toepassing van het *ne bis in idem*-beginsel in het Gemeen-

1 Zaak 14/68, *Walt Wilhelm e.a.*, [1969] ECR -1

schapsrecht: “dat de feiten, de overtreder en het beschermde rechtsgoed dezelfde zijn”.² Inmiddels hebben zich grote veranderingen voltrokken binnen het systeem van handhaving van het EG mededingingsrecht, en die veranderingen zouden aanleiding kunnen vormen voor een koerswijziging in de rechtspraak op dit punt.

In de context van de Derde Pijler van de Unie maakte de rechtspraak van het Hof van Justitie EG over het *ne bis in idem*-beginsel zoals neergelegd in art. 54 van het Schengen Uitvoeringsovereenkomst (SUO) in de afgelopen jaren³ een geheel andere ontwikkeling door. Door de vele verschillen tussen de systemen van strafrecht van de lidstaten van de Europese Unie zou een bepaling als art. 54 SUO weinig effectieve bescherming bieden, als het ‘beschermde rechtsgoed’ of de juridische kwalificatie van een gedraging onder het nationale recht een rol zou spelen bij de toepassing ervan. Het Hof van Justitie EG onderkende dit probleem, en koos daarom voor een brede, feitelijke uitlegging van ‘*idem*’, waarbij de juridische kwalificatie van de feiten in het nationale strafrecht geen rol speelt.

In hoofdstuk 5 wordt de rechtspraak van het Europees Hof voor de Rechten van de Mens over het *ne bis in idem*-beginsel zoals dat is neergelegd in art. 4 van het 7^e Protocol aan een kritische beschouwing onderworpen. Deze rechtspraak heeft een moeizame ontwikkeling doorgemaakt. In de zaken die volgden op de tegenstrijdige arresten *Gradinger*⁴ en *Oliveira*⁵ onderzocht het Hof in toenemende mate of de bewuste delictsomschrijvingen dezelfde *kernelementen* (*‘essential elements’*) vertoonden.⁶ Uit de rechtspraak kon echter nauwelijks met enige mate van zekerheid worden afgeleid welke criteria het Hof precies hanteerde bij het toepassen van deze norm; een mate van rechtsonzekerheid leek inherent te zijn aan de benadering die het Hof had gekozen. In het recente arrest *Zolotukhin* tegen Rusland⁷ heeft het Hof zijn uitlegging van art. 4 van het 7^e Protocol van het Europees Verdrag voor de Rechten van de Mens echter grondig herzien. In dat arrest heeft het Hof aansluiting gezocht bij de rechtspraak van het Hof van Justitie EG over de uitlegging van art. 54 Schengen Uitvoeringsovereenkomst, en daarmee ruim baan gegeven aan de toepassing van het *ne bis in idem*-beginsel van art. 4 van het 7^e Protocol. Deze ‘leading

2 Gevoegde zaken C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P en C-219/00 P *Aalborg Portland et al v. Commissie* [2004] ECR I-123.

3 Sinds 2003, het jaar van het arrest *Gözütok en Brügger* (gevoegde zaken C-187 en 385/01 [2003] ECR I-1345).

4 *Gradinger v. Oostenrijk*, 23 oktober 1995 (appl.no. 15963/90).

5 *Oliveira v. Zwitserland*, 30 juli 1998 (appl.no. 25711/94).

6 Zie met name de arresten in de zaken *Sailer v. Oostenrijk*, 6 juni 2002 (appl. No. 38237/97), *Gökten v. Frankrijk*, 2 juli 2002, (appl. no. 33402/96), *Asçi v. Oostenrijk*, (ontvankelijkheid) 19 oktober 2006 (appl. no. 4483/02), *Hauser Sporn v. Oostenrijk*, 7 december 2006 (appl. no. 37301/03), *Stempfer v. Oostenrijk*, 26 juli 2007 (appl. no. 18294/03) en *Schutte v. Oostenrijk*, 26 juli 2007 (appl. no. 18015/03).

7 Arrest (Grote Kamer), 10 februari 2009 *Zolotukhin* tegen Rusland (App. No. 14939/03).

case' is niet alleen van belang voor de rechtspleging in de lidstaten van de Raad van Europa, maar zou ook een schaduw vooruit kunnen werpen over de uitlegging en toepassing van het *ne bis in idem*-beginsel in het EG mededingingsrecht.

In hoofdstuk 6 worden de bevindingen van de hoofdstukken 3, 4 en 5 bijeengebracht binnen het analytisch raamwerk van hoofdstuk 2, en er worden conclusies uit getrokken. Enkele van de hoofdbevindingen van deze studie worden in het hiernavolgende kort gepresenteerd.

Enkele hoofdbevindingen

In deze studie wordt verdedigd dat uit zowel de mensenrechtelijke aard van het *ne bis in idem*-beginsel als uit de rechtspraak van het Hof van Justitie EG en dat van het Europees Hof voor de Rechten van de Mens volgt dat aan de toepassing van het *ne bis in idem*-beginsel in de rechtsorde van de EU een gemeenschappelijke standaard ten grondslag ligt, of dient te liggen. Deze studie bestrijdt derhalve dat er op goede gronden verschillen zouden moeten of kunnen bestaan tussen de bestaande interpretaties van het *ne bis in idem*-beginsel in verschillende rechtssferen, zoals door enkele auteurs wel is betoogd.⁸ In deze studie wordt gesteld dat het uniforme *ne bis in idem*-beginsel in de Gemeenschapsrechtsorde de regel is die een tweede *vervolg*ing voor een feit waarover reeds onherroepelijk door een rechter is beslist verbiedt (en derhalve niet de regel die een tweede *bestraf*ing verbiedt). Het verbod van dubbele vervolging (ook wel: *Erledigungsprinzip*) en het verbod van dubbele bestrafing (ook wel: *Anrechnungsprinzip*) vormen onderscheidenlijke, aanvullende rechten; het verbod van dubbele bestrafing vormt een specifieke uitdrukking van het *proportionaliteitsbeginsel* in het Gemeenschapsrecht, en vindt slechts dan toepassing als de verschillende voorwaarden voor de toepassing van het verbod van dubbele vervolging (derhalve: het *ne bis in idem*-beginsel) *niet* zijn vervuld.

Het *ne bis in idem*-beginsel verzet zich slechts tegen een nieuwe rechtsvervolgung vanaf het moment dat de uitkomst van een eerdere vervolging terzake onherroepelijk is geworden (*res iudicata*). Een *parallele* (gelijktijdige) rechtsvervolgung voor dezelfde feiten vormt dus op zichzelf nog geen inbreuk op het *ne bis in idem*-beginsel. Wel wordt in deze studie betoogd dat de voortzetting van een parallele vervolging, *na het moment* dat de uitkomst van een eerdere vervolging onherroepelijk is geworden, inbreuk zal maken op het *ne bis in idem*-beginsel zodat verschillende gelijktijdige procedures doorgaans uiteindelijk zullen resulteren in een inbreuk op het beginsel, indien ze worden voortgezet.

8 Zoals bijvoorbeeld: R. Löff, '54 CISA and the Principles of *ne bis in idem*', *European Journal of Crime, Criminal Law and Criminal Justice* 2007, p. 309-334.

In deze studie wordt onder meer betoogd dat het (objectieve) toepassingsbereik van het Gemeenschapsrechtelijke *ne bis in idem*-beginsel wordt bepaald door het toepassingsbereik van het Gemeenschapsrecht als zodanig, en derhalve niet door het 'rechtsgoed' dat het Gemeenschapsrecht of het nationale recht beoogt te beschermen.⁹ In het algemeen zijn de lidstaten gebonden aan de Gemeenschapsrechtelijke beginselen zoals *ne bis in idem* en het proportionaliteitsvereiste voor zover zij handelen "*within the scope of Community law*".¹⁰ Echter, niet elke dubbele toepassing van een norm van Gemeenschapsrecht zal strijd met het *ne bis in idem*-beginsel opleveren; in deze studie wordt betoogd dat hiervoor tevens vereist is dat de toepassing van de betreffende norm van Gemeenschapsrecht voor de lidstaten *dwingend* voorgeschreven is. Indien het de lidstaten immers vrijstaat een *strengere* norm te hanteren (zoals bijvoorbeeld het geval is bij minimum-harmonisatie), zou hieruit logischerwijze volgen dat de lidstaten ook in de gelegenheid gesteld moeten worden om die strengere norm te handhaven, desnoods door een tweede vervolging in te stellen.

Uit de rechtspraak van zowel het Hof van Justitie EG als het Europees Hof voor de Rechten van de Mens (de zogeheten *Engel*-criteria) komt voldoende duidelijk naar voren dat het *ne bis in idem*-beginsel doorgaans toepassing zal vinden in die onderdelen van het Gemeenschapsrecht, die *punitief* van aard zijn, waaronder is begrepen het EG mededingingsrecht.

Voor de toepassing van het Gemeenschapsrechtelijke *ne bis in idem*-beginsel komen niet alleen onherroepelijke rechterlijke beslissingen in aanmerking, maar ook andere finale beslissingen die een einde maken aan een vervolging, waaronder begrepen schikkingen en *leniency* in het EG mededingingsrecht. Voor de toepassing van het verbod van dubbele bestraffing geldt deze vereiste (die van een onherroepelijke beëindiging van de eerdere vervolging) niet onverkort, omdat het geen vereiste vormt voor de toepassing van het *proportionaliteitsbeginsel* in het Gemeenschapsrecht, waar het verbod van dubbele bestraffing een uitdrukking van vormt.

Algemeen wordt aangenomen dat er een onderscheid gemaakt kan worden tussen *objectieve* feiten, en de feiten zoals die zijn neergelegd in de delictsomschrijving (de *juridische kwalificatie* van de feiten), voor de toepassing van het *ne bis in idem*-beginsel. In deze studie wordt de juistheid van die stelling bestreden. Er wordt betoogd dat het niet goed mogelijk is om een zuiver onderscheid te maken tussen die twee, althans in het kader van een juridische procedure, omdat de achterliggende *mogelijkheid* van de latere juridische kwalificatie van bepaalde feiten in een procedure al in een zeer vroeg stadium een 'filterfunctie' gaat vervullen. Door deze filterfunctie wordt de 'eigenlijke' historische gebeurtenis onherroepelijk vervormd, en dit proces is in het kader

9 Hoewel het één indirect ook weer met het ander samenhangt.

10 Case 5/88, Wachauf [1989] ECR 2609.

van een juridische procedure onontkoombaar. Deze vervorming brengt onder meer ook het risico van een onterechte veroordeling met zich, en dient daarom tot het minimum beperkt te worden. Indien er een tweede vervolging plaatsvindt, betekent dit dat het risico van een onacceptabele mate van vervorming van de historische gebeurtenis toeneemt, en alleen al om deze reden is het *ne bis in idem*-beginsel van fundamenteel belang voor de rechtspleging.

Hieruit volgt ook dat voor de toepassing van het *ne bis in idem*-beginsel de nadruk altijd zoveel mogelijk gelegd moet worden op de vraag of de objectieve, historische feiten, voor zover die nog bepaalbaar zijn, dezelfde (*idem*) zijn, en de juridische kwalificatie van die feiten zoveel mogelijk buiten beschouwing gelaten dienen te worden gehouden. Een benadering waarbij de juridische kwalificatie van de feiten een rol speelt zal onvermijdelijk tot een grotere mate van rechtsonzekerheid leiden. Deze benadering komt naar voren in de rechtspraak van het Hof van Justitie EG over art. 54 SUO en – sinds kort – ook in de rechtspraak van het Europees Hof voor de Rechten van de Mens, maar (nog?) niet in de rechtspraak van het Hof van Justitie EG en het Gerecht van Eerste Aanleg in mededingingszaken.

Ten slotte is het *ne bis in idem*-beginsel niet absoluut, en dat zou ook niet wenselijk zijn. Er zijn doorgaans in het nationale recht uitzonderingen op het beginsel mogelijk in geval van nieuw bewijs, of fundamentele gebreken in de rechtsgang. Art. 4 lid 2 van het 7^e Protocol van het EVRM geeft wel een dergelijke uitzonderingsmogelijkheid waar deze in het Gemeenschapsrecht en in de SUO ontbreekt. In deze studie wordt gesteld dat een dergelijke uitzonderingsmogelijkheid wel degelijk nodig is, zowel in het Gemeenschapsrecht als in de Derde Pijler, en dat hiertoe maatregelen genomen dienen te worden.

Literature

Alston and Weiler 1999

Ph. Alston and J.H.H. Weiler, 'An 'Ever Closer Union' in Need of a Human Rights Policy: The European Union and Human Rights', in: Ph. Alston with N. Bustelo and J. Heenan, (eds.) *The EU and human rights*, Oxford: Oxford University Press 1999, pp. 3-66

Alegre & Leaf 2007

S. Alegre and M. Leaf, 'Mutual recognition in European judicial cooperation: a step too far too soon? Case study-the European Arrest Warrant,' (2007) 10 *European Law Journal* 2, pp. 200-217

Araujo 2004

M. Araujo, 'The respect for fundamental rights within the European Network of Competition Authorities', in: B. Hawk (ed.) *Annual Proceedings of the Fordham Corporate Law Institute* 2005 pp. 511-532

Atanasiu 2004

C.D. Ehlermann & I. Atanasiu, *European Competition Law Annual 2002: Constructing the EU Network of Competition Authorities*, Oxford: Hart Publishing 2004, pp. 433-463 (*Introduction*)

Bacquero Cruz 2002

J. Baquero Cruz, *Between competition and free movement*, Oxford: Hart Publishing 2002

Bartsch 2002

H-J. Bartsch, 'Council of Europe-ne bis in idem: the European perspective', *Revue Internationale de droit pénal* 2002-3/4, vol. 73, pp. 1163-1171

Basedow 2002

J. Basedow (ed.), *Limits and Control of Competition with a view to International Harmonisation*, The Hague: Kluwer Law International 2002

Bailey 2004

D. Bailey, 'Scope of judicial review under article 81 EC', (2004) *CMLRev.* 41 (5), pp. 1327-1360

Blekxtoon 2005

R. Blekxtoon, 'Commentary on an article by article basis', in: R. Blekxtoon & W. van Ballegooij (eds.), *Handbook on the European Arrest Warrant*, The Hague: T.M.C. Asser Press 2005

Bourgeois 2007

J. Bourgeois, 'Ne bis in idem and enforcement of EEA competition rules', in: M. Monti, N. Prinz von und zu Liechtenstein, B. Vesterdorf, J. Westbrook, & L. Wildhaber, *Economic Law and Justice in Times of Globalisation / Wirtschaftsrecht und Justiz in Zeiten*

- der Globalisierung: Festschrift for Carl Baudenbacher*, Baden-Baden: Nomos 2007, pp. 313-318
- Bork 1993
R. Bork, *The Antitrust Paradox*, New York: New York Free Press 1993
- Brammer 2005
S. Brammer, 'Concurrent jurisdiction under Regulation 1/2003 and the issue of case allocation', (2005) *CMLRev.* 42 (5), pp. 1383-1424
- Burnside & Crossley 2005
A. Burnside & H. Crossley, 'Co-operation in competition: a new era?', (2005) *European Law Review* 30(2), pp. 234-260
- Calvani 2003
T. Calvani, 'Devolution and Convergence in Competition Enforcement', (2003) *European Competition Law Review* 24(9), pp. 415-423
- Canenbley & Rosenthal 2005 I
C. Canenbley & M. Rosenthal, 'Co-operation Between Antitrust Authorities In- and Outside the EU: What Does it Mean for Multinational Corporations? Part I', (2005) *European Competition Law Review* 26(2), pp. 106-115
- Canenbley & Rosenthal 2005 II
C. Canenbley & M. Rosenthal, 'Co-operation Between Antitrust Authorities In- and Outside the EU: What Does it Mean for Multinational Corporations? Part II', (2005) *European Competition Law Review* 26(3), pp. 178-187
- Cassese 2003
A. Cassese, *International Criminal law*, Oxford: Oxford University Press 2003
- Chang 2004
S.W. Chang, 'Interaction between trade and competition: why a multilateral approach for the United States?', *Duke Journal of Comparative and International law*, 2004 Vol. 14, iss. 1, pp. 1-38
- Conrad 2003
C.A. Conrad, 'Strategies to Reform the Regulations on International Competition', (2006) *World Competition* 26(1), pp. 101-121
- Coppel & O'Neill 1992
J. Coppel & A. O'Neill, 'The European Court of Justice; Taking rights seriously?', (1992) *CMLRev.* 29 (...), pp. 669-692
- Corstens & Pradel 2002
G.J.M. Corstens & J. Pradel, *European Criminal Law*, The Hague: Kluwer Law International 2002
- Corstens 2002
G.J.M. Corstens, *Het Nederlands strafprocesrecht*, Deventer: Kluwer 2002
- De la Cuesta 2002
J.L. De la Cuesta, 'Concurrent national and international criminal jurisdiction and the principle *'ne bis in idem'* general report', *Revue Internationale de droit pénal* 2002-3/4, vol. 73, pp. 707-736
- Dabbah 2003
M.M. Dabbah, *Internationalisation of Antitrust Policy*, Cambridge: Cambridge University Press 2003

Daniels 2006

R. N. Daniels, 'Non bis in idem and the international criminal court', *The Berkeley Electronic Press*, Paper 1365, 2006, available from: law.bepress.com/expresso/eps/1365

Dawes & Lynskey 2008

N. Dawes & O. Lynskey, 'The ever-longer arm of EC law: The extension of Community competence into the field of criminal law', (2008) *CMLRev.* 45 (1), pp. 131-158

Davidow 2004

J. Davidow, 'Recent US antitrust developments of international relevance', (2004) *World Competition* 27(3), pp. 407-417

Dekeyser & Gauer 2004

K. Dekeyser & C. Gauer, 'The new enforcement system for articles 81 and 82 and the rights of defence', in: B. Hawk (ed.) *Annual Proceedings of the Fordham Corporate Law Institute*, New York: Fordham Corporate Law Institute 2004, pp. 549-585

Denza 2003

E. Denza, 'The 2000 Convention on mutual assistance in criminal matters', (2003) *CMLRev.* 40 (5), pp. 1047-1074

Dessard 2005

L. Dessard, 'France: les competences criminelles concurrentes nationales et internationales et le principe *ne bis in idem*', *Revue Internationale de droit pénal* 2002-3/4, vol. 73, pp. 913-939

Dougan 2008

M. Dougan, 'The Treaty of Lisbon 2007: Winning minds, not hearts', (2008) *CMLRev.* 45(3), pp. 609-615

Drexler 1998

J. Drexler, 'Perspektiven eines Weltkartellrechts', *Zentrum für Europäisches Wirtschaftsrecht, Vorträge und Berichte* Nr. 97, Bonn 1998, p. 2

Drexler 2003

J. Drexler, 'Do we need "Courage" for International Antitrust Law?' in: Joseph Drexler (ed.), *The future of Transnational Antitrust – from Comparative to Common Competition Law*, Max Planck Institute, Munich Series on European and International Law, The Hague: Kluwer Law International 2003, pp. 311-343

Drexler 2004

J. Drexler, 'International Competition Policy after Cancún: Placing a Singapore Issue on the WTO Development Agenda', *World Competition* (2004) 27(3), pp. 419-457

Dicey 1982

A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, Indianapolis: Liberty Fund 1982

Ehlermann & Laudati 1998

C-D. Ehlermann & L. Laudati (eds.), *European Competition law Annual 1997: Objectives of Competition Policy*, Oxford: Hart Publishing 1998

Ehlermann 2000

C-D. Ehlermann, 'The modernisation of EC antitrust policy: A legal and cultural revolution', (2000) *CMLRev* 37 (3), pp. 537-590

Eihlmannsberger 2004

T. Eihlmannsberger, 'The relationship between rights and remedies in EC law: In search of the missing link', (2004) *CMLRev.* 41 (5), pp. 1199-1246

Finkentscher & Immenga 1995

W. Finkentscher & U. Immenga, *Draft International Antitrust Code*, Baden-Baden: Nomos Verlag 2005

First 2003

H. First, 'Evolving toward what? The development of International Antitrust', in: J. Drexel (ed.), *The Future of Transnational Antitrust – from Comparative to Common Competition Law*, Max Planck Institute, Munich Series on European and International Law, The Hague: Kluwer Law International 2003, pp. 23-52

Fletcher 2003

M. Fletcher, 'Some developments to the *ne bis in idem* principle in the EU: Criminal proceedings against Hüseyin Gözütok and Klaus Brügge', (2003) 66 *Modern Law Review*, pp. 769-780

Fletcher 2007 I

M. Fletcher, 'The European Court of Justice: Carving itself an influential role in the EU's Third Pillar', paper submitted for the EUSA Tenth Biennial International Conference, Montreal, 17-19 May 2007, available from: <http://aei.pitt.edu/7818/>

Fletcher 2007 II

M. Fletcher, 'The problem of multiple criminal prosecutions: building an effective EU response', (2007) *Yearbook of European Law*, available from: <http://eprints.gla.ac.uk/3811/>

Fox 1987

E.M. Fox, 'The Battle for the Soul of Antitrust', (1987) 75 *California Law Review*

Fox 2000

E.M. Fox, 'Antitrust and Regulatory Federalism: races Up, Down, and Sideways' (2000) 75 *N.Y.U.L. Rev.* pp. 1781-1807

Fox 2001

E.M. Fox, 'The kaleidoscope of antitrust and its significance in the world economy: Respecting differences', in: B. Hawk (ed.), *International Antitrust Law & Policy: Fordham Corporate Law 2001*, New York: Fordham Corporate Law Institute 2001

Fox 2003

E.M. Fox, 'We Protect Competition, You Protect Competitors, (2003) *World Competition* 26(2), pp. 149-165

Gaja 1994

G. Gaja, 'Protection of human rights under Maastricht, in: D. Curtin & T. Heukels, *Institutional dynamics of European integration, essays in honour of G. Schermers* Dordrecht/Boston/London: Martinus Nijhoff Publishers 1994, pp. 561-571

Gerardin & Henry 2005

D. Gerardin & D. Henry, 'The EC fining policy for violations of competition law: An empirical review of the Commission's decisional practice and the Community court's judgments', College of Europe Global Competition Law Centre Working Paper 03/05, available from: <http://www.gclc.coleurop.be>

Gerardin & Petit 2005

D. Gerardin & N. Petit, 'Judicial remedies under EC competition law: complex issues arising from the "modernisation" process', in: B. Hawk (ed.) *Annual Proceedings of the Fordham Corporate Law Institute 2005*, New York: Fordham Corporate Law Institute, pp. 393-439

Goldman et al 2005

C. Goldman, C. Hirsch, & D. Witterick, 'International Antitrust: Developments after Empagran and Intel – Comity Considerations', ABA Antitrust Spring Meeting, March 31, 2005, available from: <http://www.abanet.org/antitrust/committees/sherman2/spring-05/goldman.pdf>

Guild 2004

E. Guild, 'Crime and the EU's constitutional future in an Area of Freedom, Security and Justice' (2004) 10 *European Law Review* 2, pp. 218-234

Guzman 2001

A. Guzman, 'Antitrust and International Regulatory Federalism', (2001) 76 *N.Y.U.L. Rev.*, pp. 1142-1163

Gyselen 1993

L. Gyselen, *The Commission's fining policy in competition cases – "Questo è il catalogo"* in: P.J. Slot & A. McDonnell, *Procedure and enforcement in E.C. and U.S. competition law* – proceedings of the Leiden Europa Instituut seminar on user-friendly competition law, Chapter 10 London: Sweet & Maxwell 1993

Hayek 1945

F.A. von Hayek, 'The use of Knowledge in Society', (1945) 35 *Am. Econ. Rev.*, pp. 519-530

Hewitt Pate 2004

R. Hewitt Pate, 'Current issues in international antitrust enforcement', in: B. Hawk (ed.) *Annual Proceedings of the Fordham Corporate Law Institute 2004*, New York: Fordham Corporate Law Institute 2004, pp. 17-24

Hoet 2004

P. Hoet, 'Het *ne bis in idem* beginsel in het grensoverschrijdend strafrechtsverkeer', *Cahiers Antwerpen Brussel Gent*, 2004/1

Hogan 2004

G. Hogan, 'The use of compelled evidence in European competition law cases', in: B. Hawk (ed.), *Annual Proceedings of the Fordham Corporate Law Institute 2004*, New York: Fordham Corporate Law Institute 2004, pp. 659-674

Huet & Koering Joulin 2005

A. Huet & R. Koering Joulin, *Droit Penal International*, Paris : Presses Universitaires de France 2005

Hunter 1984

J. Hunter, 'Development of the Rule against Double Jeopardy', (1984) 5 *Journal of Legal History*, pp. 3-19

Idot 2003

R. Idot, 'Restraints of Competition as an Issue of International Trade Law', in: *The future of Transnational Antitrust – from Comparative to Common Competition Law*, Max Planck Institute, Munich Series on European and International Law, The Hague: Kluwer Law International 2003, pp. 63-80

Jacobs 1994

F. Jacobs, 'European Community law and the European Convention on Human Rights', in: D. Curtin & T. Heukels, *Institutional dynamics of European integration*,

- essays in honour of G. Schermers* Dordrecht/Boston/London: Martinus Nijhoff Publishers 1994, pp. 561-571
- Jacobs 2006
F. Jacobs, 'The European Convention on Human Rights, the EU Charter of Fundamental Rights and the European Court of Justice', in: I. Pernice, J. Kokott & C. Saunders (eds.), *The Future of the European Judicial System in a Comparative Perspective*, Baden-Baden: Nomos 2006, pp. 291-296
- Janow 2000
M. Janow, *Antitrust goes global*, Washington: Brookings Institute 2000
- Jenny 2001
F. Jenny, 'Globalisation, Competition and Trade Policy' in: Yang-Ching Chao and others (eds.), *International and comparative Competition Law and Policies*, The Hague: Kluwer Law International 2001
- Jones & Matsushita 2002
C. Jones & M. Matsushita, 'Global antitrust in the millennium round: the ways forward' in: C. Jones & M. Matsushita (eds.), *Competition Policy in the Global Trading System*, The Hague: Kluwer Law International 2002
- Kapteyn-VerLoren van Themaat 2003
P.J.G. Kapteyn et al, *Het recht van de Europese Unie en van de Europese Gemeenschappen/Kapteyn, VerLoren van Themaat*, Deventer: Kluwer 2003
- Kerber 2003
W. Kerber, 'An International Multi-Level System of Competition Laws: Federalism in Antitrust', in: J. Drexler, (ed.), *The Future of Transnational Antitrust – From Comparative To Common Competition Law*, Max Planck Institute, Munich Series on European and International Law, The Hague: Kluwer Law International 2003, pp. 282-300
- Kjölbye 2004
L. Kjölbye, 'The new Commission Guidelines on the application of Article 81(3): An economic approach to Article 81', (2004) *European Competition Law review* vol. 25 issue 9, pp. 566-599
- Klip & van der Wilt 2002
A.H. Klip & H. van der Wilt, 'The Netherlands- Non bis in idem', *Revue Internationale de droit pénal* 2002-3/4, vol. 73, pp. 1091-1137
- Klip 2007
A.H. Klip, 'Recente rechtspraak strafrecht en Europese Unie', (2006) *Delikt en Delinkwent*, pp. 1052-1070
- Kovavic & Shapiro 2000
W. E. Kovavic & C. Shapiro, 'Antitrust Policy: A century of Economic and Legal Thinking', (2000) 14 *Journal of Economic Perspectives*, pp. 43-60
- Kovavic 2003
W.E. Kovacic, 'Extraterritoriality, Institutions, and Convergence in international Competition policy', (2003) 97 *Proceedings of the Annual Meeting of the American Society of International Law*, pp. 309-312
- Krabbe & Poelman 1985
H.G.M. Krabbe & H.M. Poelman, 'Enkele aspecten van het *ne bis in idem*-beginsel in internationaal verband', in: J.P. Balkema et al (ed.), *Liber Amicorum Th. W. van Veen*, Arnhem: Gouda Quint 1985, pp. 123-145

Kuijper 2000

P.J. Kuijper, 'Some legal problems associated with the communitarization of policy on visas, asylum and immigration under the Amsterdam Treaty and incorporation of the Schengen *acquis*', (2000) *CMLRev.* 37(2), pp. 345-366

Kuijper 2004

P.J. Kuijper, 'The evolution of the third pillar from Maastricht to the European Constitution: institutional aspects' (2004) *CMLRev.* 41 (2) (special issue: papers of 40th anniversary conference), pp. 609-626

Kuijper & Bronckers 2005

P.J. Kuijper & M. Bronckers, 'WTO law in the European Court of Justice', (2005) *CML Rev.* 42(5), pp. 1313-1355

Kwoka & White 2003

J.E. Kwoka & L.J. White (eds.), *The Antitrust Revolution: Economics, Competition and Policy*, 4th edition, Oxford: Oxford University Press 2003

Lampert 1999

T. Lampert, 'International Cooperation among competition authorities' (1999) *E.C.L.R.*, pp. 214-224

Lawson 1994

R.A. Lawson, 'Confusion and conflict? Diverging interpretations of the European Convention on Human Rights in Strasbourg and Luxembourg', in: R.A. Lawson & M. de Blois, *The dynamics of the protection of human rights in Europe, essays in honour of G. Schermers* Dordrecht/Boston/London: Martinus Nijhoff Publishers 1994, pp. 219-252

Lawson 1999

R.A. Lawson, *Het EVRM en de Europese Gemeenschappen*, diss. Leiden (1999), Leiden: E.M. Meijers Instituut 1999

Lecour 1988

R. Lecour, 'Cour européenne des Droits de l'Homme et Cour de justice des Communautés européennes', in: F. Matscher & H. Petzold (eds.), *Protecting human rights: the European dimension, essays in Honour of G.J. Wiarda*, Cologne: Carl Heymans Verlag 1988, pp. 336-362

Lenaerts & De Smijter 2001

K. Lenaerts & E. de Smijter, 'A "bill of rights" for the European Union', (2001) *CMLRev.* 38 (2), pp. 273-300

Lenaerts & Gerard 2004

K. Lenaerts & D. Gerard, 'Decentralisation of EC competition enforcement: Judges in the frontline', 2004 *World Competition* 27(3), pp. 313-349

Lenaerts & Vanhamme 1997

K. Lenarts & J. Vanhamme, 'Procedural rights of private parties in the Community administrative process', (1997) *CMLRev.* 34 (3), pp. 531-569

Löf 2006

R. Löf, 'Shooting from the hip: proposed minimum standards in criminal proceedings throughout the EU', (2006) 12 *European Law Journal* 3, pp. 421-430

McDermott 1999

P. McDermott, *Res Judicata and Double Jeopardy*, London: Butterworths 1999

Meessen 1989

K.M. Meessen, 'Competition of competition laws', (1989) 10 *Northwestern J. Int'l L& Bus.*, pp. 17-30

Mendelson 1989

M.H. Mendelson, 'The European Court of Justice and Human Rights', *YEL* 1 (1989), pp. 152-162

Myjer 2006

E. Myjer, 'Can the EU join the ECHR – General conditions and practical arrangements', in: I. Pernice, J. Kokott & C. Saunders (eds.), *The Future of the European Judicial System in a Comparative Perspective*, Baden-Baden: Nomos 2006, pp. 297-308

Mitsilegas 2006

V. Mitsilegas, 'The Constitutional implications of mutual recognition in criminal matters in the EU', (2006) *CMLRev.* 43(5), p. 1277-1311

Monti 2007

G. Monti, *EC Competition Law*, First Edition, Cambridge: Cambridge University Press 2007

Montini 1998

M. Montini, 'Globalization and International Antitrust Cooperation', paper, International Conference "Trade and Competition in the WTO and beyond", Venice, December 4th-5th, 1998

Möschel 2000

W. Möschel, "Guest Editorial: Change of Policy in European Competition Law?", (2000) *CMLRev.* 37(3), pp. 495-499

Motchenkova 2005

E. Motchenkova, 'Optimal Enforcement of Competition Law;', *diss.* Tilburg (2005), Tilburg: CentER Dissertation Series 2005

Narciso da Cunha Rodrigues 2005

J. Narciso da Cunha Rodrigues, 'A propos du principe "ne bis in idem"-Un regard sur la jurisprudence de la Cour de justice des Communautés européennes', in: N. Colneric, D. Edward, J.P. Puissochet, and D. Ruiz-Jarabo Colomer (eds.), *Une communauté de droit, Festschrift für Gil Carlos Rodríguez Iglesias*, Berlin: Berliner Wissenschafts-Verlag 2005, pp. 165-176

Nazzini 2006

R. Nazzini, 'Article 81 EC between the time present and the time past: a normative critique of "restriction of competition" in EU law', (2006) *CMLRev.* 43(2), pp. 497-536

O'Keeffe 1999

D. O'Keeffe, 'A critical view of the third pillar', in: A. Pauly (ed.) *De Schengen à Maastricht: voie royale et course d'obstacles*, Maastricht: European Institute of Public Administration 1999, pp. 1-16

Pallek 2004

M. Pallek, 'L'avenir de la coopération euro-américaine dans le domaine de la concurrence', *cahier, Cahiers de droit Européen* (2004) Numéros 1-2, quarantième année, pp. 95-155

Peers 2000

S. Peers, *EU Justice and Home Affairs Law*, Harlow: Longman 2000

Peers 2004

S. Peers, 'Mutual recognition and criminal law in the European Union: Has the Council got it wrong?' (2004) *CMLRev.* 41(1), pp. 5-36

Peter 2003

M. Peter, 'The Cancun experience- jolting the pillars of the WTO at the 5th Ministerial Conference', (2003) *Zeitschrift für Europäische Studien*, 6(4), pp. 619-642

Petersmann 2003

E.-U. Petersmann, 'WTO core principles and Trade/ Competition Roundtable"', in: (2004) *Annual proceedings of the Fordham Corporate Law Institute*, 30, pp. 669-684

Pitovsky 2002

R. Pitovsky, 'Antitrust Cooperation, Global Trade, and US Competition Policy' in: C. Jones & M. Matsushita (eds.) *Competition Policy in the Global Trading System*, The Hague: Kluwer Law International 2002, pp. 53-60

Rafaraci & Belfiore 2007

T. Rafaraci and R. Belfiore, 'Judicial Protection of Individuals under the Third Pillar of the European Union', 2007, Jean Monnet Working Paper, Jean Monnet Center, NYU School of Law, available from: <http://jeanmonnetprogram.org/papers/07/071001.html>

Reichelt 2005

D. Reichelt, 'To what extent does co-operation within the European Competition Network protect the rights of undertakings?' (2005) *CMLRev.* 42(3), pp. 745-782

Riley 1992/1995

A. Riley, 'Nailing the jellyfish; the illegality of the EC/US Government Competition Agreement', (1992) 13 *ECLR* pp. 101-116

Rizzuto 2008

F. Rizzuto, 'Parallel competences under Regulation 1/2003 according to the Court of First Instance', (2008) *ECLR* 29(5)

Rousseva 2005

E. Rousseva, 'Modernizing by eradicating: How the Commission's new approach to Article 81 EC dispenses with the need to apply Article 82 to vertical restraints', (2005) *CMLRev.* 42(3), pp. 587-638

Schomburg 2002

W. Schomburg, 'Germany- Concurrent national and international criminal jurisdiction and the principle *ne bis in idem*', *Revue Internationale de droit pénal* 2002-3/4, vol. 73, pp. 941-964

Schoneveld 2003

F.R. Schoneveld, 'Cartel Sanctions and International Competition Policy: Cross-Border Cooperation and Appropriate Forums for Cooperation' (2003) *World Competition* 26(3), pp. 433-471

Sevenster 1992

H.G. Sevenster, 'Criminal Law and EC Law', (1992) *CMLRev.* 29(1), pp. 29-70

Sigler 1963

Sigler, J.A., 'A History of Double Jeopardy' in: (1963) 7 *Am J of Legal History*, pp. 283-309

Sinn 2002

H.-W. Sinn, *The new system's competition*, NBER Working Paper No. 8747, January 2002, available from: <http://www.nber.org/papers/w8747.pdf>

Slot 2004

P.J. Slot, 'A view from the mountain: 40 years of developments in EC competition law', (2004) *CMLRev.* 41(2), pp. 443-473

Smits 2005

R. Smits, 'The European Competition Network: Selected Aspects', (2005) *Legal Issues of Economic Integration* 32(2), pp. 175-192

Soltész & Marquier 2006

U. Soltész & J. Marquier, 'Hält "doppelt bestraft" wirklich besser? Der *ne bis in idem*-Grundsatz im Europäischen Netzwerk der Kartellbehörden', (2006) *Europäische Zeitschrift für Wirtschaftsrecht* 17(4), pp. 102-107

Spaventa 2007

E. Spaventa, 'Opening Pandora's box: some reflections on the constitutional effects of the decision in Pupino' (2007) 3 *European Constitutional law Review* 1, pp. 5-24

Spinellis 2002

D. Spinellis, 'Global report-the *ne bis in idem* principle in "global" instruments', *Revue Internationale de droit pénal* 2002-3/4, vol. 73, pp. 1149-1162

Todino 2003

Todino, M., 'International Competition Network, The state of play after Naples', (2003) *World Competition* 26 (2), pp. 283-302

Trechsel 2005

S. Trechsel, with the assistance of S. J. Summers, *Human rights in criminal proceeding*, Oxford: Oxford University Press 2005

Tridimas 2007

T. Tridimas, *The General Principles of EU Law*, Second Edition, Oxford: Oxford University Press 2007

Tritell 2005

R.W. Tritell, 'International Antitrust Convergence: A Positive View' 19-SUM Antitrust 25, 2005, available from: <http://www.ftc.gov/bc/international/docs/tritellpositiveview.pdf>

Ullrich 2005

H. Ullrich, 'Anti-unfair competition law and anti-trust law? A continental conundrum', EUI Working Paper LAW no. 2005/01, available from: <http://www.iue.it/PUB/law05-01.pdf>

Valentine 2003

D.A. Valentine, 'WTO Core Principles and trade/ Competition Policies', Fordham 30th annual conference, New York 2003

Van Bockel 2005

W.B. Van Bockel, 'Reaction from the Europa Institute, Leiden University to the Green Paper on conflicts of jurisdiction and the *ne bis in idem* principle in criminal proceedings', available from: http://ec.europa.eu/justice_home/news/consulting_public/conflicts_jurisdiction/news_contributions_conflicts_jurisdiction_en.htm

- Van Miert 1996
K. van Miert, 'Transatlantic Relations and Competition Policy', (1996) *The World Economy*, Vol. 2, No. 3, pp. 12-46
- Van Miert 1997
Van Miert, K. 'International Cooperation in the field of competition: a view from the EC' *Fordham*, 24th annual conference, 1997
- Vander Beken, Vermeulen & Ongena 2002
T. Vander Beken, G. Vermeulen, & T. Ongena, 'Concurrent national and international criminal jurisdiction and the principle *'ne bis in idem'*', *Revue Internationale de droit pénal* 2002-3/4, vol. 73, pp. 811-848
- Van den Wyngaert & Stessens 1999
C. Van den Wyngaert and G. Stessens, 'The international non bis in idem principle: resolving some of the unanswered questions' *International and Comparative Law Quarterly* Vol. 48, 1999, pp. 779-804
- Van den Wyngaert 2004
C. Van den Wyngaert, 'Eurojust and the European Public Prosecutor', in: N. Walker (ed.), *Europe's Area of Freedom, Security and Justice*, Academy of European Law, European University Institute, Oxford: Oxford University Press 2004, pp. 201-239
- Van der Wilt 2005
H. Van der Wilt, 'The European Arrest Warrant and the Principle *Ne Bis In Idem*', in: R. Blekxtoon & W. van Ballegooij (eds.), *Handbook on the European Arrest Warrant*, The Hague: T.M.C. Asser Press 2005, pp. 99-117
- Venit 2003
J.S. Venit, 'Brave New World: The modernisation and decentralisation of enforcement under articles 81 and 82 of the EC Treaty', (2003) *CMLRev.* 40(3), pp. 545-580
- Venit & Louko 2004
J.S. Venit & T. Louko, 'The Commission's new power to question and its implications on human rights', *Annual Proceedings of the Fordham Corporate Law Institute 2005* (ed. Barry Hawk), pp. 675-700
- Vervaele 2004
J.A.E. Vervaele, Case note on *Gözütok and Brügge*, (2004) *CMLRev.* 41(3), pp. 795-812
- Vervaele 2005
J.A.E. Vervaele, 'The transnational *ne bis in idem* principle in the EU: Mutual recognition and equivalent protection of human rights', *Utrecht Law Review*, Vol. 1, Issue 2 (December) 2005, pp. 100-118
- Vervaele 2006
J.A.E. Vervaele, 'European criminal law and general principles of Union law', in: Z. Durdevic (ed.), *Current issues in European criminal law and the protection of EU financial interests*, Zagreb: Austrian Association of European criminal law 2006
- Vickers 2003
J. Vickers, 'Competition Economics and Policy' (Opinion) (2003) 24 *E.C.L.R.* vol. 3, pp. 95-102
- Vince 1962
Demosthenes, 'Speech against Leptines' (355 BC), in: *Demosthenes I*, translated by J. H. Vince, Cambridge: Harvard University Press 1962
- Völcker 2007
S. Völcker, "Rough Justice? An analysis of the European Commission's new fining guidelines" (2007) *CMLRev.* 44 (5), pp. 1285-1320

Vroom 1949

H. Vroom, *Latijnse Spraakkunst*, Bussum: Paul Brand 1949

Waelbroeck 2004

D. Waelbroeck 'Twelve feet all dangling down and six necks exceeding long: The EU network of competition authorities and the European Convention on Human Rights and Fundamental Freedoms', in: C.D. Ehlermann & I. Atanasiu, *European Competition Law Annual 2002: Constructing the EU Network of Competition Authorities*, Oxford: Hart Publishing 2004, pp. 433-463

Waelbroeck *et al* 2004

D. Waelbroeck, D. Slater and G. Even-Shoshan, *Study on the conditions of claims for damages in case of infringement of EC competition rules*, Brussels: Ashurst 2004 (available from http://ec.europa.eu/comm/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf)

Wagner 1998

E. Wagner, 'The integration of Schengen into the framework of the European Union' (1998) *Legal Issues of European Integration* 25(2), pp. 1-60

Walker 2004

N. Walker, (ed.) *Europe's Area of Freedom, Security and Justice*, Academy of European Law, European University Institute, Oxford: Oxford University Press 2004

Weber 1978

M. Weber, 'Economy and Society', (ed. G. Roth and R. Wittich), Berkeley: University of California Press, 1978

Weyembergh 2005

A. Weyembergh, 'Approximation of criminal laws, the constitutional Treaty and the Hague programme', (2005) *CMLRev.* 42(4), pp. 1567-1597

Whish 2008

R. Whish, *Competition Law*, 6th edition, Oxford: Oxford University Press 2008

Wils 1998

W.P.J. Wils, 'The Commission's new method for calculating fines in antitrust cases', (1998) *European Law Review* 23(3), pp. 252-263

Wils 2003 I

W.P.J. Wils, 'The Principle of *Ne Bis in Idem* in EC antitrust enforcement: A legal and economic analysis', (2003) *World Competition* 26(2), pp. 131-148

Wils 2003 II

W.P.J. Wils, 'Should Private Antitrust Enforcement Be Encouraged in Europe?' (2003) *World Competition* 26(3), pp. 473-488

Wils 2004 I

W.P.J. Wils, 'The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis' (2004) *World Competition* 27(2), pp. 201-224

Wils 2004 II

W.P.J. Wils, 'The EU Network of Competition Authorities, The European Convention on Human Rights and the Charter of Fundamental Rights of the EU', in: C.D. Ehlermann & I. Atanasiu, *European Competition Law Annual 2002: Constructing the EU Network of Competition Authorities*, Oxford: Hart Publishing 2004, pp. 433-463

Wils 2006

Wils, W.P.J., 'Is Criminalisation of EU Competition law the answer?', in: K. J. Cseres, M. P. Schinkel, F.O.W. Vogelaar (eds.), *Criminalization of Competition Law Enforcement: Economic and Legal Implications for the EU Member States*

Wils 2008

W.P.J. Wils, 'The use of settlements in public antitrust enforcement: objectives and principles', (2008) *World Competition* 31(3), pp. 335-352

Winslow 2001

W.T. Winslow, 'OECD programmes for International responses to Global Competition Issues', in: Yang-Ching Chao and others (eds.) *International and comparative Competition Law and Policies*, The Hague: Kluwer Law International 2001

Zanettin 2002

B. Zanettin, *Cooperation between Antitrust Agencies at the International Level*, Oxford: Hart Publishing 2002

De Zwaan 1998

J.W. de Zwaan, 'Schengen and its incorporation into the New Treaty', in: M. den Boer (ed.) *Schengen's Final Days*, Maastricht, European Institute of Public Administration 1998

Case Law

EUROPEAN COURT OF JUSTICE

Case 26/62	<i>Van Gend en Loos v. Administratie der Belastingen (Van Gend en Loos)</i>	[1963] ECR 3	
Case 6/64	<i>Flaminio Costa v E.N.E.L. (Costa/ENEL)</i>	[1964] ECR 1141	
Joined Cases 18/65 and 35/65	<i>Gutmann v Commission of the EAEC</i>	[1966] ECR 103	
Joined cases 56 and 58/64	<i>Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Community (Grundig/Consten)</i>	[1966] ECR 429	
Case 14/68	<i>Walt Wilhelm and Others</i>	[1969] ECR 1	
Case 45/69	<i>Boehringer Mannheim v Commission</i>	[1970] ECR 769	
Case 11/70	<i>Internationale Handelsgesellschaft</i>	[1970] ECR 1134	
Case 48/69	<i>ICI v. Commission (Dyestuffs)</i>	[1972] ECR 619	
Case 7/72	<i>Boehringer Mannheim v Commission</i>	[1972] ECR 1281	
Case 127/73	<i>Belgische Radio en Televisie v SV SABAM and NV Fonior (BRT)</i>	[1974] ECR 313	
Case 155/73	<i>Giuseppe Sacchi</i>	[1974] ECR 409	
Case 120/78	<i>Rewe v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)</i>	[1979] ECR 649	
Case 137/85	<i>Maizena</i>	[1987] ECR 4587	
Joined Cases 89, 104, 114, 116, 117 and 125 to 129/85	<i>A Ahlström Oy vs. Commission (Woodpulp)</i>	[1988] ECR 5193 4 CMLR 901	
Case C-234/89	<i>Delimitis v. Henninger Bräu (Delimitis)</i>	[1991] ECR I-935	

Case C-327/91	<i>France vs. Commission</i>	[1994] ECR I-3641, [1994] 5 CMLR 517	
Case T-149/89	<i>Sotralentz SA v Commission of the European Communities</i>	[1995] ECR II-1127	
Case T-141/89	<i>Tréfileurope SARL v. Commission of the European Communities</i>	[1995] ECR II-791	
Case C-327/91	<i>France vs. Commission</i>	[1994] ECR I-3641, [1994] 5 CMLR 517	
Joined Cases T-305/94, T-306/94, T-307/94, T-313/94, T-314/94, T-315/94, T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94	<i>PVC</i>	[1999] ECR II-9931	
Case C-195/97	<i>Commission v Italy</i>	[1999] ECR I-1169	
C-199/92 P	<i>Hüls v Commission</i>	[1999] ECR I-4287	
Joined cases T-25, 26, 30 to 32, 34 to 39, 42 to 46, 48, 50 to 65, 68 to 71, 87, 88, 103 and 104/95	<i>Cement</i>	[2000] ECR II-491	
Case C-344/98	<i>Masterfoods v. HB (Masterfoods)</i>	[2000] ECR I-11369	
Case C-274/99 P	<i>Connolly v Commission</i>	[2001] ECR I-1611	
Case C-127/99	<i>Commission v. Italy</i>	[2001] ECR I-8305	Opinion of Advocate General Geelhoed 31 May 2001
Case T-333/99	<i>X. v. ECB</i>	[2002] ECR II-3021, I-A-199, II-921	
Case T-199/99	<i>Sgaravatti Mediterranea v. Commission</i>	[2002] ECR II-3731	
Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P	<i>Limburgse Vinyl Maatschappij (PVC; appeal)</i>	[2002] ECR I-8375	Opinion of Advocate General Mischo 25 October 2001
Case T-223/00	<i>Kyowa Hakko Kogyo v. Commission</i>	[2003] ECR II-2553	
Case T-224/00, T-220/00, T-223/00, and T-230/00	<i>Archer Daniels Midland and others v. Commission (Lysine)</i>	[2003] ECR II-2597 5 CMLR 12	
Joined Cases C-187/01 and C-385/01	<i>Gözütok and Brugge</i>	[2003] ECR I-1345	Opinion of Advocate General Colomer 19 September 2002
Case C-182/99 P	<i>Salzgitter v. Commission</i>	[2003] ECR I-10761	

Joined cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P	<i>Aalborg Portland and others vs. Commission (Cement; appeal)</i>	[2004] ECR I-123	
Case C-217/00 P	<i>Buzzi Unicem vs. Commission</i>	[2004] ECR I-123	Opinion of Advocate General Colomer 11 February 2003
Joined Cases T-236/01, T-239/01, T-244/01-246/01, T-251/01 and T-252/01	<i>Tokai Carbon (Graphite Electrodes)</i>	[2004] ECR II-1181	
Case T-209/01	<i>Honeywell</i>	[2005] ECR II-5527	
Case T-210/01	<i>General Electric</i>	[2005] ECR II-5575	
Case T-38/02	<i>Groupe Danone v Commission (Danone)</i>	[2005] ECR II-4407	
Joined cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P	<i>Dansk Rørindustri and others v Commission (Pre-insulated pipes)</i>	[2005] ECR I-5425	
Case C-176/03	<i>Commission v. Council</i>	[2005] ECR I-7879	Opinion of Advocate General Colomer 26 May 2003
Case C-416/02	<i>Commission v. Spain</i>	[2005] ECR I-7487	Opinion of Advocate General Stix-Hackl 12 May 2005
Joined Cases T-71/03, T-74/03, T-87/03 and T-91/03	<i>Tokai Carbon and Others v Commission (Speciality Graphite)</i>	ECR II-10	
Case C-176/03	<i>Commission of the European Communities v Council of the European Union</i>	[2005] ECR I-7879	
Case C-469/03	<i>Miraglia</i>	[2005] ECR I-2009	
Case T-279/02	<i>Degussa AG v. Commission</i>	[2006] ECR II-897	
Case T-314/01	<i>Avebe v. Commission</i>	[2006] ECR II-3085	
Case T-322/01	<i>Roquette Frères v Commission</i>	[2006] ECR II-3137	
Case T-329/01	<i>Archer Daniels Midland Co. v Commission (Sodium Gluconate)</i>	[2006] ECR II-3255	
Case T-330/01	<i>Akzo Nobel v. Commission</i>	[2006] ECR II-3389	
Case T-43/02	<i>Jungbunzlauer v. Commission</i>	[2006] ECR II-3435	

Case T-59/02	<i>Archer Daniels Midland Co. v Commission (Citric acid)</i>	[2006] ECR II-3627	
Joined cases T-217 and 245/03	<i>Fédération nationale de la coopération bétail et viande (Fédération nationale CBV)</i>	[2006] ECR II-4987	
Case C-436/04	<i>Léopold Henri van Esbroek</i>	[2006] ECR I-2333	Opinion of Advocate General Colomer 20 October 2005
Case C-397/03 P	<i>Lysine (appeal)</i>	[2006] ECR I-4429	Opinion of Advocate General Tizzano 7 June 2005
Case C-289/04 P	<i>Showa Denko KK v Commission</i>	[2006] ECR I-5859	Opinion of Advocate General Geelhoed, 19 January 2006
Case C-308/04 P	<i>SGL Carbon AG v Commission (Graphite Electrodes; appeal)</i>	[2006] ECR I-5977	Opinion of Advocate General Geelhoed, 19 January 2006
Case C-150/05	<i>Van Straaten</i>	[2006] ECR I-9327	Opinion of Advocate General Colomer 8 June 2006
Case C-467/04	<i>Gasparini</i>	[2006] ECR I-9199	Opinion of Advocate General Sharpston 15 June 2006
Case T-109/02	<i>Bolloré v. Commission</i>	[2007] ECR II-947	
Case T-474/04	<i>Pergan Hilfsstoffe für industrielle Prozesse GmbH v Commission</i>	[2007] ECR n.y.r.	
Case C-3/06 P	<i>Groupe Danone v Commission (Danone; appeal)</i>	[2007] ECR I-1331	
Case C-328/05	<i>SGL Carbon AG v Commission (Specialty Graphite; appeal)</i>	[2007] ECR I-3921	Opinion of Advocate General Mazák, 18 January 2007
Case C-367/05	<i>Kraaijenbrink</i>	[2007] ECR I-6619	Opinion of Advocate General Sharpston 5 December 2006
Case T-410/03	<i>Hoechst v. Commission</i>	n.y.r. 18 June 2008	
Joined cases C-55/07 and 56/07	<i>Michaeler and others</i>	n.y.r., 24 April 2008	Opinion of Advocate General Colomer 24 January 2008
Case C-297/07	<i>Staatsanwaltschaft Regensburg v. Klaus Bourquain</i>	(n.y.r.)	Opinion of AG Colomer 8 April 2008
Case C-462/05	<i>Commission v. Portugal</i>	(n.y.r.)	
Joined Cases C-402/05 P and C-415/05 P	<i>Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council (Kadi)</i>	(n.y.r.)	

EUROPEAN COURT OF HUMAN RIGHTS

- ECtHR, 8 juni 1967, NJ 1978, 223, Series A, vol. 22.
- ECtHR, *Bentham v. Netherlands*, 23 October 1985 (Appl. No. 8848/80)
- ECtHR, *Gradinger v. Austria*, 23 October 1995 (Appl. No. 15963/90)
- ECtHR, *AP, MP, and TP v. Switzerland*, 29 August 1997 (Appl.no. 19958/92)
- ECtHR, *EL, RL and JO v. Switzerland* 29 August 1997 (Appl. No. 20919/92)
- ECtHR, *Mishel Manasson v. Sweden* 17 February 1998 (Application no. 41265/98)
- ECtHR, *Oliveira v. Switzerland*, 30 July 1998 (Appl. No. 25711/94)
- ECtHR, *Ponsetti and Chesnel v. France* (admissibility) 14 September 1999 (Appl. nos. 36855/97 and 41731/98)
- ECtHR, *J.B. v. Switzerland* (admissibility) 6 April 2000 (Appl. No. 31827/96)
- ECtHR, *R.T. v. Switzerland* (admissibility) 30 May 2000 (Appl. No. 31982/96)
- ECtHR, *Luksch v. Austria* (admissibility) 21 November 2000 (Appl. No. 37075/97)
- ECtHR, *Hangl v. Austria* (admissibility) 20 March 2001 (Appl. No. 38716/97)
- ECtHR, *Franz Fischer v. Austria* 29 May 2001 (Appl. No. 37950/97)
- ECtHR, *W.F. v. Austria* 30 May 2002 (Appl. No. 38275/97)
- ECtHR, *Sailer v. Austria* 6 June 2002 (Appl. No. 38237/97)
- ECtHR, *Göktan v. France*, 2 July 2002 (Appl. No. 33402/96)
- ECtHR, *Smirnova and Smirnova v. Russia* (admissibility), 3 October 2002 (Appl.nos. 46133/99 and 48183/99)
- ECtHR, *Zigarella v. Italy* (admissibility) 3 October 2002 (Appl. No. 48154/99)
- ECtHR, *Manasson v. Sweden* (admissibility) 8 April 2003 (Appl. No. 41265/98)
- ECtHR, *Garaudy v. France* (admissibility) 24 June 2003 (Appl. No. 65831/01)
- ECtHR, *Isaksen v. Norway* (admissibility) 2 October 2003 (Appl. No. 13596/02)
- ECtHR, *Nikitin v. Russia* 20 July 2004 (Appl. No. 50178/99)
- ECtHR, *Nils-Inge Rosenquist v. Sweden* (admissibility) 14 September 2004 (Appl. No. 60619/00)
- ECtHR, *Falkner v. Austria* (admissibility) 30 September 2004 (Appl. No. 6072/02)
- ECtHR, *Bratyakin v. Russia* (admissibility) 9 March 2006 (Appl. No. 72776/01)
- ECtHR, *Fadin v. Russia* 27 July 2006 (Appl. No. 58079/00)
- ECtHR, *Bolat v. Russia* 5 October 2006 (Appl. No. 14139/03)
- ECtHR, *Viola v. Italy* 5 October 2006 (Appl. No. 45106/04)
- ECtHR, *Aşci v. Austria* (admissibility) 19 October 2006 (Appl. No. 4483/02)
- ECtHR, *Storbråten V. Norway* (admissibility) 1 February 2007 (Appl. No. 12277/04)
- ECtHR, *Hauser-Sporn v. Austria* 7 December 2006 (Appl. No. 37301/03)
- ECtHR, *Zolotukhin v. Russia* 7 June 2007 (Appl. no. 14939/03)
- ECtHR, *Schutte v. Austria* 26 July 2007 (Appl. No. 18015/03)
- ECtHR, *Stempfer v. Austria* 26 July 2007 (Appl. No. 18294/03)
- ECtHR, *Knut Haarvig v. Norway* (admissibility) 11 December 2007 (Appl. no. 11187/05)
- ECtHR, *Jussila v. Finland* 23 November 2006 (App. No. 73053/01)

UNITED STATES COURTS

- *Blockburger vs. United States* 284 US 299 (1932)
- *United States v. Aluminium Co of America*, 148 F 2d 416 (2nd Circuit 1945),
- *Green v United States* (1957) 355 U.S. 184

- *Heath v Alabama* (1985) 474 U.S. 82
- *F. Hoffman-LaRoche Ltd. v. Empagran S.A.*, No. 03-724 (U.S. 14 June 2004), 614/04

UNITED NATIONS HUMAN RIGHTS COMMITTEE

- HRC *A.P. v. Italy* 16 Juli 1986 (Comm.no. 204/1986); available from <http://www.unhchr.ch/tbs/doc.nsf/MasterFrameView/da4db6de25fbfa7fc1256aca004dc4f3?OpenDocument>

OTHER COURTS

- High Court (Chancery Division), judgment of 19 October 2007 *Devenish Nutrition Ltd. & others vs. Sanofi-Aventis SA & others* [2008] 2 All ER 249, [2007] EWHC 2394 (Ch), [2008] 2 WLR 637 [2008] 2 All ER 249, [2007] EWHC 2394 (Ch), [2008] 2 WLR 637
- *Hoge Raad*, judgment of 17 December 1963, NJ 1964, 385
- *Rookes v. Barnard* ([1964] AC 1129, [1964] 1 All ER 367
- *Hoge Raad*, judgment of 26 November 1996, NJ 1997, 209

TREATIES & LEGISLATION

International agreements

- Agreement between the Government of the United States of America and the Government of the Federal Republic of Germany Relating to Mutual Cooperation Regarding Restrictive Business Practices 23 June 1976, 4 Trade Reg. Rep. (CCH) Par. 13501, available from www.usdoj.gov/atr/public/international/docs
- Protocol no. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Strasbourg, 22 November 1984
- Agreement 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 (1985), [2000] OJ L 239/13
- Convention between the Member States of the European Communities on Double Jeopardy [1987] OJ L 167
- Convention of 19 June 1990 implementing the Schengen Agreement, [2000] OJ L239/19 ("CISA")
- Agreement between the Government of the United States of America and the Commission of the European Communities regarding the application of their competition laws – Exchange of interpretative letters with the Government of the United States of America, [1995] OJ 95/47 (the "1991 Agreement")
- Convention of 26 July 1995 on the protection of the European Communities' financial interests, [1995] OJ C316/49
- Convention of 26 July 1995 on the establishment of a European Police Office, [1995] OJ C 316/2 (the "Europol Convention")

- Convention of 26 May 1997 on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union, [1997] OJ C195/2
- Cooperation Agreement between the Contracting Parties to the Schengen Agreement and the Schengen Convention and the Republic of Iceland and the Kingdom of Norway, Brussels, 19 December 2003, 2004] OJ L 26/3
- Protocol integrating the Schengen acquis into the framework of the European Union, [1997] OJ C 340/93 ("Schengen Protocol")
- Agreement between the European Communities and the Government of the United States of America on the application of positive comity principles in the enforcement of their competition laws, [1998] OJ L173/28 ("the 1998 Agreement")
- Convention established by the Council in accordance with Article 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between the Member States of the European Union [2000] OJ C 197/3
- Agreement between the European Community and the Government of Japan concerning cooperation on anti-competitive activities – Agreed minute, [2003] OJ L 183/12
- Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, [2007] OJ C350/1 ("Lisbon Treaty")

Regulations

- Council Regulation (EEC) 17/62 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty [1962] OJ 13/204
- Council Regulation (EEC) 4064/89 of 21 December 1989 on the control of concentrations between undertakings [1989] L395/1
- Council Regulation 2988/95 of 18 December 1995 on the protection of the European Communities' financial interests [1995] OJ L312/1
- Commission Regulation (EC) 447/98 of 1 March 1998 on the notifications, time limits and hearings provided for in Council Regulation (EEC) 4064/89 on the control of concentrations between undertakings [1998] OJ L61/1 (no longer in force)
- Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1 ("Regulation 1/2003")
- Council Regulation (EC) 139/2004 of 20 January 2004 on the control of concentrations between undertakings ("ECMR") [2004] OJ L24/1
- Council Regulation (EC) 411/2004 of 26 February 2004 repealing Regulation (EEC) 3975/87 and amending Regulations (EEC) 3976/87 and (EC) 1/2003, in connection with air transport between the Community and third countries [2004] L68/1
- Commission Regulation (EC) 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty [2004] OJ L123/18
- Commission Regulation (EC) 802/2004 of 7 April 2004 implementing Council Regulation (EC) 139/2004 on the control of concentrations between undertakings [2004] OJ L133/1

Directives

- Council Directive 91/308 of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering [1991] OJ L166/77
- Council Directive 91/676/EEC of 12 December 1991, concerning the protection of waters against pollution caused by nitrates from agricultural sources [1991] OJ L375/1

Decisions

- Decision of the Council and the Commission 145/1995 of 10 April 1995 concerning the conclusion of the Agreement between the European Communities and the Government of the United States of America regarding the application of their competition laws [1995] OJ 95/45
- Council and Commission Decision 445/1999 of 29 April 1999 concerning the conclusion of the -Agreement between the European Communities and the Government of Canada regarding the application of their competition laws, [1999] OJ L 175/50
- Council Decision 437/1999 of 17 May 1999 on certain arrangements for the application of the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the association of those two States with the implementation, application and development of the Schengen acquis [1999] OJ 176/31
- Council Decision 436/1999 of 20 May 1999 concerning the definition of the Schengen acquis for the purpose of determining in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union the legal basis for each of the provisions or decisions which constitute the Schengen acquis, OJ 1999, L176/1
- Council Decision 436/1999 of 20 May 1999 determining in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union the legal basis for each of the provisions or decisions which constitute the Schengen acquis, OJ 1999, L 176/17
- Council Decision 366/2000 of 29 May 2000 concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen acquis, [2000] OJ L 131/43
- Council Decision 192/2002 of 28 February 2002 concerning Ireland's request to take part in some of the provisions of the Schengen acquis [2002] OJ L 64/20
- Council Decision 187/2002 of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime [2002] OJ L 63/1
- Council Framework Decision 465/2002 of 13 June 2002 on joint investigative teams [2002] OJ L 162/1
- Council Framework Decision 584/2002 of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2002] OJ L 190/1
- Council Framework Decision 80/2003 of 27 January 2003 on the protection of the environment through criminal law [2003] OJ L 29/55
- Council Decision 520/2003 of 16 June 2003 concluding the Agreement between the European Community and the Government of Japan concerning cooperation on anti-competitive activities OJ [2003] L183/11

OTHER LEGISLATION

- The Schengen acquis as referred to in Article 1(2) of Council Decision 1999/435/EC of 20 May 1999, [2000] OJ L 239/1

Commission Decisions

- 1989/515/EC, Case IV/31.553 – Welded steel mesh [1989] OJ L260/1
- 2003/2/EC, Case COMP/E-1/37.512 – Vitamins, [2003] OJ L6/1
- 2003/207/EC, Case COMP/E-3/36.700, Industrial and medical gases [2003] OJ L84/1
- 2003/382/EC, Case COMP/39.041 – ex-35860B/Tubes d’acier sans soudure/PO – Seamless steel tubes, [2003] OJ L140/1
- 2003/569/EC, Case IV/37.614/F3 PO/Interbrew and Alken-Maes [2003] OJ L200/1
- 2004/134/EC, Case COMP/M.2220 – General Electric / Honeywell [2004] OJ L48/1

Commission notices and guidelines

- Notice on the non-imposition or reduction of fines in cartel cases [1996] OJ C207/4
- Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty [1998] OJ C 9/3
- Notice on immunity from fines and reduction of fines in cartel cases [2002] OJ C45/3
- Commission Notice on cooperation within the network of Competition Authorities [2004] OJ C101/43 (the “Network notice”)
- Commission Notice on the cooperation between the Commission and the courts of the Member States [2004] OJ C101/54
- Commission Notice on the handling of complaints by the Commission [2004] OJ C101/65
- Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 EC [2004] OJ C101/78
- Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, [2004] OJ C101/81
- Guidelines on the application of Article 81(3) of the Treaty [2004] OJ C101/97
- Guidelines on the method of setting fines imposed on undertakings which infringe articles 81 and/or 82 EC [2006] OJ C210/2
- Commission Notice on Immunity from fines and reduction of fines in cartel cases [2006] OJ C298/17

OECD Documents

- OECD, Council Recommendation Concerning Cooperation between Member Countries on Restrictive Business Practices Affecting International Trade, 5 October 1967, reprinted in A.V. Lowe (ed.), *Extraterritorial Jurisdiction*, Llandysul: Grotius 1983
- OECD, General “Competition and Trade Policies: their interaction (1984)”; available at <http://www.oecd.org/dataoecd/7/51/2375610.pdf>.
- Recommendation on Hardcore Cartels, C (98)35/FINAL, March 25 1998.
- OECD CCNM/GF/COMP/WD (2001) 22, materials for the 1st meeting of the Global Forum on Competition on 17 and 18 October 2001, contribution from Australia.

- OECD, 20 June 2002, 'Provisions on hardcore cartels: Background Note by the Secretariat', WT/WGTCP/W/191.

WTO Documents (All Communications are available from: <http://docsonline.wto.org>)

- WT/MIN(01)/DEC/1, No. 20, Ministerial Declaration of December 13, 1996 (available from http://www.wto.org/english/thewto_e/min96_e/wtodec_e.htm)
- WT/WGTCP/W/130, Communication of 12 July 1999 from the European Community and its member states to the Working Group on the Interaction between Trade and Competition Policy.
- WT/WGTCP/W/140, Communication of 29 May 2000 from the European Community and its member states to the Working Group on the Interaction between Trade and Competition Policy.
- WT/WGTCP/W/152, Communication of 21 September 2000 from the European Community and its member states to the Working Group on the Interaction between Trade and Competition Policy.
- WT/WGTCP/W/174, Communication of 17 April 2002 from the European Community and its member states to the Working Group on the Interaction between Trade and Competition Policy
- WT/WGTCP/W/222, Communication from the European Community and its Member States, Dispute Settlement and Peer Review: Options for a WTO Agreement on Competition Policy, 19 November 2002
- WT/MIN(03)/20, Ministerial Statement, adopted on 14 September 2003

Council of Europe

- Parliamentary Assembly Recommendation 791 (1976) on the protection of human rights in Europe, available from <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta76/EREC791.htm>

Speeches

- J.-C. Juncker, 'Council of Europe – European Union: A sole ambition for the European continent', Report by Jean Claude Juncker, Prime Minister of the Grand Duchy of Luxembourg, to the attention of the heads of state or government of the Member States of the Council of Europe, available from: http://assembly.coe.int/Sessions/2006/speeches/20060411_report_JCJuncker_EN.pdf.
- M.R. Monti, 'Cooperation between Competition Authorities – A Vision for the future, speech before the Japan Foundation Conference, Washington D.C., June 23, 2000
- M.R. Monti, 'International Antitrust – A personal Perspective', Fordham, New York, 7 October 2004, available from: [www.europa.eu.int, SPEECH/04/449](http://www.europa.eu.int/SPEECH/04/449)
- S. Norberg, 'The co-operation between the national courts and the Commission in the application of EC competition rules', Contribution to the 2nd conference organised by the Association of European Competition Law judges, Luxembourg 13 June 2003, available from http://ec.europa.eu/comm/competition/speeches/text/sp2003_060_en.pdf

- J.J. Parisi, 'Enforcement Cooperation among Competition Authorities', speech, 6th annual conference on EC competition law, London, England, May 19 1999. (available from www.ftc.org/speeches/other/ibc99059911update.htm).
- Pate, R. Hewitt, Competition and politics, presentation delivered before the 12th International Conference on Competition, Bonn, Germany June 6, 2005
- A. Schaub, 'Co-operation in Competition Policy Enforcement between the EU and the US and New Concepts Evolving at the World Trade Organisation and the International Competition network', Mentor Group Brussels, April 4, 2002

Commission documents

- Communication from the Commission concerning the consequences of the judgment given by the Court of Justice on 20 February 1979 in case 120/78 ('Cassis de Dijon') [1980] OJ C256/2
- COM (99) 101 final, White paper on modernisation of the rules implementing Articles 85 and 86 of the EC Treaty
- IP/99/957, 'Commission Fines Cartel of seamless steel Tube Producers for Market Sharing' (press release)
- COM (2003) 500 final, Report from the Commission to the Council and the European Parliament on the application of the agreements between the European Communities and the Government of the United States of America and the Government of Canada regarding the application of their competition laws 1 January 2002 to 31 December
- COM (2004) 4002 final, Communication from the Commission to the Council and the European Parliament, Five Years to establish the Area of Freedom, Security and Justice, available from: http://ec.europa.eu/justice_home/doc_centre/intro/docs/bilan_tampere_en.pdf
- COM (2005) 672, Green Paper – Damages actions for breach of the EC antitrust rules
- COM(2005) 696 final, Green Paper On Conflicts of Jurisdiction and the Principle of ne bis in idem in Criminal Proceedings
- IP/06/857, Competition: Commission revises Guidelines for setting fines in antitrust cases (press release)
- COM (2007) 373 final, Communication from the Commission to the Council and the European Parliament, Report on the implementation of The Hague programme for 2006 (the "scoreboard")
- COM(2008) 165, White Paper on Damages Actions for Breach of the EC antitrust rules
- SEC(2008) 404, Commission staff working paper accompanying the White paper on damages actions for breach of the EC antitrust rules

Council documents

- Joint Action 428/98 of 29 June 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on the creation of a European Judicial Network [1998] L 191/4
- Council Resolution of 28 October 1999 on mutual recognition [2000] OJ C141/5
- Annex IV to the Conclusions of the Presidency of the Cologne European Council (3-4 June 1999) available from http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/kolnen.htm

- Council of the EU, Charter of Fundamental Rights of the European Union – Explanations relating to the complete text of the Charter, December 2000, available at http://ue.eu.int/df/docs/en/EN_2001_1023.pdf
- Cardiff European Council, 15 and 16 June 1998, Presidency Conclusions, para. 39, available from http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/54315.pdf
- Tampere European Council Presidency Conclusions, 15&16 October 1999, available from: ue.eu.int/ueDocs/cms_Data/docs/pressdata/en/ec/00200-r1.en9.htm.
- Council doc. 16504/04, 13 December 2004, Strengthening Freedom, Security and Justice in the European Union, “The Hague Programme”, available from http://ec.europa.eu/justice_home/doc_centre/doc/hague_programme_en.pdf
- Initiative of the Hellenic Republic with a view to adopting a Council Framework Decision concerning the application of the ‘ne bis in idem’ principle, [2003] OJ C 100/24

European Parliament documents

- Resolution of the European Parliament of 7 March 1977, [1977] OJ C 57/55
- Written question 765/86 by Mr. Florus Wijsenbeek to the Commission concerning harmonisation of criminal law, [1987] OJ C 72/13

Websites

- Criminal proceedings: conflicts of jurisdiction and the *ne bis in idem* principle (Green Paper), <http://europa.eu/scadplus/leg/en/lvb/l16011.htm>

Other documents

- American Chamber of Commerce to the EU (AMCHAM EU)
- “Position paper on the modernisation package”, December 10, 2003
- European Commission for Democracy through law (“Venice Commission”), Opinion 256/2003, 18 December 2003 (available from: [http://www.venice.coe.int/docs/2003/CDL-AD\(2003\)022-e.pdf](http://www.venice.coe.int/docs/2003/CDL-AD(2003)022-e.pdf))
- House of Lords: Select Committee on the European Union, session 2002-03, 30th report A fractured Partnership Relations between the European Union and the United States of America, HL paper 134
- ‘Experiences gained so far on international cooperation on competition policy issues and the mechanisms used’, TD/B/COM.2/CLP/21/Rev.1, available from: http://www.unctad.org/en/docs/c2clp21r1_en.pdf (UNCTAD)
- US Department of Justice, ‘U.S. and Foreign Antitrust Officials launch International Competition Network New International Venue Will Assist in Global Convergence on Important Antitrust Enforcement Issues’, press release October 25, 2001, available from: http://www.usdoj.gov/atr/public/press_releases/2001/9400.htm.
- Draft Resolution: Concurrent national and international criminal jurisdiction and the principle ‘ne bis in idem’, *Revue internationale de droit pénal*, Vol. 73, 2002, pp. 1179-1184.
- Kamerstukken (Parliament, Chamber proceedings) II, 2002-2003, 28600 V, 7, p. 3435
- Programme of measures to implement the principle of mutual recognition of decisions in criminal matters [2001] OJ C 12/10

- Charter of Fundamental Rights of the European Union, available from: http://www.europarl.europa.eu/charter/default_en.htm ("the Charter")
- Convent 49: Text of the explanations relating to the complete text of the Charter as set out in Charte 448/00/Convent 50, available from http://www.europarl.europa.eu/charter/pdf/04473_en.pdf.
- U.K. Law Report Commission, Law Com. No. 267, Cm. 5048, London: The Stationery Office 2001
- Second Report from the U.K. joint Commission on Human Rights, available from: <http://www.publications.parliament.uk/pa/jt200203/jtselect/jtrights/40/4004.htm>
- House of Commons, Select Committee on European Scrutiny, 28th Report, available from www.publications.parliament.uk.
- The Law Society of England and Wales – Subcommittee E- Inquiry into the initiation of EU legislation, available from <http://www.parliament.uk/documents/upload/LawSocietyEnglandWales.04.08.pdf>
- Rapport des Chefs de delegation aux Ministres des Affaires Etrangères, Bruxelles, 21 Avril 1956 ("Spaak report")
- ECN model leniency programme, available from http://ec.europa.eu/comm/competition/ecn/model_leniency_en.pdf
- N1 58/03, 'A cartel on the Lysine market gives the Court of First Instance an opportunity to clarify the criteria for fixing the amount of fines' (press release) available from: <http://curia.europa.eu/en/actu/communiques/cp03/aff/cp0358en.htm>

Curriculum vitae

Willem Bastiaan (Bas) van Bockel was born in Amsterdam on January 30, 1973. He attended the St. Nicolaaslyceum in Amsterdam, where he graduated in 1992. He studied civil law and business law at Leiden University between 1993 and 1999, and during the last years of his studies he worked as research assistant to Prof. P.J. Slot. After graduating in 1999, he joined Clifford Chance LLP as a legal practitioner. In 2002 he was involved as *rapporteur* in the legal evaluation of the functioning of the Dutch competition act, commissioned by the Netherlands Ministry of Economic Affairs and carried out by a team of researchers from Leiden University. Between 2002 and 2009, he was a junior lecturer and PhD-fellow at the Europa Institute within the department of Public Law at Leiden University, where he specialized in EC competition law and Third Pillar law. In 2007 he conducted part of his PhD-research at the European University Institute in Florence. In 2009 he was involved as a senior competition law expert in the European Commission project 'Strengthening the Ministry of European Integration' in Tirana, Albania.

As a visiting lecturer, he has taught EC law courses at bachelors, masters, and post-graduate level at Bilgi Üniversitesi (Istanbul, Turkey); Tallinn University of Technology (Tallinn, Estonia); Universitas Indonesia (Jakarta, Indonesia) and The Hague University.

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- MI-137 T.C. Leemans, *De toetsing door de bestuursrechter in milieugeschillen. Over rechterlijke toetsingsintensiteit, bestuurlijke beslissingsruimte en deskundigenadvisering* (diss. Leiden), Den Haag: Boom Juridische uitgevers 2008, ISBN 978 90 5454 986 4
- MI-138 P. Kuypers, *Forumkeuze in het Nederlands internationaal privaatrecht* (diss. Leiden), Deventer: Kluwer 2008, ISBN 978 90 13 04797 4
- MI-139 A. Meuwese, *Impact Assessment in EU Lawmaking* (diss. Leiden), Zutphen: Wöhrmann Printing Service 2008
- MI-140 P.C. Adriaanse e.a., *Implementatie van EU-handhavingsvoorschriften*, Den Haag: Boom Juridische uitgevers 2008, ISBN 978 90 5454 862 1
- MI-141 S.D. Dikker Hupkes, *What Constitutes Occupation? Israel as the occupying power in the Gaza Strip after the Disengagement*, Leiden: Jongbloed 2008
- MI-142 R.A. Visser, E. van Gemerden, P.A. More & R.C.J. de Roon, *Sturing en samenwerking in handhavingsprojecten*, Leiden: Leiden University Press, ISBN 978 90 8728 0383
- MI-143 B.M. Dijksterhuis, *Rechtshandhaving normeren de alimentatiehoogte. Een empirisch onderzoek naar rechterlijke samenwerking in de Werkgroep Alimentatienormen (1975-2007)*, Leiden: Leiden University Press, ISBN 978 90 8728 045 1
- MI-144 F.P. Ölçer, *Eerlijk proces en bijzondere opsporing*, Nijmegen: Wolf Legal Publishers 2007, ISBN 978 90 5850 376 3
- MI-145 J.H. Crijns, P.P.J. van der Meij & J.M. ten Voorde, *De waarde van waarheid. Opstellen over waarheid en waarheidsvinding in het strafrecht*, Den Haag: Boom Juridische uitgevers 2008, ISBN 978 90 8974 020 5
- MI-146 G.K. Schoep, *Straftoematingsrecht en strafvorming* (diss. Leiden), Deventer: Kluwer 2008, ISBN 978 90 1306 018 8
- MI-147 A.R. Spanjer, *Structural and regulatory reform of the European natural gas market - Does the current approach secure the public service obligations?* (diss. Leiden), Amsterdam: Ponsen en Looijen bv, ISBN 978 90 6464 300 2
- MI-148 E.-J. Zipprow, *Privaatrechtelijke handhaving van mededingingsrecht* (diss. Leiden), Deventer: Kluwer 2008, ISBN 978 90 13 05895 6
- MI-149 G. Suurmond, *Enforcing fire safety in the catering industry. An economic analysis*, Leiden: Leiden University Press 2008, ISBN 978 90 8728 061 1
- MI-150 J.P. Loof (red.), *Juridische ruimte voor gewetensbezwaren?*, Leiden: NJCM-Boekerij 2008, ISBN 978 90 6750 048 7
- MI-151 A.G. Castermans, I.S.J. Houben, K.J.O. Jansen, P. Memelink, J.H. Nieuwenhuis & L. Reurich (red.), *De maatman in het burgerlijk recht*, Deventer: Kluwer 2008, ISBN 978 90 13 05051 6
- MI-152 P. Memelink, *De verkeersopvatting* (diss. Leiden), Den Haag: Boom Juridische uitgevers 2009, ISBN 978 90 8974 056 4
- MI-153 W. den Ouden, *De terugvordering van Europese subsidies in Nederland: Over legaliteit, rechtszekerheid en het vertrouwensbeginsel*, (oratie Leiden), Kluwer: Alphen aan den Rijn 2008, ISBN 978 90 1306 247 2
- MI-154 J. Arnscheidt, *Debating' Nature Conservation: Policy, Law and Practice in Indonesia*, (diss. Leiden), Leiden: Leiden University Press 2009, ISBN 978 90 8728 062 8
- MI-155 C. Noichim, *The Asean Space Organization. Legal Aspects and Feasibility*, (diss. Leiden), Leiden: UFB Grafi-Media 2008
- MI-156 N.M. Dane, *Overheidsaansprakelijkheid voor schade bij legitiem strafvorderlijk handelen*, (diss. Leiden), Tilburg: Celsus juridische uitgeverij 2009, ISBN 978 90 8863 034 7
- MI-157 G.J.M. Verburg, *Vaststelling van smartengeld*, (diss. Leiden) Deventer: Kluwer 2009
- MI-158 J. Huang, *Aviation Safety and ICAO*, (diss. Leiden) 2009 ISBN-13 978 90 4113 115 7
- MI-159 J.L.M. Gribnau, A.O. Lubbers & H. Vording (red.), *Terugkoppeling in het belastingrecht*, Amersfoort: Sdu Uitgevers 2008, ISBN 978 90 6476 326 7
- MI-160 J.L.M. Gribnau, *Soevereiniteit en legitimiteit: grenzen aan (fiscale) regelgeving*, (oratie Leiden), Sdu Uitgevers 2009, ISBN 978 90 6476 325 0

- MI-161 S.J. Schaafsma, *Intellectuele eigendom in het conflictenrecht. De verborgen conflictregel in het beginsel van nationale behandeling* (diss. Leiden), Deventer: Kluwer 2009, ISBN 978 90 13 06593 0
- MI-162 P. van Schijndel, *Identiteitsdiefstal*, Leiden: Jongbloed 2009
- MI-163 W.B. van Bockel, *The ne bis in idem principle in EU law*, (diss. Leiden), Amsterdam: Ipskamp 2009, ISBN 978 90 90 24382 5

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