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NIJHOFF

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Editorial

The *Idem* Component in CJEU Case Law on *Ne Bis in Idem*: How Factual is Factual?

Keywords

article 50 CFR – article 54 CISA – Dutch Supreme Court – *ne bis in idem* – same fact

1 Introduction

The fundamental principle of *ne bis in idem* seeks to protect defendants against double prosecution of double punishment for the same criminal offence. It is enshrined in, *inter alia,* Article 4 of the 7th Protocol to the ECHR, Article 50 of the EU Charter of Fundamental Rights (CFR or the Charter), and Article 54 of the Convention implementing the Schengen Agreement (CISA). The exact scope of protection against double action under the European *ne bis in idem* principle obviously depends on the interpretation of its various components. Over the last few years, it has in particular been the *bis* component that has raised debate[1]—especially in response to case law from the

1 *See*, e.g., A. de Vries, 'The Principle of *Ne Bis In Idem* (Article 50 of the Charter) at the Cross-Border Interface of Punitive Administrative and Criminal Proceedings in the European Union', 17 *Review of European Administrative Law* (2024) 123–137; L. Neumann, 'Limitations of the Transnational ne bis in idem Principle in EU Law. Remarks on the ECJ's Diesel Scandal Volkswagen Case', 18 *Eucrim* (2023) 99–105; G. Lasagni and S. Mirandola, 'The European ne bis in idem at the Crossroads of Administrative and Criminal Law', 14 *Eucrim* (2019) 126–135; M. Luchtman, 'The ECJ's recent case law on ne bis in idem: Implications for law enforcement in a shared legal order', 55 *Common Market Law Review* (2018) 1717–1750.

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Court of Justice of the European Union (CJEU or the Court) in which combinations of criminal and administrative-punitive proceedings for the same offence have been held permissible under the condition that both proceedings are sufficiently connected in substance and time.[2]

This contribution, however, deals with the *idem* component, i.e. the concept of 'same acts', and with how it must be applied in a pure criminal law context. Whereas the Court's standing interpretation of this concept may be considered well-defined, this editorial argues that further clarification is needed on one specific aspect, which is the very extent to which *legal aspects* can be included in (or: must rather be excluded from) the assessment of the identity of the acts. The said need for clarification will be demonstrated by reference to Dutch scholarly debate in which opinions on this matter have been diverging for some time, whereas the Dutch Supreme Court (*Hoge Raad*, hereinafter abbreviated as DSC) takes the viewpoint that under certain conditions, CJEU case law does permit to take into account the legal aspects of material acts, even to a decisive extent (perhaps the same or a similar approach is also taken in other Member States' courts). It will be shown that the impact of this approach can be severe, in particular for natural persons. A higher level of clarity on the sustainability of the DSC's approach would therefore be justified. This contribution attempts to lay some groundwork for that.

This contribution commences with a brief summary of CJEU case law on the interpretation of *idem* in de principle of *ne bis in idem* (Section 2). The subsequent section provides an overview of how the EU-level concept of 'same acts' has been applied to by the Dutch Supreme Court (Section 3), followed by an account of scholarly reflections (including my own) on whether, and to what extent, the DSC's approach conforms with the CJEU framework (Section 4). The next section wonders if the differing viewpoints that these reflections defend, can perhaps—at least in part—be traced back to a subtle loophole in CJEU judgments (not least in its most recent judgment in the case of *MSIG*[3]), leaving it open whether and to what extent *legal aspects* can be taken into account in assessing the identity of the acts (Section 5). As this is held undesirable, the final section (Section 6) ends with an appeal to the CJEU to close this loophole in its future case law on the concept of *idem*.

2 *See*, in particular, CJEU 20 March 2018, case C-524/15 (*Luca Menci*), ECLI:EU:C:2018:197; CJEU 22 March 2022, case C-117/20 (*Bpost NV*), ECLI:EU:C:2022:202; CJEU 29 April 2022, case C-151/20 (*Nordzucker and Others*), ECLI:EU:C:2022:203; CJEU 14 September 2023, case C-27/22 (*Volkswagen*), ECLI:EU:C:2023:663; all largely resembling ECtHR (*A and B v. Norway*).

3 CJEU 11 September 2025, case C-802/23 (*MSIG*), ECLI:EU:C:2025:688.

2 The Concept of *Idem* in CJEU Case Law: A Factual Approach

It was the *Van Esbroeck* case in which the Court in 2006 ruled for the first time on how the concept of *idem* must be defined under the EU-wide *ne bis in idem* rule of Article 54 CISA: were the import of narcotic drugs on the one hand, and the export of the same narcotic drugs on the other hand, 'the same acts' in the sense of that provision?[4] The decision was made by the Court to apply a factual (or: material) approach:

> "[T]he only relevant criterion for the application of Article 54 of the CISA is identity of the material acts, understood in the sense of the existence of a set of concrete circumstances [or: a set of facts, JWO] which are inextricably linked together [...] in time, in space and by their subject-matter"[5] [and] "irrespective of the legal classification given to them or the legal interest protected".[6]

In the case at hand, the application of this factual criterion led to the strong suggestion that the acts in dispute constitute the same acts ("a set of facts which, by their very nature, are inextricably linked").[7] The Court had three reasons for choosing the factual course, the first of which is the very wording of Article 54 CISA. The use of the words "same acts" refer "only to the nature of the acts in dispute", and *not* (unlike the term "offence" in other treaties, such as Article 4 of the 7th Protocol to the ECHR) to the legal classification of the acts.[8] Secondly, the Court pointed out that the application of Article 54 CISA has not been made conditional upon harmonization or approximation, of national criminal laws; for that reason, the Court found that divergent legal classifications as well as divergence in the protected legal interests are no obstacles to the application of Article 54 CISA.[9] Thirdly and lastly, the Court recalled the Schengen context in which the CISA has been adopted and the objective of Article 54 therein, which is to ensure that the exercise of free

4 By envisaging protection against *bis in idem* within the EU, Article 54 CISA, like article 50 CFR, offers a much wider scope of protection than Article 4 of the 7th Protocol to the ECHR does, under which the *ne bis in idem* principle only applies within "the jurisdiction of the same State".

5 CJEU 9 March 2006, case C-436/04 (*Van Esbroeck*), ECLI:EU:C:2006:165, para. 36–38.

6 *Idem*, para. 42 (dictum).

7 *Idem*, para. 37. *See*, similarly, in CJEU 28 September 2006, C-150/05 (*Van Straaten*), ECLI:EU:C:2006:614, para. 51.

8 *Idem*, paras 27–28.

9 *Idem*, paras 29–32.

movement rights should not have the effect of triggering prosecutorial actions for the same facts in multiple jurisdictions—yet another reason why the Court held that criteria based on legal qualifications (classification or protected legal interest) cannot be accepted; they would "create as many barriers to freedom of movement within the Schengen territory as there are penal systems in the Contracting States".[10]

The factual approach, taken in *Van Esbroeck*, was soon also adopted by the European Court of Human Rights (ECtHR) in the 2009 case of *Zolothukin*—and held onto ever since.[11] In CJEU case law too, it has been confirmed multiple times now, up until recently.[12] The CJEU body of CJEU case law does include judgments on the concept of *idem* under the scope of *other* EU-level codifications of the *ne bis in idem* principle, such as Article 50 CFR and Article 3(2) of the Framework Decision on the European Arrest Warrant.[13] Indeed, the Court has consciously applied a uniform interpretation of the *ne bis in idem* principle in EU law.[14]

2.1 *The Irrelevance of Legal Aspects for the Assessment of Idem*

Over time, the Court now and then slightly altered (e.g. lengthened) the precise formulation of its definition of the *idem* condition. For instance, as from its judgment in the *bPost* case in 2002, the Court has explicitly mentioned that for the assessment of the identity of the acts, the mere similarity of

10 *Idem*, paras 33–35.

11 ECtHR (Grand Chamber) 10 February 2009, appl. no. 14939/03 (*Zolothukin v. Russia*), ECLI:CE:ECHR:2009:0210JUD001493903, para. 84.

12 CJEU 11 September 2025, case C-802/23 (*MSIG*), ECLI:EU:C:2025:688.

13 Article 3(2) FD EAW dictates that surrender is refused if the requested person has already been finally judged by an EU Member State for the same act that underlies the pending European arrest warrant.

14 On the relationship between Article 54 CISA and Article 50 CFR, the CJEU ruled that the former must be interpreted in light of the latter (and limitations in the former, such as Article 54 CISA's 'enforcement condition' constitutes a limitation of the *ne bis in idem* principle that is compatible with Article 50 CFR in the sense of Article 52(1) CFR). *See*, *inter alia*, CJEU 29 June 2016, C-486/14 (*Kossowski*), ECLI:EU:C:2016:483; CJEU 27 May 2014, C-129/14 (*Spasic*), ECLI:EU:C:2014:586. Moreover, on the relationship between these two provisions on the one hand and *ne bis in idem*-related provisions (refusal grounds) in FD EAW on the other hand, the Court held that the interpretation of 'the same acts' given in the context of the former, equally applies in the context of the latter, because the concept of 'same acts' is an autonomous concept of EU law. See CJEU 16 November 2010, Case C-261/09 (*Mantello*), ECLI:EU:C:2010:683; CJEU 29 April 2021, C-665/20 (*X*), ECLI:EU:C:2021:339; CJEU 21 September 2023, C-164/22 (*Juan*), ECLI:EU:C:2023:684.

acts will not suffice; the acts must be "identical".[15] The Court's approach nevertheless remained a clear factual one. For the purpose of this contribution, it is particularly relevant to underline that, since the *Van Esbroeck* case, the Court has repeatedly found, in rather explicit terms, that for the assessment of the identity of the acts, the legal classification as well as the protected legal interest are not relevant. The most common wordings in this regard, one of which was repeated again in the Court's newest judgment on *idem*, read (partly paraphrased, partly cited) that the *idem* condition refers "only to the nature of the acts irrespective of the legal classification given to them or the legal interest protected"[16] or that "the legal classification, under national law, of the facts and the legal interest protected are not relevant for the purposes of establishing the existence of the same offence".[17]

With such wording the Court strongly suggests that it is not permitted to rely on considerations based on the *legal aspects* of the acts in dispute, at least insofar these legal aspects concern the classification of the acts (such as the classification of an act as a misdemeanor or a felony) and the legal interest that the acts aim to protect (for instance, an act may raise criminal liability under a traffic crime act serving the protection of road traffic safety whereas the same act may also raise criminal liability under another criminal prohibition serving the protection of physical integrity).

3 The Application of the CJEU Framework on *Idem* by the Dutch Supreme Court[18]

Under the Dutch *ne bis in idem* rule (since 1886 laid down in Article 68 of the Dutch Penal Code (DPC)), the precise interpretation of the *idem* component

15 CJEU 22 March 2022, C-117/20 (*Bpost*), ECLI:EU:C:2022:202, para. 36; repeated thereafter in i.a. CJEU 23 March 2023, C-365/21 (*Generalstaatsanwaltschaft Bamberg*), ECLI:EU:C:2023:236, para. 37; and CJEU 21 September 2023, C-164/22 (*Juan*), ECLI:EU:C:2023:684, paras 31–33.

16 CJEU *MSIG*, n. 12, para. 40, see the same in previous judgments, such as *inter alia* CJEU *Van Esbroeck*, n. 5, para. 42; CJEU *Van Straaten*, n. 7, para. 53; CJEU *X*, n. 14, para. 71. *See*, for a similar wording, also CJEU *Juan*, n. 14, para. 37 ("irrespective of their classification in national law").

17 CJEU *Menci*, n. 2, para. 36, CJEU 2 September 2021, C-790/19 (*LG and MH*), ECLI:EU:C:2021:661, para. 80; CJEU *Bpost*, n. 15, para. 34; CJEU 29 April 2022, C-151/20 (*Nordzucker*), ECLI:EU:C:2022:203, para. 39. See for a similar wording also CJEU 18 July 2007, C-288/05 (*Kretzinger*), ECLI:EU:C:2007:441, para. 34 ("considerations based on the legal interest protect are not to be deemed relevant").

18 This section is based on, and further builds on, two previous publications, both in Dutch: J.W. Ouwerkerk, 'Het feitsbegrip bij *ne bis in idem* en eendaadse samenloop: Tussen

has throughout the years been subject to changes.[19] Ever since the sixties, however, it is standing case law of the Dutch Supreme Court that for the assessment of whether the acts in dispute constitute the same acts, both factual and legal aspects have to be considered.[20] With regard to legal aspects, particularly relevant are the legal interests that the applicable criminal prohibitions aim to protect as well as the maximum penalties for these offences—the latter because such maxima reflect both the nature of the criminalised acts and their classification as either felonies or misdemeanors.[21]

The aforementioned evolution of CJEU case law (as well as ECtHR case law, which is not binding The Netherlands though[22]) did trigger the DSC in 2011 to revisit its combined factual-legal standard of interpretation, but it resulted in the conclusion—upheld ever since—that European case-law does not give ground for any change or alternation. This is based on the twofold argumentation that the application of the combined standard in Dutch criminal law cannot be said to put too much emphasis on the consideration of *legal* aspects, whereas the criteria used in European case law (such as the criterion

nationale uitlegging en internationale verplichtingen', 42 *Delikt en Delinkwent* (2012) 490–507; and J.W. Ouwerkerk, 'Het feitsbegrip bij ne bis in idem opnieuw bekeken', 53 *Delikt en Delinkwent* (2023) 625–635.

19 The provision of Article 68 DPC reads as follows:

(1) Behoudens de gevallen waarin rechterlijke uitspraken voor herziening vatbaar zijn, kan niemand andermaal worden vervolgd wegens een feit waarover te zijnen aanzien bij gewijsde van de rechter in Nederland, Aruba, Curaçao, Sint Maarten of de openbare lichamen Bonaire, Sint Eustatius en Saba onherroepelijk is beslist.

(2) Is het gewijsde afkomstig van een andere rechter, dan heeft tegen dezelfde persoon wegens hetzelfde feit geen vervolging plaats in geval van:

a. 1°.vrijspraak of ontslag van rechtsvervolging;

(3) 2°.veroordeling, indien een straf is opgelegd, gevolgd door gehele uitvoering, gratie of verjaring der straf.

(4) Niemand kan worden vervolgd wegens een feit dat te zijnen aanzien in een vreemde staat onherroepelijk is afgedaan door de voldoening aan een voorwaarde, door de bevoegde autoriteit gesteld ter voorkoming van strafvervolging.

20 Extensive overviews of developments in Dutch case law on the matter of *idem*, can for instance be found in (only in Dutch) W.F. van Hattum, *Non bis in idem. De ontwikkeling van een beginsel* (Nijmegen: Wolf Legal Publishers, 2012) pp. 494–505; and A.A. Franken, *'Hetzelfde feit'. Over samenloop van strafbare feiten en het non bis in idem-beginsel* (Nijmegen: Ars Aequi Libri, 1994) pp. 47–54. For a rather concise overview (also in Dutch), see Ouwerkerk (2012), *supra* note 18, pp. 490–491.

21 Hoge Raad 1 February 2011, ECLI:NL:HR:BM9102, para. 2.9.1.

22 The Netherlands has not ratified the 7th Protocol to the ECHR. ECtHR case law regarding the application and interpretation of Article 4 of this Protocol is nevertheless considered potentially relevant, see *supra* note 23, para. 2.7.1.

'inextricably linked' in CJEU case law) could not be regarded as solely factual either.[23] Therewith, the DSC suggests that the criterion developed in CJEU case law does permit national courts to somehow include *legal* aspects in the assessment of the *idem* condition. It concerns an explanation that very well fits the viewpoint defended by the DSC that the outcomes of a mere factual interpretation of the *idem* condition can be unacceptable (*"kan leiden tot onaanvaardbare uitkomsten"*), hence why it states that it had good reasons at the time to abandon such a pure factual interpretation.[24]

Of particular interest is the DSC's statement, paraphrased above, that the combined standard of interpretation cannot be considered a standard that places too much emphasis on the legal aspects of acts[25]—for at the same time it follows that a considerable difference in the legal nature of the acts and/or behaviours in dispute *can* suffice the conclusion that the acts are not the same. The latter has even been qualified as a general rule or guideline (*"vuistregel"*) for the assessment of the *idem* condition,[26] which for me has been the main reason to argue that to the extent the matters falls within the scope of EU law, the Dutch combined standard of interpretation fails to comply with CJEU case law (see Section 3).[27]

In order to demonstrate the impact of applying the combined standard of interpretation in criminal proceedings *stricto sensu*—and in that regard the impact of enabling legal aspects to play a decisive role—the following discusses four illustrative DSC judgments since 2011. These judgments have been chosen for their illustrative force, and not necessarily for the applicability of Article 54 CISA or Article 50 CFR on the acts/offences at issue in these cases. As a consequence of the DSC's explicit verdict that CJEU case law on the *idem*

23 Hoge Raad 1 February 2011, ECLI:NL:HR:BM9102, para. 8.2 (in Dutch: "Van de Nederlandse maatstaf kan immers niet worden gezegd dat deze teveel nadruk legt op de toetsing van juridische elementen [...], terwijl deze maatstaf voldoende ruimte laat aan wat wel wordt aangeduid als de feitelijke component. Daarbij verdient opmerking dat ook de criteria die in de Europese rechtspraak worden gehanteerd, ('onlosmakelijk met elkaar verbonden' onderscheidenlijk 'facts which are substantially the same'), niet als louter feitelijk kunnen worden aangemerkt").

24 Idem (in Dutch: "...en dat de Hoge Raad van oordeel is dat in de Nederlandse rechtspraak destijds op goede gronden afstand is genomen van een louter feitelijk criterium omdat het aanleggen van zo'n maatstaf kan leiden tot onaanvaardbare uitkomsten").

25 *Supra* note 23.

26 Hoge Raad 1 February 2011, ECLI:NL:HR:BM9102, para. 2.9.2 (in Dutch: "Vuistregel is nochtans dat een aanzienlijk verschil in de juridische aard van de feiten en/of in de gedragingen tot de slotsom kan leiden dat geen sprake is van "hetzelfde feit" in de zin van art. 68 Sr").

27 Ouwerkerk (2023), *supra* note 18, pp. 631–632.

component did not require a modification of the combined standard of interpretation that Dutch criminal courts have been applying for decades, the assessment of *idem* in Dutch criminal law is based on a uniform standard, irrespective of whether the EU *ne bis in idem* framework applies, or merely the domestic one—hence why also cases falling outside the scope of EU law are illustrative of the practical impact of including legal aspects. They should, however, not be taken as to suggest that the CJEU standard applies, or should apply, to each and every domestic criminal case.

Further good to mention is the following. While three of the rulings summarised below have arisen from typical *ne bis in idem* situations of second, non-concurrent criminal proceedings for acts that are asserted to be *the same acts*, in one judgment an assessment of *idem* was required for a different reason, namely to determine whether the original indictment could be amended. Under Article 313 of the Dutch Code of Criminal Procedure (DCCP). Such an amendment is solely permitted if after amendment the criminal charge still concerns the same act(s); this is a question of frequent occurrence as to which the law stipulates application of the same standard of interpretation as applicable under the Dutch *ne bis in idem* rule (Article 313(2) DCCP). Therefore, its inclusion in the account below contributes to a sound picture of DSC case law on the *idem* condition.

3.1 *The Role of Legal Aspects in the Assessment of Idem in Dutch Criminal Courts*

The circumstance that in Dutch criminal law, the legal aspects of acts can play a decisive role in the assessment of the *idem* condition is indeed evident from various DSC judgments. One of these judgments was handed down in 2012, not long after the key ruling in 2011.[28] Against the defendant in this case, criminal proceedings had been initiated because, allegedly, he intentionally hit a police officer while driving on a moped at high speed. The original charge on the indictment constituted the offence of an attempted intentional aggravated assault, alternatively intentional common assault (both are crimes under the DPC). In cassation, the question at dispute was whether the original indictment had on appeal rightly been amended by adding two other alternative charges, namely the offences of aggravated injury caused by negligence, and dangerous driving (both are crimes under the Road Traffic Act 1994, (Wegenverkeerswet 1994)).[29] As mentioned before, under applicable rules of criminal procedure, such an amendment is only permitted if after

28 *Supra* note 23.

29 Hoge Raad 6 March 2012, ECLI:NL:HR:2012:BS1716, paras 2.2.1–2.2.2.

amendment the charges still constitute the same act. Whereas this was apparently held to be the case on appeal, the DSC ruled otherwise—and it did so based on merely legal aspects: Because there is such a big difference between both the legal interests protected through the criminal prohibitions concerned, and the maximum penalties for the acts prohibited therein, it was held that the acts at dispute cannot be considered the same acts.[30] Consequently, the prosecutor's request to amend the original indictment should not have been granted in the previous instance.

In the context of this very case, the result can be seen as to the defendant's benefit. Would, however, the same criminal law provisions be relied on in a typical *ne bis in idem* situation—i.e. with non-concurrent, multiple criminal proceedings—the reverse applies. Such a decisive role for legal aspects would then have had the result that an earlier final conviction or acquittal for the crimes under the DPC would not protect the same defendant against another criminal prosecution for the crimes under the Road Traffic Act. And if anyone is wondering whether such a course of action would actually be taken in practice, the answer is yes. This can be inferred from yet another DSC ruling in 2012, in which the alleged conduct took place in traffic as well.[31] On the highway, the defendant allegedly drove his motor vehicle erratically before another motor vehicle, then stopped his car and got out of his car, forcing the driver in the motor vehicle behind him to stop, after which he spoke to this driver in a threatening manner. In the first criminal proceedings, the defendant was charged with the crime of threat (criminalised as a felony under the DPC). Following his final acquittal, a new criminal prosecution was initiated against him, again in relation to the circumstances set out above. This time, charges were based on the criminal prohibition of dangerous driving (a misdemeanour under the Road Traffic Act 1994)—and this time, the defendant was convicted. On appeal, defence unsuccessfully objected that these second criminal proceedings were a violation of the *ne bis in idem* principle, whereafter the same objection was submitted in cassation. In its reasoning the Amsterdam Court of Appeal had given stronger weight to the differing legal nature of the crimes at hand, at the expense of its very recognition that the set of circumstances underlying both successive criminal proceedings did occur at the same time and place. After all, it pointed out that the *rationale* of the

30 *Idem*, para. 2.4 (in Dutch: "In het onderhavige geval is zowel het verschil in de rechtsgoederen ter bescherming waarvan de onderscheiden delictsomschrijvingen strekken als het verschil in de strafmaxima die op de onderscheiden feiten zijn gesteld, dermate groot dat geen sprake kan zijn van 'hetzelfde' feit in de zin van art. 68 Sr").

31 Hoge Raad 25 September 2012, ECLI:NL:HR:2012:BX5012.

criminal prohibition relied on in the earlier criminal proceedings (the crime of threat, Article 285(1) DPC) is "completely different" from the *rationale* of the one relied on in the second criminal proceedings (dangerous driving, Article 5 Road Traffic Act 1994): While the first constitutes a crime against individual liberty, the second aims to promote something entirely different, namely road traffic safety.[32] For the court, this sufficed to conclude that the initiation of the second prosecution did not violate the *ne bis in idem* principle. Since this was in accordance with standing case law, it cannot surprise that the DSC confirmed the judgment in appeal. In doing so, it added that in the case at hand there is yet another legal aspect as to which both offences differ significantly, i.e. the maximum penalties that can be imposed: at the time maximum two years imprisonment or a 4th category fine for the felony of threat *versus* only two months of police custody and a 2nd category fine for the misdemeanor of dangerous driving.

Both these rulings exemplify the aforementioned general jurisprudential rule that a considerable difference in the legal nature of the acts and/or behaviours in dispute can suffice to draw the conclusion that the *idem* condition is not fulfilled.[33] Legal aspects (i.e. protected legal interests and applicable maximum penalties) clearly dominate the assessment of the *idem* condition in these cases. They are the starting point—and because in both cases the legal nature of the acts appears to considerably diverge, the potential factual identity of these acts is no longer relevant at all.

In line with that, it seems to be that under the combined standard of interpretation, an assessment of factual identity only has to take place once it has first been established that the legal nature of the acts in dispute are not considerably divergent, or do not diverge at all, such as in a 2023 DSC judgment.[34] The underlying case revolved about a person driving in a car when he got apprehended by the police; thereupon, the police investigated the car and found a built-in hidden compartment containing 5 kilos cocaine. Prior to the case that led to the judgment of 2023, the person involved had already been convicted for his role in these acts that were then qualified as preparation of the intentional transportation of cocaine, in fact through the

32 *Idem*; para. 2.3 cites the court's reasoning (in Dutch: "[d]e ratio van beide strafbaarstellingen is geheel verschillend: artikel 285, lid 1, van het Wetboek van Strafrecht betreft een misdrijf tegen de vrijheid en beschermt een ander belang dan de strafbaarstelling van verkeersgevaarlijk gedrag in artikel 5 van de Wegenverkeerswet 1994, welke strafbaarstelling strekt tot het bevorderen van de veiligheid op de weg").

33 *Supra* note 26.

34 Hoge Raad 14 November 2023, ECLI:NL:HR:2023:1559.

possession of a car with a built-in hidden compartment. After the conviction became final, a new prosecution was initiated against him in relation to the same set of facts as described above, although this time he was charged with the intentional transportation of 5 kilo cocaine, namely the amount of cocaine that was found in the aforementioned hidden compartment of the car in which the suspect was driving when he got apprehended.

It is clear from the outset that the legal nature of the acts that underlie both the first and the second prosecution, which both constitute crimes under the Opium Act (*Opiumwet*), are not considerably divergent. This was also recognised on appeal[35]—and as it seems, it is for that reason that the remaining assessment of *idem* had to be made on the basis of the *factual* identity of both acts.[36] Because both charges were based on the previously described set of facts that took place at the same time and place, it made the DSC (settling the matter in cassation) rule that both instances concerned the same fact, for which reason it held the second prosecution inadmissible. Earlier DSC judgments support the suggested inference that in Dutch criminal law factual aspects only need to be assessed if the legal nature of the acts in dispute appears undecisive.[37]

A particular category of criminal cases in which *idem* issues easily arise concern those in which suspects are prosecuted for, on the one hand, their alleged participation in a criminal organisation and, on the other hand, their alleged commission of one or more of the individual crimes committed in the context of this organisation. Obviously, the preferred course of action in such cases is parallel prosecution, which facilitates proportionate sentencing under the concepts of *concursus realis* and *concursus idealis*. Would their prosecution nonetheless be separated, it can, according to the DSC, raise an issue under the *ne bis in idem* principle.[38] But how in such cases the combined standard of interpretation for the assessment of *idem* has to be applied according to the DSC is not as straightforward as in cases such as those described above. This can be illustrated with a judgement from 2021. Based on the DSC reasoning in this judgment, it appears that for the DSC it matters

35 *Idem*, para. 2.7. See also the decision on appeal: Court of Appeal Amsterdam 23 September 2021, ECLI:NL:GHAMS:2021:2798.

36 *Idem*.

37 Hoge Raad 26 April 2012, ECLI:NL:HR:2012:BZ8645; Hoge Raad 16 December 2014, ECLI:NL:HR:2014:3636.

38 Hoge Raad 20 June 2017, ECLI:NL:HR:2017:1113, para. 3.6. This consideration has in fact been made superfluously, for in the case at hand both crimes were prosecuted concurrently (the suspect was charged with cannabis production as well as with participation in a criminal organisation that intends to commit such crimes).

what comes first, and what comes second. Would the first action comprise that the suspect is charged with participation in a criminal organisation and the subsequent second action a charge of an individual crime, committed in connection with the first charge, it *can* raise an issue under the *ne bis in idem* principle. More precisely, would the first action comprise that the suspect is charged with participation in a criminal organisation intended to commit crime X, while his alleged participation does explicitly (also) consist of his commission of a specific crime falling under the category of crime X, the DSC states that to subsequently charge the same suspect with the commission of that very specific crime, is essentially at odds with the *ne bis in idem* principle.[39]

This is, however, not necessarily also the case if prosecutorial actions follow the reverse order, like in the very case underlying the 2021 DSC ruling. Here, the first action against the defendant took place in Germany and was based on his failure to pay, as an employer, social security contributions (which resulted in the illegal employment of Polish and Hungarian workers). After his final conviction for this crime, the defendant became subjected to criminal proceedings in The Netherlands, for his alleged participation in a criminal organisation—operating in both Germany and The Netherlands—of which the conduct for which he had been convicted in Germany, formed part. To the extent to which the prosecution in The Netherlands concerned this latter act, the question arose whether this would amount to a second prosecution for the same act and hence violate the *ne bis in idem* principle. The DSC ruled in the negative: for establishing a violation of *ne bis in idem* in such cases, it held required that the participation in the criminal organisation fully encompasses the specific crime(s) for which the suspect had been tried previously—something which, indeed, will hardly ever be the case.[40]

The question has been raised whether the DSC reasoning fully corresponds with the approach communicated in standing case law, in which a considerable difference in legal aspects usually leads to the conclusion that the acts in dispute are not the same. After all, such a considerable difference is not

39 Hoge Raad 23 March 2021, ECLI:NL:HR:2021:387 para. 3.3.1.

40 Idem, para. 3.3.2 (in Dutch: "Wanneer, zoals in het onderhavige geval, de eerste vervolging betrekking heeft op het door de verdachte begaan zijn van een concreet delict en de tweede vervolging het deelnemen aan een criminele organisatie betreft, staat het ne bis in idem-beginsel in de weg aan die latere vervolging voor het deelnemen aan een criminele organisatie als die deelneming van de verdachte op niets anders betrekking heeft dan het begaan van het concrete delict waarvoor de verdachte al is vervolgd. Het begaan van een concreet delict zal echter slechts in uitzonderlijke gevallen de deelneming aan een criminele organisatie geheel omvatten").

hard to establish if one of the charges concerns participation in a criminal organisation;[41] despite the fact that there will always be a connection with a concrete type of crime, the very criminalisation of participation in a criminal organisation can easily be argued to protect the self-standing legal interest of public order, or more specifically, the legal interest of safeguarding societies from the general dangers criminal organisations pose.[42]

That, nonetheless, this approach should, according to the DSC, *no*t be followed in the first situation described above (i.e. the specific one in which the first prosecution concerns participation in a criminal organisation, whereas the second prosecution concerns individual crimes committed in the context of that organisation), suggests that in such a situation factual aspects, in principle, ought to outweigh legal aspects. With regard to the second situation (first prosecution for individual crime, second prosecution for participation in a criminal organisation in the context of which the previously established individual crime has been committed too), the ruling in 2021 suggests an emphasis on factual aspects either—though this time not for principled reasons, but just because the second prosecution partly comprises other factual behaviours.[43] Whether and to what extent these suggested interpretations are correct remains however uncertain, due to a lack of explicit motivation by the DSC on how its argumentation relates to its previous case law on *idem*—and on whether, and if so why, it chose to deviate from it in its 2021 ruling.

4 Does the Dutch Supreme Court Get It Wrong?

It follows from the previous section that in Dutch criminal law the assessment of the identity of acts under the *ne bis in idem* principle—irrespective of whether the case falls within the scope of EU law—considers both the factual and the legal aspects of the acts at issue. Moreover, case law from the DSC shows that legal aspects can have a dominant or even decisive role therein, compliant with the general rule it developed that a considerable difference in

41 *See* J.H. Crijns in his annotation on the discussed judgment, *NJ* 2022/308, para. 4.

42 J.M. ten Voorde, *Tekst & Commentaar Strafrecht*, commentary on Article 140 DPC (criminalisation of participation in a criminal organisation), note 6 (available in Dutch only).

43 This is supported by the argument that “Article 140 (DPC, JO) does not require more to prove than that the organisation had the intention to commit crimes” (my translation of: “terwijl artikel 140 Sr ook niet meer eist dan dat de organisatie het oogmerk heeft misdrijven te plegen”), Hoge Raad 23 March 2021, ECLI:NL:HR:2021:387 para. 3.3.2.

the legal nature of the acts and/or behaviours in dispute *can* suffice the conclusion that the acts are not the same. The previous section also demonstrates which repercussions this may have for finally acquitted or convicted persons—at least in cases where the connection between the acts in dispute is not based on the existence of a criminal organisation in which the suspect has allegedly been active; in such cases, the picture appears less clear.

In Dutch legal scholarship it has been debated for some time whether and to what extent the combined standard of interpretation complies with CJEU case law, naturally insofar as applied in Dutch criminal cases that fall under the protection of the EU *ne bis in idem* rule. Opinions diverge.

Those who defend the viewpoint that the Dutch standard of interpretation *fails* to comply with CJEU case law—this is where I belong to—have been pointing out, above all, that the significant role for legal aspects, potentially even to a decisive extent, are at odds with the factual approach that is central to the CJEU definition of the *idem* component. They believe it is impossible to ignore the explicitly declared irrelevance of legal aspects in the Court's case law (see Section 2.1)[44]—not least because, according to some, the mere factual approach best satisfies the protective aim of the fundamental *ne bis in idem* rule.[45] It seems to me that the first two DSC judgments presented in Section 3.1, can be regarded as sufficiently illustrative.

Among those who, on the contrary, believe that the CJEU framework *does* permit the consideration of legal aspects, two main arguments have been put forward. The first argument basically entails a different reading of both CJEU and ECtHR case law on the matter, in particular of the terms "inextricable linked" (CJEU) and "facts which are substantially the same" (ECtHR). After all, an assessment of whether the acts or events must be considered inextricably linked or substantially the same, would rely on the charges as formulated on the relevant indictments—and because these charges are usually presented in wordings that reflect those of the applicable criminal prohibitions, legal aspects would inevitably resonate in what is being presented as fact(s).[46] If I am correct, this argument is mirrored in one of the considerations of the Spanish

44 Y. Buruma, annotation on Hoge Raad 1 February 2011, ECLI:NL:HR:2011:BM9102, *NJ* 2011/394; J.M. Reijntjes, annotation on Hoge Raad 6 March 2012, ECLI:NL:HR:2012:BS1716, *NJ* 2012/448; Ouwerkerk (2012, 2023), *supra* note 18.

45 Y. Buruma, annotation on ECtHR (Grand Chamber) 10 February 2009, appl. no. 14939/03 (*Zolothukin v. Russia*), ECLI:CE:ECHR:2009:0210JUD001493903, *NJ* 2010/36; Ouwerkerk (2012), *supra* note 18, p. 502; Ouwerkerk (2023), *supra* note 18, p. 635.

46 F.C.W. de Graaf, *Meervoudige aansprakelijkstelling*, Boomjuridisch 2018, p. 265; M.J. Borgers, annotation on Hoge Raad 25 September 2012, ECLI:NL:HR:2012:BX5012, *NJ* 2013/176, para. 6.

referring court in the *MSIG* case (although this court suggests a reliance of previous judgments instead of indictments):

> [T]he referring court raises the question of how the concept of 'act' is to be understood for the purposes of assessing the principle *ne bis in idem*, in particular in light of the different ways in which 'acts' are presented in judgments delivered in the Member States. That concept could relate solely to the occurrence of an event, disconnected from its legal classification, or could be regarded as having legal content and as relating, not to an objective act, but to its connection to one of the existing criminal classifications or to the qualified legal act.[47]

In its judgment in the *MSIG* case the Court did not address this issue explicitly, perhaps because it was strictly not required to do so under the wording and the content of the four preliminary questions that were eventually presented.[48] It is nevertheless worth mentioning that it has clarified in the meantime that the assessment of *idem* requires more than the mere consideration/comparison of indictments or judgments. As follows from the 2023 judgment in the case of *INTER CONSULTING* (and it has been repeated in *MSIG*), in addition to the "facts cited in the enacting terms of the indictment [...] and in the operative part of the final judgment delivered" (to be understood as the previously delivered judgment, JO), the assessment also needs to take into consideration

> "[t]he facts cited in the grounds of that judgment, including those that were the subject of the preliminary investigation, but which were not included in the indictment, and all relevant information concerning the *material acts* covered by previous criminal proceedings" (italics added).[49]

This wording may not fully clarify to what extent a possible resonation of legal aspects in indictments, judgment and other relevant documentation makes it inevitable—hence perhaps admissible—to include legal aspects in the assessment of the *idem* condition, although in my view the opposite is suggested by the the Court's use of the words "material acts". Further contributing to

47 CJEU (*MSIG*), n. 3, para. 21.

48 *Idem*, para. 24.

49 CJEU 12 October 2023, C-726/21 (*INTER CONSULTING*), ECLI:EU:C:2023 :764, para. 85; see also CJEU (*MSIG*), *supra* note 3, para. 52.

such a reading is that in CJEU case law in the area of competition law, it has explicitly been held admissible to consider, when assessing the *idem* condition, a particular legal aspect, namely the legal qualification under national law.[50] It seems to me an additional contraindication to the truth of the reading set out above, in which CJEU case law in the area of criminal law would also permit consideration of legal aspects.[51]

A second argument to claim that CJEU case law does not entirely exclude the consideration of legal aspects for the assessment of *idem* implies that the CJEU judgments on *idem* must be understood against the background of the cross-border context for which Article 54 CISA had been designed—a context that indeed fits the facts of the large majority of cases that have been referred to the CJEU for preliminary rulings on issues with regard to the *idem* condition. It has therefore been doubted whether the same factual approach would be applied to cases within the legal order of one and the same Member State, and to cases in which the acts at issue would differ to a much larger extent than the facts that so far had been in dispute (the argument was made in 2018).[52] While it is true that such latter cases have still not been submitted to the CJEU, the core of the argument must in my view be considered outdated since the Court's confirmation in *Menci* that the Article 54 CISA-based interpretation of the *idem* condition equally applies to the *idem* condition of Article 50 CFR, which in fact had been designed to protect citizens against double prosecution for the same act in the *Union*, whether in a cross-border or domestic context.

Whichever scholarly interpretation is correct, the DSC firmly maintains the combined standard of interpretation for the assessment of the *idem* component, also in cases that fall under the scope of protection offered by Article 50 CFR. Arguments that have repeatedly been put forward (also under reference to CJEU case law) in favour of the adoption of a (stronger) factual approach, have apparently not been considered convincing by the DSC—possibly for the right reasons, possibly wrongly.

50 *See*, *inter alia*, CJEU 14 February 2012, C-17/10 (*Toshiba*), ECLI:EU:C:2012:72, para. 97. The inconsistency this has caused in relation to the approach in criminal law, has raised critique, *see*, e.g., Luchtman (2018), *supra* note 1, pp. 1724–1725.

51 *Cf.*, Ouwerkerk (2023), *supra* note 18, p. 632.

52 De Graaf (2018), *supra* note 46, p. 268.

5 A Not so Helpful Loophole in CJEU Case Law (Which Also May be no Loophole at All)

It remains to be seen whether the most recent CJEU case law can provide the perspicuity that some may desire. In fact, the impression is that slightly more ambiguity has been created regarding the extent to which legal aspects may or may not be considered in the assessment of the identity of acts. True, since the *Van Esbroeck* case onwards, the CJEU has repeatedly and explicitly ruled that for the assessment of the identity of the acts, their legal classification as well as the legal interest they protect, are not relevant. In some of its other judgments, however, the Court's wording could be interpreted as reflecting a less unambiguous approach to the consideration of legal aspects in assessing the identity of the acts. Already in the very *Van Esbroeck* case, the Court stated that "a divergent legal classification of the same act in two different Contracting States is *no obstacle* to the application of Article 54 of the CISA" (italics added)—a formulation that was soon thereafter repeated in the 2007 *Kraaijenbrink* judgment.[53] If I am correct, the same wording has not been relied on by the Court since 2007. However, in the 2025 *MSIG* case, similar words with a similar level of ambiguity were chosen when the Court held that "the possibility of divergent legal classifications of the same acts [...] or even the pursuit of different legal interests in those States cannot preclude the application of the principle *ne bis in idem*".[54] In the meantime a different, though also ambiguous choice of words featured in the 2023 *Juan* judgment case, where the Court stated that for establishing the existence of the same acts, it is not necessary ("without it being necessary") to "take account of the classification of the offences in question under the law of the executing Member State".[55]

Such formulations can be taken as leaving some room for the consideration of legal aspects when assessing the identity of acts under the *ne bis in idem* principle. The absence, however, of any elucidation on the reason for using additional formulations in *Juan* and *MSIG*, complicates the assessment of the (potential) significance of these formulations—and hence of the sustainability of national-level interpretations of *idem* in which legal aspects are consciously taken into account, such as in Dutch criminal courts.

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53 CJEU *Van Esbroeck*, *supra* note 5, para. 31; CJEU 18 July 2007, C-367/05 (*Kraaijenbrink*), ECLI:EU:C:2007:444, para. 23.

54 CJEU *MSIG*, *supra* note 3, para. 41.

55 CJEU *Juan*, *supra* note 14, para. 38.

6 Final Remarks

True, it is not solely the *idem* component that determines the precise scope of protection under EU-level *ne bis in idem* rules. Once it is established that the acts in dispute must be considered identical, parallel administrative action and criminal prosecution are not as such ruled out under CJEU case law, provided that certain conditions are met.[56] In purely criminal cases, however, the identity of acts does create an obstacle for a second criminal prosecution. Therefore, it must be crystal clear how the identity of acts has to be established—and in particular whether for the assessment of the identity of acts it is permitted to also consider *legal* aspects, a viewpoint that the Dutch Supreme Court adheres to. To enhance legal clarity (in the Dutch legal order and beyond) and to advance the uniform interpretation and application of Union law, it would be good and helpful if future CJEU case law on the *idem* condition in the criminal law context could provide for further guidance on this particular point.

Jannemieke Ouwerkerk | ORCID: 0000-0002-1381-1449
Institute of Criminal Law and Criminology, Leiden University, PO Box 9520, 2300 RA Leiden, The Netherlands
j.w.ouwerkerk@law.leidenuniv.nl

56 *See supra*, note 2.