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The *Ne Bis in Idem* Principle in the Interpretation of European Courts: Towards Uniform Interpretation

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Abstract
As a result of the extension of the jurisdiction of the Court of Justice of the European Union over the former third pillar (Police and Judicial Cooperation in Criminal Matters), several cases were referred to the Court for interpretation, inter alia, of the dispositions of the Schengen Convention dealing with criminal matters, especially the *ne bis in idem* principle. This principle was also addressed in the case law of the European Court of Human Rights, the Inter-American Court of Human Rights, and the Supreme Court of the United States. While addressing the problem at international level, this article focuses principally on the case law of the Court of Justice of the European Union and the European Court of Human Rights in the field of the *ne bis in idem* principle, concisely presenting the legal framework, findings of the Courts, and some conclusions on the interpretation of the principle. The study also analyses the absence of uniformity in interpretation and the use of different criteria in addressing identical situations by different courts, or even by the same court, concluding on a (seemingly) fortunate approximation in interpretation at European level.

Key words
Court of Justice of the European Union; European Court of Human Rights; *ne bis in idem*

1. Introduction

1.1. The *ne bis in idem* principle – a simple rule causing many problems

In the vast majority of national and international instruments, the *ne bis in idem* principle is to be understood as a rule forbidding further prosecution/judgment/conviction for the same offence/conduct/act.

Even if it might seem simple, the principle raises a lot of questions. What do we consider to be the basis for the definition of the same/*idem*? Is it the legal definition/classification of the offences (*in abstracto*) or the set of facts (*idem factum, in concreto*)? Does it depend upon the scope of and the legal values to be protected by the legal provisions? Is the scope of the principle limited to double criminal sanctioning or does it also include other forms of punitive sanctions under private or administrative law? What is a final judgment? Does it include acquittal or dismissal of charges? What does an enforced final judgment mean? Does it also concern final settlements concluded by prosecuting or other judicial authorities out of court?

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Does respect for the *ne bis in idem* principle require a bar on further prosecution or punishment (*Erledigungsprinzip*), or can the authority imposing the second punishment take into account the first punishment (*Anrechnungsprinzip*)?[1] Does the principle imply parallel or repeated criminal proceedings for the same facts? Does the principle refer to a single national jurisdiction, or does it have an international scope?

This article attempts to answer these questions by giving a synthesis of rulings of a few federal and international courts as regards the *ne bis in idem* principle instituted in different federal or international instruments, focusing on the main points that need clarification: the concept of 'criminal penalty', the concept of 'final judgment', the notion of 'the same acts', and the meaning of 'enforcement'.

The article will show that there is an obvious lack of consensus at the international level to uniformly apply the *ne bis in idem* principle. At the same time, a tendency towards uniformization in interpretation may be found at the European level, in particular in the case law of the ECJ and ECHR. This article argues that there is a need for an autonomous meaning of the various constitutive elements of the *ne bis in idem* principle. The autonomous meaning of *ne bis in idem*, it is argued, should be applied above national standards, therefore leading to a genuine common supranational (European) understanding of the principle.

The first section examines the relevant and comparative federal and international law. Sections 2 to 5 then address the constitutive elements and the various understandings of the *ne bis in idem* principle. Section 2 examines the concept of 'criminal proceedings'; section 3 addresses the notion of 'final judgment'; section 4 analyses the concept of '*idem*'; and section 5 focuses on the notion of 'enforced penalty'. Finally, section 6 provides an analytical overview of the findings in previous sections, analyses the reasons behind the different interpretations of the *ne bis in idem* principle, and consequently discusses the advantages and disadvantages of a uniformization of the interpretation at the European level.

1.2. Same idea, but different drafting of the principle in federal and international instruments

An analysis of the legislative instruments incorporating the *ne bis in idem* principle reveals the variety of terms in which it is drafted. Thus, Article 4 of Protocol No. 7 to the European Convention of Human Rights,[2] Article 14 paragraph 7 of the

1 J. A. E. Vervaele, 'Joined cases C-187/01 and C-385/01, 'Criminal Proceedings against Hüseyin Gözütok and Klaus Brügge', Judgment of the Court of Justice of 11 February 2003, Full Court [2003] ECR 1–5689', (2004) 41 CMLR 795, at 802.

2 Article 4 of Protocol No. 7 to the European Convention of Human Rights provides 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.
3. No derogation from this Article shall be made under Article 15 of the Convention.'

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United Nations Covenant on Civil and Political Rights,[3] Article 50 of the Charter of Fundamental Rights of the European Union,[4] and the Fifth Amendment to the Constitution of the United States of America[5] refer to the 'same offence'; the American Convention on Human Rights[6] speaks of the 'same cause'; the Convention Implementing the Schengen Agreement[7] prohibits prosecution for the 'same acts'; and the Statute of the International Criminal Court[8] employs the term 'same conduct'.[9] The difference between the terms 'same acts' or 'same cause' on the one hand and the term 'same offence' on the other was held by the Court of Justice of the European Union and the Inter-American Court of Human Rights to be an important element in favour of adopting the approach based strictly on the identity of the material acts and rejecting the legal classification of such acts as irrelevant. In so finding, both tribunals emphasized that such an approach would favour the perpetrator, who would know that, once he had been found guilty and served his sentence or had been acquitted, he need not fear further prosecution for the same act.[10]

The approach is also different in respect of the scope of the principle. The International Covenant on Civil and Political Rights and the European Convention on Human Rights guarantee the right to be free from double jeopardy; however, they

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3 The *ne bis in idem* principle is drafted in Art. 14, para. 7 of the United Nations Covenant on Civil and Political Rights:
'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.'

4 According to Article 50 of the Charter of Fundamental Rights of the European Union, '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.'

5 In the United States the double-jeopardy rule arises out of the Fifth Amendment to the Constitution: 'nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb'.

6 Art. 8, para. 4 of the American Convention on Human Rights reads as follows: 'An accused person acquitted by a non-appealable judgment shall not be subjected to a new trial for the same cause.'

7 Art. 54 of the Convention Implementing the Schengen Agreement of 14 June 1985 ('the CISA') provides as follows:
'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.'

8 Art. 20 of the Statute of the International Criminal Court (2187 UNTS 90, entered into force July 1, 2002) establishes several rules regarding the principle:
'1. Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.
2. No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court.
3. No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:
(a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or
(b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.'

9 Several other European instruments expressly forbid international co-operation unless the *ne bis in idem* principle is respected. The European Convention on Extradition (1957) Art. 9, and its Second Protocol (1975), Art. 2; the European Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (1990) Art. 18(1)e; the European Convention on the International Validity of Criminal Judgments (1970), Part III, Arts. 53–5; European Convention on the Transfer of Proceedings in Criminal Matters (1972), Part V, Arts. 35–7. For a detailed analysis see A. Weyembergh, 'Le principe "ne bis in idem": Pierre d'achoppement de l'espace pénal européen?', (2004) 40 *Cahiers de droit européen* 341–2.

10 *Zolothukin v. Russia*, Decision of 10 February 2009, [2010] ECHR, at para. 79.

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do not apply to prosecutions by two different sovereigns[11] (unless the relevant extradition treaty expresses a prohibition). On the contrary, the Convention Implementing the Schengen Agreements deals only with cases in different contracting parties, while the Charter of Fundamental Rights of the European Union refers to both situations, but only when implementing European Union legislation.[12]

There are also instruments expressly forbidding the prosecution in case of a previous acquittal (the American Convention on Human Rights), conviction (the Convention Implementing the Schengen Agreements), or both (the International Covenant on Civil and Political Rights, the European Convention on Human Rights).

As we can see, the *ne bis in idem* principle is drafted under various forms in different international or federal instruments. These differences were addressed and the scope of the principle was partially extended through the interpretation of these provisions by relevant federal and international courts.

2. The concept of 'criminal proceedings' in the interpretation of courts

As a general rule, the *ne bis in idem* principle applies mainly in criminal proceedings. This means that parallel or subsequent administrative or civil proceedings regarding the same acts are not prohibited. However, at international level, there are different views of what is to be understood by 'criminal proceedings' and by their scope. Each sovereign state applies its own interpretation to this notion, according to national legislation. This is why there is a tendency in international courts' case law, especially at European level, to extend the notion of 'criminal proceedings' to other proceedings having similar effect.

Problems are to be found in the understanding of 'criminal proceedings', both in legislative drafting and in the case law. While the European Convention of Human Rights and the Charter of Fundamental Rights of the European Union expressly refer to 'criminal proceedings' as being the scope of the *ne bis in idem* principle, other instruments suggest the criminal scope of proceedings in different drafting: reference to the law and penal procedure in the United Nations Covenant on Civil and Political Rights or reference to the gravity of the penalty (in jeopardy of life or limb) in the Constitution of the United States of America, reference to being prosecuted in the Convention Implementing the Schengen Agreement, and reference to the accused person in the American Convention on Human Rights.

Although it appears that all analysed jurisdictions address criminal proceedings while imposing the *ne bis in idem* principle, the vast majority of decisions in case law do not analyse the concept, merely accepting as criminal proceedings what is considered to be criminal at national level in the legislation. The European Court of Human Rights was the only one to offer a set of criteria as to what should be

11 *A.P. v. Italy*, UN HRC CCPR/C/31/D/204/1986. See also D. Spinellis, 'Global Report: The *Ne Bis in Idem* Principle in "Global" Instruments', (2002) 73 *International Review of Penal Law* 1152.

12 See also A. J. Menéndez, 'Chartering Europe: Legal Status and Policy Implications of the Charter of Fundamental Rights of the European Union', (2002) 40 JCMS 482.

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considered criminal, trying to establish a common definition at European level, different from the ones in the domestic jurisdiction.

It appears that it is easier to establish a general rule at international level linking criminal proceedings to the national definition. This, however, is far from solving the problem of differences between national jurisdictions, in respect of what are considered to be criminal proceedings. Apart from *mala in se* offences (e.g., murder, theft, arson, rape), which are to be found in all jurisdictions (sometimes, though, in a different framing and with different constitutive elements), there are also *mala prohibita* ones, which may or may not be considered criminal offences in different jurisdictions (e.g., road traffic offences may be considered criminal or administrative offences, depending on the jurisdiction).

That is why establishing the 'Engel criteria' by the European Court of Human Rights is a bold step forward towards a uniform interpretation of the *ne bis in idem* principle in respect of the notion of 'criminal proceedings'. However, at least for the moment, the Court of Justice of the European Union is reluctant to apply the *Engel* criteria.

2.1. Punitive sanctions under private law allowed by the Supreme Court of the United States

The case law of the Supreme Court of the United States respects the general rule. Double jeopardy does not apply if the later charge is civil rather than criminal in nature, which involves a different legal standard. Acquittal in a criminal case does not prevent the defendant from being tried in a civil suit relating to the same incident (though *res judicata* operates within the civil court system). For example, O. J. Simpson was acquitted of a double homicide in a California criminal prosecution, but lost a civil wrongful death claim brought over the same victims.[13]

2.2. Extensive interpretation by the European Court of Human Rights

In the case law of the European Court of Human Rights, the legal characterization of the procedure under national law does not constitute the only relevant criterion for the applicability of the *ne bis in idem* principle. Leaving the application of this provision at the discretion of the contracting states might lead to results incompatible with the object and purpose of the Convention.[14] The Court interpreted the notion of 'penal procedure' in the context of Article 4 of Protocol No. 7 in the light of the general principles concerning the corresponding words 'criminal charge' and 'penalty' in Articles 6 and 7 of the Convention respectively.[15] Thus, the concept of a 'criminal

13 *People v. O. J. Simpson* (5 September 1995) Superior Court of the State of California, District 103, BA097211.

14 See, most recently, *Storbråten v. Norway*, Decision of 1 February 2007, [2008] ECHR, with further references.

15 See *Haarvig v. Norway*, Decision of 11 December 2007, [2008] ECHR; *Rosenquist v. Sweden*, Decision of 14 September 2004, [2005] ECHR; *Manasson v. Sweden*, Decision of 8 April 2003, [2004] ECHR; *Göktan v. France*, Decision of 2 July 2002, [2003] ECHR; *Malige v. France*, Decision of 23 September 1998, [1999] ECHR; *Nilsson v. Sweden*, Decision of 13 December 2005, [2006] ECHR.

charge' bears an 'autonomous' meaning, independent of the categorizations employed by the national legal systems of the member states.[16]

The Court's established case law set out three criteria – commonly known as the *Engel* criteria[17] – to be considered in determining whether or not there was a 'criminal charge'. The first one is the legal classification of the offence under national law, the second is the nature of the offence, and the third is the degree of severity of the penalty that the person concerned risks incurring.

The first criterion is of relative weight and serves only as a starting point. If domestic law classifies an offence as criminal, then this will be decisive. Otherwise the Court will look behind the national classification and examine the substantive reality of the procedure in question.

In evaluating the second criterion, which is considered more important,[18] the following factors can be taken into consideration: whether the legal rule in question is addressed exclusively to a specific group, or is of a generally binding character;[19] whether the proceedings are instituted by a public body with statutory powers of enforcement;[20] whether the legal rule has a punitive or deterrent purpose;[21] whether the imposition of any penalty is dependent upon a finding of guilt;[22] how comparable procedures are classified in other Council of Europe member states.[23] The fact that an offence does not give rise to a criminal record may be relevant, but is not decisive, since it is usually a reflection of the domestic classification.[24]

The third criterion is determined by reference to the maximum potential penalty which the relevant law provides for.[25] 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.[26]

Thus, in the court's interpretation, an administrative penalty under national law can fulfil at least one of the criteria mentioned above and qualify as a criminal penalty, falling, as a consequence, under the scope of the *ne bis in idem* principle.

16 The concept of 'charge' has to be understood within the meaning of the Convention. It may thus be defined as 'the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence', a definition that also corresponds to the test whether 'the situation of the [suspect] has been substantially affected'. See, for example, *Deweer v. Belgium*, Decision of 27 February 1980, [1981] ECHR para. 42 and 46; and *Eckle v. Germany*, Decision of 15 July 1982, [1983] ECHR, para. 73.

17 See *Engel and Others v. The Netherlands*, Decision of 8 June 1976, [1977] ECHR.

18 See *Jussila v. Finland*, Decision of 23 November 2006, [2007] ECHR, para. 38.

19 See, for example, *Bendenoun v. France*, Decision of 24 February 1994, [1995] ECHR, para. 47.

20 See *Benham v. The United Kingdom*, Decision of 10 June 1996, [1997] ECHR, para. 56.

21 See *Bendenoun v. France* case, *supra*, note 19, para. 47.

22 See *Benham v. The United Kingdom*, *supra*, note 20, para. 56.

23 See *Öztürk v. Germany*, Decision of 21 February 1984, [1985] ECHR, para. 53.

24 See, for example, *Ravnsborg v. Sweden*, Decision of 23 March 1994, [1995] ECHR, para. 38.

25 See *Campbell and Fell v. The United Kingdom*, Decision of 28 June 1984, [1985] ECHR, para. 72; *Demicoli v. Malta*, Decision of 27 August 1991, [1992] ECHR, para. 34.

26 See *Jussila v. Finland* case, *supra* note 18; and *Ezeh and Connors v. The United Kingdom*, Decision of 15 July 2002, [2003] ECHR.

2.3. Evasive approach by the Court of Justice of the European Union

Even if the standards of protection and the observance of human rights are, in administrative proceedings at European Union level and especially in the field of competition law, similar to the protection awarded by the European Court of Human Rights, the Court of Justice of the European Union is reluctant to apply the *Engel* criteria to the said proceedings. The opinion formulated by requesting parties in the proceedings[27] in respect of their criminal nature is avoided in the Court's response.[28]

The main line of argumentation goes in the direction of lack of jurisdiction to assess the lawfulness of an investigation under competition law in the light of provisions of the ECHR, inasmuch as those provisions do not as such form part of European Union law.[29] Other arguments go in favour of the procedure before the Commission in competition law being merely administrative in nature[30] or of the institution imposing the penalty in competition law (the Commission) not being a 'tribunal' within the meaning of Article 6 of the ECHR.[31]

Nonetheless, even in administrative proceedings, the rights of the defence are fundamental rights forming an integral part of the general principles of law, whose observance is ensured by the Union judicature.[32] The general principles of Union law need not necessarily have the same scope as when they apply to a situation covered by criminal law in the strict sense.[33] Furthermore, it has been held that the effectiveness of Union competition law would be seriously affected if the argument that competition law formed part of criminal law were accepted.[34]

A similar approach was adopted by the Court of Justice of the European Union in cases related to decisions of the Council establishing the 'blacklist' concerning financing of terrorism. The allegation that the Council has arrogated itself a judicial role and powers in criminal matters not envisaged by the Treaty was rejected by the Court. The Court argued that the allegation was based on the mistaken premise that the restrictive measures at issue in this case were of a criminal nature. The assets of the persons concerned have not been confiscated as proceeds of crime but

27 Case T-276/04, *Compagnie maritime belge v. Commission*, [2008] ECR I, at 1277, para. 51.

28 Case T-99/04, *AC-Treuhand v. Commission*, [2008] ECR I, at 1501, para. 113.

29 This argument, however, is no longer valid. According to Art. 6(3) TEU, fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the member states, shall constitute general principles of the Union's law. Also, according to Art. 6(2) TEU, the Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Even in present time the case law of the ECJ identifies the ECHR as a source of EU general principles. See in this regard, inter alia, Joined Cases C-74/95 and C-129/95 *X* [1996] ECR I, at 6609, para. 25, and Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others v. Commission* [2005] ECR I, at 5425, paras. 215–219.

30 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 *Aalborg Portland and Others v. Commission*, [2004] ECR I, at 123, para. 200; *Dansk Rørindustri and Others v. Commission* case, *supra* note 29, paras. 215–223.

31 Joined Cases T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02, and T-136/02, *Bolloré v. Commission*, [2007] ECR II, at 947, para. 86.

32 *Aalborg Portland and Others* case, *supra* note 30, para. 64; and Case C-3/06 P *Groupe Danone v. Commission*, [2007] ECR I, at 1331, para. 68.

33 *AC-Treuhand* case, *supra* note 28, para. 113.

34 *Compagnie maritime belge* case, *supra* note 27, para. 66.

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rather frozen as a precautionary measure; those measures do not constitute criminal sanctions and, moreover, do not imply any accusation of a criminal nature.[35]

3. 'Final judgment' – from literal to extensive interpretation

There is a common agreement in national and international instruments that the *ne bis in idem* principle applies in respect of final judgments. That is, the principle can be invoked in so far as a final decision has been issued and a further prosecution for the same offence/conduct/act is foreseeable. But there are several possible approaches in respect of the notion of 'final judgment'. Does it include judgments considered final only when addressing the merits of the case, or can we include here judgments delivered on procedural matters (for example, lack of evidence, limitation period, pardon, etc.)? Several of these issues were addressed by the Courts with surprising findings.

There are also discussions at European level on extending the scope of the principle further than the 'final judgment' limit and addressing the problem of parallel proceedings. This means that two or more states may, for example, be able to establish their jurisdiction for the same facts in situations where the commission of a criminal offence involves the territory of several states or the effects of an offence are felt in the territory of several states. If in these cases it is discovered that two or more states are conducting criminal proceedings for the same facts and against the same person, this may lead to a conflict of jurisdiction as the respective authorities exercise their respective competences in parallel. Rules were established at European level on positive conflict of jurisdiction, co-operation and concentration of proceedings in a single jurisdiction.[36] Meanwhile, the courts deny that *ne bis in idem* applies to parallel proceedings as long as there is no final judgment in either of the said proceedings.

The scope of the 'final judgment' limits is extended in case law to both acquittal and conviction. Thus, even if in some jurisdictions the legislative drafting of the principle includes only acquittal (the American Convention on Human Rights) or conviction (the Convention Implementing the Schengen Agreements) as solutions for barring further prosecution, in the case law there is a general agreement that the principle applies in both cases.

Two common rules are also generally respected in case law: there seems to be a general tendency not to include extraordinary remedies in the scrutiny of the 'final judgment' criterion and a convergence of opinions in not including parallel proceedings in the scope of the *ne bis in idem* principle.

The 'final judgment' criterion is somewhat circumvented by the 'dual sovereignty' doctrine in federal states, which is a legal doctrine holding that more than one

35 Case T-47/03, *Sison v. Council*, [2007] ECR I, at 1233, para. 101.

36 Council of the European Union, Framework Decision on prevention and settlement of conflicts of jurisdiction in criminal proceedings, 2009/948/JHA of 30 November 2009, JO L 328/42 from 15.12.2009, Explanatory Report, available online at http://register.consilium.europa.eu/pdf/en/09/st05/st05208-ad02.en09.pdf. The Framework Decision was due for implementation by 15 June 2012.

sovereign may prosecute an individual without violating the prohibition against double jeopardy if the individual's act breaks the law of each sovereignty. This doctrine is limited, however, but not overruled, by the interpretation of the courts of the notion of the 'same offence'.

3.1. The doctrine of 'dual sovereignty' in American federal courts

The 'separate sovereigns' exception to double jeopardy arises from the unique nature of the American federal system, in which states are sovereign with plenary powers who have relinquished certain powers to the federal government. Double jeopardy attaches only to prosecutions for the same criminal act by the same sovereign; as separate sovereigns, the federal government and the state governments can prosecute separately for the same act.

Although the doctrine of dual sovereignty in federal states denies double-jeopardy protection in federal trials to a defendant when a previous trial has been conducted at state level (and vice versa) (as the federal and state prosecutions are considered to belong to different governments),[37] there exists a line of common-law authority in favour of international application of *ne bis in idem*. In *R.* v. *Van Rassel*,[38] the Canadian Supreme Court concluded that the common-law authorities have accepted that double jeopardy may apply in cases between sovereign states where the offences are the same. This brings into discussion the notion of 'same offence' as a limit to the doctrine of dual sovereignty, which is going to be further developed when addressing the notion of 'same offence/conduct/act' in the case law of the Supreme Court of the United States.

3.2. Conservative approach by the European Court of Human Rights

The *ne bis in idem* principle is aimed to prohibit the repetition of criminal proceedings that have been concluded by a 'final' decision.[39] A 'decision is final "if, according to the traditional expression, it has acquired the force of *res judicata*. This is the case when 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."'[40] This approach is constant in the case law of the Court.[41]

The European Court of Human Rights seems to have a conservative approach, considering that decisions against which an ordinary appeal lies are excluded from

37 *US v. Wheeler*, 345 United States Reports 313 (1978). US courts have held that the dual-sovereignty rule operates to exclude double jeopardy protection in an international extradition context too (although such a case has never been addressed in the Supreme Court): see, e.g., *US v. Rezaq*, 134 Federal Law Reports 3d 1121, 1128 (DC Cir. 1998) (as noted in C. L. Blakesley, 'Criminal Law: Autumn of the Patriarch: The Pinochet Extradition Debacle and Beyond – Human Rights Clauses Compared to Traditional Derivative Protections Such as Double Criminality', 2000 91 *Journal of Criminal Law & Criminology*, 1, 49–50.

38 Canadian Supreme Court, *R. v. Van Rassel*, [1990] 1 Supreme Court Reports (Can.) 225.

39 See *Franz Fischer v. Austria*, Decision of 29 May 2001, [2002] ECHR, para. 22; and *Gradinger v. Austria*, Decision of 23 October 1995, [1996] ECHR, para. 53.

40 Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Explanatory Report, para. 22, available online at http://conventions.coe.int/Treaty/en/Reports/Html/117.htm.

41 See, e.g., *Nikitin v. Russia*, Decision of 20 July 2004, [2005] ECHR, para. 37; and *Horciag v. Romania*, Decision of 15 March 2005, [2006] ECHR.

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the scope of the guarantee contained in the *ne bis in idem* principle, as long as the time limit for lodging such an appeal has not expired. On the other hand, extraordinary remedies such as a request for reopening the proceedings or an application for extension of the expired time limit are not taken into account for the purposes of determining whether the proceedings have reached a final conclusion.[42] Although these remedies represent a continuation of the first set of proceedings, the 'final' nature of the decision does not depend on their being used.

The 'final judgment' may not necessarily result in a conviction. Article 4 of Protocol No. 7 is not confined to the right not to be punished twice but extends to the right not to be prosecuted or tried twice.[43] The *ne bis in idem* principle applies even where the individual has merely been prosecuted in proceedings that have not resulted in a conviction. This principle 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.[44]

3.3. Extensive interpretation by the Court of Justice of the European Union

An extended interpretation of the 'final judgment' criterion is to be found in the case law of the Court of Justice of the European Union, not only in judgments addressing the merits of the case, but also in judgments delivered on procedural matters (for example, lack of evidence, limitation period, pardon, etc.).

The Court held in *Gözütok and Brügge*[45] that the condition of the case being 'finally disposed of' for the purpose of Article 54 CISA[46] is met if proceedings are discontinued by the Public Prosecutor without involvement of the Court following a settlement with the accused. This constitutes an extension of the strict interpretation of the principle from *decisions taken by a court* to *all forms of judicial decision* taken by an authority required to play a part in the administration of criminal justice in the concerned national legal system.

On the contrary, in *Miraglia*[47] the Court stated that this condition is not fulfilled when proceedings are discontinued because of parallel proceedings instituted in another member state.

The Court ruled in favour of the extension of the *ne bis in idem* principle in *Gasparini*,[48] stating that the *ne bis in idem* principle applies in the case of a final acquittal because prosecution of the offence is time-barred. The Court avoided by this provision the danger of forum shopping for the conviction of the defendants and applied for the first time the principle *even if there was no assessment of the merits of the case.*

42 *Nikitin* case, *supra* note 41, para. 39.
43 *Franz Fischer* case, *supra* note 39, para. 29.
44 *Zolothukin* case, *supra* note 10, paras. 107–110.
45 Joined Cases C-187/01 and C-385/01, *Hüseyn Gözütok and Klaus Brügge*, [2003] ECR I, at 1345.
46 For the drafting of Art. 54 CISA, *supra* section 2.
47 Case C-469/03, *Filomeno Mario Miraglia*, [2005] ECR I, at 2009.
48 Case C-467/04, *Gasparini and Others*, [2006] ECR I, at 9199.

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Also, in *Gasparini*, the Court ruled that the *ne bis in idem* principle fails to be applied in respect of a decision of the judicial authorities of a contracting state by which the accused is finally acquitted for lack of evidence. The Court argued that not to apply that article to a final decision acquitting the defendant for lack of evidence would have the effect of jeopardizing exercise of the right to freedom of movement.[49]

The scope of this decision is somewhat limited in *Turanský*.[50] The Court held that in order to be considered as a final disposal for the purposes of Article 54 of the CISA, a decision must bring the criminal proceedings to an end and *definitively bar* further prosecution. A decision which does not definitively bar further prosecution at national level under the law of the first contracting state which instituted criminal proceedings against a person 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. As a conclusion, if the national legislation provides that a case can be reopened if new evidence is found after the acquittal of the accused for lack of evidence then the acquittal decision is not 'final'.

The Court issued an interesting decision in *Bourquain*.[51] Even if it had the choice of the smooth path already used in *Gasparini* regarding the limitation period, the Court chose to address another problem, that of a conviction *in absentia*. The Court stated that the conviction *in absentia* is 'final' even considering the impossibility of direct enforcement of the penalty as a result of the obligation to hold a new trial if the person convicted *in absentia* should reappear, this time in person.

A contradiction appears in the Court's rulings in the *Bourquain* and *Turanský* cases. In *Bourquain*, the Court ruled that a conviction is 'final' even if the prosecution is not definitively barred because of the obligation to hold a new trial if the person convicted *in absentia* should reappear. In *Turanský*, delivered 11 days after Bourquain, the Court stated that a decision is 'final' when it brings the criminal proceedings to an end and definitively bars further prosecution. The decision taken in *Turanský* should be considered to constitute the right approach and the solution in *Bourquain*[52] should have been based on amnesty or expiry of the limitation period to fulfil the condition of 'finally disposed of' enshrined in Article 54 CISA.

Another problem addressed in *Gasparini* is whether the *ne bis in idem* principle also applies to persons other than those whose trial has been finally disposed of in a contracting state (accessories to the crime).[53] The Court's answer was negative, stating that in this case the condition of the case being 'finally disposed of' for these persons is not met.

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49 See, to this effect, Case C-436/04, *Léopold Henri van Esbroeck*, [2006] ECR I, at 2333, para. 34.

50 Case C-491/07, *Vladimir Turanský*, [2008] ECR I, at 11039.

51 Case C-297/07, *Klaus Bourquain*, [2008] ECR I, at 2245, paras. 18–25.

52 Even if the solution in *Bourquain* is correct in respect of the application of the *ne bis in idem* principle, the motivation obviously is less satisfactorily.

53 *Gasparini* case, *supra* note 48, paras. 27–37.

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4. The same offence/conduct/act: the core problem of the *ne bis in idem* principle

One of the most disputed elements and the core problem of the *ne bis in idem* principle is the *idem* element. Does it refer to the legal classification of the offence or the conduct of the offender?

Several criteria were put forward in the case law to identify the *idem* element of the principle. Even if they vary in interpretation of the courts, two main theories emerged as guiding lines for defining the notion of *idem*: the 'same elements' test also known as the 'test of equivalence' (i.e., *in abstracto*) and the 'same conduct' test, also called the 'same act' test (*in concreto*).

The 'test of equivalence' (or the 'same elements' test) relates to the substance of the offence, i.e., whether the offences in two given jurisdictions are roughly comparable in terms of their constitutive elements within the respective national systems, as suggested by analogies with other offences and the penalties imposed. In other words, the 'same elements' test refers less to the legal classification of the offence, becoming more relevant as a criterion if the constituent elements of the offence which need to be proved in court are the same, than if the offence has the same name or is incriminated in the same legal instrument.

The 'same conduct' may range from identical to multiple acts committed in more than one place and at different times but related to the actor's initial design. As regards the 'same act' or the 'same conduct' test, another controversy sparks between different courts: which are the criteria for determining the same conduct of the offender, especially in cases where the same conduct may constitute two different offences at the same time in the same jurisdiction. Further development was needed in case law to establish criteria for determining the 'same conduct' accepted at least at European level – a set of concrete factual circumstances involving the same defendant and inextricably linked together in time and space.

4.1. 'Same offence' in the case law of the Supreme Court of the United States

In interpreting the notion of 'same offence', the Court used two different criteria, thereby changing its case several times: the 'same elements' versus the 'same conduct' tests.

In the case of *Blockburger* v. *United States*, the Court employed the 'same elements' test, adopting the following interpretation:[54]

> Each of the offences created requires proof of a different element. The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offences or only one is whether each provision requires proof of an additional fact which the other does not . . .

In the case of *Grady* v. *Corbin*, the Supreme Court developed a different approach:[55]

54 *Blockburger v. United States*, 284 U.S. 299 (1932).
55 *Grady v. Corbin*, 495 U.S. 508 (1990).

> [A] technical comparison of the elements of the two offences as required by *Blockburger* does not protect defendants sufficiently from the burdens of multiple trials. Thus, a subsequent prosecution must do more than merely survive the *Blockburger* test. . . . The critical inquiry is what *conduct* [emphasis added] the State will prove, not the evidence the State will use to prove that conduct . . . [A] State cannot avoid the dictates of the Double Jeopardy Clause merely by altering in successive prosecutions the evidence offered to prove the same conduct . . .

Nevertheless, in the case of *United States* v. *Dixon*, the Supreme Court returned to the *Blockburger* test:[56]

> The Double Jeopardy Clause's protection attaches in non-summary criminal contempt prosecutions just as it does in other criminal prosecutions. In the contexts of both multiple punishments and successive prosecution, the double jeopardy bar applies if the two offences for which the defendant is punished or tried cannot survive the 'same elements' or '*Blockburger*' test . . . That test inquires whether each offence contains an element not contained in the other; if not, they are the 'same offence' within the Clause's meaning, and double jeopardy bars subsequent punishment or prosecution . . .[57]

4.2. 'Same conduct' in the case law of the Inter-American Court of Human Rights

The Inter-American Court of Human Rights used the 'same conduct' criterion in the *Loayza-Tamayo* v *Peru* case:[58]

> This principle is intended to protect the rights of individuals who have been tried for specific facts from being subjected to a new trial for the same cause. Unlike the formula used by other international human rights protection instruments (for example,the United Nations International Covenant on Civil and Political Rights, Article 14(7), which refers to the same 'crime'), the American Convention uses the expression '*the same cause*', which is a much broader term in the victim's favour.

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56 *United States v. Dixon*, 509 U.S. 688 (1993).

57 For a more detailed analysis, see *Zolothukin* case, *supra* note 10, paras. 42–44; see also J. Giannopoulos, 'Recent Development: *United States v. Dixon*: The Double Jeopardy Clause and the Appropriate Test for Determining What Constitutes the Same Offense', (1994) 20 *Journal of Contemporary Law*, 225; S. Barton, '*Grady v. Corbin:* An Unsuccessful Effort to Define "Same Offense"', (1990) 25 *Georgia Law Review*, 143; A. C. Rodriguez, 'Detaching Dual Sovereignty from the Sixth Amendment: Use of the Blockburger Offense Test Does Not Incorporate Double Jeopardy Doctrines', (2007) 33 *New England Journal on Criminal and Civil Confinement*, 213; J. Padover, 'The Constitutional Guarantee of Protection against Double Jeopardy Is Not Violated When a Defendant Is Convicted of, and Punished for, Separate Offenses That Contain Different Elements', (2009) 40 *Rutgers Law Journal*, 969; K. A. Hicks, 'Note: A Proposal for Legislative Effectuation of Double Jeopardy Protection', (1990) 41 *Hastings Law Journal*, 669; E. J. Richardson, 'Recent Development: Matching Tests for Double Jeopardy Violations with Constitutional Interests', (1992) 45 *Vanderbilt Law Review*, 273; G. C. Thomas III, 'A Unified Theory of Multiple Punishment', (1985) 47 *University of Pittsburgh Law Review*, 1; D. McCune, 'Case Note: United States v. Dixon: What Does "Same Offense" Really Mean?', (1995) 48 *Arkansas Law Review*, 709; G. E. Becker, 'Recent Developments in Rico: Multiple Prosecutions and Punishments under Rico: A Chip off the Old "Blockburger"', (1983) 52 *University of Cincinnati Law Review*, 467; K. A. Pamenter, 'Case Comment: United States v. Dixon: The Supreme Court Returns to the Traditional Standard for Double Jeopardy Clause Analysis', (1994) 69 *Notre Dame Law Review*, 575; R. L. McGee, 'Note: Criminal Rico and Double Jeopardy Analysis in the Wake of Grady v. Corbin: Is This Rico's Achilles' Heel?', (1992) 77 *Cornell Law Review*, 687; K. Pace, 'Fifth Amendment: The Adoption of the "Same Elements" Test: The Supreme Court's Failure to Adequately Protect Defendants from Double Jeopardy', (1994) 84 *Journal of Criminal Law & Criminology*, 769; A. R. Amar, 'Essay: Double Jeopardy Law Made Simple', (1997) 106 *Yale Law Journal*, 1807.

58 *Loayza-Tamayo v. Peru*, IACtHR, 17 September 1997, para. 66.

4.3. 'Same act' in the case law of the Court of Justice of the European Union

One of the crucial points in the Court's rulings as regards the *ne bis in idem* principle is the notion of 'the same acts' (basically the 'same conduct' doctrine).[59]

Initially, the Court of Justice of the European Union addressed the issue of the *ne bis in idem* principle in competition law, as a 'fundamental principle of EC law', requiring a 'threefold condition': 'identity of the facts, unity of offender and unity of the legal interest protected' before that principle is applicable.[60]

When addressing the principle in respect of Article 54 of the CISA, the Court removed the additional criterion used in competition law (the unity of the legal interest protected)[61] and switched to the 'same act' test, establishing also the criteria for determining if the conduct of the offender constitutes the same act prohibited by the *ne bis in idem* principle.

In *Van Esbroeck*, the Court chose to interpret *ne bis in idem* more broadly than it had previously in that area of EC law. According to the Court, the 'only relevant criterion' for the purposes of Article 54 of the CISA is that there should be an '*identity of the material facts, 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 object*'.[62]

The Court also stated that the relevant national authorities, which have to determine whether there is identity of material facts, must confine themselves to examining whether they constitute a set of facts inextricably linked together.

In its subsequent rulings the Court developed a coherent case law based on the above-mentioned criteria. I will further point out the main findings of the Court as being 'the same acts' for the purpose of application of Article 54 CISA. The Court concluded that carrying different quantities of drugs in two different states and having different accessories who allegedly participated in the events in the two states is not an impediment for considering the conduct as the 'same acts'.[63] Also export and import of the same drugs and continued in different contracting states in the Convention are, in principle, to be regarded as 'the same facts';[64] the same with marketing of goods in another member state, after its importation into the member state which pronounced the acquittal;[65] taking possession of contraband tobacco in one contracting state and the importation and possession of the same

59 For a thorough analysis of the case law of the Court of Justice of the European Union in respect of the *ne bis in idem* principle see also M. Wasmeier, 'The Principle of "ne bis in idem"', (2006) 77 *Revue internationale de droit pénal* 121–30; B. Nita, 'Orzeczenia uruchamiające zakaz wynikający z zasady *ne bis in idem* w art. 54 konwencji wykonawczej z Schengen', 2008 1 *Przegląd prawa europejskiego i międzynarodowego* 5–22; E. Sharpston and J. M. Fernández-Martín, 'Some reflections on Schengen free movement rights and the principle of "ne bis in idem"', (2008) 10 *Cambridge Yearbook of European Legal Studies* 413–48; V. C. Ramos, *Ne bis in idem e União Europeia: contributo para a compreensão do fundamento valorativo e da vigência do princípio na União Europeia e para a interpretação da regra 'ne bis in idem' constante do artigo 54 da Convenção de aplicação do Acordo de Schengen* (2009); B. van Bockel, *The* Ne Bis in Idem *Principle in EU Law* (2010); V. Mitsilegas, *EU Criminal Law* (2009), 143–53.

60 *Aalborg Portland and Others* case, *supra* note 30, para. 338.

61 *Van Esbroeck* case, *supra* note 49, para. 42.

62 Ibid., paras. 36–8, emphasis added. It is perhaps unfortunate that the neither the Court nor the Advocate General appear to have considered *Aalborg Portland and Others* in their examination of *Van Esbroeck*.

63 Case C-150/05, *Jean Leon van Straaten*, [2006] ECR I, at 9327, para. 53.

64 *Van Straaten* case, *supra* note 63, para. 53.

65 *Gasparini* case, *supra* note 48, para. 57.

tobacco in another contracting state constitutes conduct that may fall within the concept of 'same facts',[66] being characterized by the fact that the accused who has been prosecuted in both contracting states had from the outset intended to carry tobacco, after first taking possession, to a final destination across several contracting states.

On the contrary, the Court held that different facts, such as, first, to hold money from drug trafficking in a contracting state and, second, to sell money coming from such trafficking in exchange offices located in another contracting state must not be seen as the 'same facts' just because of the mere fact that the competent national authority finds that the facts are linked by the same criminal intent.[67]

4.4. Surprising shift in interpretation in the case law of the European Court of Human Rights

Several shifts in interpretation can be noticed also in the position of the European Court of Human Rights. Initially the Court followed the 'same conduct' test for determining whether the *ne bis in idem* principle is applicable, then it switched to the 'essential elements' test and finally it went to the 'same act' test, adopting the approach of the Court of Justice of the European Union.

The first approach, which focuses on the 'same conduct' on the applicant's part irrespective of the classification in law given to that conduct (*idem factum*), is exemplified in the *Gradinger* judgment. In that case Mr Gradinger had been criminally convicted of causing death by negligence and also fined in administrative proceedings for driving under the influence of alcohol. The Court found that although the designation, nature, and purpose of the two offences were different, there had been a breach of Article 4 of Protocol No. 7 in so far as both decisions had been based on the same conduct by the applicant.[68]

The second approach also proceeds from the premise that the conduct by the defendant which gave rise to prosecution is the same, but concludes that the same conduct may constitute several offences (*concours idéal d'infractions*) which may be tried in separate proceedings. This approach was developed by the Court in the case of *Oliveira*,[69] in which the applicant had been convicted first of failing to control her vehicle and subsequently of negligently causing physical injury. In the subsequent case of *Göktan*[70] the Court also held that there had been no violation of Article 4 of Protocol No. 7 because the same criminal conduct of which the applicant had been convicted constituted two separate offences: a crime of dealing in illegally imported drugs and a customs offence of failing to pay the customs fine.[71]

66 Case C-288/05, *Jürgen Kretzinger*, [2007] ECR I, at 6641, para. 40.
67 Case C-367/05, *Norma Kraaijenbrink*, [2007] ECJ I, at 619, para. 36.
68 See *Gradinger* case, *supra* note 39, para. 55.
69 See *Oliveira v. Switzerland*, Decision of 30 July 1998, [1999] ECHR.
70 See *Göktan* case, *supra* note 15, para. 50.
71 This approach was also employed in the cases *Gauthier v. France*, Decision of 24 June 2003, [2004] ECHR, and *Ongun v. Turkey*, Decision of 10 October 2006, [2007] ECHR.

The third approach puts the emphasis on the 'essential elements' of the two offences. In *Franz Fischer* v. *Austria*,[72] the Court confirmed that Article 4 of Protocol No. 7 tolerated prosecution for several offences arising out of a single criminal act (*concours idéal d'infractions*). However, since an applicant's being tried or punished again for offences which were merely 'nominally different' would be incompatible with this provision, the Court held that it should additionally examine whether or not such offences had the same 'essential elements'. As in Mr Fischer's case the administrative offence of drunken driving and the crime of causing death by negligence while 'allowing himself to be intoxicated' had the same 'essential elements', so the Court found a violation of Article 4 of Protocol No. 7. It also pointed out that had the two offences for which the person concerned was prosecuted only overlapped slightly, there would have been no reason to hold that the defendant could not be prosecuted for each of them in turn. The same approach was followed in the case of *W.F.* v. *Austria*[73] and *Sailer* v. *Austria*, [74] both of which were based on a similar set of circumstances.

A surprising shift in interpretation took place in case *Zolothukin* v. *Russia*.[75] While returning to the 'same conduct' approach as in the *Gradinger* ruling, the Court followed the criteria used by the Court of Justice of the European Union for identifying the same acts, stating 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. . . . The Court's inquiry should therefore focus on those facts which constitute a set of concrete factual circumstances involving the same defendant and inextricably linked together in time and space, the existence of which must be demonstrated in order to secure a conviction or institute criminal proceedings.[76]

But while the criteria used are the same, the conclusion reached is somewhat different. The Court decided that Mr Zolotukhin's swearing at Ms Y. and Captain S. on the passport office premises, and his insulting of Major K., first in his office and then in the car, and threatening him with violence do not constitute the 'same acts', because there is no temporal or spatial unity between the episodes. Although in essence Mr Zolotukhin's conduct was substantially similar during the entire day of 4 January 2002 – in that he continued being verbally abusive towards various officials – it was not a continuous act but rather different manifestations of the same conduct shown on a number of distinct occasions.

The assertion of the European Court of Human Rights that there is no temporal or spatial unity between episodes which took place in the same day and under similar

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72 *Franz Fischer* case, *supra* note 39.

73 *W.F. v. Austria*, Decision of 30 May 2002, [2003] ECHR.

74 *Sailer v. Austria*, Decision of 6 June 2002, [2003] ECHR. The 'essential elements' criterion was also used and expanded upon in the *Manasson* case, *supra* note 15; *Bachmaier v. Austria*, Decision of 2 September 2004, [2005] ECHR; the *Rosenquist* case, *supra* note 15; the *Storbråten* and *Haarvig* case, *supra* note 15; *Hauser-Sporn v. Austria*, Decision of 7 December 2006, [2007] ECHR, *Schutte v. Austria*, Decision of 26 July 2007, [2008] ECHR; *Garretta v. France*, Decision of 4 March 2008, [2009] ECHR.

75 For an extensive analysis of the existing approaches and reasons for the proposed harmonization criteria, see *Zolothukin* case, *supra* note 10, paras. 70–84.

76 Ibid., paras. 82–84. See also *Maresti v. Croatia*, Decision of 25 June 2009, [2010] ECHR.

circumstances seems to be contrary to the Court of Justice of the European Union's assertion that acts committed over an extended period of time and even in different states are to be considered as inextricably linked together in time and space.

I consider there is no contradiction, but for different reasons than the ones stated by the Court. This is due to unwritten principles in national jurisdictions on offences committed against certain social values related to natural persons (like life, health, corporal integrity). In respect of offences committed against the said social values there is a general rule stating that the conduct should be directed against the same victim; a succession of the same acts, even if inextricably linked and committed one after the other on the same occasion, but against *different persons* is to be considered as two different acts, even if committed in the same temporal and spatial circumstances. The solution of the European Court of Human Rights can be considered as a possible introduction of new criteria through the back door, without explicitly saying so, related to extending the interpretation of the CJUE also on the passive subject of certain offences against natural persons. This means the criteria for establishing a breach of the *ne bis in idem* principle as regards the *idem* concept in respect of *certain offences against natural persons* should read as a set of facts inextricably linked together in time and space, as well as by their object and *subjects*. Since no such particularity could be included in a tendency of the ECtHR to harmonize its previous case law and offer a new set of criteria of universal value, the only option remains that of considering the conduct in the *Zolothukin* case as a breach of the temporal and spatial criteria.

5. 'Enforced penalty' – a neglected issue?

There are two options once the penalty imposed on the convicted person has been enforced or is in the process of being enforced in a certain jurisdiction. The first one is to take into account the first judgment as an impediment to further prosecution (*Erledigungsprinzip*). The second one is to take into account the penalty previously imposed and deduct it from the new penalty in the new trial (*Anrechnungsprinzip – ne bis poena in idem*). There is no consensus on deciding which of the two solutions should apply. It is clear that in the same jurisdiction the *Erledigungsprinzip* should apply. But in the international environment, where there is no harmonization of legislation, it is hard to impose on one particular jurisdiction to take into account and recognize automatically the solution given in another jurisdiction, whether national or international.

As regards the interpretation of the notion of 'enforced penalty', this seems to be a neglected issue, since all jurisdictions apparently adopt a conservative approach and leave the solution to the national jurisdiction. The solution of national definition in respect of enforcing criminal penalties raises the same problems as the national 'criminal proceedings' solution.

As a general rule, there should be a bar to further prosecution if there is a previous final judgment followed by an enforced penalty, in cases where the final judgment ends with a conviction of the accused. But what does 'enforced penalty' mean? Is the penalty enforced if a fine is paid in transactions concluded with

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the prosecutor in order to dismiss proceedings? Is the penalty enforced if there is a conviction with suspension of execution? Is an enforced penalty to be considered if the limitation period for execution of the penalty has elapsed? On some of these issues only the Court of Justice of the European Union has shed some light.

5.1. Extended interpretation of the notion of 'enforced penalty' by the Court of Justice of the European Union

The Court analysed the meaning of 'enforcement' in several of its decisions.

The Court held that 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. This decision was taken by the Court in the case of *Gözütok and Brügge*, following a discontinuance of criminal proceedings brought in a member state by the Public Prosecutor, imposing a fine and without the involvement of a court.[77]

Further clarification upon the concept of 'enforcement' was given by the Court in *Kretzinger*. The Court stated that the penalty had been 'enforced' or was 'actually in the process of being enforced' when the defendant was sentenced to a term of imprisonment the execution of which was accompanied by a suspension, in accordance with the law of that contracting state.[78] However, this condition is not fulfilled if the accused was briefly taken into custody and/or remand and when, according to the law of the state of conviction, that deprivation of liberty shall be charged against subsequent enforcement of imprisonment.

Also in *Kretzinger*, the Court answered to the referring court essentially asking whether, and to what extent, the provisions of the Framework Decision on the European arrest warrant have an effect on the interpretation of the notion of 'enforcement' within the meaning of Article 54 of the CISA. The Court concluded that the fact that a member state in which a person has been convicted of a final judgement of conviction in domestic law can issue a European arrest warrant designed to arrest that person to carry out this trial under the Framework Decision should not affect the interpretation of the concept of 'enforcement'. In the same spirit, the option open to a member state to issue a European arrest warrant does not affect the interpretation of the concept of 'enforcement', even if the judgment relied upon in support of a possible European arrest warrant has been given *in absentia*.

The actual wording of the *ne bis in idem* principle, apart from the existence of a final and binding conviction in respect of the same acts, expressly requires the enforcement condition to be satisfied. That enforcement condition could not, by definition, be satisfied where a European arrest warrant were to be issued after trial and conviction in a first member state precisely in order to ensure the execution of a custodial sentence which had not yet been enforced within the meaning of Article 54 of the CISA. That is confirmed by the Framework Decision itself, which, in Article

77 *Gözütok and Brügge* case, *supra* note 45, para. 48.
78 *Kretzinger* case, *supra* note 66, paras. 44–66.

3(2), requires the member state addressed to refuse to execute a European arrest warrant if the executing judicial authority is informed that the requested person has been finally judged by a member state in respect of the same acts and that, where there has been sentence, the enforcement condition has been satisfied. The Court's conclusion is, in other words, that an option of a member state to enforce a penalty by issuing a European arrest warrant[79] cannot affect the meaning of 'enforcement'.

The Court stated in *Bourquain* that the condition regarding enforcement is satisfied when, at the time when the second criminal proceedings were instituted, the penalty imposed in that first state can no longer be enforced even if enforcement of the penalty given *in absentia* is conditional on a further conviction pronounced in the presence of the accused.[80]

6. 'TOWER OF BABEL'[81] VERSUS UNIFORM INTERPRETATION

A *ne bis in idem* principle in a form universally recognized and accepted is yet to be found in legislation. Courts' interpretations of the principle at international level also differ around the world as regards its scope. There is no agreement in respect of its territorial application, its national or international dimension, its application in the same or different jurisdictions (i.e., in a federal system), its forbidding two different criminal proceedings, or its imposing two different penalties for the same offence/act.

To summarize the main tendencies in the three Courts examined, federal or international, there is a conservative approach in the US Courts as regards 'criminal proceedings' and 'enforced penalty', the 'dual sovereignty' response to the 'final judgment' barrier, and a different approach as adopted by European Courts in respect of *idem* (the 'same elements' test).

The European Court of Human Rights distinguishes itself by an extensive interpretation of the 'criminal proceedings' notion, a conservative approach as regards 'final judgment' and 'enforced penalty', and a surprising change in interpretation, following the case law of the Court of Justice of the European Union in respect of *idem*.

From the case law of the Court of Justice of the European Union the following can be inferred: a cautious and conservative approach as regards 'criminal proceedings', an extensive interpretation of the 'final judgment' notion, a leading interpretation at European level in respect of *idem*, and an extensive interpretation of the 'enforced penalty' issue.

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79 The State may decide to issue an EAW for the enforcement of the penalty or may renounce to the enforcement of the penalty.

80 *Bourquain* case, *supra* note 51, para. 48.

81 According to chapter 11 of the Book of Genesis, a united humanity, speaking a single language and migrating from the East, took part in the building of the Tower of Babel after the Great Flood. The people decided their city should have a tower so immense that it would have its top in the heavens. However, the Tower of Babel was not built for the worship and praise of God, but was dedicated to the glory of man, with a motive of making a 'name' for the builders. God, seeing what the people were doing, came down and confounded their languages and scattered the people throughout the earth.

6.1. Causes of differences in interpretation

What seem to be the causes of these differences in interpretation? In the fields where the principle depends on the national interpretation of its component criteria, there seem to be a lack of mutual trust at international level and a reservation in recognizing final judgments of foreign jurisdictions. The *ne bis in idem* rule, which is stated and applied in domestic law, is far from being accepted as a general principle of law in international relations.

The main argument brought against allowing such status to the principle is that the divergences of approach in national laws are too great to allow the abstraction of a principle at an international level.[82] At national level the principle offers the same setting for the two different proceedings, because of the identical background (same legislative frame). At international level there is, first, the problem of national sovereignty – some states prefer to judge the offender for the second time and afterwards to recognize the foreign judgment and deduct from the punishment applied the punishment established in the foreign jurisdiction; second, the problem of different legislative background – it is difficult to accept a solution coming from a totally different system which can or cannot be trusted. A breakthrough was made at European Union level, where the principles of mutual trust and mutual recognition are considered to be the cornerstone of judicial co-operation in both civil and criminal matters within the Union.[83] In the case law of US courts, even if these principles are used and recognized, they are limited in scope by the 'dual sovereignty' doctrine.

In other aspects, some reasons are revealed by the courts themselves. For example, causes for not adopting the *Engel* criteria by the Court of Justice of the European Union range from no valid reasons (any more), like lack of jurisdiction to assess the lawfulness of an investigation in the light of provisions of the ECHR, to not fulfilling the criterion of a tribunal by the body establishing the penalty, to the argument that effectiveness of Union competition law would be seriously affected if the argument that competition law formed part of criminal law were accepted. When dealing with the criterion of the unity of the protected legal interest imposed in competition law, in its subsequent rulings in the field of the *ne bis in idem* principle the Court of Justice of the European Union pointed out that, because there is no harmonization of national criminal law, considerations based on the legal interest protected might create as many barriers to freedom of movement within the Schengen area as there are penal systems in the contracting states.[84]

Also, in abandoning the 'same act' test in applying the *ne bis in idem* principle, the Supreme Court of the United States argued that it had contradicted an unbroken

82 For a detailed analysis of the international dimension of the *ne bis in idem* principle, see G. Conway, 'Ne Bis in Idem in International Law', (2003) 3 *International Criminal Law Review* 217, at 229–30.

83 I. Bantekas, 'The Principle of Mutual Recognition in EU Criminal Law', (2007) 32 ELR 365–85.

84 *Van Esbroeck* case, *supra* note 49, para. 35. The free movement of persons is considered to be a constitutional principle and the ECJ invoked the principle in several occasions to justify barring or continuing further prosecutions for the same acts. See in this respect *Gözütok and Brügge* case, *supra* note 45, para. 36; *Miraglia* case, *supra* note 47, para. 34; *Gasparini* case, *supra* note 48, para. 36; *Van Straaten* case, *supra* note 63, para. 46.

line of decisions, had produced confusion, and had already proved unstable in application.

In changing its previous case law centred on the 'same elements' test, the European Court of Human Rights considered 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, namely the right not to be prosecuted twice for the same offence. It is against this background that the Court was called upon to provide a harmonized interpretation of the *idem* element of the *ne bis in idem* principle. While it is in the interest 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.[85]

All these reasons are plausible in themselves, but it is clear that they lead to different solutions between different courts.

6.2. The (dis)advantages of uniformization in interpretation

As we have seen in the previous pages, there is no consensus at international level, neither in legislative instruments, nor in courts' case law, on the same framing of the *ne bis in idem* principle, either in respect of its component features, or in respect of its scope.

Conflicting approaches as regards the *ne bis in idem* principle at global level in international and federal legislation and also its interpretation by the courts may lead to the conclusion that at the moment there is a true Tower of Babel in respect of its application. But there are encouraging signals at European level towards a uniformization in applying the principle, in respect of its meaning, scope, and criteria to be applied. The two European Courts have made tremendous steps towards mutual co-operation and influencing each other's case law. With the entering into force of the EU Charter of Fundamental Rights and the approaching accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms the two courts are bound to work together smoothly in order to ensure the compliance of the European legal order with the fundamental principles enshrined in the said legislative acts and also the uniform interpretation at European level.[86]

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85 *Zolothukin* case, *supra* note 10, para. 78.

86 In this scenario, there might be an overlapping in jurisdiction between the two courts, the fundamental rights enshrined in the EU Charter of Fundamental Rights and the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms being basically the same. For more information on the relationship between the ECtHR and CJUE, see M.-L. Bemelmans-Videc, 'Explanatory Memorandum, The Accession of the European Union/European Community to the European Convention on Human Rights', Parliamentary Assembly, Council of Europe, 18 March 2008, at 9; F. G. Jacobs, 'Contribution to the Report on The Accession of the European Union/European Community to the European Convention on Human Rights', Parliamentary Assembly, Council of Europe, 18 March 2008, at 19; *Matthews v. The United Kingdom*, Decision of 18 February 1999, [2000] ECHR; *Bosphorus Airlines v. Ireland,* Decision of 30 June 2005, [2006] ECHR; Menéndez, *supra* note 12, at 482.

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Ne bis in idem is an important rule which must be enforced in all circumstances. In the absence of legislative framework harmonization and interpretation of the principle, efforts should be made at national and international level to work out solutions for mutual recognition and mutual trust between jurisdictions, eventually through imposing internationally recognized principles on national jurisdictions. The recognition of the international dimension of the *ne bis in idem* principle is necessary.

But to have an international principle, effectively and uniformly applied in the context explained in the previous pages, several steps should be taken towards raising the concepts that form the principle above national grounds and definitions. It is good for international co-operation in criminal matters, but it is not enough to declare mutual trust in other legislative systems and mutual recognition of foreign judgments in order to have a uniform enforcement of the principle at European level. There is a need also for autonomous concepts of the principle at European and international level in order to gain international scope.

At the moment, we have autonomous concepts in respect of criminal proceedings (autonomous interpretation of the ECHR, still to be acknowledged by the ECJ) and also in respect of the notion of the 'same acts' (same test used by European Courts to determine what constitute the same acts), but problems arise when confronted with the notion of final judgment.

We should look at the notion of final judgment, as defined by the ECJ or ECHR, to understand why this autonomous meaning is necessary. Both courts refer back to the national legislative systems in their definition of final judgment: a judgment is final when, according to national law, new proceedings cannot be brought against the accused for the same acts. But this very simple definition brings forward a wide range of different interpretations of the notion of final judgment, according to each national system involved. Apart from different solutions between different states in respect of final decisions in identical cases, in order to apply the *ne bis in idem* principle at international level there is also a need to contact the state where the first proceedings took place in order to ascertain if the decision taken is 'final'.

As an example of different interpretations, considering the interpretation of final judgment according to national jurisdictions in the field of acquittal for lack of evidence may trigger the issue of a threshold in principle that should apply to lack of evidence before it can bar further proceedings. The problem may be addressed differently in national jurisdictions, some national legal systems imposing such a threshold, others considering an acquittal for lack of evidence a bar to further prosecution, irrespective of the evidence presented in the first trial.[87]

Such a problem and possible difference in interpretation would not arise when dealing with an autonomous concept of 'final judgment' at European level. The ECJ has started towards creating such a concept, establishing when a judgment is final on a case-by-case basis, but without establishing a general rule or test to consider the judgment final. After several attempts to establish the conditions for a final

87 The latter opinion seems to be also favoured by the ECJ. See in this respect *Van Straaten* case, *supra* note 63, paras. 58–61.

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judgment (see *supra*, section 3.3), the ECJ finally adopted in the *Turanský* case the ECHR national criterion,[88] which is a step back in creating an autonomous concept of 'final judgment', and hence an autonomous concept of the *ne bis in idem* principle at European level, which can be applied uniformly without further harmonization of national legislation.

Another problem which needs to be addressed by the European Courts is the 'same act' test. While establishing same rules to determine the notion of *idem* (an identity of the material facts, 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 object), it is not clear which is the position of the ECJ in respect of the same acts constituting different offences (*concours idéal d'infractions*). The ECHR shifted its case law from the 'same elements' test towards the 'same act' test, leaving also this issue unanswered. We may infer that by adopting the 'same act' test both courts embraced the opinion of the US Supreme Court in *Grady* v. *Corbin* (with emphasis on the 'same act' test, irrespective of how many offences the incriminated conduct may constitute).

7. Conclusion

There is no consensus at international level in respect of uniform application of the *ne bis in idem* principle, due to differences in drafting international legal instruments and also differences in interpretation by international courts.

A tendency towards uniformization in interpretation is to be found at European level, where both the ECJ and ECHR apply the same test in respect of the notion of *idem*. However, further steps should be taken towards reaching an autonomous meaning of the concepts which constitute the *ne bis in idem* principle, especially the 'final judgment' notion, which should be raised above national standards. This approach would confer a real supranational (European) dimension on the principle. Also, further clarification is needed in respect of the 'same act' test versus *concours idéal d'infractions*.

88 *Turanský* case, *supra* note 50, para. 40. The Court held that in order to be considered as a final disposal for the purposes of Art. 54 of the CISA, a decision must bring the criminal proceedings to an end and *definitively bar* further prosecution. A decision which does not definitively bar further prosecution *at national level under the law of the first contracting state* which instituted criminal proceedings against a person 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.