Application Problems Relating to "Ne bis in idem" as Guaranteed under Art. 50 CFR/Art. 54 CISA and Art. 4 Prot. No. 7 ECHR

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Article

ABSTRACT

The principle of ne bis in idem as an individual right is textually guaranteed in Art. 50 CFR / Art. 54 CISA, on the one hand, and in Art. 4 Prot. No. 7 ECHR, on the other. The CJEU and the ECtHR have delineated many issues in their detailed case law and have reciprocally influenced each other's jurisprudence. The article identifies three major problems: Firstly, the definition of "criminal proceeding" as a prerequisite for application of the principle relies on the Engel criteria identified by the ECtHR, but it is difficult to incorporate new forms of sanctions, such as "naming and shaming," into this definition, and the fact that administrative sanctions do not fall within the ambit of ne bis in idem is not justifiably accounted for. Secondly, the courts may have determined which procedural acts meet the requirement of res judicata (terminating a criminal proceeding) and which ones do not. However, it is the Member State itself which determines whether a decision is final and whether national follow-up procedures are permitted, thus reinvigorating the issue of jurisdictional concentration. The author therefore proposes a solution relying foremost on bona fides, namely identifying to what extent the accused himself/herself was reasonably allowed to place trust in the finality of the proceeding. Thirdly, the normative nature of the process of identifying the precise act to which ne bis in idem applies proves problematic when legal entities are perpetrators, be it in characterising the legal interest protected or the identity of the criminal act itself.
The author points to Art. 82 para. 1 TFEU, which provides a legal basis for a – potentially – convincing overall European approach to the concept of res judicata. The CJEU should only address problems of application of the principle of ne bis in idem in individual cases.

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I. Introduction

As long as the "conflict of jurisdiction" has not been clearly solved, the question of whether a second judgment is admissible is – according to the principle of mutual recognition – governed by the "ne bis in idem" principle. This guarantee, which on the one hand provides legal certainty within the EU and on the other hand also creates an individual right of the sentenced/acquitted person not to be prosecuted a second time, is guaranteed by Art. 50 CFR under the conditions set out in Art. 54 of the Convention implementing the Schengen Agreement (CISA). This guarantee can also be found in the ECHR – in Art. 4 Prot. No. 7 ECHR (which is meant to be a pure adoption of Art. 14 para. 7 of the International Covenant on Civil and Political Rights). *The ECHR guarantee* not only serves as a means of interpretation of the EU guarantee *(Art. 53 CFR),* but also provides a *minimum level of protection that cannot be restricted by the CFR (see Art. 54 CFR).* This is why both guarantees must be considered together in this paper. Both the Luxemburg and the Strasbourg Courts have developed the foundations and many details of this guarantee in their jurisprudence. Nevertheless, a number of important problems remain unresolved. The question is whether the jurisprudence should carry on with its case-by-case interpretation of the relevant provision. Or, alternatively, whether the EU legislator should interfere, at least in relation to the most pertinent problems.

For the time being, the interpretation, application, and scope of Art. 50 CFR and Art. 54 CISA are determined by the CJEU. Its jurisprudence – convincingly (!) – follows a *wide understanding* of all preconditions of *ne bis in idem* in order to secure the effective exercise of the fundamental freedoms of the person concerned (especially freedom of movement) under the TFEU. The CJEU's jurisprudence is *inspired by the ECtHR,* which is competent for the interpretation of Art. 4 Prot. No. 7 ECHR.

The effects of the *ne bis in idem* guarantee can be of greatest importance for national criminal proceedings. If the guarantee is applicable, the responsible national prosecutors are *prevented from starting/continuing investigations* – even if the (chronologically) first sentence rendered only covered part of the whole story and thus only part of the wrongdoing/damage caused. This is especially important in the economic context – recent cases have given rise to questions of interpretation that have not been solved by jurisprudence so far.

The present article deals with "ne bis in idem" as initially guaranteed by Art. 50 CFR and Art. 54 CISA. I will indicate some of the main problems that could be solved by the CJEU – at least in principle. Nevertheless, they are closely related to the context of solving "conflicts of jurisdiction" and therefore should best not be regulated randomly on a case-by-case basis but coherently in a legal act adopted by the EU. As already mentioned, due to the legal interrelation between CFR and ECHR guarantees, this article will also provide short comparisons with the guarantee in the ECHR and its interpretation by the ECtHR.

II. General Problems as to Art. 50 CFR, 54 CISA (Potentially Solved by a Legal Act to be Elaborated by the European Commission)

1. The criminal nature of the proceedings

Art. 50 CFR / Art. 54 CISA only apply to proceedings that are "criminal" in nature.[1] In order to define this notion, the CJEU, in principle, refers to the jurisprudence of the ECtHR. The latter's position of taking a European-autonomous approach towards defining what is criminal in nature[2] has been (convincingly) adopted by the CJEU:

The ECtHR has held that the notion of "criminal procedure" in the text of Art. 4 of Protocol No. 7 must be interpreted in the light of the general principles concerning the corresponding words "criminal charge" and "penalty" in Art. 6 and 7 of the Convention respectively. The Court's established case-law sets out three criteria, commonly known as the "Engel criteria" (*Engel and Others v. the Netherlands*), to be considered in determining whether or not there was a "criminal charge" (*Sergey Zolotukhin v. Russia [GC]*, § 53). For the consistency of interpretation of the Convention taken as a whole, the Court finds it appropriate for the applicability of the principle of ne bis in idem to be governed by the same criteria as in Engel (*A and B v. Norway [GC]*, §§ 105–107). The first criterion is the legal classification of the offence under national law, the second is the very nature of the offence and the third is the degree of severity of the penalty that the person concerned risks incurring. The second and third criteria are alternative and not necessarily cumulative. This, however, does not rule out 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 (*Sergey Zolotukhin v. Russia,* § 53, *Jussila v. Finland [GC]*, §§ 30–31; *Mihalache v. Romania [GC]*, § 54).

Nevertheless, fundamental problems remain to be solved:

- Considering the fact that "new forms" of sanctions have begun to appear, which do not correspond to the classical forms of either criminal or administrative sanctions (e.g. naming and shaming), are the *Engel* criteria sufficient to draw a line between criminal and non-criminal sanctions?

- Even if administrative sanctions are covered in principle, in the last several years, the problem of "double-track enforcement regimes" (administrative and criminal sanctions for same criminal behaviour in a number of Member States) arose and, under strict conditions, these were held to be in conformity with *ne bis in idem*. If extended, this could lead to lowering the guarantee in general, which calls for some in-depth analysis of the matter.[3] At least the conditions for the non-application of *ne bis in idem* should be further clarified (irrespective of individual cases).

- All Member States use confiscation measures as a consequence of criminal behavior; the question is whether confiscation also amounts to a "criminal sanction", with the consequence that confiscation orders in one Member State exclude subsequent convictions in other Member States and whether, *vice versa*, convictions (even without confiscation elements) in one Member State exclude subsequent confiscations abroad.

2. The *bis* requirement: The trial must be "finally disposed of" (CISA), the person "finally acquitted or convicted" (ECHR)

According to Art. 54 CISA, a person's trial must have been "finally disposed of". The exact meaning of this wording has raised many questions, but the CJEU's and the ECtHR's case law has at least produced useful clarifications:

a) The **ECtHR** provides some guidance on the interpretation of the "finality" requirement. The leading decision here is *Zolotukhin v. Russia*.[4] The ECtHR held that a decision is final if, according to the traditional expression, it has acquired the force of "res judicata". This is the case when the decision 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.[6] However, the availability of extraordinary remedies is not taken into account for the purpose of determining whether the proceedings have reached a final conclusion. Art. 4 of the Additional Protocol No. 7 to the ECHR is not confined to the right not to be punished twice but also extends to the right not to be prosecuted or tried for a second time. It applies even where the individual has merely been prosecuted in proceedings that have not resulted in a conviction.[5] Art. 4 of Protocol No. 7 clearly prohibits consecutive proceedings if the first set of proceedings has

already become final at the moment when the second set of proceedings is initiated.[6] However, Art. 4 of Protocol No. 7 does not prohibit several concurrent sets of proceedings (*litis pendens*). In such a situation, it cannot be said that an applicant is prosecuted once again "for an offence for which he has already been finally acquitted or convicted".[7]

b) The **CJEU** also made clarifications: To date, the Luxembourg Court has accepted as "a decision that has been finally disposed of" an out-of-court settlement with the public prosecutor (*Gözütok and Brügge*), a court acquittal based on lack of evidence (*Van Straaten*), a court acquittal arising due to the prosecution of the offence being time-barred (*Gasparini*), and a decision of *non lieu,* i.e., a finding that there was no ground to refer the case to a trial court because of insufficient evidence (*M.*).

However, the CJEU rejected the application of Art. 54 CISA in cases in which a judicial authority had already closed proceedings without any assessment of the unlawful conduct that the defendant had been charged with (*Miraglia*); cases in which a police authority, following expiry of the limitation period and an examination of the merits of the case, had submitted an order to suspend the criminal proceedings (*Turanský*); and cases in which a decision of the public prosecutor to terminate the criminal proceedings against a person was adopted without having undertaken a detailed investigation (*Kossowski*). In relation to the possibility to reopen the proceedings, the CJEU considers such a possibility under national law if new facts/evidence are discovered (*M.*).

According to the CJEU's jurisprudence, it is up to the legal order of the first sentencing state to determine whether the decision is final or not (cf. *M.*, *Kossowski*). The interpretation of the first Member State is not absolute, however, and can be set aside if it is not in line with the objectives of Art. 54 CISA or the TEU, which comprise not only the need to ensure the free movement of persons but also the need to promote the prevention and combating of crime within the area of freedom, security and justice (*Miraglia*, *Kossowski*). In this regard, another important factor for assessment of the finality requirement of the *ne bis in idem* principle is whether the decision at stake was rendered after determination of the merits of the case, i.e. after a detailed investigation had been carried out (*Kossowski*).

Insofar, however, the jurisprudence is far from being clear and is not completely convincing: In *my view*, as a general rule, the element of *legitimate trust* (*bona fide* solution) on the part of the person concerned should serve as a guideline:[8] Of course, the finality of a decision according to the national law of the first deciding state must serve as the *prima facie* aspect. But the decisive factor should eventually be whether the person concerned could have *bona fide* confidence in the final nature of the decision.[9]

c) One *special problem* deserves mention: it occurs within national jurisdictions that *apply criminal and administrative sanctions to the same acts*:

In the jurisprudence of the **ECtHR**, according to the criteria set out above (see II.1.), for the definition of "criminal", administrative sanctions will often also be covered by the term "criminal" or "punishment". In principle, this entails the "ne bis in idem prohibition" (*Grande Stevens/Italy*). In particular, the ECtHR has examined the cumulation of criminal and administrative tax sanctions in several cases. No violation of Art. 4 of Protocol No. 7 was found if there was a "sufficiently close connection in substance and in time" between the administrative and criminal proceedings and if the specific legislation indicated a uniform system of sanctions for the offence in question (*A and B v. Norway*).[10]

Similarly, the **CJEU** applied the *ne bis in idem* prohibition in principle to parallel administrative and criminal sanctions for the same act. It also allows an exception under Art. 50 CFR only under strict conditions (especially the principle of proportionality):[11]

"42 In that regard, it should be pointed out that the objective of protecting the integrity of financial markets and public confidence in financial instruments is such as to *justify a duplication of proceedings and penalties of a criminal nature* such as that provided for by the national legislation at issue in the main proceedings, where those proceedings and penalties have, for the purpose of achieving such *an objective, additional complementary objectives covering, as the case may be, different aspects of the same unlawful conduct at issue* (see, to that effect, judgment of 20 March 2018, *Garlsson Real Estate*, C-537/16, EU:C:2018:193, para. 46).

43 However, the bringing of proceedings for an administrative fine of a criminal nature, such as those at issue in the main proceedings, following the final conclusion of criminal proceedings, is subject to *strict compliance with the principle of proportionality* (see, to that effect, judgment of 20 March 2018, *Garlsson Real Estate*, C-537/16, EU:C:2018:193, para. 48). …"

d) Moreover, the *problem of a "restricted res judicata"* according to national law arises: Can criminal proceedings be continued if, according to the national law (of the first sentencing state), such a follow-up procedure is allowed (even if only under strict conditions)? Following this line of jurisprudence, the national law is decisive. As a consequence, the continuation of the criminal proceedings must be possible – but only in the country where the first sentence was rendered (and in no other Member State!) and only if the national conditions for continuation are met. In the end, this results in a "jurisdiction concentration" as regards the continued proceedings.[12]

e) **Conclusion**: All these problems strongly suggest that *the concept of (partial) res judicata* in conjunction with Art. 50 CFR/54 CISA *should be solved comprehensively and be regulated in general by European law* instead of risking patchwork solutions based on case-by-case decisions taken by the CJEU (and the ECtHR).

3. The "same act" in relation to legal persons/enterprises and corporate groups

a) Originally, the **ECtHR** favored a factual notion of offence (same act: see *Gradinger*), then turned towards a normative interpretation ("same essential elements": see *Fischer/Austria*; even narrower, "same offence" in a material sense: *Oliveira/Switzerland*), and changed its jurisprudence in *Zolotukhin/Russia* towards an *idem factum* interpretation. The court argued that it wanted to avoid contradictory results in comparison with the jurisprudence of the **CJEU**, which always favored a factual interpretation of the "same acts/same offences". According to the constant jurisprudence of the EU court, "offence" must be interpreted as the "identity of the material acts, understood as the existence of a set of facts which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected" (see *Van Esbroeck*, C-436/04). Nevertheless, some "normative elements" can be found, e.g., as to the (ir)relevance of a "uniform intention" and a certain flexibility as to the application of the conditions establishing a close connection in space and time, which form the basis of *idem factum*. So far, there is *consistency* between the jurisprudence of the ECtHR and the CJEU.

b) Uncertainty remains, however, regarding the development of the future jurisprudence of the EU courts, as to the necessity of a third normative element – in addition to the identity of the facts and the unity of the offender –, especially in EU competition law, when it comes to taking into account the "*identity of the legal interest protected*". So far, this third requirement is still being upheld by EU courts, even though two influential opinions of Advocates General[13] point towards a parallel interpretation according to Art. 54 CISA/Art. 50 CFR:[14]

"In the context of cartel offences, the material acts to which the ne bis in idem principle is then applicable necessarily always include, therefore, the period of time and the territory in which the cartel agreement had anti-competitive effects (a restriction of competition 'by effect') or could have had such effects (a restriction

of competition 'by object'). *This has nothing to do with the legal interest protected or the legal characterisation of the facts."*[15]

> "I would tend to agree with Advocate General Kokott that the principle of ne bis in idem, as enshrined in Article 50 of the Charter, *should be interpreted uniformly in all areas of EU law*, having due regard to the requirements of the case-law of the ECtHR. Simply because competition law does not belong to the 'core' of criminal law, or because sanctions in competition law should have a sufficiently deterrent effect so as to ensure effective protection of competition, do not for me constitute sufficient reasons to limit the protection afforded by the Charter in the field of competition law."[16]

c) It cannot be denied that Art. 50 CFR/Art. 54 CISA must also be applicable to **legal persons** as they also enjoy fundamental rights in the internal market (e.g. freedom of establishment and to provide services). Although there is abundant jurisprudence in relation to natural persons, the details of this guarantee in relation to legal persons/enterprises is far from being clear. Irrespective of whether national law provides for criminal sanctions for legal persons or whether "only" administrative sanctions exist for an enterprise for actions committed by its representatives or for failing to properly control the enterprise (e.g., in the German legal order: Sec. 30, 130 of the Ordnungswidrigkeitengesetz), the term "act" *must be interpreted differently* when it is applied to legal persons, as the latter act through all its representatives in different places and at different times. In the end, this must lead to a significantly broader comprehension of the term "same act" in relation to enterprises, which raises a number of consequential (and practically relevant) questions. Ultimately – in my opinion – the "identity of the act" must be established from an *objective viewpoint of the enterprise itself*.

d) Applied to legal persons, the question has to be answered as to whether – and if so, how far – a sanction imposed on an enterprise that is a member of a corporate group has a *ne bis in idem* effect on the other members of the group.

4. Art. 55 CISA and the applicability of exceptions after entry into force of the Lisbon Treaty

Lastly, the "open question" remains as to whether the exceptions originally made available by Art. 55 CISA are still applicable. This should be regulated in order to clarify the uncertain legal situation.

III. Excursus: Additional Issues Identified by Eurojust

1. As to "same acts" and criminal organisation

According to the general rule, all acts of one person which form a set of concrete circumstances inextricably linked together in time, space and by their subject matter, form the *idem factum*. The consequence is that, if certain individual offences (theft, robbery, assault) are committed within the context of a criminal organisation, the person convicted of being a member of that organisation cannot later be convicted of the individual offence. As a rule without exceptions, this seems unacceptable. Similar problems arise in national law, e.g. in Germany, on the basis of a comparable *idem factum* definition of the offence. The original, very wide jurisprudence has been restricted. Whenever a person has been convicted of membership in a criminal organisation, an individual act (murder, etc.) is not regarded as being "covered" by the conviction, even though both offences (membership in the organisation and murder) are closely connected. The exact conditions for (not) applying *ne bis in idem* are of course far from being clarified. Sometimes it is argued that *ne bis in idem* cannot apply if the "dimension" of the offence was not covered by the first conviction – a criterion that is wide

open to interpretation. Nevertheless, it is, in principle, accepted that there must be an exception to *ne bis in idem*.[17]

In my view, at least as regards European law, the *bona fide* solution described above (under II.2.a.) can be used as a criterion that is fair in respect to the defendant, on the one hand, and flexible enough to be applied to different cases, on the other hand. Nevertheless, as *ne bis in idem* is an important subjective legal position for the defendant, and one that is fundamental to any state based on the rule of law, this exception must be dealt with restrictively and in accordance with the principle of proportionality.

2. As to agreements between the suspect and the authorities

In addition, as regards agreements/deals between a suspect and the (judicial) authorities, the "bona fide" approach leads to fair and effective solutions. In my view, as a general rule, the element of legitimate trust on the part of the person concerned should serve as a guideline:[18] Starting with the finality requirement of the national law of the first deciding state as the *prima facie* aspect, it should be decisive *whether the person concerned could have bona fide confidence in the final nature of the decision*.

IV. Summary: Need/Use of EU Action and EU Competence?

1. In principle, all – or at least most of the – questions mentioned above could be resolved by the CJEU on a case-by-case basis. But this would only be the result of a – rather high – number of preliminary rulings which could take a considerable amount of time. Moreover, since the CJEU can only deal with a problem on the basis of individual cases, it is not in a position to develop consistent guidelines for the problem of "ne bis in idem" as such. The same applies in principle to the jurisprudence of the ECtHR that only reacts to individual complaints. Only in the long run these rulings could (if at all) bring about a (more or less) consistent system of mutual recognition of final judgments.

Considering the importance of the topic, a two-step solution is advisable:

- First, an EU legal act *partly summarizing, partly correcting, and partly developing further* the basic concept of a European *res judicata* and its consequences should be prepared.
- Second, all details of the application (and minor problems) can and should be left to the jurisprudence of the CJEU, as it would be impossible to deal with all these aspects in a legal act; the application of a guarantee to the special circumstances of a specific case is the traditional and classic task of the courts.

2. **Art. 82 para. 1 lit. a) TFEU** contains the necessary *competence to adopt a legal act* (directive or regulation) for laying down rules and procedures to ensure recognition throughout the Union of all types of judgments and judicial decisions. Rules for effective and consistent application of the *ne bis in idem* principle could be drafted (preferably – but not necessarily – in the same act as the rules on avoiding conflicts of jurisdiction). One small but important detail must finally be mentioned: Art. 82 para. 3 – the emergency brake – does not apply to a legal act based on Art. 82 para. 1 TFEU.

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1. Art. 50, see heading: "Right not to be tried or *punished* twice in *criminal* proceedings for the same *criminal* offence"; Art. 54, "penalty".↩
2. See H. Satzger, in: Satzger/Schluckebier/Widmaier, *Strafprozessordnung*, 4th ed., 2020 [SSW-StPO], Art. 50 GRC/Art. 54 SDÜ, mn. 23.↩
3. Cf. S. Mirandola and G. Lasagni, "The European ne bis in idem at the Crossroads of Administrative and Criminal Law", (2019) *eucrim*, 126 et seq.↩
4. ECtHR (GC), 10 February 2009, *Sergey Zolotukhin v. Russia*, Appl. no. 14939/03.↩
5. ECtHR, *ibid*, paras. 110-111 in respect of an acquittal following the second set of proceedings.↩

6. ECtHR, *op. cit.* (n. 4).↩
7. Cf. ECtHR, 7 July 2003, *Garaudy v. France*, Appl. no. 65831/01.↩
8. See details in H. Satzger, in SSW-StPO, *op. cit.* (n. 2), Art. 54 SDÜ/Art. 50 GRC, mn. 26.↩
9. For more detail, see H. Satzger, "Auf dem Weg zu einer ‚europäischen Rechtskraft'?", in: Heinrich et al. (eds.), *Festschrift für Claus Roxin zum 80. Geburtstag*, 2011, p. 1515, 1534.↩
10. As to further jurisprudence, see ECtHR, 18 May 2017, *Jóhannesson and Others v. Iceland*, Appl. no. 22007/11; ECtHR, 6 June 2019, *Nodet v. France*, Appl. No. 47342/14, para. 53, ECtHR, 8 July 2019, *Mihalache v Romania* [GC], Appl. No. 54012/10, para. 84.↩
11. CJEU in Enzo di Puma C-596/16 and C-597/16 as to market abuse (emphasis added by the author).↩
12. E.g., C. Burchard, "‚Wer zuerst kommt, mahlt zuerst – und als einziger!' – Zuständigkeitskonzentrationen durch das europäische ne bis in idem bei beschränkt rechtskräftigen Entscheidungen" (2015) HRRS, pp. 26, 29 et seq.↩
13. AG Kokott, opinion in C-17/10, *Toshiba*, paras. 122, 124; AG Wahl, opinion in C-617/17, *Powszechny Zakład Ubezpieczeń na Życie S.A.*, paras. 43 et seq.↩
14. CJEU, 14 February 2012, case C-17/10 (Toshiba Corporation and Others); for further references, see G. Hochmayr, in: Pechstein/Nowak/Häde, Frankfurter Kommentar, GRC Art. 50 mn. 11.↩
15. AG Kokott, opinion in C-17/10, *Toshiba*, para. 130 (emphasis added).↩
16. AG Wahl, opinion in C-617/17, *Powszechny Zakład Ubezpieczeń na Życie S.A.*, para. 46 (emphasis added).↩
17. For more detail, see W. Beulke/S. Swoboda, *Strafprozessrecht*, 15th ed., 2020, mn.517 et seq.↩
18. See, for more detail, Satzger, in SSW-StPO (*op. cit.* n. 2), Art. 54 SDÜ/Art. 50 GRC, mn. 26.↩

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