

Rules on the Application of ne bis in idem in the EU

Is Further Legislative Action Required?

Katalin Ligeti



eu crim

European Law Forum: Prevention • Investigation • Prosecution

Article

AUTHOR

Katalin Ligeti

Professor of European and International Criminal Law
Université du Luxembourg

CITATION SUGGESTION

K. Ligeti, "Rules on the Application of ne bis in idem in the EU", 2009, Vol. 4(1), eu crim, pp37–43. DOI: <https://doi.org/10.30709/eu crim-2009-002>

Published in
2009, Vol. 4(1) eu crim pp 37 – 43
ISSN: 1862-6947
<https://eu crim.eu>



Within a relatively short period of time, the European Court of Justice (ECJ) has had the opportunity to address the issue of a transnational *ne bis in idem* principle in several cases in the EU, and a legislative proposal was also put forward on this matter.¹ The increased attention paid to the transnational application of the *ne bis in idem* principle shows that the judicial authorities of the EU Member States are facing a growing number of cases that simultaneously involve several jurisdictions.

The present article focuses on the *ne bis in idem* principle in the context of an Area of Freedom, Security and Justice.² Taking as a starting point the rationale and content of *ne bis in idem* as a principle of national criminal law, the rules for its transnational application shall be examined. The current legal framework for the transnational application of the *ne bis in idem* principle in the EU is provided by Art. 54–58 of the Convention on the Implementation of the Schengen Agreement (CISA). The latter subjects the application of the *ne bis in idem* principle to certain exemptions and thereby curtails its fundamental right character.

With a view to the present stage of integration, it is argued in the following that the wording of Art. 54–58 CISA and the respective case law of the ECJ provide incomplete rules for the application of *ne bis in idem* in the interstate relations of the EU Member States. In order to properly balance the values of legal certainty and material justice at the transnational level, further legislative action is required.

I. The Rationale and Content of the *ne bis in idem* Principle in the National Legal Systems

The rationale for the *ne bis in idem* principle is complex. It comprises aspects relating to the rule of law as well as economic factors.

Emanating from the rule of law in criminal law, *ne bis in idem* is mainly regarded as a means of protecting the individual against possible abuses by the State of its *ius puniendi*.³ The State should not be allowed to make repeated attempts to convict an individual for an alleged offence. At the same time, the principle of *ne bis in idem* is also strongly connected to the legitimacy of the legal system, especially to legal certainty and equity.⁴ Based on the idea of “*aequitas*”, the individual, once having been subjected to the distress of criminal proceedings, should remain secure from further embarrassment. From the point of view of legal certainty, all European States recognise that once ordinary appellate remedies have been exhausted, or the relevant time limit for appeal has expired, a conviction or acquittal is to be regarded as irrevocable, and it acquires the quality of *res judicata*.⁵

Besides the above-cited rationale embedded in the rule of law, the *ne bis in idem* principle may also be based on economic considerations in that it prevents costly multiple prosecutions and creates incentives for efficient coordination between prosecutors.⁶ This rationale is also important at the transnational level, where efficient coordination between different jurisdictions must be secured.

The *ne bis in idem* principle contains two different prohibitions: (1) the prohibition of double punishment, i.e., that no one should be punished twice for the same act; and (2) the prohibition of double prosecution, i.e., that no one should have to face more than one prosecution for the same act.⁷

Based on the content described above, the *ne bis in idem* principle, as elaborated in the national legal systems, has three major characteristics. Firstly, it is a principle that is limited to criminal justice.⁸ This means that the *ne bis in idem* principle does not, in general, exclude administrative or civil proceedings and sanctioning for an act which has already been dealt with in the criminal justice system. Similarly, previous disciplinary, civil, or administrative convictions usually do not bar criminal proceedings.⁹

Secondly, the *ne bis in idem* principle applies only when the criminal decision has become final and irrevocable, such that no appellate remedy is available.¹⁰ Thus, provisional measures in criminal proceedings or in the pre-trial stage do not have a *ne bis in idem* effect. It is, therefore, generally accepted that final judgments on the merits of the charge (conviction or acquittal) result in *ne bis in idem*. Meanwhile, it has also become widely recognised that out-of-court settlements common in the criminal procedural law of most national legal systems have the same status as final judgements and also have a *ne bis in idem* effect.¹¹

Thirdly, the *ne bis in idem* principle applies in most national legal systems in respect of the same natural person. In those legal systems that recognise the criminal sanctioning of legal entities, it is therefore usually accepted that both the individual and the legal entity may be prosecuted and sanctioned for the same act.

II. The Transnational *ne bis in idem* Principle in the European Union

As European integration advanced and the creation of an Area of Freedom, Security and Justice became more and more tangible, the concurrence among national criminal jurisdictions of the Member States turned into a daily problem of law enforcement in the European Union. In order to avoid double prosecutions, Art. 54 of the CISA contained an explicit rule on the transnational application of *ne bis in idem*.

According to Art. 54 of the CISA: “A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party.”

It follows from the wording of Art. 54 that it does not limit the *ne bis in idem* principle to the prohibition of double punishment, but also forbids double prosecution. Art. 55 of the CISA, however, waters down this general prohibition by allowing for three categories of exemptions from the application of Art. 54:

- The *territoriality exception*, according to which acts are exempted that took place in whole or in part in one Member State’s own territory;
- The *national security exception*, according to which acts that constitute an offence against national security or other equally essential interests of a Member State are exempted;
- The *national official exception*, according to which acts that have been committed by a Member State’s own officials in violation of the duties of their office, are exempted.¹²
- Even in cases where a Member States resorts to one of these three exemptions, it must nevertheless apply the principle of deduction according to Art. 56 of the CISA.

1. General rules of interpretation

The preliminary rulings delivered by the ECJ on the interpretation of Art. 54 of the CISA crystallise mutual trust and safeguarding the right to freedom of movement as general rules for the transnational application of the *ne bis in idem* principle.¹³

In this sense, the ECJ has repeatedly emphasised that Art. 54–58 of the CISA are based on Art. 34 and 31 of the Treaty on European Union (TEU) and thereby imply that Member States have mutual trust in each other’s criminal justice systems.¹⁴ Mutual trust means that each Member State “recognises the criminal law in force in other Member States even when the outcome would be different if its own national law were applied.”¹⁵

The concept of mutual trust was thus employed by the ECJ to underpin that “the application of Art. 54 of the CISA [is not] made conditional upon harmonisation, or at least approximation, of the criminal laws of the Member States.”¹⁶ Separating the application of the *ne bis in idem* principle from the national criminal laws of the Member States opened the possibility for the ECJ to set autonomous standards for its transnational application.

The argumentation of the ECJ makes clear that the Court considers the *ne bis in idem* principle enshrined in Art. 54 of the CISA to be based on the concept of mutual recognition. In the widest sense, mutual recognition means that Member States recognise the criminal decisions of other Member States without any further formalities, thus giving them the status of a domestic decision. Though this viewpoint has been hotly debated among academics,¹⁷ the ECJ’s case law on the *ne bis in idem* principle leaves no doubt that the Court utilises the concept of mutual recognition in connection with the *ne bis in idem* principle as a means of identifying rules for the coexistence of multiple criminal jurisdictions in the European Union. Interpreting the *ne bis in idem* principle enshrined in Art. 54 of the CISA on the basis of the mutual recognition principle has far-reaching consequences for the interpretation of the elements of the *ne bis in idem* principle, as will be shown below in Sections 2– 4.

Before looking into the elements of the *ne bis in idem* principle, attention should be drawn to the second general guideline of its application as developed by the ECJ. The ECJ already emphasised in its first decision on Art. 54 of the CISA that there is an intrinsic link between Art. 54 of the CISA and the free movement of persons.¹⁸ the “right to freedom of movement is effectively guaranteed only if the perpetrator of an act knows that, once he has been found guilty and served his sentence, or, where applicable, been acquitted by a final judgment in a Member State, he may travel within the Schengen territory without fear of prosecution in another Member State on the basis that the legal system of that Member State treats the act concerned as a separate offence.” The fundamental right to free movement could be undermined if individuals had to face several prosecutions for the same criminal behaviour within the European Union. The Court held that the objective of Art. 54 of the CISA is “to ensure that no one is prosecuted on the same facts in several Member States on account of his having exercised his right to freedom of movement.”¹⁹

This “pro-free movement” approach, was however, streamlined and further elaborated by the ECJ in *Miraglia*. The ECJ established that the objectives of the TEU must be properly taken into account when interpreting the *ne bis in idem* principle. Consequently, in an Area of Freedom, Security and Justice, “the free movement of persons is assured in conjunction with appropriate measures with respect to [...] prevention and combating of crime.”²⁰ The right to freedom of movement, therefore, cannot run counter to the objective of “providing citizens with a high level of safety” as proclaimed in Art. 29 of the TEU. The prevention and combating of crime may, under certain conditions, restrain the right to freedom of movement and thus the *ne bis in idem* principle. The interpretation of the *ne bis in idem* principle has to balance these conflicting interests.

2. The meaning of *idem* for the purposes of Art. 54 of the CISA

Although all official language versions of the CISA refer to the “same acts”,²¹ the interpretation of this phrase triggered quite some academic debate even before the ECJ had the opportunity to address this question. The central debate on *idem* was whether “same acts” should be understood in a legal sense, as acts constituting the same offence in two or more systems,²² or in a (broader) factual sense as “same facts”,²³ or as a combination of these two as the same protected legal interest.²⁴

Relying on the concept of mutual recognition and freedom of movement, the ECJ clarified in *Van Esbroeck*²⁵ that the only relevant criterion for the purposes of Art. 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 subject matter.”²⁶ The Court went on to emphasise

that “[b]ecause there is no harmonisation of national criminal laws, a criterion based on the legal classification of the acts or on the protected legal interest might create as many barriers to freedom of movement within the Schengen territory as there are penal systems in the Contracting States.”²⁷ Viewed from the perspective of mutual recognition and free movement, the ECJ strived to develop rules of an autonomous interpretation of Art. 54 of the CISA that does not depend on the national criminal laws of the Member States.²⁸ Such autonomous interpretation was enabled only by a factual approach.

The ECJ reaffirmed and further outlined its approach in *Van Straaten*,²⁹ where it pronounced that a lack of complete identity of the material facts does not prevent the application of the *ne bis in idem* principle.³⁰ For example, the place of commission may change (as, e.g., in *Van Esbroeck*) or the commission may stretch over a longer period of time (as, e.g., in *Kraaijenbrink*).

To help the task of the national judge, the ECJ put the *Van Esbroeck* standard in a concrete context with regard to the illegal smuggling of narcotic substances, contraband tobacco, and other goods. The ECJ explicitly stated “that punishable acts consisting of exporting and importing the same illegal goods and which are prosecuted in different CISA Contracting States constitute conduct which may be covered by the notion of ‘same acts’ within the meaning of Article 54 of the CISA.”³¹ The ECJ has, however, always underlined that the definitive assessment as to whether the concrete circumstances constitute the same act for the purposes of Art. 54 of the CISA is the task of the competent national courts.

3. The meaning of “finally disposed of” for the purposes of Art. 54 of the CISA

The wording of Art. 54 of the CISA concerning the types of decision that should bar further prosecution is not homogenous in the various language versions: in German *rechtskräftig abgeurteilt*, in Dutch *onherroepelijk vonnis*, in French *définitivement jugée*. There has been a wide consensus that conviction or acquittal pronounced by a criminal court falls within the scope of Art. 54 of the CISA. It was, however, unclear, whether Art. 54 of the CISA requires *res iudicata* in a material sense, i.e., that the decision of the first prosecuting State definitively bars further prosecution at the national level.³² In addition, there have been differing opinions regarding whether out-of-court settlements and procedural agreements also fall within the scope of the *ne bis in idem* principle.³³

The first preliminary reference to the types of decisions having a *ne bis in idem* effect concerned out-of-court settlements.³⁴ Here, the ECJ held that Art. 54 of the CISA neither requires that a court is involved in the procedure nor that the decision in which the procedure culminates takes the form of a judicial decision.³⁵ According to the Court, a “decision of an authority required to play a part in the administration of criminal justice in the national legal system concerned”³⁶ is sufficient to trigger a *ne bis in idem* effect if the accused undertakes “to perform certain obligations prescribed by the Public Prosecutor, [which] penalises the unlawful conduct”³⁷ allegedly committed by him/her. Thus, the *ne bis in idem* principle laid down in Art. 54 of the CISA “also applies to procedures whereby [...] the Public Prosecutor of a Member State discontinues criminal proceedings brought in that State, without the involvement of a court, once the accused has fulfilled certain obligations and, in particular, has paid a certain sum of money determined by the Public Prosecutor.”³⁸

The very broad interpretation given in *Gözütök and Brügge* to the phrase “finally disposed of” as part of the *ne bis in idem* principle suggested that this principle may also apply to situations where national law bars further prosecution based on a purely formalistic ground. This was at issue in *Miraglia*³⁹ where the ECJ explicitly held that Art. 54 of the CISA does not apply “to a decision of the judicial authorities of one Member State declaring a case to be closed, after the Public Prosecutor has decided not to pursue the prosecution on

the sole ground that criminal proceedings have been started in another Member State against the same defendant and for the same acts, without any determination whatsoever as to the merits of the case.”

In its examination of the case law of the ECJ, *Wassmer* rightly concluded that, in *Miraglia*, the ECJ did not make the examination of the merits of the case an absolute condition for the application of Art. 54 of the CISA.⁴⁰ It rather aimed at streamlining its ruling in *Gözütök and Brügge* so as to exclude from the scope of the *ne bis in idem* provision decisions that “clearly run counter to the very purpose of the provisions of Title VI of the Treaty on European Union [...] namely: to maintain and develop the Union as an Area of Freedom, Security and Justice.”⁴¹

The fact that situations – in which national law bars further prosecution based on a purely formalistic ground – may be covered by Art. 54 of the CISA as long as they do run counter to the objectives of the TEU is confirmed by two further rulings in *Van Straaten*⁴² and *Gasparini*⁴³.

In *Van Straaten*, the Court held that the *ne bis in idem* principle applies in respect of a decision of the judicial authorities of the Member States by which the accused is acquitted for lack of evidence.⁴⁴ The ECJ stipulated that “in the case of a final acquittal for lack of evidence, the bringing of criminal proceedings in another Contracting State for the same acts would undermine the principles of legal certainty and of the protection of legitimate expectations”⁴⁵ and would jeopardise the exercise of the right to freedom of movement.⁴⁶ Moreover, the ECJ mentioned that – taking into account its ruling in *Miraglia* – an acquittal for lack of evidence presupposes the assessment of the merits of the case.⁴⁷

Similarly, the ECJ ruled in *Gasparini* that the *ne bis in idem* principle also applies in respect of a court’s decision of a Member State by which the accused is finally acquitted because prosecution of the offence is time-barred.⁴⁸ To arrive at this conclusion, the ECJ recalled again the aim of Art. 54 of the CISA, namely to ensure the exercise of the right of free movement,⁴⁹ which would be undermined by a second prosecution. In *Gasparini*, the ECJ again adopted a “pro-free movement and mutual trust reasoning” and decided not to follow the suggestions of the Advocate General. The latter argued, by referring to *Miraglia*, that since an acquittal due to lapse of time implies that there had been no assessment whatsoever of the unlawful conduct of the defendant, such an acquittal should not bar a second prosecution in another Member State.⁵⁰ Contrary to this, the ECJ clarified in *Gasparini* that the assessment of the merits of the case is not a general condition for the transnational application of the *ne bis in idem* principle. It reconfirmed that the interpretation of Art. 54 of the CISA may by no means depend on the national criminal laws of the Member States.

Finally, the ECJ clarified in its recent ruling in *Turansky* that “a decision which does not, under the law of the first [prosecuting State] definitively bar further prosecution at national level cannot, in principle, constitute a procedural obstacle to the opening or continuation of criminal proceedings in respect of the same acts against that person in another Contracting State.”⁵¹ In line with its decision in *Gözütök and Brügge*, the Court has accepted in *Turansky* that a final decision can come from a police authority that examined the case. However, in *Turansky*, the decision of the Slovak police authority did not preclude under Slovak law the institution of new criminal proceedings in respect of the same acts in the territory of the Slovak Republic. Consequently, the decision of the Slovak police authority did not preclude proceedings in another Member State. The Court thereby underlined the importance of *res judicata* in a material sense for the application of Art. 54 of the CISA.

4. The enforcement condition in Art. 54 of the CISA

According to Art. 54 of the CISA, the prohibition on criminal prosecutions for the same acts applies only if “it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party.” The reason for the enforcement condition in Art. 54 of the CISA is to

avoid having those who successfully fled from justice to another country invoke the *ne bis in idem* principle and thereby impede punishment.

In *Kretzinger*, the referring court asked whether a suspended custodial sentence may be regarded as a sentence that is enforced, or is actually in the process of being enforced.⁵² The Court confirmed that since “a suspended custodial sentence penalises the unlawful conduct of a convicted person, it constitutes a penalty within the meaning of Art. 54 of the CISA. That penalty must be regarded as ‘actually in the process of being enforced’ as soon as the sentence has become enforceable and during the probation period.”⁵³ The ECJ also noted that the very wording of Art. 54 of the CISA allows for taking into account only sanctions applied after the trial of the person in question has been finally disposed of. Therefore, procedural coercive measures preceding the final judgment, such as, e.g., police custody and detention on remand pending trial, fall outside the scope of the *ne bis in idem* principle.⁵⁴

Especially with a view to the above-mentioned reason for the enforcement condition – namely that those who successfully fled from justice to another country should not be in a position to invoke the *ne bis in idem* principle –, the question arose as to whether Article 54 of the CISA should be understood in such a way that the penalty imposed by the sentencing State must have been capable of being enforced at least on the date it was imposed. This was the issue of the reference for a preliminary ruling in *Bourquain*, where the ECJ decided “that the *ne bis in idem* principle, enshrined in Article 54 of the CISA, is applicable to criminal proceedings instituted in a Contracting State against an accused whose trial for the same acts as those for which he faces prosecution was finally disposed of in another Contracting State, even though, under the law of the State in which he was convicted, the sentence which was imposed on him could never [...] have been directly enforced.”⁵⁵ In this way, the Court once again underlined that the EU-wide application of the *ne bis in idem* principle cannot depend on the national criminal laws of the Member States.

III. Is Further Legislative Action on *ne bis in idem* Necessary?

The overall jurisprudence of the European Court of Justice on the interpretation of Art. 54 of the CISA has developed a set of rules that is not dependent on the national criminal laws of the Member States. By rejecting categories of the national legal systems, the Court has given preference to the exercise of the right to free movement, which may not be hindered by the national criminal laws of the Member States.⁵⁶ It is new in the Court’s approach, however, that the *ne bis in idem* principle in the interstate relations of the Member States must be related to mutual recognition. The Court reaffirms thereby that Member States are obliged to recognise decisions of other Member States even if there are substantial differences between their legal systems. According to the Court, such recognition should prevail even if it was adopted on purely formalistic grounds as long as recognition of a criminal decision of another Member State does not run counter to the objectives of the Treaty. Such formalistic grounds may derive both from the substantive and procedural criminal laws of the Member States, such as, e.g., age of criminal responsibility, lapse of time, pardon, or lack of evidence. The ECJ does not distinguish between substantive and procedural grounds of termination; if one Member State finally terminates the prosecution of the defendant, such a decision seems to trigger the application of *ne bis in idem* in other Member States, except for cases in which it would run counter to the objectives of the TEU.

The *Commission Staff Working Document* drawn up in 2005 raised the dilemma that the balance struck by the ECJ in interpreting the *ne bis in idem* principle might lead to undesirable consequences in cases where the discharging authority has ignored relevant interests of another Member State.⁵⁷ Therefore, the Commission is seeking ways of protecting individuals from multiple prosecutions without their having to resort to *ne bis in*

idem.⁵⁸ Indeed, one major weakness of the principle from the viewpoint of the defendant is that it does not, as currently framed, actually prevent multiple prosecutions. In order to strengthen the fundamental rights character of the *ne bis in idem* principle, the Commission suggests removing the exceptions and conditions contained in Art. 54–55 of the CISA.

Even though one may agree with the Commission that the optional derogations based on the territoriality, national security, and national official exemptions contained in Art. 55 of the CISA⁵⁹ unjustifiably prioritise the interests of national sovereignty and criminal prosecution over the fundamental rights of the person prosecuted and thereby run contrary to the objective of an “area of justice” as proclaimed in Art. 29 of the TEU, lifting the derogations will not solve the remaining problems of the *ne bis in idem* principle. It is not only the details of the concrete application of the *ne bis in idem* principle that are still unclear, but also the more fundamental issue concerning the rationale of *ne bis in idem* at the transnational level. As has been explained earlier, the *ne bis in idem* principle was founded in the national legal systems upon the twofold basis of securing due process rights for the individual and securing the finality of judgments in order to legitimise the legal order. The jurisprudence of the ECJ has not yet struck the balance between the contending values of legal certainty and material justice at the transnational level. In light of the case law on *idem*, it is not evident whether all situations in which national law bars further prosecution based on a purely formalistic ground are covered by Art. 54 of the CISA as long as they run counter to the objectives of the TEU. Or would the ECJ only accept such decisions provided that “the accused has fulfilled certain obligations and, in particular, has paid a certain sum of money determined by the Public Prosecutor?” In other words, it is unclear which weight the Court attributes to *res judicata* and legal certainty. In this respect, the *Turansky* judgment still leaves open whether the final decision of an investigating body other than the Public Prosecutor – such as, e.g., the police – could result in *ne bis in idem*, provided that such a decision bars further prosecution at the national level.

IV. Conclusion

It clearly emerges from the analysis of the jurisprudence that the ECJ faces great difficulties when trying to define rules for the transnational application of legal principles. This is partly a consequence of the nature of the preliminary ruling procedure where the ECJ may only decide on the very legal problem referred to it. Therefore, the suggestion of the Commission to adopt more coherent and detailed rules on the conflicts of jurisdiction and the *ne bis in idem* principle is certainly well founded. The two legislative proposals⁶⁰ brought forward so far have, however, ended in talk only. The very recent Presidency proposal for a framework decision on prevention and settlement of conflicts of jurisdiction in criminal proceedings⁶¹ does not contain stringent criteria for selecting jurisdiction either. Rather, it is limited to the strengthening of cooperation and coordination between the Member States. The further specification of the transnational *ne bis in idem* principle therefore remains the job of the ECJ.

1. Initiative of the Hellenic Republic with a view to adopting a Council Framework Decision concerning the application of the “*ne bis in idem*” principle. O.J. C 100 of 26 April 2003, p. 24.↵

2. For the application of the *ne bis in idem* principle in the EC internal market, see T. Liebau, „*Ne bis in idem*” in Europa, Berlin Vienna Zurich 2005.↵

3. The Law Commission, Double Jeopardy and Prosecution Appeals, Report, Law Com No. 267, pp. 37-38. Available at www.lawcom.gov.uk.↵

4. F.C. Schröder, Die Rechtsnatur des Grundsatzes „*ne bis in idem*”. JuS 1997, p. 227.↵

5. H.-H. Kühne, Anmerkung zum EuGH Urteil v. 11.2.2003. JZ 2003, p. 306. The finality of criminal proceedings may be outweighed only exceptionally and usually in favour of the affected individual. Some national legal systems, however, permit the extraordinary reopening of criminal cases even to the detriment of the sentenced person, e.g., Hungary (B. Gellér/N. Kis/P. Polt, Hungarian Report. RIDP 2002/3-4, pp. 995-996.) and Finland (R. Lahti, Finnish national report. RIDP 2002/3-4, p. 906.).↵

6. W.P.J. Wils, The principle of *ne bis in idem* in EC antitrust enforcement: a legal and economic analysis. World Competition 2003/2, p. 136.↵

7. H. van der Wilt, The European Arrest Warrant and the Principle *Ne Bis In Idem*. In: R. Blextton (ed.), Handbook on the European Arrest Warrant. The Hague 2005, p. 99.↵

8. J.L. de la Cuesta, General Report on Concurrent National and International Criminal Jurisdiction and the Principle *ne bis in idem*. RIDP 2002/3-4, p. 712.↵

9. The autonomous interpretation of a criminal charge by the European Court of Human Rights has induced some national legal orders to oblige the prosecuting authorities to choose between criminal and administrative proceedings in cases where the same act can be sanctioned both ways. See A. Kilp/H. van der Wilt, Dutch national report. RIDP 2002/3-4, p. 1109.↵
10. In cases involving an extraordinary reopening of the prosecution, *ne bis in idem* does not block the opening of a new prosecution, but it usually impedes double punishment. The principle of deduction obliges the court to deduct from the sanction the punishment imposed in the first decision.↵
11. H.-H. Kühne, *op cit.*↵
12. Of the EU Member States, AT, DE, DK, EL, FI, SE, and UK have made use of the territoriality exemption and four of them (AT, DK, EL, FI) also of the national security exemption. See Commission Staff Working Document SEC (2005) 1767, p. 47.↵
13. M. Wassmer, The principle of *ne bis in idem*. RIDP 2006/1-2, p. 123. For the judgments, cited in the following, and relevant developments regarding the *ne bis in idem* principle, see also the news section of eucrim (1-2/2006, pp. 16-17; 3-4/2006, pp. 64-65; 1-2/2007, pp. 33-34, 3-4/2007, p. 104; 1-2/2008, pp. 31-32).↵
14. C-187/01 and C-385/01 *Gözütök and Brügge* [2003] ECR I-1345, para. 32. Recalled in C-436/04 *Van Esbroek* [2006] ECR I-2333, para. 29.; C-467/04 *Gasparini and Others* [2006] ECR I-9199, para. 29.; C-297/07 *Bourquain*, Judgement of 11 December 2008, para. 37.↵
15. C-187/01 and C-385/01 *Gözütök and Brügge* [2003] ECR I-1345, para. 33. Recalled in C-436/04 *Van Esbroek* [2006] ECR I-2333, para. 30.; C-150/05 *Van Straaten* [2006] ECR I-9327, para. 43.; C-467/04 *Gasparini and Others* [2006] ECR I-9199, para. 30.; C-297/07 *Bourquain*, Judgement of 11 December 2008, para. 37.↵
16. C-187/01 and C-385/01 *Gözütök and Brügge* [2003] ECR I-1345, para. 32. Recalled in C-436/04 *Van Esbroek* [2006] ECR I-2333, para. 29.; C-467/04 *Gasparini and Others* [2006] ECR I-9199, para. 29.; C-297/07 *Bourquain*, Judgement of 11 December 2008, para. 36.↵
17. There is a debate on whether one needs to first harmonise substantive and procedural criminal law in order to be able to mutually recognise criminal decisions made by foreign judicial authorities. S. Peers, Mutual recognition and criminal law in the European Union: Has the Council got it wrong? CMLR 2004/41, pp. 5-36.↵
18. C-187/01 and C-385/01 *Gözütök and Brügge* [2003] ECR I-1345, para. 38. Recalled in C-469/03 *Miraglia* [2005] ECR I-2009, para. 32.; C-436/04 *Van Esbroek* [2006] ECR I-2333, para. 34.; C-150/05 *Van Straaten* [2006] ECR I-9327, paras. 46., 57.; C-467/04 *Gasparini and Others* [2006] ECR I-9199, para. 27.; C-491/07 *Turansky*, Judgement of 22 December 2008, para. 41.↵
19. C-187/01 and C-385/01 *Gözütök and Brügge* [2003] ECR I-1345, para. 38.↵
20. C-469/03 *Miraglia* [2005] ECR I-2009, paragraph 34.↵
21. In Dutch "kann terzake niet meer worden vervolgd wegens dezelfde feiten"; in French "ne peut, pour les mêmes faits, être poursuivie" and in German "wegen derselben Tat nicht verfolgt werden".↵
22. Similarly, e.g., Wyngaert and Stessens suggest that "Without expressing an opinion as to the exact meaning of Art. 54 of the Schengen Convention, any general international *non bis in idem* provision should, in principle, bar only new prosecutions for the same offence, not for the same facts." C. Van den Wyngaert/G. Stessens, The International *Non Bis In Idem* Principle: Resolving Some of the Unanswered Questions, ICLQ 1999, p. 791.↵
23. A similar approach was adopted in the Freiburg Proposal, according to which *idem* is defined by the objective criteria of the *human behaviour* at the *same place* and at the *same time*. Freiburg Proposal on Concurrent Jurisdictions and the Prohibition of Multiple Prosecutions in the European Union. MPI Freiburg 2003, p. 23.↵
24. K. Ambos, Internationales Strafrecht. Munich 2006, p. 437.; K. Ligeti, Strafrecht und strafrechtliche Zusammenarbeit in der Europäischen Union. Berlin 2005, pp. 107-108.↵
25. C-436/04 *Van Esbroek* [2006] ECR I-2333, paras. 14-17.↵
26. C-436/04 *Van Esbroek* [2006] ECR I-2333, para. 38. Recalled in C-150/05 *Van Straaten* [2006] ECR I-9327, para. 48.; C-467/04 *Gasparini and Others* [2006] ECR I-9199, para. 54.; C-367/05 *Kraaijenbrink*, Judgement of 18 July 2007, para. 26.↵
27. C-436/04 *Van Esbroek* [2006] ECR I-2333, para. 35. Recalled in C-150/05 *Van Straaten* [2006] ECR I-9327, para. 48.; C-288/05 *Kretzinger*, [2007] ECR I-6441, para. 29. The Court thereby chose to interpret *ne bis in idem* more broadly than it had previously done in the area of EC law, and it held that 'unity of the legal interest protected' is not required for the application of Art. 54 of the CISA.↵
28. In support of an autonomous interpretation, the ECJ also underlined that the wording of Art. 54 of the CISA differs from that in other international instruments which enshrine the *ne bis in idem* principle. C-436/04 *Van Esbroek* [2006] ECR I-2333, para. 28.; C-150/05 *Van Straaten* [2006] ECR I-9327, para. 42.↵
29. C-150/05 *Van Straaten* [2006] ECR I-9327, paras. 19-23.↵
30. The ECJ contested that "[i]n case of offences relating to narcotic drugs, the quantities of the drug that are at issue in the two Contracting States concerned or the persons alleged to have been party to the act in the two States are not required to be identical. It is [...] possible that a situation in which such identity is lacking involves a set of facts which, by their very nature, are inextricably linked." C-150/05 *Van Straaten* [2006] ECR I-9327, paras. 50-51.↵
31. C-288/05 *Kretzinger*, [2007] ECR I-6441, para. 35 contains a summary of the case law of the Court on the meaning of "same act" for the purposes of Art. 54 of the CISA.↵
32. H. Radtke/D. Busch, Transnationaler Strafklageverbrauch in der Europäischen Union, NSTZ 2003, p. 284.↵
33. For different opinions, see B. Hecker, Das Prinzip „*ne bis in idem*“ im Schengener Rechtsraum, StV 2001, p. 309.; K. Ambos, *op. cit.*, p. 429.↵
34. C-187/01 and C-385/01 *Gözütök and Brügge* [2003] ECR I-1345, paras. 9-21.↵
35. C-187/01 and C-385/01 *Gözütök and Brügge* [2003] ECR I-1345, para. 31.↵
36. C-187/01 and C-385/01 *Gözütök and Brügge* [2003] ECR I-1345, para. 28.↵
37. C-187/01 and C-385/01 *Gözütök and Brügge* [2003] ECR I-1345, para. 29.↵
38. C-187/01 and C-385/01 *Gözütök and Brügge* [2003] ECR I-1345, para. 48.↵
39. C-469/03 *Miraglia* [2005] ECR I-2009, paras. 13-23.↵
40. M. Wassmer, *op. cit.*, p. 126.↵
41. C-469/03 *Miraglia* [2005] ECR I-2009, para. 34.↵
42. C-150/05 *Van Straaten* [2006] ECR I-9327.↵

43. C-467/04 *Gasparini and Others* [2006] ECR I-9199.↵
44. C-150/05 *Van Straaten* [2006] ECR I-9327, para. 61.↵
45. C-150/05 *Van Straaten* [2006] ECR I-9327, para. 59.↵
46. C-150/05 *Van Straaten* [2006] ECR I-9327, para. 58. Contrary to the national criminal laws of the Member States that, under certain circumstances, allow for extraordinary revision of *res judicata* in order to rectify judicial wrongdoing, such an extraordinary remedy is not available in the interstate relations of the Member States. Therefore, if a Member State terminates prosecution of the defendant due to lack of evidence, no other Member States may prosecute the defendant for the same facts even if they dispose of the necessary evidence. In such scenarios, material justice may only be satisfied in the first prosecuting State, which may reopen the case if it receives the evidence in question from abroad.↵
47. The Court underlined that in *Van Straaten* there was no need to deliver a general ruling on whether an acquittal that is not based on a determination of the merits of the case may fall within Art. 54 of the CISA. C-150/05 *Van Straaten* [2006] ECR I-9327, para. 60.↵
48. C-467/04 *Gasparini and Others* [2006] ECR I-9199, para. 33.↵
49. C-467/04 *Gasparini and Others* [2006] ECR I-9199, para. 27.↵
50. The Advocate General in *Gasparini* argued that “a distinction can and should be drawn between trusting other Member States’ criminal proceedings in general (including such matters as fair trial guarantees, the substantive delineation of offences and rules on production and admissibility of evidence), on the one hand, and trusting a decision that no substantive assessment of the offence can take place at all because the prosecution is time-barred, on the other hand. The first is a proper expression of respect, in a non-harmonised world, for the quality and validity of other sovereign States’ criminal law. The second is tantamount to de facto harmonisation around the lowest common denominator.” Opinion of the Advocate General of 15 June 2006, Case C-467/04, para. 109.↵
51. C-491/07 *Turansky*, Judgement of 22 December 2008, para. 36.↵
52. C-288/05 *Kretzinger*, [2007] ECR I-6441, para. 38.↵
53. C-288/05 *Kretzinger*, [2007] ECR I-6441, para. 42.↵
54. C-288/05 *Kretzinger*, [2007] ECR I-6441, para. 49.↵
55. C-297/07 *Bourquain*, Judgement of 11 December 2008, para. 52.↵
56. This “free movement” approach is in line with the previous case law of the Court, according to which “[a]lthough in principle criminal legislation is a matter for which the Member States are responsible, the Court has consistently held that Community law sets certain limits to their power, and such legislation may not restrict the fundamental freedoms guaranteed by Community law.” C-348/96 *Donatella Calfa* [1999] ECR-I 11, para. 17.↵
57. Commission Staff Working Document SEC (2005) 1767, p. 55.↵
58. In the Commission’s view, the only way to more efficiently solve cases that have links to more than one jurisdiction would be to regulate how and when Member States are entitled to exercise their criminal jurisdiction. Green Paper on Conflicts of Jurisdiction and the Principle of *Ne bis in Idem* in Criminal Proceedings, COM (2005) 696 final = eucrim 1-2/2006, p. 16.↵
59. Critical remarks on national derogations by F. Zeder, *Verbot der Doppelbestrafung (ne bis in idem) in der EU: Fragen, Fragen, Fragen – und einige Antworten*, AnwBl 2007, p. 465.↵
60. *Initiative of the Hellenic Republic*, *op. cit.* (note 1) and Green Paper, *op. cit.* (note 58).↵
61. SN 1123/09 of 14 January 2009, Council of the European Union. For this proposal, see also the reports in the news section of this issue.↵

COPYRIGHT/DISCLAIMER

© 2026 The Author(s). Published by the Max Planck Institute for the Study of Crime, Security and Law. This is an open access article published under the terms of the Creative Commons Attribution-NoDerivatives 4.0 International (CC BY-ND 4.0) licence. This permits users to share (copy and redistribute) the material in any medium or format for any purpose, even commercially, provided that appropriate credit is given, a link to the license is provided, and changes are indicated. If users remix, transform, or build upon the material, they may not distribute the modified material. For details, see <https://creativecommons.org/licenses/by-nd/4.0/>.

Views and opinions expressed in the material contained in eucrim are those of the author(s) only and do not necessarily reflect those of the editors, the editorial board, the publisher, the European Union, the European Commission, or other contributors. Sole responsibility lies with the author of the contribution. The publisher and the European Commission are not responsible for any use that may be made of the information contained therein.

About eucrim

eucrim is the leading journal serving as a European forum for insight and debate on criminal and “criministrative” law. For over 20 years, it has brought together practitioners, academics, and policymakers to exchange ideas and shape the future of European justice. From its inception, eucrim has placed focus on the protection of the EU’s financial interests – a key driver of European integration in “criministrative” justice policy.

Editorially reviewed articles published in English, French, or German, are complemented by timely news and analysis of legal and policy developments across Europe.

All content is freely accessible at <https://eucrim.eu>, with four online and print issues published annually.

Stay informed by emailing to eucrim-subscribe@cs.l.mpg.de to receive alerts for new releases.

The project is co-financed by the [Union Anti-Fraud Programme \(UAFB\)](#), managed by the [European Anti-Fraud Office \(OLAF\)](#).



**Co-funded by
the European Union**