

Research Article

NE BIS IN IDEM AS A MODERN GUARANTEE IN CRIMINAL PROCEEDINGS IN EUROPE

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Summary: 1. Introduction to ne bis in idem in Criminal Proceedings. – 2. The Convention for the Protection of Human Rights and Fundamental Freedoms: The First Step towards the Europeanisation of ne bis in idem in All Types of Proceedings. – 3. The Charter of Fundamental Rights of the European Union: A Step Forward or a ‘copy’ of the Convention? – 4. The Convention Implementing the Schengen Agreement: Recognition of ne bis in idem at the Inter-state Level. – 5. The European Convention on Extradition: Ne bis in idem in the Traditional Scheme on Extradition. – 6. Legislative Instruments in the Field of Mutual Recognition of Judicial Decisions in Criminal Proceedings: Ne bis in idem in the Modern Scheme of Co-operation in Criminal Matters. – 7. Conclusions.

This publication contains some results of research that has previously appeared in the following of my publications, which were substantively updated: L Klimek, *European Arrest Warrant* (Springer Cham 2015) <<https://doi.org/10.1007/978-3-319-07338-5>>; L Klimek, *Mutual Recognition of Judicial Decisions in European Criminal Law* (Springer Cham 2017) <<https://doi.org/10.1007/978-3-319-44377-5>>; L Klimek, ‘Transnational application of the Ne bis idem principle in Europe’ (2011) 5(3) *Notitiae ex Academia Bratislavensi Iurisprudentiae* 12-33; L Klimek, *Judikatúra Súdneho dvora Európskej únie vo veciach trestných* [transl.: Case-law of the Court of Justice of the European Union in Criminal Matters] (Wolters Kluwer 2018); L Klimek, *Judikatúra Súdneho dvora Európskej únie vo veciach zneužívania trhu a súvisiacich trestnoprávných otázok* [transl.: Case-law of the Court of Justice of the European Union in Matters of Market Abuse and Related Criminal Issues] (Wolters Kluwer 2020).

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ABSTRACT

Background: The principle ne bis in idem is a traditional principle relevant to criminal proceedings in European states. While in the past, crime had a primarily national dimension, these days, it has an international dimension as well. The Europeanisation of law also occurred in criminal law, including criminal proceedings. Thus, an understanding of ne bis in idem as a modern guarantee involving the international dimension is needed.

Methods: The basic sources used for the elaboration of the paper are scholarly sources (monographs, textbooks, studies, and scientific papers, etc.), legislative instruments (international agreements, etc.), and case-law (of the European Court of Human Rights and the Court of Justice of the European Union). The materials used here also include the available explanatory memorandums. The author uses traditional methods of legal scientific (jurisprudential) research – general scientific methods as well as special methods of legal science (jurisprudence). The general scientific methods used in the paper are predominantly logical methods, namely, the method of analysis, the method of synthesis, and the method of analogy, as well as the descriptive method. The descriptive method has been used to familiarise the reader with the current legal regulation of ne bis in idem. The method of analysis has been used as regards relevant provisions and case-law. The method of synthesis has also been used, as has the method of analogy. The special methods of legal science used here predominantly include methods belonging to a group of interpretative methods, namely, the teleological method, the systematic method, the historical method, and the comparative method. The teleological method has been used as regards the explanation of the purpose of legislative instruments. The systematic method has been used in the classification of the principle of ne bis in idem. The historical method has been used as regards the genesis and historical aspects of ne bis in idem. The comparative method has been used to examine the relationship between legislative instruments.

Results and Conclusions: The principle of ne bis in idem is one of the oldest norms in western civilisation. Since the Europeanisation of law also occurred in criminal law, including criminal proceedings, the principle of ne bis in idem became a part of international legal documents. The Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 7, introduced a new right – the ‘right not to be tried or punished twice’. In addition, the Charter of Fundamental Rights of the European Union, which is the first bill of rights developed explicitly for the EU, also introduced the principle of ne bis in idem as the ‘right not to be tried or punished twice in criminal proceedings for the same criminal offence’. However, its understanding in the Charter has no additional significance. In principle, it is the same. Despite the fact the primary purpose of the Convention implementing the Schengen Agreement is to facilitate the free movement of persons between member states of the EU by removing internal border controls, several measures have been introduced which focus on police and judicial co-operation, including the principle of ne bis in idem, in the provision entitled ‘Application of the ne bis in idem principle’. This provision is considered the most developed expression of an internationally applicable ne bis in idem. Ne bis in idem also occurs in extradition proceedings and surrender proceedings. Its operation under the European Convention on Extradition prevents the double prosecution of the same person for the same offence in different jurisdictions. As regards the new procedural system introduced by the Framework Decision 2002/584/JHA on the European arrest warrant, based on the surrender proceedings as a special kind of criminal proceedings, there is no absolute obligation to execute the European arrest warrant. The Framework Decision, in its core text, includes grounds for non-execution of the arrest warrant in the executing state – and one of them is the principle of ne bis in idem.

1 INTRODUCTION TO NE BIS IN IDEM IN CRIMINAL PROCEEDINGS

The principle known by the Latin maxim *ne bis in idem* or *non bis in idem* (in common law jurisdictions, *double jeopardy*¹), which means 'not the same thing twice', implies that a person cannot be sentenced or prosecuted twice in respect of the same act (criminal offence). When society has exercised its legitimate right to punish the perpetrator for an act contrary to its rules, it has exhausted its right to prosecute him/her. That principle is therefore inseparable from the principle of *res judicata* and is intended to provide a convicted person with a guarantee that, when s(he) has served a sentence and 'paid his/her debt' to society, s(he) can regain his/her place in the society without fear of renewed prosecution.²

The principle of *ne bis in idem* is one of the oldest recognised norms in western civilisation, drawing its traditional origins from European culture. For example, in *Nahum*, an Old Testament book, we see a passage stating that 'affliction shall not rise up the second time'.³ As regards Roman law, we can turn to the *Digest of Justinian* (hereinafter – the *Digest*), part of the *Corpus Iuris Civilis*, which represents the compilations of Roman law⁴ promulgated by the Roman emperor Justinian, containing four parts – namely (i) the *Institutes*, (ii) the *Digest*, (iii) Justinian's *Code*, and (iv) the *Novels*. As regards *ne bis in idem*, attention is mainly focused on the *Digest*, which is the principal source for attempts to reconstruct the law of classical Rome. Despite the fact that Roman law deals especially with civil law, we see in Book 48 of the *Digest* that 'the governor should not permit the same person to be again accused of a crime of which he has been acquitted'.⁵ However, the understanding of *ne bis in idem* in Roman law is significantly different from today's modern form.⁶

Although the principle of *ne bis in idem* did not carry the same legal significance then as it does today, its historical significance can be found in its effect on criminal proceedings. These days, most civilised nations recognise it. Although different states may have their own reasons for adopting it, the rationale for supporting it generally falls into two categories: first, a human rights oriented rationale and, second, a pragmatic rationale. The human rights rationale reflects concerns over the individual, and the pragmatic rationale concerns the impact of multiple prosecutions on judicial systems.⁷

During recent decades, the principle of *ne bis in idem* has – in European states – become a part of their constitutions as well as their criminal law systems. For instance, according to the German Constitution⁸ (Basic Law), 'no person may be punished for the same act more than

1 See, for example: GP Fletcher, *Basic Concepts of Criminal Law* (Oxford University Press 1998); GC Thomas, *Double Jeopardy: The History, The Law* (New York University Press 1998).

2 Case No C-261/09 – *Criminal proceedings against Gaetano Mantello*, Court of Justice of the European Union – Opinion of Advocate General Yves Bot of 7 September 2010 <www.curia.europa.eu/juris/document/document.jsf?text=&docid=78746&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=311319> accessed 15 July 2022.

3 Nahum 1:9.

4 M Turošík, *Roman Law* (Matej Bel University in Banská Bystrica, 2013) 66.

5 Digest of Justinian, Book XLVIII (48). English translation: SP Scott, *The Civil Law: Including the Twelve Tables, the Institutes of Gaius, the Rules of Ulpian, the Opinions of Paulus, the Enactments of Justinian, and the Constitutions of Leo* (Central Trust 1932, Vol. 11) 17 (reprinted by The Lawbook Exchange, 2001).

6 DS Rudstein, *Double Jeopardy: A Reference Guide to the United States Constitution* (Greenwood Publishing Group 2004) 3.

7 L Sure, 'The Practical Applications of Ne Bis in Idem in International Criminal Law', in Y Sienho (ed), *International Crime and Punishment: Selected Issues*, Vol. 2 (University Press of America 2004) 172.

8 The Basic Law for the Federal Republic of Germany 'Grundgesetz für die Bundesrepublik Deutschland' of 8 May 1949 (as amended by later legislation) <www.gesetze-im-internet.de/gg/BJNR000010949.html> accessed 1 September 2022.

once under the general criminal laws.⁹ The Slovak Republic the Constitution¹⁰ establishes this principle by stipulating that ‘no one shall be made criminally liable for an act for which s(he) has already been sentenced or of which s(he) has already been acquitted in a legally valid manner.’¹¹

2 THE CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS: THE FIRST STEP TOWARDS THE EUROPEANISATION OF NE BIS IN IDEM IN ALL TYPES OF PROCEEDINGS

The Convention for the Protection of Human Rights and Fundamental Freedoms¹² (hereinafter – the Convention or ECHR), adopted in 1950 by the Council of Europe, is the most important source of human rights in Europe. Although the text of the Convention was inescapably a historic compromise, it represented a clear victory for the affirmation of certain human rights, as opposed to rights-scepticism, and for the non-integrationist conception of post-war Europe. The Convention was signed two years later as the Universal Declaration of Human Rights.¹³ Yet unlike the Universal Declaration, the Convention had the advantage of creating an international mechanism for the enforcement of the rights it guarantees.¹⁴

The ECHR includes a number of rights, and its protocols have introduced further rights. Protocol No. 7 to the ECHR¹⁵ of 1984 introduced a new right – the ‘right not to be tried or punished twice’ – which reads ‘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.’¹⁶ The words ‘under the jurisdiction of the same State’ limit the application of the cited provision of the Protocol to the national level. It should not be overlooked that the rule established by this provision is applicable only after the person has been acquitted or convicted in accordance with the law and criminal proceedings of the state concerned. There must be a final decision resulting from criminal proceedings. Even so, the provision of Protocol No. 7 to the ECHR does not prevent a reopening of the proceedings in favour of the convicted person and any other changing of the judgment to the benefit of the convicted

9 Art. 103(3) of Basic Law for the Federal Republic of Germany; in original language – ‘[n]iemand darf wegen derselben Tat auf Grund der allgemeinen Strafgesetze mehrmals bestraft werden’. For details, see, for example: M Sachs *Grundgesetz: Kommentar* (9th edn, CH Beck 2021).

10 The Constitution of the Slovak Republic No 460/1992 Coll. ‘Ústava Slovenskej republiky č. 460/1992 Zb.’ of 1 September 1992 (as amended by later legislation) <www.slov-lex.sk/pravne-predpisy/SK/ZZ/1992/460/20210101> accessed 1 October 2022.

11 Art. 50(5) of the Constitution of the Slovak Republic; in original language – ‘[n]ikoho nemožno trestne stíhať za čin, za ktorý bol už právoplatne odsúdený alebo oslobodený spod obžaloby’. For details, see, for example: J Drgonec ‘Ústava Slovenskej republiky: Komentár’ (2nd edn, CH Beck 2019).

12 The Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 <www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=005> accessed 17 September 2022.

13 The Universal Declaration of Human Rights of 10 December 1948 <www.un.org/en/about-us/universal-declaration-of-human-rights> accessed 17 September 2022.

14 MB Dembour, *Who Believes in Human Rights? Reflections on the European Convention* (Cambridge University Press 2006) 20.

15 The Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms of 22 November 1984 <www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=117> accessed 17 September 2022. For details, see, for example: WA Schabas, *The European Convention on Human Rights: A Commentary* (Oxford University Press 2015).

16 Art. 4 of the Protocol No. 7 to the Convention.

nature, value, and scope of the Charter have been thoroughly investigated. Although initially, it had no formal legal status within EU law, it had a profound influence on the institutions after it was adopted.²³ It is viewed as codifying existing rights enjoyed by European citizens. The rights enshrined in the Charter are somewhat vague but, in essence, are not new. They are invariably based on a precursor text. A wide range of rights is included, such as civil and political rights reminiscent of the ECHR.²⁴

The Charter was not a formal legal instrument like the ECHR, but it was an authoritative statement of the rights considered to be fundamental in the EU. Advocates General began referring to it as a source of fundamental rights.²⁵ The Court of Justice of the European Union also began to refer to the Charter as a source of fundamental rights, but there has never been exclusive reliance on the Charter.²⁶ The approach has been continued by the Treaty on European Union.²⁷ It states that ‘the European Union recognises the rights, freedoms and principles set out in the Charter, which shall have the same legal value as the Treaties’²⁸ – i.e., the Treaty on European Union and the Treaty on the functioning of the European Union.²⁹ With regard to this provision, the Charter became a part of the primary EU law. The change to the legal status of the Charter was followed by a prolonged battle as regards the question of whether it should be made legally binding.³⁰

Ne bis in idem, in the provisions of the Charter, is entitled the ‘right not to be tried or punished twice in criminal proceedings for the same criminal offence’. It reads that ‘[n]o 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 European Union in accordance with the law’.³¹ As was seen, the Charter is not the first instrument recognising the principle of *ne bis in idem* at the international level. Thus, we can presume that the scope and content of the provision are identical to its understanding in Protocol No. 7 to the ECHR.³² However, if we compare *ne bis in idem* in Protocol No. 7 to the ECHR and in the Charter, its understanding in the Charter has no additional significance.³³

23 EU Network of Independent Experts on Fundamental Rights ‘*Commentary of Charter of Fundamental Rights of the European Union*’ (2006) 15.

24 RKM Smith, *Textbook on International Human Rights* (7th edition, Oxford University Press 2017) 117.

25 See, for example: Case No C-540/03 – *European Parliament v Council of the European Union*, Court of Justice of the European Union – Opinion of Advocate General Juliane Kokott of 8 September 2005 <www.curia.europa.eu/juris/document/document.jsf?text=&docid=59709&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=6798836> accessed 15 July 2022

26 D Chalmers, G Davies, G Monti, *European Union Law* (4th edn, Cambridge University Press 2019) 242.

27 Treaty on European Union as amended by the Treaty of Lisbon [2010] OJ C 83/47.

28 Art. 6(1) of the Treaty on European Union.

29 Treaty on the functioning of the European Union as amended by the Treaty of Lisbon [2010] OJ C 83/47.

30 L Klimek, ‘Transnational application of the *Ne bis in idem* principle in Europe’ (2011) 5(3) *Notitiae ex Academia Bratislavensi Iurisprudentiae* 18.

31 Art. 50 of the Charter.

32 EU Network of Independent Experts on Fundamental Rights, *Commentary of Charter of Fundamental Rights of the European Union* (2006) 384; Draft Charter of Fundamental Rights of the European Union, CHARTE 4473/00, CONVENT 49 45.

33 L Klimek, ‘Trestnoprávne záruky Charty základných práv Európskej únie: krok vpred alebo “nový obal” Dohovoru o ochrane ľudských práv a základných slobód?’ [transl.: Criminal Guaranties of the Charter of Fundamental Rights of the European Union: Step Ahead or “New Label” of the Convention for the Protection of Human Rights and Fundamental Freedoms?], in V Marková (ed) *Aktuálne otázky trestného práva v teórii a praxi*, Zborník príspevkov vedeckej konferencie na Akadémii policajného zboru v Bratislave konanej dňa 19. marca 2015 [transl.: Current Issues of Criminal Law in Theory and Practice, Proceedings of the Scientific Conference at the Academy of Police Force in Bratislava held on 19 March 2015] (Academy of Police Force in Bratislava 2015) 339-349.

It should be noted that ever prior to the Charter, the Court of Justice of the European Union had adopted a number of decisions concerning *ne bis in idem*. The first case before the Court of Justice was *Gutmann v. Commission*.³⁴ Mr. Gutmann, an official of the European Atomic Energy Community, was accused of charging the Community the expense of repairs for a camera belonging to him and for private telephone calls. A decision was reached to issue a reprimand, and the inquiry was terminated. After that, further inquiries were launched on the grounds of certain irregularities that had been found and a complaint that had been lodged by a head of the division without specifying whether these were new factors. The Court of Justice held that it was not sufficiently clear from the file presented to it by the Commission what precisely the first proceedings were based on and ordered the Commission to present the files in their entirety. When the Commission came forward with the files, the Court held that there were no grounds for finding that the two inquiries were based on different conduct and that there were therefore no circumstances that could justify a second inquiry. It appears from the judgment that the Court of Justice based its findings mainly on the Commission's inability to produce any convincing circumstances that could justify the second proceedings against Mr. Gutmann.³⁵ However, the *ne bis in idem* principle as such was hardly given any consideration.

On the other hand, the case of *Walt Wilhelm*³⁶ is considered a landmark judgment of the Court of Justice of the European Union. As noted by van Bockel, it played a key role in the development of the case-law on the principle of *ne bis in idem*³⁷ (despite the fact that it was related to the area of competition law, not criminal law). The Court of Justice faced the question of what legal consequences might result for the member states of European Communities (i.e., their former states) in the application of their national competition laws, drawing on the fact that the European Commission had already taken action in a specific case. The case concerned an agreement between a group of German undertakings, and the Bundeskartellamt had initiated proceedings under German competition law after the European Commission had done the same on that very basis. A specialised court dealing with competition cases under German law (Kammergericht Berlin) stayed proceedings in order to ask the Court of Justice whether national authorities are at liberty to 'apply to the same facts the provisions of national law' after the European Commission has initiated proceedings in the same case. Regarding the question of whether the risk of accumulation of penalties imposed 'render[ed] impossible the acceptance for one set of facts of two parallel procedures, the one Community and the other national', the Court of Justice observed that the special system of sharing jurisdiction between the Community and the member states with regard to cartels (laid down by Regulation 17/62,³⁸ which is still applicable) does not preclude the possibility of different proceedings, each pursuing distinct ends. However, it should be noted that these findings do not appear to build on the *ne bis in idem* principle as such.

Since the Charter is applicable, it has affected several areas of law in practice. One of the most interesting is its application as a criminal law guarantee in the area of market abuse.³⁹ The Court of Justice of the European Union has ruled, for example, following rulings regarding the Charter's application.

34 *Max Gutmann v Commission of the European Communities* – Case 92/82 (CoJEC, 20 October 1983) <www.eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61982CJ0092> accessed 17 September 2022.

35 B van Bockel, *The ne bis in idem Principle in EU Law* (Cambridge University Press 2016) 134.

36 *Walt Wilhelm and others v Bundeskartellamt* – Case 14-68 (CoJEC, 13 February 1969) <www.eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:61968CJ0014> accessed 17 September 2022.

37 B van Bockel, *The ne bis in idem Principle in EU Law* (Cambridge University Press 2016) 134.

38 Council Regulation No 17: First Regulation implemented in Arts. 85 and 86 of the Treaty [1962] OJ L3.

39 L Klimek, *Judikatura Súdneho dvora Európskej únie vo veciach zneužívania trhu a súvisiacich trestnoprávných otázkach* [transl.: Case-law of the Court of Justice of the European Union in Matters of Market Abuse and Related Criminal Issues] (Wolters Kluwer 2020).

In the case of *Garlsson Real Estate and others*,⁴⁰ the Court of Justice ruled that Art. 50 of the Charter must be interpreted as precluding national legislation, which permits the possibility of bringing administrative proceedings against a person in respect of unlawful conduct consisting of market manipulation for which the same person has already been convicted, in so far as that conviction is, given the harm caused to the company by the offence committed, sufficient to punish that offence in an effective, proportionate, and dissuasive manner. The *ne bis in idem* principle guaranteed by Art. 50 of the Charter confers on individuals a right that is directly applicable in the context of a dispute, such as that at issue in the main proceedings.

In the joined cases of *Enzo Di Puma & Commissione Nazionale*,⁴¹ the Court of Justice ruled that Art. 14(1) of Directive 2003/6/EC on insider dealing and market manipulation,⁴² read in the light of Art. 50 of the Charter, must be interpreted as not precluding national legislation in accordance with which proceedings for an administrative fine of a criminal nature may not be brought following a final criminal judgment of acquittal ruling that the acts capable of constituting a violation of the legislation relating to insider dealing, on the basis of which those proceedings had also been initiated, were not established.

In the case of *Criminal proceedings against Luca Menci*⁴³ the Court of Justice ruled that Art. 50 of the Charter must be interpreted as not precluding national legislation in accordance with which criminal proceedings may be brought against a person for failing to pay the value-added tax due within the time limits stipulated by law, although that person has already been made subject, in relation to the same acts, to a final administrative penalty of criminal nature for the purposes of Art. 50 of the Charter, on the condition that that legislation: (i) pursues an objective of general interest which is such as to justify such duplication of proceedings and penalties, namely, combating value added tax offences, it being necessary for those proceedings and penalties to pursue additional objectives, (ii) contains rules ensuring co-ordination which limits to what is strictly necessary the additional disadvantage which results, for the persons concerned, from duplication of proceedings, and (iii) provides for rules making it possible to ensure that the severity of all of the penalties imposed is limited to what is strictly necessary in relation to the seriousness of the offence concerned. It is for the national court to ensure, considering all the circumstances in the main proceedings, that the actual disadvantage resulting for the person concerned from the application of the national legislation at issue in the main proceedings and from the duplication of the proceedings and penalties that that legislation authorises is not excessive in relation to the seriousness of the offence committed.

In the case of *Åklagaren v Hans Åkerberg Fransson*,⁴⁴ the Court of Justice ruled that the *ne bis in idem* principle laid down in Art. 50 of the Charter does not preclude a member state

40 *Garlsson Real Estate SA, in liquidation, Stefano Ricucci, Magiste International SA versus Commissione Nazionale per le Società e la Borsa (Consob)* – Case C-537/16 (CoJEU, 20 March 2018) <www.curia.europa.eu/juris/document/document.jsf?text=&docid=200402&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=147102> accessed 20 September 2022.

41 *Enzo Di Puma versus Commissione Nazionale per le Società e la Borsa (Consob) (C-596/16), and Commissione Nazionale per le Società e la Borsa (Consob) versus Antonio Zecca (C-597/16)* – Joined Cases C-596/16 and C-597/16 (CoJEU, 20 March 2018) <www.curia.europa.eu/juris/document/document.jsf?text=&docid=200401&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=148942> accessed 20 September 2022.

42 The Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation [2003] OJ L 96/16. The Directive was replaced and repealed by Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) [2014] OJ L 173/1.

43 *Criminal proceedings against Luca Menci* – Case C-524/15X (CoJEU, 20 March 2018) <www.curia.europa.eu/juris/document/document.jsf?text=&docid=200404&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=150673> accessed 20 September 2022.

44 *Åklagaren v Hans Åkerberg Fransson* – Case C-617/10 (CoJEU, 26 February 2013) <www.curia.europa.eu/juris/document/document.jsf?text=&docid=134202&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=152785> accessed 20 September 2022.

of the EU from imposing successively, for the same acts of non-compliance with declaration obligations in the field of value-added tax, a tax penalty and a criminal penalty in so far as the first penalty is not criminal in nature, a matter which is for the national court to determine. EU law does not govern the relations between the ECHR and the legal systems of the member states, nor does it determine the conclusions to be drawn by a national court in the event of a conflict between the rights guaranteed by that Convention and a rule of national law. EU law precludes a judicial practice that makes the obligation for a national court to disapply any provision contrary to a fundamental right guaranteed by the Charter conditional upon that infringement being clear from the text of the Charter or the case-law relating to it since it withholds from the national court the power to assess, with, as the case may be, the co-operation of the Court of Justice, whether that provision is compatible with the Charter.

4 THE CONVENTION IMPLEMENTING THE SCHENGEN AGREEMENT: THE RECOGNITION OF NE BIS IN IDEM AT INTER-STATE LEVEL

In 1984, Germany and France reached an agreement in which they expressed their intention to slowly proceed to the abolition of checks at their common border. The Benelux Member States were allowed to join their surrounding neighbours. In 1985, the five states signed the Schengen Agreement.⁴⁵ This agreement contains a declaration of intention to abolish internal border controls, thus creating an experimental garden for the co-operation between the ten members of the European Community counted at that moment. Later, in 1990, these intentions were elaborated in what was to become the Convention implementing the Schengen Agreement.⁴⁶

Despite the fact the primary purpose of the Convention implementing the Schengen Agreement is to facilitate the free movement of persons between member states of the EU by removing internal border controls, several measures have been introduced that focus on police and judicial co-operation. These measures were introduced to address concerns relating to crime and public security arising from the relaxation of border controls.⁴⁷ The Convention implementing the Schengen Agreement has been described as a landmark in the history of the regulation of international police co-operation in Western Europe.⁴⁸ In 1997, the Treaty of Amsterdam⁴⁹ formally integrated the Schengen *acquis* into the EU framework. These days, the substance of the Schengen Agreement is incorporated into the Treaty on the functioning of the European Union.⁵⁰

As far as international co-operation in criminal matters is concerned, the Convention implementing the Schengen Agreement again enacted the principle of *ne bis in idem* in Arts. 54-58 – entitled 'Application of the *ne bis in idem* principle'. Its enactment in this Convention

45 The Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders [2000] OJ L 239/13.

46 Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders [2000] OJ L 239/19.

47 I Bantekas, S Nash, *International Criminal Law* (2nd edn, Cavendish Publishing 2003) 236-237.

48 C Fijnaut, 'The Schengen Treaties and European Police Co-operation' (1993) 1(1) *European Journal of Crime, Criminal Law and Criminal Justice* 37.

49 Treaty of Amsterdam [1997] OJ C 340/1.

50 Art. 77(1)(a) of the Treaty on the functioning of the European Union stipulates that the European Union shall develop a policy with a view to ensuring the absence of any controls on persons, whatever their nationality, when crossing internal borders.

was a landmark as regards multilateral international *ne bis in idem* based on international agreements. The Convention implementing the Schengen Agreement recognises it at the inter-state level.⁵¹

The key provision is Art. 54 of the Convention implementing the Schengen Agreement. It stipulates that 'a person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts 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.' This provision of the Convention implementing the Schengen Agreement is considered the most advanced version of *ne bis in idem* at the international level and is applicable in Europe.⁵² Its wide interpretation led member states of the EU to recognise not only each other's judicial decisions but also each other's criminal proceedings.⁵³ As a consequence, as noted by the Court of Justice of the European Union, the application of *ne bis in idem* supposes that the member states of the EU have mutual trust in their national criminal justice systems.⁵⁴

Art. 54 of the Convention implementing the Schengen Agreement does not apply to multiple prosecutions in one state but is applicable only to a second prosecution in another Schengen state. The question is whether this provision could also apply in respect of administrative law proceedings. At first glance, the answer to this question would be negative. This legal provision was designed for criminal law purposes. The intended scope of its application is therefore restricted to the sphere of criminal law. On the other hand, in many member states of the EU, administrative law plays an important role in penalising certain types of conduct. It is conceivable that in one member state, certain types of acts are a matter of criminal law, whereas, in another state, the same acts fall under administrative law or both. Such differences on the national level could partially undermine the protection offered by Art. 54 of the Convention implementing the Schengen Agreement.⁵⁵ Moreover, Art. 54 of the Convention implementing the Schengen Agreement does not apply in respect of: (i) crimes committed in whole or in part in the territory of the second state to initiate the prosecution, (ii) crimes affecting 'essential interests' of state, and (iii) crimes that have been committed by the officials of the (second) state in the exercise of their duties.⁵⁶

Regarding the application of the *ne bis in idem* principle in the perception of the Convention implementing the Schengen Agreement, application problems had to be resolved by the Court of Justice of the European Union. These were mainly answers to preliminary questions from the states participating in Schengen co-operation. The most fundamental application controversies are presented in the following sections.⁵⁷

One of the application problems of the *ne bis in idem* principle is the temporal validity of the Convention implementing the Schengen Agreement. In the case of *Van Esbroeck*,⁵⁸ the Court of Justice ruled that the *ne bis in idem* principle must be applied to criminal proceedings

51 G Conway, 'Ne Bis in Idem in International Law' (2003) 3 International Criminal Law Review 221.

52 B van Bockel, *The ne bis in idem Principle in EU Law* (Cambridge University Press 2016) 68.

53 D Chalmers, G Davies, G Monti, *European Union Law* (4th edn, Cambridge University Press 2019) 615.

54 *Hüseyin Gözütok and Klaus Brügge* – Joined Cases C-187/01 and C-385/01 (CoJEC, 11 February 2003) <www.curia.europa.eu/juris/document/document.jsf?text=&docid=48044&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=6815758> accessed 17 September 2022.

55 B van Bockel, *The ne bis in idem Principle in EU Law* (Cambridge University Press 2016) 25.

56 Art. 55 of Convention implementing the Schengen Agreement.

57 L Klimek, *Judikatura Súdneho dvora Európskej únie vo veciach trestných* [transl.: Case-law of the Court of Justice of the European Union in Criminal Matters] (Wolters Kluwer 2018).

58 *Leopold Henri Van Esbroeck* – Case C-436/04 (CoJEU, 9 March 2006) <www.curia.europa.eu/juris/document/document.jsf?text=&docid=57331&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=162686> accessed 20 September 2022.

brought in a contracting state for acts for which a person has already been convicted in another contracting state even though the Convention was not yet in force in the latter state at the time at which that person was convicted, in so far as the Convention was in force in the contracting states in question at the time of the assessment of the conditions of applicability of the *ne bis in idem* principle by the court before which the second proceedings were brought. Art. 54 of the Convention must be interpreted as meaning that: (i) the relevant criterion for the purposes of the application of that article is 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; (ii) punishable acts consisting of exporting and importing the same narcotic drugs and which are prosecuted in different contracting states to the Convention are, in principle, to be regarded as 'the same acts' for the purposes of Art. 54, the definitive assessment in that respect being the task of the competent national courts.

In the case of *Van Straaten*,⁵⁹ the Court of Justice ruled that Art. 54 of the Convention implementing the Schengen Agreement must be interpreted further as meaning: (i) the relevant criterion for the purposes of the application of that article is 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; (ii) in the 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 acts in the two states are not required to be identical; (iii) punishable acts consisting of exporting and importing the same narcotic drugs and which are prosecuted in different contracting states party to that Convention are, in principle, to be regarded as 'the same acts' for the purposes of Art. 54 of the Convention, the definitive assessment in that respect being the task of the competent national courts. 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 acquitted for lack of evidence.

In the case of *Gaspariny and others*,⁶⁰ the Court of Justice focused on criminal prosecution for an offence that is time-barred. It ruled that the *ne bis in idem* principle applies in respect of a decision of a court of a contracting state made after criminal proceedings have been brought, by which the accused is acquitted finally because prosecution of the offence is time-barred. That principle does not apply to persons other than those whose trial has been disposed of in a contracting state. A criminal court of a contracting state cannot hold goods to be in free circulation in national territory solely because a criminal court of another contracting state has found, in relation to the same goods, that prosecution for the offence of smuggling is time-barred. The marketing of goods in another member state constitutes conduct which may form part of the 'same acts' within the meaning of Art. 54 of the Convention after their importation into the member state, where the accused was acquitted.

In the case of *Bourquain*,⁶¹ the Court of Justice ruled that the *ne bis in idem* principle 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

59 *Jean Leon Van Straaten versus Staat der Nederlanden* – Case C-150/05 (CoJEU, 28 September 2006) <www.curia.europa.eu/juris/document/document.jsf?text=&docid=65194&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=164152> accessed 20 September 2022.

60 *Giuseppe Francesco Gasparini and others* – Case C-467/04 (CoJEC, 28 September 2006) <www.curia.europa.eu/juris/document/document.jsf?text=&docid=65199&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=166750> accessed 20 September 2022.

61 *Criminal proceedings against Klaus Bourquain* – Case C-297/07 (CoJEC, 11 December 2008) <www.curia.europa.eu/juris/document/document.jsf?text=&docid=75793&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=167704> accessed 20 September 2022.

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 on account of specific features of procedure such as those referred to in the main proceedings.

In the joined cases of *Gözütok & Brügge*,⁶² the consideration focused on the decision of the prosecutor. The Court of Justice ruled that the *ne bis in idem* principle also applies to procedures whereby further prosecution is barred, such as the procedures at issue in the main actions, by which 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.

The Court of Justice of the European Union faced the question of whether Art. 54 of the Convention implementing the Schengen Agreement should be applied when the decision of a court in the first state consists of discontinuing the prosecution without any adjudication on the merits of the case and on the sole ground that proceedings have already been initiated in another state. In the case of *Miraglia*,⁶³ the Court of Justice answered in the negative. It decided that the principle of *ne bis in idem* does not fail to be applied 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 the case of *Turanský*,⁶⁴ the Court of Justice ruled that the *ne bis in idem* principle does not fail to be applied to a decision by which an authority of a contracting state, after examining the merits of the case brought before it, makes an order, at a stage before the charging of a person suspected of a crime, suspending the criminal proceedings, where the suspension decision does not, under the national law of that state, definitively bar further prosecution and therefore does not preclude new criminal proceedings in that state in respect of the same acts.

Some difficulties in interpreting Art. 54 of the Convention arise out of the inherent complexity of the *ne bis in idem* principle generally; others are caused by the differences that exist between the systems of the criminal law of the Schengen states and therefore arise specifically in the context of the transnational application of the provision. Another issue is that the Convention does not provide for a mechanism for the resolution of positive conflicts of jurisdiction. For these reasons, *inter alia*, several initiatives have been brought. They aimed to strengthen the application of the *ne bis in idem* principle within the EU. In the Mutual Recognition Programme,⁶⁵ the *ne bis in idem* principle is included among the immediate priorities of the EU, in particular as regards final criminal judgments delivered by a court in another member state. Measure No. 1 of that programme recommends a reconsideration of Arts. 54-57 of the Convention implementing the Schengen Agreement.

62 *Hüseyin Gözütok and Klaus Brügge* – Joined Cases C-187/01 and C-385/01 (CoJEC, 11 February 2003) <www.curia.europa.eu/juris/document/document.jsf?text=&docid=48044&pageIndex=0&doclang=en&mode=r eq&dir=&occ=first&part=1&cid=6815758> accessed 17 September 2022.

63 *Filomeno Mario Miraglia* – Case C-469/03 (CoJEC, 10 March 2005) <www.curia.europa.eu/juris/document/document.jsf?text=&docid=54088&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=6816494> accessed 17 September 2022.

64 *Criminal proceedings against Vladimir Turanský* – Case C-491/07 (CoJEC, 22 December 2008) <www.curia.europa.eu/juris/document/document.jsf?text=&docid=73224&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=165537> accessed 20 September 2022.

65 Programme of measures to implement the principle of mutual recognition of decisions in criminal matters [2001] OJ C 12/10.

In 2003, was introduced a Draft Framework Decision on the application of the *ne bis in idem* principle.⁶⁶ It was introduced with the intention to replace and repeal relevant articles of the Convention. However, the proposed draft was not successful and has never been adopted.

5 THE EUROPEAN CONVENTION ON EXTRADITION: NE BIS IN IDEM IN THE TRADITIONAL SCHEME ON EXTRADITION

The basic multilateral treaty in Europe regulating extradition is the European Convention on Extradition⁶⁷ of 1957 and its additional protocols,⁶⁸ which represent a traditional scheme of extradition. It is the oldest of the conventions relating to penal matters prepared within the Council of Europe.

Extradition is normally subject to strict requirements. The principle of double criminality and the rule of speciality apply, and the offences must also be extraditable. The requested state may deny extradition with reference to the principle of *ne bis in idem*.⁶⁹ Its application points to the potential for an international rule.⁷⁰ As regards extradition proceedings, it is intended to prevent an individual from being prosecuted for the same offence in different states.⁷¹ The European Convention on Extradition stipulates that '[e]xtradition may be refused if the competent authorities of the requested Party have decided either not to institute or to terminate proceedings in respect of the same offence or offences.'⁷² As far as the word 'final' is concerned, this requires that all types of appeal have been exhausted.⁷³

It should be noted that besides the European Convention on Extradition, other legislative documents have been adopted in the area of extradition that lay down *ne bis in idem* in a similar manner. It can be observed, for example, in the Agreement on the Simplification of Extradition of 1989, in the Convention on Simplified Extradition⁷⁴ of 1995, and in the Convention on Extradition in the European Union⁷⁵ of 1996.

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

67 The European Convention on Extradition of 13 December 1957 <www.coe.int/en/web/conventions/full-list?module=treaty-detail&treaty-num=024> accessed 19 September 2022.

68 The Additional Protocol to the European Convention on Extradition of 15 October 1975 <www.coe.int/en/web/conventions/full-list?module=treaty-detail&treaty-num=086> accessed 19 September 2022; the Second Additional Protocol to the European Convention on Extradition of 17 March 1978 <www.coe.int/en/web/conventions/full-list?module=treaty-detail&treaty-num=098> accessed 19 September 2022; the Third Additional Protocol to the European Convention on Extradition of 10 November 2010 <www.coe.int/en/web/conventions/full-list?module=treaty-detail&treaty-num=209> accessed 19 September 2022.

69 R Cryer, H Friman, D Robinson, E Wilmschurst, *An Introduction to International Criminal Law and Procedure* (2nd edn, Cambridge University Press 2010) 93.

70 G Conway, 'Ne Bis in Idem in International Law' (2003) 3 *International Criminal Law Review* 243.

71 G Biehler, 'Procedures in International Law' (Springer 2008) 255.

72 Art. 9 of the European Convention on Extradition.

73 Explanatory report to the European Convention on Extradition.

74 Convention drawn up on the Basis of Art. K.3 of the Treaty on European Union on a simplified extradition Procedure between the Member States of the European Union [1995] OJ C 78.

75 Convention of 27 September 1995 drawn up on the Basis of Art. K.3 of the Treaty on European Union, relating to extradition between the Member States of the European Union [1996] OJ C 313.

6 LEGISLATIVE INSTRUMENTS IN THE FIELD OF MUTUAL RECOGNITION OF JUDICIAL DECISIONS IN CRIMINAL PROCEEDINGS: NE BIS IN IDEM IN THE MODERN SCHEME OF CO-OPERATION IN CRIMINAL MATTERS

The scope of the *ne bis in idem* application is almost unlimited, and the EU legislators have adopted many legislative measures concerning this principle. An area of particular importance is the mutual recognition of judicial decisions in criminal proceedings.⁷⁶ Legislative measures regulating special mutual recognition measures include the *ne bis in idem* principle.

Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between member states⁷⁷ (hereinafter – Framework Decision 2002/584/JHA or the Framework Decision) obliges member states to execute the European arrest warrant on the basis of the principle of mutual recognition of judicial decisions. By providing for the automatic recognition of arrest warrants issued in member states of the EU, the Framework Decision uses surrender proceedings, which replaced and repealed extradition proceedings within the member states of the EU in proceedings focused on faster extradition, i.e., faster surrender of requested persons.⁷⁸ Probably the most important difference between the traditional proceedings of extradition before Framework Decision 2002/584/JHA is that there are now limited grounds that are applicable in case of surrender refusal. As noted, the Court of Justice of the European Union's confidence and trust in the judicial processes applied in other member states led to a presumption in favour of surrender.⁷⁹

The system established by Framework Decision 2002/584/JHA is based on the principle of mutual recognition; it does not mean that there is an absolute obligation to execute each European arrest warrant.⁸⁰ The Framework Decision, in its core text, includes two sets of grounds for non-execution of the European arrest warrant.

First, Framework Decision 2002/584/JHA provides mandatory grounds for non-execution of the European arrest warrant. It stipulates that the 'executing judicial authority shall refuse to execute the 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 provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State.'⁸¹ This provision is an expression of *ne bis in idem* as mandatory grounds for the non-execution of the European arrest warrant.

76 See, for example: L Klimek, *Mutual Recognition of Judicial Decisions in European Criminal Law* (Springer 2017).

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

78 N Vennemann, 'The European Arrest Warrant and Its Human Rights Implications' (2003) 63 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 103.

79 A Łazowski, S Nash, 'Detention', in N Keijyer, E van Sliedregt (eds) *The European Arrest Warrant in Practice* (TMC Asser Press 2009) 40.

80 See, for example: I.B. – Case C-306/09 (CoJEU, 21 October 2010) <www.curia.europa.eu/juris/document/document.jsf?text=&docid=83633&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=195121> accessed 20 September 2022; Melvin West – Case C-192/12 PPU (CoJEU, 28 June 2012) <www.curia.europa.eu/juris/document/document.jsf?text=&docid=124464&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=195556> accessed 20 September 2022; João Pedro Lopes Da Silva Jorge – Case C-42/11 (CoJEU, 5 September 2012) <www.curia.europa.eu/juris/document/document.jsf?text=&docid=126361&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=196017> accessed 20 September 2022.

81 Art. 3(2) of the Framework Decision 2002/584/JHA on the European arrest warrant.

Second, Framework Decision 2002/584/JHA provides optional grounds for non-execution of the European arrest warrant. It stipulates that the 'executing judicial authority may refuse to execute the European arrest warrant [...] if the executing judicial authority is informed that the requested person has been finally judged by a third State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing country'.⁸² This provision is an expression of *ne bis in idem* as optional grounds for the non-execution of the European arrest warrant.

A number of application problems occurred, in particular, regarding the interpretation of the *ne bis in idem* in European arrest warrant proceedings. The Court of Justice of the European Union introduced case-law on their interpretation.⁸³

As regards the case of *Mantello*,⁸⁴ the Court of Justice ruled that the concept of 'same acts' in Framework Decision 2002/584/JHA constitutes an autonomous concept of EU law. In circumstances such as those at issue in the main proceedings where, in response to a request for information made by the executing judicial authority, the issuing judicial authority, applying its national law and in compliance with the requirements deriving from the concept of 'same acts', expressly stated that the earlier judgment delivered under its legal system did not constitute a final judgment covering the acts referred to in the arrest warrant issued by it and therefore did not preclude the criminal proceedings referred to in that arrest warrant, the executing judicial authority has no reason to apply the ground for mandatory non-execution provided for in the Framework Decision in connection with such a judgment.

As regards the application of Framework Decision 2002/584/JHA and the Convention implementing the Schengen Agreement, in the case of *Kretzinger*,⁸⁵ the Court of Justice ruled that the fact that a member state of the EU in which a person has been sentenced by a final and binding judgment under its national law may issue a European arrest warrant for the arrest of that person in order to enforce the sentence under Framework Decision 2002/584/JHA cannot affect the interpretation of the notion of 'enforcement' within the meaning of Art. 54 of the Convention implementing the Schengen Agreement.

A similar approach has been taken as regards other mutual recognition instruments, for example, in Framework Decision 2008/909/JHA on the mutual recognition of custodial sentences and deprivation of liberty,⁸⁶ Framework Decision 2008/947/JHA on mutual recognition of probation measures and alternative sanctions,⁸⁷ and Framework Decision 2005/214/JHA on the mutual recognition of financial penalties.⁸⁸ These instruments also

82 Art. 4(5) of the Framework Decision 2002/584/JHA on the European arrest warrant.

83 L Klimek, *Judikatúra Súdneho dvora Európskej únie v konaní o európskom zatýkacom rozkaze* [transl.: Case-law of the Court of Justice of the European Union in European Arrest Warrant Proceedings] (Wolters Kluwer 2018).

84 *Gaetano Mantello* – Case C-261/09 (CoJEU, 16 November 2010) <www.curia.europa.eu/juris/document/document.jsf?text=&docid=84420&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=193474> accessed 20 September 2022.

85 *Criminal proceedings against Jürgen Kretzinger* – Case C-288/05 (CoJES, 18 July 2007) <www.curia.europa.eu/juris/document/document.jsf?text=&docid=62753&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=190793> accessed 20 September 2022.

86 Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union [2008] OJ L 327/27.

87 Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions [2008] OJ L 337/102.

88 Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties [2005] OJ L 76/16.

involve *ne bis in idem* – similar to the Framework Decision 2002/584/JHA – as a ground for the non-execution of individual mutual recognition measures.

7 CONCLUSIONS

The principle of *ne bis in idem* is one of the oldest recognised norms in western civilisation. During recent decades, it has – in European states – become a part of their constitutions as well as their criminal law systems. While in the past, crime had a primarily national dimension, these days, it has an international dimension. The Europeanisation of law occurred in criminal law as well, including in criminal proceedings. Consequently, the principle of *ne bis in idem* became a part of international legal documents.

The most important European legal documents on human rights define the principle of *ne bis in idem* as a human/fundamental right. The Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 7, introduced a new right – the ‘Right not to be tried or punished twice’. In addition, the Charter of Fundamental Rights of the European Union, which is the first bill of rights developed explicitly for the EU, introduced the principle of *ne bis in idem* as the ‘Right not to be tried or punished twice in criminal proceedings for the same criminal offence’. However, its understanding by the Charter has no additional significance. In principle, it is the same. Despite this, both the Convention and the Charter are applicable sources of *ne bis in idem* as a procedural guarantee in criminal proceedings in European states.

Even though the primary purpose of the Convention implementing the Schengen Agreement is to facilitate the free movement of persons between member states of the EU by removing internal border controls, several measures have been introduced that focus on police and judicial co-operation. As far as international co-operation in criminal matters is concerned, when the Convention implemented the Schengen Agreement, it again enacted the principle of *ne bis in idem* in Arts. 54-58, entitled ‘Application of the *ne bis in idem* principle’. Its enactment in this Convention was a landmark as regards multilateral international *ne bis in idem*.

Ne bis in idem also occurs in extradition proceedings and surrender proceedings. Its operation under the European Convention on Extradition in the context of extradition points to the potential for a broader international rule. It is applicable to prevent an individual from being prosecuted for the same offence more than once in different jurisdictions. As regards the system established by Framework Decision 2002/584/JHA, there is no absolute obligation to execute each European arrest warrant since the principle of *ne bis in idem* can be applied. A similar approach has been chosen as regards other mutual recognition measures, for example, mutual recognition of custodial sentences, mutual recognition of probation measures and alternative sanctions, and mutual recognition of financial penalties.

REFERENCES

1. Bantekas I, Nash S, *International Criminal Law* (2nd edn, Cavendish Publishing 2003) 236-237.
2. Biehler G, *Procedures in International Law* (Springer 2008) 255.
3. Chalmers D, Davies G, Monti G, *European Union Law* (4th edn, Cambridge University Press 2019) 615.
4. Conway G, ‘*Ne Bis in Idem* in International Law’ (2003) 3 *International Criminal Law Review* 221, 243.
5. Cryer R, Friman H, Robinson D, Wilmschurst E, *An Introduction to International Criminal Law and Procedure* (2nd edn, Cambridge University Press 2010) 93.

6. Dembour MB, *Who Believes in Human Rights? Reflections on the European Convention* (Cambridge University Press 2006) 20.
7. Digest of Justinian, Book XLVIII (48). English translation: SP Scott, *The Civil Law: Including the Twelve Tables, the Institutes of Gaius, the Rules of Ulpian, the Opinions of Paulus, the Enactments of Justinian, and the Constitutions of Leo* (Central Trust 1932, Vol 11) 17 (reprinted by The Lawbook Exchange, 2001).
8. EU Network of Independent Experts on Fundamental Rights, *Commentary of Charter of Fundamental Rights of the European Union* (2006) 15, 384.
9. Draft Charter of Fundamental Rights of the European Union, CHARTE 4473/00, CONVENT 49, 45.
10. Funta R, Golovko L, Juriš F, *Európa a európske právo* [transl: Europe and European Law], (2nd edn, Brno 2020) 194.
11. Klimek L, *Judikátúra Súdneho dvora Európskej únie v konaní o európskom zatýkacom rozkaze* [transl: Case-law of the Court of Justice of the European Union in European Arrest Warrant Proceedings] (Wolters Kluwer 2018).
12. Klimek L, *Judikátúra Súdneho dvora Európskej únie vo veciach trestných* [transl: Case-law of the Court of Justice of the European Union in Criminal Matters] (Wolters Kluwer 2018).
13. Klimek L, *Judikátúra Súdneho dvora Európskej únie vo veciach zneužívania trhu a súvisiacich trestnoprávných otázok* [transl: Case-law of the Court of Justice of the European Union in Matters of Market Abuse and Related Criminal Issues] (Wolters Kluwer 2020).
14. Klimek L, 'Transnational application of the *Ne bis in idem* principle in Europe' (2011) 5(3) *International Criminal Law Review* 18.
15. Klimek L, 'Trestnoprávne záruky Charty základných práv Európskej únie: krok vpred alebo "nový obal" Dohovoru o ochrane ľudských práv a základných slobôd?' [transl.: Criminal Guaranties of the Charter of Fundamental Rights of the European Union: Step Ahead or "New Label" of the Convention for the Protection of Human Rights and Fundamental Freedoms?], in V Marková (ed), *Aktuálne otázky trestného práva v teórii a praxi*, Zborník príspevkov vedeckej konferencie na Akadémii policajného zboru v Bratislave konanej dňa 19. marca 2015 [transl: Current Issues of Criminal Law in Theory and Practice, Proceedings of the Scientific Conference at the Academy of Police Force in Bratislava held on 19 March 2015] (Academy of Police Force in Bratislava 2015) 339-349.
16. Łazowski A, Nash S, 'Detention', in N Keijyer, E van Sliedregt (eds), *The European Arrest Warrant in Practice* (TMC Asser Press 2009) 40.
17. Mitsilegas V, *EU Criminal Law After Lisbon* (Hart Publishing 2018) 154.
18. Rudstein DS, *Double Jeopardy: A Reference Guide to the United States Constitution* (Greenwood Publishing Group 2004) 3.
19. Smith RKM, *Textbook on International Human Rights* (7th edn, Oxford University Press 2017) 117.
20. Sure L, 'The Practical Applications of Ne Bis in Idem in International Criminal Law', in Y Sienho (ed), *International Crime and Punishment: Selected Issues*, Vol. 2 (University Press of America 2004) 172.
21. Turošik M, *Roman Law* (Matej Bel University in Banská Bystrica 2013) 66.
22. van Bockel B, *The ne bis in idem Principle in EU Law* (Cambridge University Press 2016) 25, 68, 134.
23. van Dijk P, van Hoof F, van Rijn A, Zwaak L, *Theory and practice of the European Convention on Human Rights* (5th edn, Intersentia 2017) 723.
24. Vennemann N, 'The European Arrest Warrant and Its Human Rights Implications' (2003) 63 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 103.
25. Zetterquist O, 'The Charter of Fundamental Rights and the European Res Publica', in G di Federico (ed), *The EU Charter of Fundamental Rights: From Declaration to Binding Document* (Springer 2011) 3.