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The Transnational ne bis in idei Principle in the EU Mutual Recognition and Equivalent Protection of Human Rights†

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The concurrent prosecution and authorization by the Membei States in the event of transborder crimes would not only be ar impediment to the process of European integration, but also defy the principle of ne bis in idem which is accepted as a transnational human right in a common judicial area. The article tries to explore the role of European Convention on Human Rights (ECHR) in the development of a general ne bis in idem standard in Europe. The application in inter-state judicial cooperation in criminal matters is also explored in the framework of the EU. The EU plays a dynamic role in the area of Freedom, Security and Justice and the principle of ne bis in idem is discussed in the light of relevant Court of Justice's case law. In transnational justice there is an inbuilt strain between mutual recognition and the protection of human rights and this

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is discussed with respect to introduction of ne bis in idem principle in the Framework Decision of the European arrest warrant.

1. The *ne bis in idem* Principle as a Domestic General Principle of Law

The *ne bis in idem* principle is a general principle of (criminal) law in many national legal orders, sometimes even codified as a constitutional right. It has also been established as an individual right in international human rights legal instruments. The *ne bis in idem* principle has been historically elaborated as a principle that only applies nationally and is limited to criminal justice. Concerning the substance of the principle, traditionally a distinction is made between *nemo debet bis vexari pro una et eadem causa* (no one should have to face more than one prosecution for the same offence) and *nemo debet bis puniri pro uno delicto* (no one should be punished twice for the same offence). Some countries limit the principle to the prohibition of double punishment.[1] The rationale of the *ne bis in idem* principle is manifold. It is of course a principle of judicial protection for the citizen against the *ius puniendi* of the state and as such is part of the principles of due law and fair trial. On the other hand respect for the *res judicata (pro veritate habitur)* of final judgments[2] is of importance for the legitimacy of the legal system and of the state.

Traditionally, the *ne bis in idem* principle is recognized by the State for application only within its own domestic legal order. A rich set of case law has meanwhile developed in the European States concerning the domestic *ne bis idem* principle. Generally speaking, the principle applies only in the field of criminal law and to final judgments in criminal matters. This means that in many States double prosecution remains fully possible, as does the combination of administrative punitive sanctions with criminal sanctions. It is also possible in many States to combine criminal sanctions with out-of-court settlements. Not only is the reach of the principle limited, its application in the domestic legal orders of the States also still raises quite a few questions.[3] Much of the domestic case law deals with the definitions of *idem* and *bis*. Should the legal definition of the offences be considered as the basis of the definition of the

term the same *(idem),* or rather the facts? Does the application of the *ne b* *idem* principle depend on the scope of the offence descriptions or on the l values which they aim to protect? Is a distinction made between natural and l persons for the application of the principle? It can safely be concluded national case law has not yet produced a common standard concerning the sc and the application of the *ne bis in idem* principle in the domestic legal orders.

Meanwhile the EU, since the coming into force of the Treaty of Amsterd has been actively realizing a common area of Freedom, Security and Justice. classical inter-State cooperation in criminal matters has been replaced enhanced judicial cooperation directly between the actors of the criminal ju: system. Moreover, these now have to recognize each other's judicial decis based on the principle of mutual recognition. As a result, essential aspects of functioning of the criminal justice system are now taking place in a Europ area without internal borders, a transnational judicial area. By several framev decisions the mutual recognition principle has been elaborated for pre- judicial decisions, such as seizure, evidence gathering and arrest. Jud decisions in one Member State have legal effect in the legal area of the EU. most famous framework decision in this context must certainly be the Europ Arrest Warrant which replaces the classic extradition procedure. Mu recognition of each other's arrest warrants not only leads to the quicker surrer of suspects within the EU, but also to the fact that legal principles such as the *bis in idem* principle have to be applied transnationally. This transnatic application presumes that the scope and the application of the *ne bis in ic* principle in the EU rely on a common standard.

The main questions are therefore: how may we achieve such a comn standard, what transnational function should it fulfil and what would be content of this function? This article analyses (in Section 2) whether and to w extent the ECHR has contributed and may contribute to the development of s a common *ne bis in idem* standard in Europe. It is also examined whether application of the *ne bis in idem* principle in classic inter-state judi cooperation in criminal matters in the framework of the Council of Europe is a to make a contribution as well. The transnational function of the *ne bis in id* principle is discussed in Sections 3 and 4. First it is analysed how 'transnationalness' has developed in EC law and in the pre-Maastricht judi

integration. Then a detailed analysis is given of how the Court of Justice has further defined the principle in the framework of the area of Freedom, Security and Justice. Finally, this is tested in Section 5 against the meaning of the ne bis in idem principle in the framework decision on the European Arrest Warrant, as an example of the inherent tension between mutual recognition and the protection of human rights in transnational justice. In the concluding Section 6 a summary is given of the findings.

2. The *ne bis in idem* Principle in International Relations and as an International Human Right

Are States willing to accept the operation of an international *ne bis in idem* principle between them? Very few countries recognize the validity of foreign judgments in criminal matters for execution or enforcement in their national legal order lacking a treaty basis. States consider their *ius puniendi* and the full exercise of it as essential to their sovereignty. Even the recognition of *res judicata* in respect of a foreign criminal judgment is problematic, certainly when it concerns territorial offences. Besides arising from self-interest, this may result from the fact that States do not always have sufficient confidence or trust in the way in which other States administer justice. Recognition of foreign *res judicata* means that prosecuting or punishing anew is no longer possible (negative effect) or that the decision has to be taken into account in the context of other cases to be decided (positive effect). A refusal to recognize the validity of foreign judgments leads to multiple prosecution, which is certainly problematic for the individual, but can also cause problems in the international relations between states. Most common law legal systems actually do recognize the *res judicata* effect of foreign judgments, and of the civil law family the Netherlands have the most far-reaching and liberal provisions. The Dutch Criminal Code contains a general *ne bis in idem* provision that is applicable to both domestic and foreign judgements, regardless of where the offence was committed.[4] However, the Netherlands stand quite alone in this respect.

There is no mandatory rule of international law *(ius cogens)* imposing a duty to respect the *ne bis in idem* principle between States. The application of the principle depends on the content of international treaties. We do find treaty-based *ne bis in idem* provisions, both in human rights treaties and in bilateral or multilateral treaties dealing with judicial cooperation in criminal matters.

The *ne bis in idem* principle is established as an individual rig international human rights legal instruments, such as the International Cov on Civil and Political Rights of 19 December 1966 (Article 14 (7)). The Euro Convention on Human Rights (ECHR) does not contain such a provision an former European Commission on Human Rights[5] denied the existence c principle as such under Article 6 of the ECHR, without however precludi absolute terms that certain double prosecutions might violate the fair trial under Article 6 ECHR. The provision has meanwhile been elaborated i Seventh Protocol to the ECHR (Article 4), but only a minority of the 2 Member States have ratified Protocol no 7. Can we derive from the case l the ECtHR a common standard? Most of the cases deal with one aspect of *i in idem,* namely the definition of *idem.* After some contradictory judgment the application of Article 4 of Protocol 7, the ECtHR followed its judgment *Franz Fischer v. Austria* decision,[7] based on *idem factum.* However, in the of*Göktan v. France,*[8] the Court again seemed to rely on the legal *idem.* Alth the case law is limited, some conclusions can be derived from it. The ECtH deals with the national *ne bis in idem,* meaning the principle as it operates the domestic legal orders of the Party States, and it does not deal wit international or transnational *ne bis in idem.* This is in line with the applicat Art. 14(7) of the UN International Covenant on Civil and Political Rights. also clear from the Strasbourg case law that the *ne bis in idem* principle limited to double punishment, but also includes double prosecution, means that the accounting principle is not enough to respect the principle *bis in idem.* This underlines the importance of cooperation at the level inquiry and of preferably introducing *una via* provisions rather anti-cumulation of sanctions. In addition, the element of *bis* also include combination of two criminal charges in the sense of Article 6, for instanc imposition of a criminal punitive sanction and an administrative pu sanction.[10] Case law provides some important guidance here, but falls sh producing a solid common standard. Moreover, very few States have r Protocol 7. The *ne bis in idem* principle is also important as a ground for re to cooperate in the framework of international treaties dealing with ju cooperation in criminal matters. The *ne bis in idem* principle was included milestone multilateral treaty on Extradition of the Council of Europe December 1957. Article 9 provided not only for the classic formulation of t

bis in idem principle dealing with final judgments *(res judicata),* but also included final decisions of a procedural character. The former ground for refusal ground is mandatory, however, whereas the latter is only optional:

> 'Extradition shall not be granted if a final judgement has been passed by the competent authorities of the requested Party upon the person claimed in respect of the offence or offences for which extradition is requested. Extradition 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.'

Article 8 also provides an optional ground for *ne bis in idem* refusal in the case of *lispendens:*

> 'The requested Party may refuse to extradite the person claimed if the competent authorities of such Party are proceeding against him in respect of the offence or offences for which extradition is requested.'

Article 7 even concerns a prior phase, accepting the preponderance of sovereign interests:

> 'The requested Party may refuse to extradite a person claimed for an offence which is regarded by its law as having been committed in whole or in part in its territory or in a place treated as its territory.'

The Extradition Convention deals with *ne bis in idem* in a classic intergovernmental setting between the requesting and requested State, but the additional Protocol of 15 October 1975 supplements Article 9 of the Convention with the following paragraphs 2 and 3 which also cover other Contracting Parties:

> '2. The extradition of a person against whom a final judgement has been rendered in a third State, Contracting Party to the Convention, for the offence or offences in respect of which the claim was made, shall not be granted;
>
> a. if the afore-mentioned judgment resulted in his acquittal;

b. the term of imprisonment or other measure to which he was sentenc

I) has been completely enforced;

II) has been wholly, or with respect to the part not enforced, the sub of a pardon or an amnesty;

c) if the court convicted the offender without imposing a sanction.

3. This mandatory refusal ground can however be set aside (optional) calling in exceptions based on territoriality principle, vital interest jeopardy or the implication of own civil servants:

a. if the offence in respect of which judgment has been rendered v committed against a person, an institution or any thing having pul status in the requesting State;

b. if the person on whom judgement was passed had himself a pul status in the requesting State;

c. if the offence in respect of which judgement was passed was commit completely or partly in the territory of the requesting State or in a plc treated as its territory.'

Ne bis in idem provisions are not limited to extradition, but have included in many Council of Europe Conventions concerning judicial coope in criminal matters. In Europe, in the framework of the Council of Europe, e have been made since the 1970s to introduce a regional international *ne idem* principle. In this cooperation framework the *ne bis in idem* principle applies *inter partes*, which means that it can be or must be applied betwee contracting States in case of a concrete request. It is not considered to b individual right *erga omnes*. *Ne bis in idem* is provided for under the Convention of the Council of Europe on the International Validity of Cri Judgements (Articles 53-57) and under the 1972 Convention on the Trans Proceedings in Criminal Matters (Articles 35-37) as mandatory. However, Conventions have a rather poor ratification rate and contain quite a numb exceptions to the *ne bis in idem* principle. In the 1990 Convention Laundering, Search, Seizure and Confiscation of the Proceeds from C (Article 18, paragraph 1e), which is very well ratified, it is optional, but s

Contracting States did include it in their ratification declaration as a ground for refusal for cooperation requests. The Council of Europe Convention of 15 May 1972 on the transfer of Proceedings in Criminal Matters provides in Part V (Articles 35-37):

> *Article 35.* 1. A person in respect of whom a final and enforceable criminal judgment has been rendered may for the same act neither be prosecuted nor sentenced nor subjected to enforcement of a sanction in another Contracting State:
>
> a. if he was acquitted;
>
> b. if the sanction imposed:
>
> i) has been completely enforced or is being enforced, or
>
> ii) has been wholly, or with respect to the part not enforced, the subject of a pardon or an amnesty, or
>
> iii) can no longer be enforced because of lapse of time;
>
> c. if the court convicted the offender without imposing a sanction.
>
> 2. Nevertheless, a Contracting State shall not, unless it has itself requested the proceedings, be obliged to recognise the effect of *ne bis in idem* if the act which gave rise to the judgment was directed against either a person or an institution or any thing having public status in that State, or if the subject of the judgment had himself a public status in that State.
>
> 3. Furthermore, a Contracting State where the act was committed or considered as such according to the law of that State shall not be obliged to recognise the effect of ne *bis in idem* unless that State has itself requested the proceedings.
>
> *Article 36.* If new proceedings are instituted against a person who in another Contracting State has been sentenced for the same act, then any period of deprivation of liberty arising from the sentence enforced shall be deducted from the sanction which may be imposed.

Article 3 7. This Part shall not prevent the application of wider dome: provisions relating to the effect of ne *bis in idem* attached to forei criminal judgments.

In these Conventions the *ne bis in idem* principle has as its objecti avoidance of double punishment, not of double prosecution or investig That is the reason why we do not find *ne bis in idem* provisions in the Cou Europe Convention of 20 April 1959 on mutual assistance in criminal mat in the additional protocols dealing with judicial letters rogatory. Even if recognize the international *ne bis in idem* principle, problems may ai transnational settings because of the different interpretations of the princi to the meaning of *idem, bis,* etc. The main questions here are whether the can deal with these matters and whether individuals may claim the applica the *ne bis in idem* principle as a subj ective right or even a human right? D *bis in idem* serves as an impediment to international cooperation in gener to the surrender of suspects in particular or is it a human right of the accus we have seen, the principle operates *inter partes,* rather than *erga* c However, the state-to-state approach has begun to be affected by the case the ECtHR.[11] In the *Soering* case,[12] the ECtHR decided on the applicat Articles 3 and 6 ECHR to the extradition of a suspect to the USA. It rule although Article 1 of the ECHR, which provides that 'the High Contracting shall secure to everyone within their jurisdiction the rights and freedoms c in Section I of this Convention' cannot be read as justifying a general princ the effect that a Contracting State may not surrender an individual satisfied that the conditions awaiting him in the country of destination are accordance with each of the safeguards of the Convention, this does not a the Contracting Parties from responsibility under that Convention for all ai foreseeable consequences outside their jurisdiction.[13] From this decision it i clear that the rule of comity and non-inquiry does not apply in the c possible flagrant violations of human rights. The requested State has the scrutiny as to whether the requesting State properly respects their rights. I the respect of human rights is a joint responsibility of both States, and have the right to an effective remedy in this field. This means that the extr procedure not only affects State to State relations, but also the subjective ri citizens. In the cases *Drozd v. France and Spain*[14] and *Iribarne Perex v. Fr*

which both concerned the transnational execution of criminal convictions, the ECtHR ruled that Contracting States are obliged to refuse cooperation if it emerges that the conviction is the result of a flagrant denial of justice.[16]

From the analysis above it is clear that the ECtHR has not yet elaborated a common standard concerning the scope and the application of the *ne bis in idem* principle. Concerning the application of human rights in interstate judicial cooperation, the ECtHR has imposed duties upon the States. Due to a lack of relevant case law, it remains unclear, however, whether the notion of flagrant violation of human rights also applies to a failure to respect the *ne bis in idem* principle as such.

In conclusion therefore state practice in the Member States and the case law of the ECtHR only give us limited guidance for the elaboration of a common transnational *ne bis in idem* standard in a regional integration setting.

3. Regional Integration in the EU and the Transnational Application of the ne bis in idem Principle

The economic integration process in the framework of the EC stumbled upon the issue of transnational application of the *ne bis in idem* principle when dealing with punitive administrative sanctioning. This means that the principle played a role in EC law even before the coming into force of the Treaty of Maastricht.

The EC has administrative sanctioning powers in the field of competition and far-reaching powers to harmonize national administrative sanctioning in many EC policies. The ECJ has had occasion to address the issue of *ne bis in idem* in the field of competition.[17] Already in 1969, the ECJ held in *Wilhelm v. Bundeskartellamt*[18] that double prosecution, once by the Commission and once by the national authorities, was in line with regulation 17/62[19] and did not violate the *ne bis in idem* principle, given the fact that the scope of the European rules and the national rules differed. However, if this would result in the imposition of two consecutive sanctions, a general requirement of natural justice demands that any previous punitive decisions be taken into account in determining any sanction which is to be imposed *(Anrechnungsprinzip)*. It is now fixed case law of the ECJ to confirm the *ne bis in idem* principle as a general principle of Community law,[20] which means that it is not limited to criminal

sanctions, but that it also applies in competition matters. However, the ECJ se to limits the *ne bis in idem* principle to double punishment and still accept accounting principle. This problem has not been solved by the new compe regulation 1/2003.[21] This regulation provides that, besides the Euro Commission, national competition authorities will also apply Euro competition rules, including the rules concerning enforcement (Article 3 5). European Commission and the national authorities will form a network base close cooperation. In practice, conflicts of jurisdiction and problems regardin *bis in idem* should be avoided through best practices of cooperation, after w competition authorities can suspend or terminate their proceedings (Article There is however no obligation, which means that double prosecution is excluded as such. It is quite clear that by excluding double prosecution fron *ne bis idem* principle and by accepting the accounting principle the case la the ECJ concerning international *ne bis in idem* in competition cases is entirely in line with the ECtHR case law on the national *ne bis in idem* princ The *ne bis in idem* rule can be of importance in other sectors in which the EC sanctioning power, e.g., within the area of European public procurement.[22] EC has also harmonized sanctioning regimes in the Member States. The pacl on the protection of the financial interest of the EC is a good example. Mer States have to impose administrative and criminal sanctions for irregularities fraud. Article 6 of regulation 2988/95[23] provides for suspension of nati administrative enforcement during criminal proceedings. However, administrative proceedings must be resumed when the criminal proceedings concluded and the administrative authority must impose the prescr administrative sanctions, including fines. The administrative authority may into account any penalty imposed by the judicial authority on the same persc respect of the same facts. It is obvious that these provisions do not reflect the effect of the *ne bis in idem* principle. Article 6 provides only that the reopenir the administrative proceedings after the criminal proceedings can be precl by general legal principles. The *ne bis in idem* principle should bar reopening if the same persons and the same facts are involved, but regulation does not mention this explicitly. We can conclude that the EC recognized the transnational *ne bis in idem* principle as a general principl Community law, but accords to it a scope and application that lags behind the minimal standard set by the ECtHR.

On the other hand, even before the integration of Justice matters in the EU, European Justice Ministers were fully aware that the deepening and widening of European integration would lead to an increase in transborder crime and of transnational justice in Europe and that concurring prosecution and sanctioning would become an obstacle to Justice integration. In the framework of the European Political Cooperation, before the coming into force of the Maastricht Treaty with its Third Pillar on Justice and Home Affairs, the 1987 Convention on Double Jeopardy was elaborated between the Member States of the EC. This Convention deals with the *ne bis in idem* principle in a transnational setting in the EC. The Convention has been poorly ratified,[24] but its substance has been integrated into the CISA to such an extent that it may qualify with reason as the first multilateral convention establishing an international *ne bis in idem* principle as an individual right *erga omnes*.

> ***Article 54***. 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.
>
> ***Article 55*** 1. A Contracting Party may, when ratifying, accepting or approving this Convention, declare that it is not bound by Article 54 in one or more of the following cases:
>
> a. where the acts to which the foreign judgment relates took place in whole or in part in its own territory; in the latter case, however, this exception shall not apply if the acts took place in part in the territory of the Contracting Party where the judgment was delivered;
>
> b. where the acts to which the foreign judgment relates constitute an offence against national security or other equally essential interests of the Contracting Party;
>
> c. where the acts to which the foreign judgment relates were committed by officials of that Contracting Party in violation of the duties of their office.
>
> 2. A Contracting Party which has made a declaration regarding the exception referred to in paragraph 1(b) shall specify the categories of offences to which this exception may apply.

3. A Contracting Party may at any time withdraw a declaration relatir one or more of the exceptions referred to in paragraph 1.

4. The exceptions which were the subj ect of a declaration u paragraph 1 shall not apply where the Contracting Party concerned in connection with the same acts, requested the other Contracting Pai bring the prosecution or has granted extradition of the person concern

Article 56. If a further prosecution is brought in a Contracting Party ag a person whose trial, in respect of the same acts, has been finally disp of in another Contracting Party, any period of deprivation of liberty se in the latter Contracting Party arising from those acts shall be dedu from any penalty imposed. To the extent permitted by national penalties not involving deprivation of liberty shall also be taken account.

Article 57. 1. Where a Contracting Party charges a person with an off and the competent authorities of that Contracting Party have reasc believe that the charge relates to the same acts as those in respe which the person's trial has been finally disposed of in another Contra Party, those authorities shall, if they deem it necessary, request the rel information from the competent authorities of the Contracting Par whose territory judgment has already been delivered.

2. The information requested shall be provided as soon as possible shall be taken into consideration as regards further action to be tak the proceedings under way.

3. Each Contracting Party shall, when ratifying, accepting or appr this Convention, nominate the authorities authorised to request receive the information provided for in this Article.

Article 58. The above provisions shall not preclude the applicatic broader national provisions on the *ne bis in idem* principle with rega judicial decisions taken abroad.

The Schengen provisions have served as a model for several *ne bis* provisions in the EU instruments on Justice and Home Affairs.[25] In this s Schengen Treaties have served as a testing laboratory. The Conventior

Financial Protection of the European Communities and its several protocols contain several provisions on *ne bis idem,*[26] as does the Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union.[27] The Corpus Juris[28] on European Criminal Law does not provide for a specific transnational *ne bis in idem* provision, but deals with the problem in Article 17 in the framework of concurring incriminations, as far as double criminal sanctioning is concerned, and imposes the accounting principle in case a criminal sanction is imposed after an administrative sanction.

From the above analysis it becomes quite clear that integration – be it economic integration with consequences for law enforcement, or justice integration – and the establishment of common territorial areas automatically usher in the transnational aspect of the *ne be in idem* principle.

4. *Ne bis in idem*, the ECJ and the area of Freedom, Security and Justice

4.1 Introduction

The CISA has been an important landmark for the establishment of a multilateral treaty-based international *ne bis in idem*. Although the CISA was very much linked with the internal market and the four freedoms, it was an intergovernmental instrument. With the coming into force of the Treaty of Amsterdam, in May 1999, the Schengen provisions were integrated into the EU *acquis*. The *ne bis in idem* Schengen provision was integrated in the Third Pillar provisions of the area of Freedom, Security and Justice. The EU was very much aware of the necessity to legislate in more detail on the transnational *ne bis in idem* principle in the area of Freedom, Security and Justice. Provisions in international treaties governing the principle were too different and their application in the Member States varies too much. Point 49(e) of the Action Plan of the Council and the Commission on the implementation of the area of Freedom, Security and Justice[29] provides that measures will be established within five years of the entry into force of the Treaty 'for the coordination of criminal investigations and prosecutions in progress in the Member States with the aim of preventing duplication and contradictory rulings, taking account of better use of

the *ne bis in idem* principle'. In the Programme of measures to implem principle of mutual recognition of decisions in criminal matters,[30] the *ne idem* principle is included among the immediate priorities of the E reference is *inter alia* made to the problem of out-of-court settlement. In became clear, also through national case law, that national courts experiencing problems with transactions and the application of the Sch provisions on the transnational *ne bis in idem* principles.

Apart from the legislative perspective, the Treaty of Amsterdan introduced the European Court of Justice as an important player in this fie European Court of Justice had already established a full range of g principles of Community law, including in the area of criminal law and c procedure. [31] With the coming into force of the Third Pillar cooperation in and Home Affairs (JHA) under the EU Treaty of Maastricht and the ex jurisdiction of the Court of Justice in Third Pillar issues under the EU Tr Amsterdam the ECJ has been given the opportunity to widen the scope general principles into new policy areas that touch more directly upon pri of due law and fundamental rights. In the first preliminary questions Schengen *acquis*[32] in the joined cases *Gözütok and Brügge,* national referred to the ECJ for a preliminary ruling under Article 35 EU c interpretation of Article 54 of the CISA, raising interesting questions validity and the scope of the *ne bis in idem* principle in the EU/Schengen c National courts asked the ECJ to clarify the scope and application transnational *ne bis in idem* principle. As this was a landmark case, v analyse it in detail below, focusing on the transnational dimension.

4.2 The Joined Cases Gözütok and Brügge: Facts

Mr Gözütok, a Turkish national who had lived in the Netherlands for s years, was suspected of the possession of illegal quantities of soft drugs. course of searches of his coffee – and teahouse in 1996, the Dutch poli indeed find several kilos of hashish and marijuana. The criminal proce against Mr Gözütok were discontinued because he accepted a fin transaction proposed by the Dutch Public Prosecutor's Office, as provided Article 74(1) of the Dutch Criminal Code: 'The Public Prosecutor, prior to th may set one or more conditions in order to avoid criminal proceedin

serious offences, excluding offences for which the law prescribes sentences of imprisonment of more than six years, and for lesser offences. The right to prosecute lapses when the conditions are met'. Mr Gözütok paid the proposed sums of NLG 3,000 and NLG 750. Mr Gözütok subsequently drew the attention of the German authorities after a notification of suspicious transactions by a German Bank to the German financial intelligence unit, which had been set up in the framework of the EC obligations against money laundering.[33] The German authorities obtained further information concerning the abovementioned offences from the Dutch authorities and decided to arrest Mr Gözütok and to prosecute him for dealing in narcotics in the Netherlands. In 1997, the District Court of Aachen in Germany convicted Mr Gözütok and sentenced him to a period of one year and five months' imprisonment, suspended on probation. Both Mr Gözütok and the Public Prosecutor's Office appealed. The Regional Court of Aachen discontinued the criminal proceedings brought against Mr Gözütok inter alia on the ground that under Article 54 of the CISA the German prosecuting authorities were bound by the definitive discontinuance of the criminal proceedings in the Netherlands. In a second appeal by the Public Prosecutor's Office to the Higher Regional Court, the Court decided to stay the proceedings and refer the matter to the ECJ for a preliminary ruling on the basis of Article 35 EU Treaty.

Mr Brügge, a German national living in Germany, was charged by the Belgian prosecution authorities with having intentionally assaulted and wounded Mrs Leliaert in Belgium, which constituted a violation of several provisions of the Belgian Criminal Code. Mr Brügge faced a double criminal investigation, one in Belgium and one in Germany. In the Belgian criminal proceedings, the District Court had to deal with both the criminal and civil aspects of the case, due to the fact that Mrs Leliaert, who became ill and unable to work because of the assault, as a civil party claimed pecuniary and non-pecuniary damages. In the course of the proceedings before the District Court of Veurne in Belgium, the Public Prosecutor's Office in Bonn in Germany offered to Mr Brügge an out-of-court settlement in return for payment of DEM 1 000, in line with Section 153a in conjunction with Paragraph 153(1), second sentence, of the German Code of Criminal Procedure. The District Court of Veurne decided to stay the proceedings and refer questions to the ECJ for a preliminary ruling on the basis of Article 35 EU Treaty.

4.3 Legal Background and the Preliminary Questions

The German Higher Regional Court referred to the ECJ the following qu for a preliminary ruling: 'Is there a bar to prosecution in the Federal Rep Germany under Article 54 of the Schengen Implementation Convention if Netherlands law, a prosecution on the same facts is barred in the Nether In particular, is there a bar to prosecution where a decision by the Prosecutor's Office to discontinue proceedings after the fulfilment conditions imposed *(transactie* under Netherlands law), which under the other Contracting States requires judicial approval, bars prosecution b Netherlands court?' The Belgian District Court referred to the ECJ the fo question for a preliminary ruling: 'Under Article 54 of the Sc Implementation Convention is the Belgian Public Prosecutor's Office perm require a German national to appear before a Belgian criminal court convicted on the same facts as those in respect of which the Germar Prosecutor's Office has made him an offer, by way of a settlement, to disc the case after payment of a certain sum, which was paid by the accused? the similarity of the substance of the questions, the cases were join examined together.

Articles 54 to 58 of the CIS A on the application of the *ne bis in idem* r incorporated in Title VI of the Treaty on EU (Third Pillar provisions) on th basis of Article 34 EU and 31 EU.[34] Article 54 provides: 'A person whose t been finally disposed of in one Contracting Party may not be prosec another Contracting Party for the same acts provided that, if a penalty h imposed, it has been enforced, is actually in the process of being enfo can no longer be enforced under the laws of the sentencing Contractin Article 55 stipulates exceptions to the rule of *ne bis in idem,* but they r formally laid down at the moment of signature or ratification. One possible exceptions is that the acts took place in whole or in part in territory. Another relevant article in this context is Article 58 that stipula national provisions may go beyond the Schengen provisions on *ne bis i* by giving a broader protection.

The Treaty of Amsterdam has extended the jurisdiction of the ECJ i Pillar matters, inter alia to give rulings on the validity and interpret decisions. Member States must accept that jurisdiction in accordan

Article 35 (2) and they can, according to Article 35 (3) TEU, when accepting choose between granting the power to refer questions for a preliminary ruling either to any of its courts or tribunals or only to those courts or tribunals which give a final decision against which there is no further judicial remedy. Both Germany and Belgium have opted for the full range of courts and tribunals and the questions referred for a preliminary ruling do not affect public order or internal security (Article 35(5) TEU).

4.4 Opinion of the Advocate General (AG)

The AG sticks to a strict interpretation of Article 35 (1) TEU, which precludes any view on the application of the *ne bis in idem* principle to the case pending before the national court or with regard to the discontinuance of the criminal action. For this reason the AG expresses that the EC J must disregard the terms in which the German Higher Regional Court formulates the first of its questions. For that reason the AG reformulates all the preliminary questions into two interpretative questions:

> '1. The first is whether the *ne bis in idem* principle stated in Article 54 of the Convention also applies when in one of the signatory States a criminal action is extinguished as the result of a decision to discontinue proceedings, taken by the Public Prosecutor's Office once the defendant has fulfilled the conditions imposed on him.
>
> 2. If the reply to the above question is positive, the German court wonders whether it is necessary for the decision taken by the Public Prosecutor's Office to be approved by a court.'

The AG qualifies Article 54 as a genuine expression of the *ne bis in idem* principle in a dynamic process of European integration. It is not a procedural rule, but a fundamental safeguard, based on legal certainty and equity, for persons who are subject to the exercise of the *ius puniendi* in a common area of Freedom, Security and Justice. He also is of the opinion that the *ne bis in idem* principle is not only applicable within the framework of one particular legal system of a Member State. A strict application of national territoriality is incompatible with many situations in which there are elements of extra-territoriality and in which the same act may have legal effects in different parts of the territory of the Union. On the other hand the *ne bis in idem* rule is also an

expression of mutual trust of the Member States in their criminal justice sys
Penal settlements are not contractual, but an expression of criminal justice.
do exist in many national legal orders, they are a form of administering ju
which protects the rights of the accused and culminates in the imposition
penalty. Since the rights of the individual are protected, it is irrelevant wh
the decision to discontinue the criminal action is approved by a court. A ver
given on the acts being judged and on the guilt of the perpetrator. It involv
delivery of an implicit final decision on the conduct of the accused an
imposition of penalising measures. The rights of the victims are not affe
while they are not barred from claiming compensation. The phrasing c
Article 54 provision concerning the *res judicata* is in the opinion of the A
homogenous in the various language versions (finally disposed, *rechtsk
abgeurteilt, onherroepelijk vonnis, définitivement jugée, juzgada en sent
firme...*). Member States do not agree on this point. France, Germany
Belgium are in favour of a restrictive interpretation limited to court decision
Netherlands and Italy, j oined also by the European Commission plead in f
of a more extensive interpretation, including out-of-court judicial settlement
AG underlines that the terms used by the various versions are not homoge
and that a strict interpretation, limited to court judgments, may have a
consequences that are contrary to reason and logic. Two persons suspec
the same offence could face a different application of the *ne bis in idem* pri
if the one is acquitted in a final judgement and the other accepts an out-of
settlement. The AG concludes:

> 'The *ne bis in idem* principle stated in Article 54 of the Conventi
> implementing the Schengen Agreement on the gradual abolition of che
> at the common borders also applies when criminal proceedings
> discontinued under the legal system of one Contracting Party as
> consequence of a decision taken by the Public Prosecutor's Office, or
> the defendant has fulfilled certain conditions – and it is irrelevant whetl
> that decision has to be approved by a court – provided that: (1)
> conditions imposed are in the nature of a penalty; (2) the agreem
> presupposes an express or implied acknowledgement of guilt a
> accordingly, contains an express or implied decision that the act
> culpable; and (3) the agreement does not prejudice the victim and ot
> injured parties, who may be entitled to bring civil actions.'

4.5 The Reasoning and Interpretative Answer of the Court[35] and *de lege ferenda* Proposals

The ECJ not only followed the rephrasing of the preliminary questions by the AG, but also subscribed to his main arguments. The discontinuation is due to a decision of the Public Prosecutor's Office, being part of the administration of criminal justice. The result of the procedure penalises the unlawful conduct, which the accused is alleged to have committed. The penalty is enforced for the purposes of Article 54 and further prosecution is barred. The ECJ considers the *ne bis in idem* principle as a principle having proper effect, independent from matters of procedure or form, like the approval by a court. In the absence of an express indication to the contrary in Article 54, the principle of ne *bis in idem* must be regarded as sufficient to apply.

The arguments of Germany, Belgium and France that the wording and the general schema of Article 54, the relationship between Article 54 and Articles 55 and 58, the intentions of the Contracting Parties and certain other international provisions with a similar purpose, preclude Article 54 from being construed in such a way as to apply to procedures barring further prosecution in which no court is involved, fail to convince the ECJ. The ECJ does not find any obstacle in Articles 55 and 58 and considers the intentions of the Contracting Parties as of no value, since they predate the integration of the Schengen *acquis* in the EU. Concerning the Belgian Government's argument of possible prejudice to the rights of the victims, the ECJ follows the Opinion of the AG, underlining that the victim's rights to bring civil actions is not precluded by the application of the *ne bis in idem* principle.

For these reasons the ECJ rules that: 'The *ne bis in idem* principle, laid down in Article 54 of the 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, signed on 19 June 1990 at Schengen, 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 ECJ states explicitly that the area of Freedom, Security and Justice i mutual trust in each other's criminal justice systems and that the validity of *bis in idem* principle is not dependent upon further harmonization. Th further considers that the intentions of the Contracting Schengen Parties longer of value, as they predate the integration of the Schengen *acquis* in t This is as such remarkable, since the Dutch proposal[36] at the time conception of Article 54 to include out-of-court transaction settlemen rejected. The intention of the Contracting Parties to exclude transactions fr *ne bis in idem* principle was clear. However, the integration of the Sch provisions in the EU, based upon the decision of the IGC and ratified national authorities did not only change the conceptual framework o provisions, but also their meaning and effect. A parallel can be drawn he the general principles of Community law in the internal market. Com loyalty and non-discrimination, for example, influenced the meaning an of several national criminal provisions, without taking into account the int of the national legislator. It is typical for an integrated legal order like the the conceptual framework of integration interferes with national sovereign in respect of cooperation and transnational aspects.[37] What happened dur process of market integration in the EC is now repeated in the process of integration in the EU. Rights and remedies for the market citizen are trans into rights and remedies for the Union citizen. National decisions, in criminal decisions, can have an EU-wide effect in a new setting of Eu territoriality. This is also what makes the European integration proc different from the dual sovereignty in the USA, where the constitutional jeopardy does not bar double prosecution in several states. When a defen a single act violates the 'peace and dignity' of two sovereign powers by bi the laws of each, in the USA he has committed two distinct offences[38] w different values to protect. In the EU we have a single area of Freedom, S and Justice and an integrated legal order in which full effect should be g fundamental standards.

However, with this decision the ECJ did not solve all the problems of *bis in idem* principle. As mentioned the interpretation of the term final ju is only one of the problem points. If the legislator does not intervene in du the ECJ will certainly receive other requests for preliminary rulings interpretation of the *ne bis in idem* principle. Questions that remain fully

table are of course the problem of the definitions of *idem* and *bis* and the scope of the *ne bis in idem* principle as a whole. The ECJ in the joined *ne bis in idem* cases used the words '(...) 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', wording that is much wider than the formulation of the AG who spoke of conditions with the nature of a penalty, the decision of guilt and no prejudice to victims. More concretely, the question is whether procedural agreements, such as plea bargaining or full or partial immunity deals for collaboration with the law enforcement authorities fall under the scope of the *ne bis in idem* principle? In some countries these deals can be connected to an out-of-court settlement in the form of a transaction. Another problem is the full application of the *ne bis in idem* rule if the first proceedings were conducted for the purpose of shielding the person concerned from criminal responsibility. Under which conditions can the *ne bis in idem* be set aside and by whom?

In that light it is important to underline that a couple of days after the ECJ ruling in the *Gözütok and Brügge* case Greece submitted a proposal for a framework decision on *ne bis in idem*[39] with the aim to establish common legal rules in order to ensure uniformity in both the interpretation of those rules and their practical implementation. The framework decision would replace Articles 54-58 CIS A. The proposal defines criminal offences (Article 1) as offences *sensu strictu* and administrative offences or breaches punished with an administrative fine on the condition that the appeal procedure is before a criminal court. Judgments also include any extra-judicial mediated settlements in criminal matters and any decisions which have the status of *res judicata* under national law shall be considered as final judgments. Article 4 provides for exceptions to the *ne bis in idem* principle if the acts to which the foreign judgment relates constitute offences against the security or other equally essential interest of that Member State or were committed by a civil servant of the Member State in breach of his official duties. Article 3 provides for a consultation procedure and jurisdiction rules in order to avoid double prosecution. The initiative certainly deserves to be welcomed, but its reach is rather too narrow. In fact, excluding punitive administrative sanctioning if not appealable before a criminal court is quite absurd, also in the light of the ECtHR case law, although it does fit in with the German tradition of administrative criminal law *(Ordnungswidrigkeiten)*. The

draft also contains far too many exceptions to the *ne bis in idem* rule. Fin
draft does not deal with the applicability of the principle to legal persc
discussions in the Council are underway, but quite difficult on several
including the issues at stake in the *Gözütok and Brügge* case.

This ECJ judgment on *ne bis in idem* is just the start of an important
the ECJ in the area of European criminal justice. All this illustrates that th
real need to sign and ratify the draft Constitution, including the Ch
Fundamental Rights (CFR)[40] as a binding legal text. The CFR refers to the
as the minimal standard and the EU would also become a party to the
The territorial scope of Article 50 CFR[41] dealing with *ne bis in idem*
transnational in the EU, but its substantive reach is disappointing
wording of the text: 'No one shall be liable to be tried or punished
criminal proceedings of an offence for which he or she has already bee
acquitted or convicted within the Union in accordance with the law'.[42] By
so much on criminal proceedings, this text is not even in line with the
case law of the ECtHR. Moreover, the provision seems to deal only w
judgments. For this reason the Max Planck Institute for Foreign and Inter
Criminal Law set up an expert group to elaborate the so called Freiburg I
on Concurrent Jurisdictions and the Prohibition on Multiple Prosecutior
EU.[43] The text deals with the prevention of multiple prosecutions in inter
cases through the imposition of forum/jurisdiction rules, the applic
transnational *ne bis in idem* and finally, as a safety net, the applicatio
accounting principle. Concerning transnational *ne bis in idem,* the expe
proposes a *ne bis in idem factum* right for natural and legal persons. Th
in idem principle should apply to all punitive procedures and sanctions,
they are of an administrative or a criminal nature, whether they are nat
European. The draft proposal uses the term 'finally disposed of instead
acquitted or convicted'. This terminology includes every decision t
prosecution authorities, which terminates the proceedings in a way tha
reopening of the case subject to exceptional circumstances, as for inst
reopening of res judicata cases. This means for example that German
out-of-court settlements *(Einstellunggegen Auflagen, transactie)* and the
ordonnance de non-lieu moitivée en fait are included in the definition of
idem. This proposal provides an excellent set of provisions *de lege lata,*
the legislator and the judiciary, and both at the European and the nationc

5. Mutual Recognition, *ne bis in idem* and Equivalent Protection: The European Arrest Warrant

What does this ECJ preliminary ruling mean for the new set of mutual recognition instruments replacing the classic instruments of judicial cooperation in criminal matters, such as for instance the European Arrest Warrant replacing extradition? It it quite clear that the wave of mutual recognition proposals was mostly driven by thoughts of effectiveness, as was the original proposal of the European Commission[44] for the European Arrest Warrant, which contained a very limited set of provisions on the *ne bis in idem* principle. It is quite clear that in 2001 the importance of the principle in a transnational setting was still underestimated.

> **Art. 30 *ne bis in idem***
>
> 1. The executing judicial authority shall refuse to execute a European arrest warrant, if a judicial authority in the executing Member State has passed final judgement upon the person claimed in respect of the offence or offences for which the European arrest warrant has been issued.
>
> 2. The execution of a European arrest warrant may also be refused if the judicial authorities of the executing Member State have decided either not to institute or to terminate proceedings in respect of the same offence or offences.

However, as a result of the negotiations in the Council these provisions changed substantially when a distinction between final judgments, prosecution and pending proceedings was introduced. The major asset of the new rules is that, in recognizing *res judiciata* as a bar to surrender, they considers final judgments and out-of-court settlements in all Member States of the EU to be on a par with those emanating from the requested State. In the case of final judgments the *ne bis in idem* principle leads to a mandatory ground for refusal. Whenever a final judgment has been passed in a Member State, all other states should abide by this decision. The executing authority will have to assess all prior judgments in respect of the act under scrutiny, irrespective of whether they derive from the issuing State, the executing State or another Member State. In fact, for the executing State it is much easier under the European Arrest Warrant regime

to bar surrender procedures based on the *ne bis in idem* principle tha under the extradition Convention of the Council of Europe, which is in l the mutual trust principle.

Concerning prosecution, what is in fact meant here is the situation o court settlement. Article 4(3) reads that:

> 'Where the judicial authorities of the executing Member State have dec either not to prosecute for the offence on which the European c warrant is based or to halt proceedings, or where a final judgemen been passed upon the requested person in a Member State, in respe the same acts, which prevents further proceedings.'

Non-execution in this case is optional, which means that cu proceedings, like in the case of *Krombach v. Bamberski,*[45] are still possib the EU, which constitutes a weakening of the CISA provisions as interp the ECJ. The only new aspect compared to the Extradition Convention is principle not only plays a role in relation to the issuing State, but in relati Member States, i.e., in the whole legal area. It is a pity that this has r integrated as a mandatory ground for non-execution. Another point o could be whether the decision by the Prosecutor must be approved by Furthermore, it is not at all clear who the judicial authorities are an decisions are covered. Indeed, Article 6(3) states that Member States de the competent judicial authorities are for the European Arrest Warran 4(3) refers to the same judicial authorities.

Finally, the European Arrest Warrant includes *lis pendens* proceeding with Article. 8 of the Extradition Convention, Article 4(2) defines pending proceedings in the executing Member State as a ground for optional refu

> 'Where the person who is the subject of the European arrest warr being prosecuted in the executing Member State for the same act a on which the European arrest warrant is based.'

We can conclude that the final version of the framework decisior European Arrest Warrant has improved substantially compared Commission draft when it comes to the protection offered by the transnat *bis in idem* principle. However, the EAW regime also allows for the

application of the *ne bis in idem* principle in the case of out-of-court settlements. Still, the *ne bis in idem* principle has been largely spelled out in the text, which cannot be said of the duty to respect other human rights in a transnational setting: these must be at least flagrantly violated before they may bar the surrender procedure.[46] By contrast, for the principle of *ne bis in idem,* the ECJ has laid the foundation for its transnational application as a human right, which leads to equivalent protection in the common area of Freedom, Security and Justice.

6. Conclusion

As has emerged clearly from the analysis above, neither ECtHR practice, nor the application of the ne bis in idem principle in the framework of the multilateral treaties in criminal matters of the Council of Europe have led to a common *ne bis in idem* standard in Europe.

In the EU, the traditional *ne bis in idem* principle has developed from a domestic legal principle into a transnational human right. This process began as a result of Schengen integration and has deepened further in the framework of the common area of Freedom, Security and Justice. Classic inter-state cooperation in criminal matters has been replaced by enhanced judicial cooperation, directly between the actors of the criminal justice system. Moreover, these have to recognize each other's judicial decisions, based upon the principle of mutual recognition. Mutual recognition of, for example, each other's arrest warrants does not only lead to speedier surrender of suspects within the EU, but also to the duty of transnational application of legal principles such as the *ne bis in idem* principle. And this transnational operation presumes that the territorial scope and substantive application of the *ne bis in idem* principle within the EU is based on a common standard. This is the only way in which to guarantee equivalent protection. Essential aspects of the operation of the criminal justice system are thus functioning in an European area without internal borders, a transnational judicial area. Member States must be prepared to leave behind their classic, outdated views on sovereignty and accept a vision of shared sovereignty in the common judicial area. Transnational human rights are a substantial part of such a common judicial area.

Despite this, it has clearly emerged from the above analysis that the l legislator is finding it enormously difficult to give shape and substan transnational legal principles and this is also true in the case of the *ne bis in* principle. It is the ECJ which, through interpretation of the principles c Community legal order, has to define the legal principles and determine scope and application. The ECJ's prelimary ruling in cases C-187/01 C-385/01, *Hüseyin Gözütok and Klaus Brügge,* has made clear that the E prepared to play this role, just as it has played it in the process of the integ of the Community. National courts, too, are joining in, as the Belgian Sup Court has submitted a new preliminary question to the ECJ. At the mome writing the Advocate General has just submitted his Opinion.[47]

Mutual recognition of each other's judicial decisions, such as for instar the application of the European Arrest Warrant, requires common and equi protection of human rights in the area of Freedom, Security and Ju Common standards of the Rule of Law, at least in line with the mini standards developed by the ECtHR, are the *minimum minimorum* for mutua between States and for mutual trust between the citizens of the EU and th the legitimacy of the EU criminal policy as such.

For this reason, it is essential that all the necessary legal guarantees are in into the new mutual recognition instruments (European evidence wa retention of data, etc.) and to allow the ECJ sufficient room to de transnational legal principles in criminal matters within the EU. If the ECJ deal quickly and efficiently with these issues, a specialized chamber would n amiss.

Endnotes

† A short version of this article was published as a case note in 2004 Common M Law Review, no. 41, pp. 795-812.

1 In that case, still a double prosecution can be recognized as a violation c principles of a fair administration of justice.

2 *Interest reipublice ut sit finis litium,bis de eadem re ne sit actio.*

3 See for instance the Report of the UK Law Commission on double jeopardy, 17.24.01, http://www.lawcom.gov.uk/

4 For a comment on the Dutch *ne bis in idem* in Art. 68 of the Criminal Code, see P. Baauw, 'Ne bis in idem', in B. Swart et al. (eds.), *International Criminal Law in the Netherlands*, 1997, pp. 75-84.

5 European Commission on Human Rights, 13 July 1970, no. 4212/69, CDR 35, 151.

6 *Gradinger v. Austria*, judgment of 23 October 1995, Series A no. 328-C and *Oliveira v. Switzerland* judgment of 30 July 1998, *Reports of Judgments and Decisions* 1998-V, p. 1990.

7 *Franz Fischer v. Austria of 29 May 2001*, Series A no. 312 (C), confirmed in *W.F. v. Austria*, judgment of 30 May 2002 and *Sailer v. Austria*, judgment of 6 June 2002. See http://www.echr.coe.int/ for these decisions.

8 *Göktan v. France*, Judgment of 2 July 2002, http://www.echr.coe.int/.

9 The Human Rights Committee ruled that Article 14 (7) does not apply to foreign *res judicata*, UN Human Rights Committee 2 November 1987. The Netherlands has formulated the following reservation:

'Article 14, paragraph 7

The Kingdom of the Netherlands accepts this provision only insofar as no obligations arise from it further to those set out in article 68 of the Criminal Code of the Netherlands and article 70 of the Criminal Code of the Netherlands Antilles as they now apply. They read:

1. Except in cases where court decisions are eligible for review, no person may be prosecuted again for an offence in respect of which a court in the Netherlands or the Netherlands Antilles has delivered an irrevocable judgement.

2. If the judgement has been delivered by some other court, the same person may not be prosecuted for the same offence in the case of (I) acquittal or withdrawal of proceedings or (II) conviction followed by complete execution, remission or lapse of the sentence.'

10 The double jeopardy clause in the Fifth Amendment is not limited to criminal law, but includes civil and administrative punitive sanctions. However, the leading case, *United States v. Halper*, 490 US 435 (1989), has recently been again restricted *in Hudson v. US*, 522 US 93 (1997); See also J. Vervaele, 'La saisie et la confiscation à la suite d'atteintes punissables au droit aux Etats-Unis', 1998*Revue de Droit Pénal et de Criminologie*, pp. 974-1003.

11 See P. Garlick, 'The European Arrest Warrant and the ECHR' and N. H 'Extradition and Human Rights: a Dutch Perspective', in R. Blekxtoon et al. *Handbook on the European Arrest Warrant*, 2005, pp.167-194.

12 ECtHR, 7 July 1989, *Soering v. U.K*, A 161.

13 Para. 86.

14 ECtHR, 26 June 1992, *Drozd v. France and Spain*.

15 ECtHR, 24 October 1995, *Iribarne v. France*.

16 For further analysis see A. van Hoek et al., 'Transnational cooperation in c matters and the safeguarding of human rights', 2005 *Utrecht Law Review*, http://www.UtrechtLawReview.org.

17 W. Wils, 'The principle of '*ne bis in idem*' in EC Antitrust Enforcement: a Leg Economic Analysis', 2003 *World Competition*, no. 2.

18 Judgment of 13 February 1969, [1969] *ECR* 3.

19 Regulation no. 17/62, *OJ* P 013, 21.2.1962, p. 0204-0211, English special e Series 1 Chapter 1959-1962 p. 0087.

20 See for instance Judgment of *14/12/1972, Boehringer Mannheim/Comr* (Rec.1972, p. 1281) (DK1972/00323 GR1972-1973/00313 P 1972/ ES1972/00261 SVII/00061 FIII/00059) and Judgment of the Court of 15 C 2002. *Limburgse Vinyl Maatschappij NV (LVM)* (C-238/99 P), *DSM NV an Kunststoffen BV* (C-244/99 P), *Montedison SpA* (C-245/99 P), *Elf Atochem* 247/99 P), *Degussa AG* (C-250/99 P), *Enichem SpA* (C-251/99 P), *Wacker-C GmbH and Hoechst AG* (C-252/99 P) and *Imperial Chemical Industries plc (I* 254/99 P) *v. Commission of the European Communities*.

21 Regulation no. 1/2003, *OJ* L 001, 4.1.2003, p. 0001-0025, in force from 2004.

22 Regulation no. 1605/2002, Arts. 93-96, *OJL* 248, 16/09/2002, p. 0001-00 Regulation 2342/2002, Art. 133, *OJ L* 357, 31.12.2002, p. 0001-0071.

23 Regulation no. 2988/95, *OJ* L 312, 23.12.1995, p. 0001-0004.

24 The *ne bis in idem* Convention has been ratified by Denmark, France, Ita Netherlands and Portugal and is provisionally applied between them.

25 H. Kühne, '*ne bis in idem* in den Schengener Vertragsstaaten', 1998 *J.Z.*, pp 880, W. Schomburg, 'Die Europäisierung des Verbots doppelter Strafverfol Ein Zwischenbericht', 2000 *NJW.*, pp. 1833-1840 and C. Van den Wyngaert 'The international non bis in idem principle: Resolving some of the unan questions', 1999*I.C.L.Q.*, pp. 786-788.

26 See Art. 7 of the Convention, *OJ* 1996 C 313/3.

27 *OJ* 1997 C 195/1, Art. 10.

28 M. Delmas-Marty et al. (eds.), *The Implementation of the Corpus Juris in the Member States*, vol. 1-4, 2000-2001.

29 *OJ* C 19, 23.1.1999.

30 *OJ* C 12, 15.1.2001.

31 See further Case 80/86, *Kolpinghuis*, [1987] *ECR* 3969. For further comments H. Sevenster, 'Criminal Law and EC Law', 1992 *CMLR*, pp. 29-70.

32 ECJ 11 February 2003, Cases C-187/01 and C-385/01, *Hüseyin Gözütok and Klaus Brügge*, [2003] *ECR* I-5689.

33 Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering, *OJ L* 166, 28/6/1991, pp. 0077-0083.

34 Council Decision 1999/436/EC of 20 May 1999, *OJ L* 176, 10.7.1999, pp. 0017-0030.

35 For other comments in literature see M. Rübenstahl et al., 2003 *European Law Reporter*, no. 4, pp. 177-185; K. Adomeit, 2003 *NJW*, pp. 1162-1164; M. Fletcher, 2003 *The Modern Law Review*, pp. 769-780; O. Plöckinger, 2003 *Österreichische Juristenzeitung*, pp. 98-101; N. Thwaites, *2002 Revue de Droit de l 'Union Europeenne*, pp. 295-298; J. Vogel, 'Europäisches *ne bis in idem*, – EuGH', 2003 *NJW*, p. 1173.

36 As provided for under Art. 68(3) of the Dutch Criminal Code.

37 See e.g., Judgment of the Court of 2 February 1989, Case 186/87, *Ian William Cowan v. Trésor public*, [1989] *ECR*, p. 00195.

38 *Heath v. Alabama*, 474 US 82 (1985).

39 Initiative of the Hellenic Republic with a view to adopting a Council Framework Decision concerning the application of the '*ne bis in idem*' principle, *OJ* C 2003 100/4.

40 Proclaimed in Nice on 7 December 2000, but not legally binding.

41 Council of the EU, Charter of Fundamental Rights of the European Union – Explanations relating to the complete text of the Charter, December 200, available at http://ue.eu.int/df/docs/en/EN_2001_1023.pdf

42 Art. II-50 of the Draft Constitution for the EU.

43 http://www.iuscrim.mpg.de/forsch/straf/projekte/nebisinidem.html.

44 Document COM(2001) 522 final, Brussels, September 13th 2001, *OJ* C 332 E/305.

45 See Case-7/98, *Krombach* v. *Bamberski*, Judgment of the Full Court of 28 J 2000, [2000] *ECRI*-1395, annotated by A. van Hoek, 2001 *Common Marke Review*, no. 4, pp. 1011-1027.

46 See Van Hoek et al., *supra* note 16, and Blekxtoon et al., *supra* note 11.

47 Case C-436/04, *Léopold Henri van Esbroeck* v. *Public Prosecutor's Office*, Oj of 20 October 2005.