
The ‘European’ *Ne Bis in Idem* Principle

Substance, Sources, and Scope

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1 Introduction

The principle of *ne bis in idem* is a fundamental principle of law, which restricts the possibility of a defendant being prosecuted repeatedly on the basis of the same *offence, act or facts*. The principle has a long history and exists in national systems of law in different forms: as a constitutional guarantee, as a rule of criminal procedure, and as a guarantee in extradition law. In continental law traditions, a distinction is often made between the principle’s role as an individual right and its function as a guarantee for legal certainty, although these two aspects are intrinsically linked. In the former sense, the principle protects the individual from abuses of the state’s *ius puniendi* (right to punish). Several logically linked *rationale* are identified in this regard. For one, the guarantee ensures the fair administration of criminal justice, as the additional burdens arising out of the repeated prosecution of a subject ‘include the duplicated costs of legal representation, coercive measures to the person and property, and psychological burdens associated with the extended procedures and the absence of finality’.¹ Another *rationale* is found in the requirement that a prosecution must be based on pre-existing legislation (principle of legality), which would become illusory if a defendant could be prosecuted continually for various legal aspects of the same act or facts. In its function as a guarantee for legal certainty the principle serves to protect the authority of the judgment by upholding the final authority of judicial

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¹ Such burdens form part and parcel of law enforcement, it is their repetition that is by definition ‘unfair’: M. Fletcher, ‘The problem of multiple criminal prosecutions: building an effective EU response’, *Yearbook of European Law* (Glasgow: 2007), 10.

decisions. This is also important because a court cannot be impartial unless its decisions bind not only on the subject, but also other organs of the State and other courts.² The guarantee therefore touches on both the ‘very essence of the right to a fair trial’ and the legitimacy of the state.³ In spite of the determinacy of legal rules and doctrines and the disciplining force of legal procedure, the legal process itself would become entirely arbitrary if legal proceedings could be repeated indefinitely.⁴ A final *rationale* commonly identified in connection with the *ne bis in idem* principle is that of proportionality, which is also an important principle in EU law.⁵

The principle’s traditional appropriation as a ‘principle’ rather than a ‘rule’ appears to form a customary expression of its importance; according to most contemporary distinctions between legal rules and principles, the *ne bis in idem* principle would belong in the ‘rule’ rather than the ‘principle’ category.⁶

There is no generally accepted customary rule of international law or *ius cogens* offering international protection against double jeopardy in international situations. The international and transnational application of the *ne bis in idem* principle therefore depends on specific instruments offering protection from double jeopardy, usually in connection with extradition or other forms of mutual assistance in criminal matters.

2 The Reception of *Ne Bis in Idem* in the EU Legal Order

Ne bis in idem provision entered into the EU legal order in different ways, and for different reasons. The Treaties establishing the European

² With the exception of the possibility of appeal.

³ *Nikitin v. Russia*, ECtHR 20 July 2004, appl. no. 50178/99, para. 57.

⁴ Selznick conceives the function of the rule of law as the restraint of public authority through what he calls the ‘rational principles of civic order’, which ‘aim to minimize the arbitrary element in legal norms and decisions’. P. Selznick, P. Nonette, and H. Vollmer, *Law, Society and Industrial Justice*, (Transaction Publishers, 1980), 11. This observation arguably reveals a bias in Dworkin’s ‘right answer thesis’ towards substantive rather than procedural aspects of legal decision-making, which equally determine the legal validity and even moral content of a judgment. Absent the requisite legal safeguards, Judge Hercules’ decision, although it is the ‘right answer’ is not of *legal* value.

⁵ The principle of proportionality in EU law is a multifaceted principle which plays a pivotal role in EU legal order. See, amongst others: T.-I. Harbo, ‘The Function of the Proportionality Principle in EU Law’, (2010) 16 *European Law Journal*, 2, 158–185.

⁶ The influential rule/principle distinction proposed by Dworkin shares sufficient common ground on this point with other distinctions such as those proposed by Raz and Schauer. See: Ronald M. Dworkin, ‘The Model of Rules’, 35 *U. Chi. L. Rev.* 25 (1967); Joseph Raz, ‘Legal Principles and the Limits of Law’, 81 *Yale L. J.* 823 (1972).

Communities did not provide for a *ne bis in idem* rule or any other provisions guaranteeing the protection of fundamental rights.⁷ The absence of a fundamental rights instrument on the Community level, however, proved problematic in view of the growing extent to which the Community showed itself to be capable of raising fundamental rights issues.⁸ This led to the development of a body of fundamental rights including the *ne bis in idem* principle through the case law of the Court of Justice of the European Union (CJEU) as 'general principles of EU law', later codified in the Charter of Fundamental Rights of the EU. In addition a number of instruments of Community and EU law, such as for example the European Arrest Warrant, were adopted over time containing *ne bis in idem* rules. Some of these instruments were modeled after similar initiatives and instruments within the Council of Europe, resulting in the coexistence of a number of differently worded *ne bis in idem* provisions in different parts of EU law as well as in Conventions within the legal framework of the Council of Europe and other international instruments. Perhaps the most significant development for the reception of the *ne bis in idem* principle in EU law has been the incorporation of the Schengen agreements into the EU legal order by way of a Protocol to the Treaty of Amsterdam. With the coming into force of the Treaty of Amsterdam the necessity to provide for a transnational *ne bis in idem* principle in the Area of Freedom, Security and Justice (AFSJ) was increasingly felt. Provisions in existing instruments were considered too varied in substance and scope to provide effective *ne bis in idem* protection, in keeping with the aim of free movement. A solution was found in the form of Article 54 of the 1990 Convention on the Implementation of the Schengen Agreement (CISA).⁹ As discussed at several points in this

⁷ The initial absence of a fundamental rights instrument in Community law may reflect a decision to leave the protection of European citizens in the hands of the Member States, assuming that economic integration would not carry any real fundamental rights relevance.

⁸ B. De Witte, 'The past and future role of the European Court of Justice in the Protection of Human Rights', in *The EU and Human Rights*, ed. P. Alston with N. Bustelo and J. Heenan (Oxford: Oxford University Press, 1999), 878 *et seq.*

⁹ Convention of 19 June 1990 implementing the Schengen Agreement, [2000] OJ L239/19. The first Schengen agreement had been concluded in 1985 outside of the legal framework of the (then) Communities as an intergovernmental instrument between five Member States: 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 (1985), [2000] OJ L 239/13.

chapter, Art. 54 CISA has been a turning point for the establishment of the *ne bis in idem* in the EU and has spawned a sizeable body of case law.

2.1 Provisions

2.1.1 Article 4 of Protocol no.7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms ('Art. 4 of Protocol no. 7 ECHR')

Article 4 of Protocol no. 7 to the ECHR reads as follows:

1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.
2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

Although Art. 4 of Protocol no. 7 ECHR forms a later addition to the ECHR, it is placed amongst those guarantees that cannot be derogated from even in time of war or other public emergency, which forms an indication of its importance. The draft provision was prepared by the Steering Committee for Human Rights and finally adopted and opened for signature by the Member States of the Council of Europe at the 374th meeting of the Ministers' Deputies on 22 November 1984.¹⁰ The reason for including the 7th Protocol was, that 'problems might arise from the coexistence of the European Convention on Human Rights and the United Nations Covenants'.¹¹ In Recommendation 791,¹² the Assembly urged the Committee of Ministers to 'endeavour to insert as many as possible of the substantive provisions of the Covenant on Civil and Political Rights in the Convention', and the influence of Article 14(7) ICCPR on Art. 4 of Protocol no. 7 ECHR is clear. The 7th Protocol has not been ratified by all of the Member States of the Council of Europe. In

¹⁰ The Explanatory Report is available from: <http://conventions.coe.int/Treaty/en/Reports/Html/117.htm>.

¹¹ Explanatory Report, at point 1.

¹² Recommendation 791 (1976) on the protection of human rights in Europe, <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta76/EREC791.htm>.

Ponsetti and Chesnel, the European Court of Human Rights (ECtHR) confirmed that the *ne bis in idem* principle 'is embodied solely in Article 4 of Protocol no. 7 (and) the other provisions of the Convention do not guarantee compliance with it either expressly or implicitly'.¹³ For the Member States of the EU this gap is partially filled by the applicability of Article 50 of the Charter, in situations falling within the scope of EU law.

According to the Explanatory report, Art. 4 of Protocol no. 7 ECHR does not 'prevent the reopening of the proceedings in favour of the convicted person or any changing of the judgment to the benefit of a convicted person', and therefore only applies in situations in which proceedings are brought in order to secure a conviction.¹⁴ Art. 4 of Protocol no. 7 ECHR refers to 'criminal proceedings', mirroring the term 'criminal charge' found in Article 6 par. 1 ECHR, but does not require that the offence is 'criminal' in nature. According to the Explanatory Report:

It has not seemed necessary ... to qualify the offence as "criminal". Indeed, Article 4 already contains the terms "in criminal proceedings" and "penal procedure", which render unnecessary any further specification of the text of the article itself.

The Report goes on to state that Article 4 does not prevent a person from being subjected to an action of a different 'character'.¹⁵ In spite of these reassurances, the ECtHR has in its case law concerning Art. 4 of Protocol no. 7 interpreted the terms 'criminal proceedings' in Art. 4 of Protocol no. 7 ECHR and 'criminal charge' in Art. 6 ECHR broadly and autonomously, as will be discussed in more detail later on in this chapter. As a result, the scope of application of Art. 4 of Protocol no. 7 ECHR has expanded into other areas of law, including administrative and tax law, and disciplinary proceedings of different kinds.

Art. 4 of Protocol no. 7 refers to both the right not to be tried, and the right not to be punished again for an 'offence' for which the subject has been finally acquitted or convicted. This may give rise to some confusion, as these two guarantees differ considerably from one another. The prohibition of double punishment on the one hand merely prohibits the accumulation of penalties in respect of the same offence, but does not in itself preclude the possibility of bringing a second prosecution if

¹³ *Ponsetti and Chesnel v. France* (dec), ECtHR 14 September 1999, appl. nos. 36855/97 and 41731/98, para. 6.

¹⁴ Explanatory Report at point 31. ¹⁵ Explanatory Report at point 28.

this doesn't lead to the imposition of a 'double' penalty on the same subject. This offers only very limited protection as the bringing of a second prosecution itself already places a considerable burden on the subject, regardless of the outcome.¹⁶ The right not to be prosecuted twice or 'prohibition of double prosecution' on the other hand bars any further proceedings once the outcome of the first set of proceedings has become final. This guarantee bars the bringing of any new proceedings, regardless of whether a penalty was imposed in the first proceedings, or of the manner in which that penalty was calculated. In *Franz Fischer*, the ECHR confirmed that the *ne bis in idem* principle of Art. 4 of Protocol no. 7 primarily sets forth the prohibition of double prosecution and 'is not confined to' the prohibition of double punishment.¹⁷ In the decision of the Grand Chamber in the case of *Zolotukhin*, the Court confirmed this, and identified a third 'distinct' guarantee contained in Art. 4 of Protocol no. 7: 'that no one shall be . . . liable to be tried' for an offence for which that person has been finally acquitted or convicted.¹⁸ Although the Court has not shed any further light on when it is precisely that a subject is 'liable to be tried', it must be assumed from this that, similarly to Article 6 ECHR, the protection afforded by Art. 4 of Protocol no. 7 extends into the pre-trial stages of the prosecution.

Art. 4 of Protocol no. 7 ECHR requires that the subject is 'finally acquitted or convicted', but does not require that the penalty imposed has been enforced or is being enforced. Furthermore, Art. 4 of Protocol no. 7 ECHR contains an exception to the *ne bis in idem* rule allowing for a second trial where there are new or newly discovered facts (*novum*), or if there has been a fundamental defect in the previous proceedings affecting the outcome of the case. This includes new or newly discovered evidence, including new means of proof.¹⁹

¹⁶ In some legal systems, this guarantee finds expression in a procedural rule which stipulates that only the highest penalty is actually enforced in the event that several penalties are imposed in respect of the same event, or course of events.

¹⁷ In the *Franz Fischer* judgment, the ECtHR expressly held that Art. 4 of Protocol no. 7 'is not confined to the right not to be punished twice but extends to the right not to be tried twice', *Franz Fischer v. Austria*, ECtHR 29 May 2001, appl. no. 37950/97. See also: *Sergey Zolotukhin v. Russia*, ECtHR (GC) 10 February 2009, appl. no. 1493/03.

¹⁸ *Sergey Zolotukhin v. Russia*, ECtHR (GC) 10 February 2009, appl. no. 1493/03, para. 110.

¹⁹ Explanatory Report at point 31.

2.1.2 Article 50 of the Charter of Fundamental Rights of the European Union

Article 50 of the Charter of Fundamental Rights of the European Union ('the Charter') reads as follows:

No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.

The Charter was proclaimed on 7 December 2000 in Nice and

reaffirms, with due regard for the powers and tasks of the Community and the Union and the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Community and by the Council of Europe and the case law of the Court of Justice of the European Communities and of the European Court of Human Rights.²⁰

According to Annex IV to the Conclusions of the Presidency of the Cologne European Council of 3–4 June 1999, the aim was 'to establish a Charter of fundamental rights in order to make their overriding importance and relevance more visible to the Union's citizens'.

The Venice Commission concluded that the Charter is 'obviously inspired by the ECHR', but that there 'exist however significant differences between the two instruments, relating to both the wording and the scope of the rights guaranteed':

In respect of the rights which are also listed in the ECHR, the Charter has taken as an example the text of the latter, but has often modified it with a view to rendering it simpler, more up-to-date, and at times broader. Possibilities for limitations of the rights guaranteed by the Charter are not enumerated right-by-right, like in the ECHR, but are contained in a general provision (Article 52 of the Charter), without an exhaustive enumeration of the grounds for limitation. Further, certain rights guaranteed by the Charter are not listed in the ECHR, but have been recognised by the case-law of the European Court as being encompassed by it.²¹

²⁰ Preamble, at para. 5.

²¹ European Commission for Democracy through law ('Venice Commission'), Opinion 256/2003, 18 December 2003, [www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2003\)022-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2003)022-e).

The Explanatory Memorandum provided by the Bureau of the Convention, the body which drafted the Charter, states that:

in accordance with Article 50, the “non bis in idem” principle applies not only within the jurisdiction of one State but also between the jurisdictions of several Member States. That corresponds to the *acquis* in Union law; see Articles 54 to 58 of the Schengen Convention, Article 7 of the Convention on the Protection of the European Communities’ Financial Interests and Article 10 of the Convention on the fight against corruption.²²

Art. 50 Charter is succinctly worded when compared to the provisions cited in the Explanatory Memorandum. Like many Charter rights, Art. 50 captures the essence of the *ne bis in idem* principle, possibly in order to avoid conflict with other *ne bis in idem* provisions. Now that the Charter has become legally binding primary EU law, an important question is whether this economy of words intentionally gave Art. 50 Charter stronger protective force than other European *ne bis in idem* provisions (*inter alia* by not including the exception possibility from Art. 4 (2) of Protocol no. 7 ECHR or the enforcement condition from Art. 54 CISA) or whether Art. 50 Charter should be interpreted ‘in accordance with’ the other provisions mentioned in the Explanatory Memorandum, so that particular features of pre-existing *ne bis in idem* provisions in EU law will remain unaffected by the wording of Art. 50 Charter. In essence, the question is therefore how discrepancies between Charter rights and other fundamental rights provisions in EU law should be dealt with, and this question presents itself for many other Charter rights. In theory, there are different methods available to the Court when dealing with possible conflict between different provisions in EU law: by way of recourse to the hierarchy of legal norms in the EU legal order and/or Art. 52 of the Charter, or by way of ‘integrative’ interpretation between different provisions. For the *ne bis in idem* principle these questions were addressed by the Court for the first time in the *Zoran Spasic* judgment discussed later in this chapter (Section 2.1.4).

²² www.europarl.europa.eu/charter/pdf/04473_en.pdf.

2.1.3 Articles 54–58 of the Convention Implementing the Schengen Agreement²³

Articles 54–58 of CISA read as follows:

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 that 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 relating to one or more of the exceptions referred to in paragraph 1.

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

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

Article 57: 1. Where a Contracting Party charges a person with an offence and the competent authorities of that Contracting Party have

²³ Convention of 19 June 1990 implementing the Schengen Agreement, [2000] OJ L239/19.

reason to believe that the charge relates to the same acts as those in respect of which the person's trial has been finally disposed of in another Contracting Party, those authorities shall, if they deem it necessary, request the relevant information from the competent authorities of the Contracting Party in whose territory judgment has already been delivered.

2. The information requested shall be provided as soon as possible and shall be taken into consideration as regards further action to be taken in the proceedings underway.

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

Article 58: The above provisions shall not preclude the application of broader national provisions on the *ne bis in idem* principle with regard to judicial decisions taken abroad.

Although the 1985 Schengen-agreement and the 1990 CISA (together: the 'Schengen-agreements') were concluded outside of the Community framework between the original five 'Schengen-group States',²⁴ they were drafted with European integration in mind and are functionally linked to the objective of free movement of persons. Around the same time as the Schengen-agreements were adopted, the 1987 'Convention between the Member States of the European Communities on Double Jeopardy' was opened for ratification by the Member States. Although it was never adopted, the 1987 Convention was very similar in wording to the 1990 CISA on the point of the *ne bis in idem* principle, but was more supranational in design due to the fact that it lacked the more intergovernmental exceptions of Art. 55 CISA. At the EU Intergovernmental Conference (IGC) of 1996, the Deputy Minister of Foreign Affairs of the Netherlands submitted a proposal for the integration of the Schengen *acquis* into the framework of the (then) 'Third Pillar' of the EU, enabling the EU to benefit from the progress that had been made within the 'Schengen-framework'. Three years later, the Schengen *acquis* was successfully 'hijacked' by the EU with the entry into force of the Treaty of Amsterdam, and became (secondary) EU law.

The aim of the Schengen-agreements is twofold: to establish free circulation of persons by abolishing border checks, while at the same time implementing countervailing measures facilitating the cross-border enforcement of criminal law through police cooperation, mutual assistance in criminal matters, extradition,²⁵ transfer and enforcement of

²⁴ The Netherlands, Belgium, Luxemburg, Germany and France.

²⁵ The European Arrest Warrant has since replaced the extradition provisions of the Schengen-agreements.