

Exploring the Ne Bis in Idem principle: Material scope and application in EU law

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World Journal of Advanced Research and Reviews, 2024, 22(02), 1125–1138

Publication history: Received on 03 April 2024; revised on 10 May 2024; accepted on 13 May 2024

Article DOI: <https://doi.org/10.30574/wjarr.2024.22.2.1454>

Abstract

This article examines and analyses the application of the ne bis in idem principle based on a final verdict of acquittal or conviction by a competent court where the cases have already been concluded by a final decision. It examines the principle concerning Article 4 of Protocol No. 7 of the European Convention on Human Rights (Article 4P7 ECHR), Article 50 of the Charter of Fundamental Rights of the European Union and its implication under Articles 54 to 58 of the Convention Implementing the Schengen Agreement (CISA).

By reviewing previous literature, case law and fact sheets of the Court of Justice on the Ne bis in idem principle, the paper analyses the material scope of application of the principle and highlights the multifaceted significance of the Ne Bis in idem principle in criminal proceedings and the harmonisation of legal practices within the European Union. It reaffirms the principle's foundational importance in fostering fairness, legal certainty, and the protection of fundamental rights across a wide array of legal contexts.

It elaborates and provides an interpretative analysis of the principle on the associated jurisprudence of the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR). The paper also shows that the ne bis in idem principle serves as a common ground for judicial cooperation in criminal matters and mutual recognition of the Council Framework Decision 2002/584/JHA concerning the European Arrest Warrant ('EAW FD') and Directive 2014/41/EU regarding the European Investigation Order in criminal matters.

Keywords: European Union law; Criminal proceedings; Case Law; European Court of Human Rights; Court of Justice; International law; Material Scope; Punishment; Criminal Nature; Duplication of proceedings; Final decision; Same facts; Prosecution; same person

1 Introduction

The principle of ne bis in idem or prohibition of double jeopardy entailing the right of individuals not to be subject to criminal proceedings or punished more than once for the same facts finds credence in most national and international criminal law systems [1]. The principle originates from Latin and translates to "not twice for the same." It is enounced in several national constitutions and international conventions and expressly recognised as a fundamental principle of EU law enshrined in Article 50 of the Charter of Fundamental Rights of the European Union [2], Article 4 of Protocol No 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms ('Protocol No 7') and Articles 54 to 58 of CISA. Although its scope of application varies depending on the legal system in question, it generally applies in criminal and administrative proceedings. The principle protects against multiple prosecutions or punishments for the same offence and is vital for upholding procedural equity and the integrity of legal systems [3].

The principle is twofold: Firstly, to provide judicial protection to individuals against the State's "jus puniendi" following a fair and equitable prosecution [4]. Secondly, to uphold legal certainty and respect for res judicata. In the European

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Union, *ne bis in idem* is applied at the national level and its *res judicata* effect is acknowledged in foreign judgments [5]. The principle holds equal relevance in international law, as affirmed by Article 14(7) of the International Covenant on Civil and Political Rights with primary legal sources being Articles 54 to 58 of CISA and Article 50 of the Charter [6]. Today, the CISA as a Schengen *law* is a part and parcel of the framework of EU law [7]. Thus, articles 54 to 58 of CISA on the principle are binding and applicable throughout the EU and the United Kingdom.

In the context of European Union (EU) law, the principle of *Ne Bis in Idem* has gained significant attention and importance. It has been enshrined in several legal instruments [8], most notably in Article 50 of the Charter of Fundamental Rights of the European Union which guarantees the right not to be prosecuted or punished twice in criminal proceedings for the same offence [9]. Additionally, it finds expression in the jurisprudence of the Court of Justice of the European Union (CJEU), which has consistently upheld and interpreted the principle in the context of EU law [10]. In that regard, several requirements should be satisfied for a situation to be considered a *bis in idem*. These are the criminal nature, the same person requirement, the 'idem' requirement, and the 'bis' requirement, concerning the existence of a final decision.

Furthermore, the application of the principle within the EU legal framework is multifaceted and encompasses both substantive and procedural aspects. It does not only safeguard individuals' rights but equally contributes to the coherence and effectiveness of the EU's legal order. Despite its importance, questions and challenges regarding the material scope and application of the *Ne Bis in Idem* principle in EU law persist.

One significant area of debate concerns the material scope of the principle, particularly its applicability beyond traditional criminal proceedings [11]. While the principle is explicitly recognised in criminal law contexts, its extension to administrative, regulatory, and disciplinary proceedings remains subject to interpretation [12]. The evolving landscape of EU law, marked by expanded competencies and increased regulation, has sparked concerns about potential conflicts between legal regimes, requiring clarity on the scope of the *Ne Bis in Idem* principle. The principle intersects with other EU legal tenets like mutual recognition and effectiveness, posing challenges in balancing individual rights and law enforcement. Given this context, delving into the *Ne Bis in Idem* principle's material scope and application is crucial. Research into legal frameworks, court rulings, and scholarly analysis can deepen understanding of its role in ensuring legal certainty, protecting fundamental rights, and upholding the rule of law within the EU. Such research can also contribute to ongoing discussions and legislative efforts aimed at strengthening the EU's legal and judicial framework coherence and efficacy.

2 Review of Previous Literature

While previous literature has extensively explored the significance of the *Ne Bis in idem* principle in various legal contexts, such as criminal proceedings, international relations, and the harmonization of legal practices within the European Union, very little has been written of the material scope of application of the principle in EU Law.

For instance, Orhan Ceku (2023) emphasised the importance of the principle in criminal proceedings before national courts, while Libor Klimek (2022) examines its modern understanding as a guarantee in criminal proceedings, considering legislative instruments, case law, the Charter, CISA, and interpretative methods of legal science. Jamile Bergamaschine Mata Diz (2023) focuses on the principle of *ne bis in idem* in the context of international corruption committed by legal entities while Stoyan Stoykov (2022) discussed the current regulatory framework for administrative and criminal liability for violations of tax legislation related to excise goods through the lens of the *Ne bis in idem* principle.

Furthermore, Javier Escobar Veas (2023) and Gerard Coffey (2023) have delved into its protection against multiple prosecutions and punishments. But Coffey went a step further to analyse the principle based on a final verdict of acquittal or conviction. Tubić and Radojčić (2022) analysed the *ne bis in idem* principle within EU Law, focusing on regulations, divergences among states and the jurisprudence of the European Court of Justice.

Similarly, Aliev et al. (2022) discussed the principle of "*ne bis in idem*" in international legal relations, pointing out that while many countries recognise the principle, they often subject it to certain requirements, creating problems for the courts to solve.

In exploring the principle, Javier Escobar Veas (2023) provides a comprehensive theory of the *ne bis in idem* principle in EU law, considering both case law and doctrine, although without specific mention of its material scope of application. In a separate analysis, he critically examines the case law of the ECtHR and the CJEU, proposing an alternative

interpretation to the ne bis in idem principle under the European Convention on Human Rights and the European Union Charter of Fundamental Rights, again without discussing the material scope of application within EU law.

Bošković and Kostić (2020) discuss the application of the principle in European courts concerning financial offences but do not address its material scope of application in EU Law. Alessandro Rosanò (2017), in contrast, discusses the controversial interpretation of the ne bis in idem principle in the case law of the Court of Justice of the European Union, focusing on Article 54 of the Convention Implementing the Schengen Agreement and antitrust law, without mentioning its material scope of application within EU law.

Chiriac and Moldovan (2017) examined the ne bis in idem principle in various branches of law, including administrative law, but equally did not specifically discuss its material scope of application in EU law. Tuba Kelep Pekmez (2019) and María José Bravo Bosch (2016) similarly discuss the importance of the ne bis in idem principle in European jurisprudence but failed to address its material scope of application within EU law. On his part, John A. E. Vervaele (2013) analysed the ne bis in idem principle in the EU area of freedom, security, and justice.

The above scholarship offers diverse perspectives and analyses. Their collective insights consistently reaffirm the foundational importance of the Ne Bis in idem principle in fostering fairness, legal certainty, and the protection of fundamental rights across a wide array of legal contexts.

2.1 Purpose and Significance of the Study

This study aims to strengthen the position of the ne bis in idem principle and clarify the Material scope of application of the principle within the legal order of the EU. Thus, contributing to a thorough understanding of this aspect of EU law as a prerequisite for future research. The study is significant in that understanding the material scope of application of the principle is crucial for researchers, legal practitioners, policymakers, and judges who interpret and apply EU law in various legal contexts.

2.2 Research Questions

Very little attention has been given to the Material Scope of application of the Ne bis in idem principle in the EU Law. Based on this background, the paper seeks to examine the material scope of application of the principle. The Research equally seek to answer the following questions. What is the Material Scope of application of the ne bis in idem principle in EU law? And how does the principle align with fundamental rights and principles of EU law?

These questions provide a foundation for exploring various aspects of the ne bis in idem principle in EU law and offer opportunities for in-depth analysis and critical examination of its material scope of application within the contexts of the European legal framework.

3 Methodology

The research employs a comprehensive methodology combining analysis and synthesis of legal norms related to the Ne bis in Idem principle. It uses descriptive and doctrinal methods of interpretation to delve into the practical application of the principle. The study adopts a normative research approach, employing conceptual and case study-based methods to analyse its implementation. Academic sources, legal acts, and case law are examined, using traditional and specialised legal research methods. Additionally, the study investigates preliminary references from national courts, employing traditional jurisprudential research methods to understand the Ne bis in Idem principle's impact on criminal proceedings within European Union Member States.

3.1 Development of the Ne Bis in Idem in the EU Law and Jurisprudence

To comprehend the current development of the ne bis in idem principle in EU law, it is imperative to examine its evolution. The question is, how has the Ne Bis in idem principle developed over time? Although much has been written on the principle, very little is written on the historical development of the principle. However, Scholars such as Libor Klimek (2022), have traced the origins of this principle back to ancient legal systems. He believes that the development of the ne bis in idem principle is one of the oldest norms in Western Civilization. Thus, the principle is incorporated into modern legal systems of the EU and can be observed in various international instruments and national constitutions.

N Bojan Tubić and S. Radojic (2022) argue that the principle has equally been progressively developed through case law from the European Court of Justice (ECJ) and legal instruments such as the European Convention on Human Rights [13]. Additionally, regarding the caselaw concerning articles 54-57 of the CISA, it is noteworthy that these provisions

have been integrated into EU law since their inclusion during the Amsterdam Treaty period. Moreover, the seminal ruling in the case of *A and B v. Norway* by the European Court of Human Rights (ECtHR) significantly influenced the understanding of *ne bis in idem* within the European legal framework.

3.2 Ne Bis in Idem as a Fundamental Right in EU Law

Article 6 of the Treaty of the European Union (TEU) grants the European Union an autonomous fundamental rights law derived from national constitutional traditions, the European Convention for the Protection of Human Rights and Freedom (ECHR) and the European Union Charter of Fundamental Rights and Freedom (Charter) of 7th December 2000, as adopted at Strasbourg, on 12 December 2007[14].

Thus, the scope of the Charter of Fundamental Rights of the European Union is defined in Article 51 under which the provisions of the Charter are addressed to the agencies and institutions of the Union and the Member States only when they are implementing EU law [15]. They shall therefore respect the rights, observe the principles, and promote the application thereof by their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties. Thus, one of the principles of the European Union Law is the recognition of judicial decisions as stipulated in Article 82 TFEU [16].

However, Tubić and Radojčić (2022) have analysed the legal framework and relevant jurisprudence of the ECJ and concluded that the *ne bis in idem* principle in the EU Law system has been interpreted extensively. They believe that in the EU law, the *ne bis in idem* principle can be understood through the legal texts and case law.

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

During the formative period of European integration, the Union courts pioneered the establishment of a framework for reviewing actions undertaken by the Union and its Member States. According to Ágnes Váradi (2015), the development of a uniform European Law which garnered attention in both legal scholarship and EU policymaking drew upon the administrative law practices entrenched within the member states' legal traditions [17].

Concurrently, driven primarily by apprehensions regarding the implications of the doctrine of EU law supremacy on the Union's legitimacy in connection to Member States as well as on an international scale, fundamental rights were delineated. These rights were derived from the European Convention on Human Rights (ECHR) and the shared constitutional principles embedded within the Member States' legal frameworks, evolving as integral components of general legal principles.

Specifically, article 50 of the Charter [18] of Fundamental Rights of the European Union explicitly states that no person should be tried or punished twice in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance to the law [19].

This implies that the principle of *ne bis in idem* prohibits duplication of proceedings and penalties of a criminal nature for the same acts and against the same person [20]. The principle therefore continues to be a cornerstone of EU criminal law and the freedom of movement within the EU as understood in the pertinent jurisprudence of the European Court of Justice (ECJ).

As regards the 'bis' condition, for a person to be seen as someone who has been 'finally acquitted or convicted' concerning the acts which he or she is accused of having committed, within the meaning of Article 50 of the Charter, it is incumbent and primarily, that further prosecution has been definitively barred, under national law. A decision which does not definitively bar further prosecution at the national level cannot, in principle, constitute a procedural obstacle to the opening or continuation of criminal proceedings, in respect of the same acts, against that person [21].

In the Judgment of the Court of Justice (First Chamber), 25 January 2024, *Parchetul de pe lângă Curtea de Apel Craiova and Others* [22], the order that no further action be taken in the case was unchallenged by the complainants in the main proceedings within the prescribed time limits. Secondly, the request confirming the reopening of criminal proceedings by the Chief Prosecutor of the Court of First Instance of Slatina was rejected. It appears that in case No. 673/P/2016, further public prosecution was definitively barred and that the order that no further action be taken if the case has become final, was a matter only subject to the verifications of the referring court.

It should be noted additionally that the determination of whether a decision definitively precludes further prosecution is not solely contingent upon its adoption by a public prosecutor. Article 50 of the Charter is also applied where a public prosecutor responsible for administering criminal justice in the domestic legal system issues decisions definitively

discontinuing criminal proceedings, notwithstanding such decisions are adopted without the involvement of a court and do not resemble a judicial decision [23].

Although the Charter is not strictly legally binding, it reaffirms rights derived from various sources such as constitutional traditions, international obligations, EU treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms, Social Charters, and case law [24]. Article 50 of the Charter encompasses the principle of "Ne bis in idem" extending its applicability not solely within the jurisdiction of individual states but also across multiple Member States' jurisdictions. This aligns with existing Union law, particularly provisions in the Schengen Convention, the Convention on the Protection of the European Communities' Financial Interests, and the Convention on the Fight Against Corruption. However, Article 50 differs from similar provisions in other conventions by being more restrictive in its wording, specifically mentioning only the possibilities of "acquittal or conviction" as outcomes of the first trial [25].

Article 51 of the Charter deals with its scope of application. It states that the provisions of the Charter are addressed only to the institutions and bodies of the Union. Consequently, it can be inferred that the exact wording of Article 50 of the Charter, while possibly unclear, is not necessarily conclusive in determining the scope of application of the ne bis in idem principle contained within it. If the Charter's provisions are "addressed to" the Union's institutions and bodies as articulated in Article 51 of the Charter, then Article 50 of the Charter is intended to apply to the systems of criminal law and all areas of the Union law.

It is crucial at this point to recognise that the Charter does not extend to purely domestic matters within Member States unless they are implementing EU law. This limitation respects the principle of conferral, ensuring that the EU only acts within the competencies conferred upon it by the Member States through treaties.

3.4 Articles 54 et Seq of the Convention Implementing the Schengen Agreement (CISA)

The inclusion of Articles 54 to 58 of the Convention Implementing the Schengen Agreement within the European Union acquis marks a significant milestone in the establishment of a multilateral treaty-based international ne bis in idem [26]. The Common Consular Instructions on Visa (CISA) were incorporated into EU law through Protocol (No 2), which integrated the Schengen acquis into the framework of the European Union. This integration was annexed to the EU Treaty in its pre-Treaty of Lisbon version and to the EC Treaty by the Treaty of Amsterdam, as a component of 'the Schengen acquis' defined in the annex of that protocol.

Protocol (No 19) on the Schengen acquis integrated into the framework of the EU, annexed to the Treaty of Lisbon, mandates 25 Member States, within the institutional and legal framework of the EU, to build closer cooperation among themselves in areas covered by the Schengen acquis.

Accordingly, under Article 2 of that protocol:

- "The Schengen acquis shall apply to the Member States referred to in Article 1, without prejudice to Article 3 of the Act of Accession of 16 April 2003 or to Article 4 of the Act of Accession of 25 April 2005. The Council will substitute itself for the Executive Committee established by the Schengen agreements".

Articles 54 et seq. of the CISA state the following:

- "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".

For a person to be regarded as someone whose trial has been 'finally disposed of' within the meaning of Article 54 of the CISA, concerning the acts which he is alleged to have committed, it is necessary, in the first place, that further prosecution has been definitively barred [27] (see, to that effect, the judgment of 5 June 2014 in *M*, C-398/12, EU: C:2014:1057, paragraph 31 and the case-law cited).

Article 55:

- 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:

- Where the acts to which the foreign judgment relates took place in whole or in part in its territory; in the latter case, however, this exception shall not apply if the acts took place partly in the territory of the Contracting Party where the judgment was delivered.
- Where the acts to which the foreign judgment relates constitute an offence against national security or other equally essential interests of that Contracting Party.
- Where the acts to which the foreign judgment relates were committed by officials of that Contracting Party and in violation of the duties of their office.
- 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.
- A Contracting Party may whenever withdraw a declaration relating to one or more of the exceptions referred to in paragraph 1.
- 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 the extradition of the person concerned.

As per 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 considered.

Article 57

- Where a Contracting Party charges a person with an offence and the competent authorities of that Contracting Party have 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.
- 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
- 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 concerning judicial decisions taken abroad. The 1985 Schengen agreement and the 1990 CISA, collectively known as the Schengen agreements, were crafted with European integration in focus despite being outside the Community framework. Their main goal is to facilitate the free movement of people by eliminating border checks [28]. However, they also include measures to enhance cross-border enforcement of criminal laws among the Schengen states.

3.5 Article 4 of Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)

Article 4 of Protocol No. 7 to the Convention entails a fundamental right guaranteeing that no one is to be tried or punished in criminal proceedings for an offence of which he or she has already been finally convicted or acquitted.[29]

Article 4 of Protocol No. 7 read as follows:

- 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.
- The provisions of the preceding paragraph shall not prevent the reopening of the case per 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.
- No derogation from this Article shall be made under Article 15 of the Convention.”

The European Court of Human Rights considers the ne bis in idem principle as one of the guarantees that cannot be derogated from even in times of war, or other public emergencies. This underscores the significance of the principle concerning the fairness of criminal proceedings. It is, therefore, particularly remarkable that the principle was initially

omitted from the ECHR. Beyond the treaties, the EU has also adopted specific legislation to implement and reinforce the *ne bis in idem* principle. For instance, the principle is enshrined in Directive 2014/41/EU on the European Investigation Order in Criminal Matters, which establishes rules on mutual recognition of judicial decisions, including decisions on prosecution or conviction.

While the EU sets out the principle of *ne bis in idem* at the supranational level, it also respects the autonomy of Member States' legal systems. The application of the principle may vary slightly across different national jurisdictions within the EU. However, Member States are under obligation to ensure compliance with EU law, including fundamental rights such as *ne bis in idem*.

In the case of *Fadin V. Russia* [30], an application against the Russian Federation was lodged under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms by Mr Aleksandr Nikolayevich Fadin on 6 January 2000. The applicant alleged that the supervisory review as conducted in the present case had violated his rights under Article 4 of Protocol No. 7. The Court decided based on previously examined cases raising similar complaints to the quashing of a final judicial decision as regards the applicability of Article 4 of Protocol No. 7 to supervisory review in *Nikitin v. Russia* [31] held that, for the *ne bis in idem* principle to apply, supervisory review may be regarded as a special type of reopening falling within the scope of Article 4 § 2 of Protocol No. 7.

The Court thus observes in *Fadin V. Russia* that a final judicial decision had been quashed due to serious procedural defects and that the case was reconsidered by two judicial instances, which delivered the final judgment. Like in the *Nikitin* case mentioned above, the subject matter of the new proceedings entailed the same criminal charge and the validity of its previous determination. Concerning the above findings, the Court concluded that the supervisory review in the instant case constituted a reopening of the case due to a fundamental defect in the previous proceedings, as understood in Article 4 § 2 of Protocol No. 7. By a unanimous judgment, the court held that there had been no violation of Article 4 of Protocol No. 7 as regards the supervisory review of the Tula Regional Court's decision of 24th March 1998 and the outcome of the criminal proceedings.

Contrarily, in *Mihalache v. Romania*, [32] the applicant Mr Aurelian-Erik Mihalache who was stopped by the police while driving was found guilty of having refused to undergo a blood alcohol test during the night of 2nd to 3rd May 2008. He alleged against the Romanian Government that he had been tried and convicted twice for the same offence and that there had been a violation of Article 4 of Protocol No. 7 to the Convention.

As regards the applicant's plea alleging non-compliance with the *ne bis in idem* principle (*bis*), a previous set of proceedings must have been concluded with a final judgment entailing a conviction or acquittal as required by Article 4 § 2 of Protocol No. 7 as was the case in *Sergey Zolotukhin V. Russia* [33]. However, to determine whether there was a duplication of proceedings ("*bis*") for Article 4 of Protocol No. 7 to apply, there would have been a "final" decision acquitting or convicting the applicant in the domestic court. Thus, for a person to qualify for protection under Article 4 a final decision alone does not suffice. The final decision must also involve the person's acquittal or conviction.

In the present case, the Court found that the applicant was convicted based on the order of 7th August 2008, which had become final when a further prosecution was triggered by the order on 7th January 2009. It concluded that the applicant was tried twice for the same offence in breach of the *ne bis in idem* principle, and in violation of Article 4 of Protocol No. 7 to the Convention.

Thus, the principle in the EU is a fundamental aspect of the legal framework, promoting legal certainty, protection of individuals' rights, and mutual recognition of judicial decisions across Member States.

3.6 Material Scope of application of the *ne bis in idem* within the European legal framework

In terms of material scope, the principle covers not only traditional criminal prosecutions but also administrative sanctions or penalties that are of a criminal nature. Notwithstanding contradictions in wording and scope of the *ne bis in idem* principle in different legal provisions, the CJEU has striven in its case law for a uniform approach regarding the *ne bis in idem* principle. The application of that principle is subject to a twofold condition, first, that there must be a prior final decision, the '*bis*' and second, that the former decision and the subsequent proceedings or decisions have to be of the same facts, the '*idem*' condition.[34]

By Article 19(3)(b) TEU and Article 267 TFEU, the CJEU has jurisdiction to give preliminary rulings on the interpretation and validity of EU law or acts of the EU institutions. In that regard, it should be noted that the scope of the Charter, so long as the action of the Member States is concerned, is defined in Article 51(1) thereof, which expressly delineates the

scope of the Charter concerning the actions of Member States. This provision is fundamental in understanding the applicability of the principle and its relationship with the Member States. It further indicates that the Charter primarily governs the actions of Member States in situations where they are acting within the framework of EU law. The implication is to underscore a key principle of subsidiarity within the EU legal system. It acknowledges the EU's commitment to respecting the sovereignty of its Member States while ensuring compliance with fundamental rights in areas where EU law has jurisdiction.

Applying the *Ne bis in idem* principle to the actions of Member States when implementing EU law ensures the protection of fundamental rights within the EU legal framework. This serves as a safeguard, against potential violations of human rights and fundamental freedoms by Member States during the implementation of EU laws. Furthermore, the clarity provided by Article 51(1) enhances the responsibilities of Member States concerning the *Ne bis in idem* principle. It prevents ambiguity and provides a clear legal basis for addressing potential violations or disputes regarding fundamental rights within the EU.

In the case concerning Volkswagen Group Italia and Volkswagen Aktiengesellschaft, it was held that, where, on the other hand, a legal situation does not come within the scope of EU law, the Court does not have jurisdiction to rule on it and any provisions of the Charter relied upon cannot of themselves form the basis for such jurisdiction [35].

Given the shared objective of Article 54 of the CISA and Article 3(2) of the Framework Decision of the European Arrest Warrant (EAW FD), the CJEU has held that an interpretation of the *ne bis in idem* principle given in the context of the CISA is equally valid for the FD EAW [36].

In the criminal proceedings against Leopold Henri Van Esbroeck, the question was whether Article 54 of the CISA applied to criminal proceedings initiated in a Contracting State for offences of which an individual has already been convicted in another Contracting State, despite the absence of the CISA's enforcement in that State at the time of the initial conviction [37]?

The facts are that Mr Van Esbroeck, a Belgian national was sentenced by the judgment of 2nd of October 2000 of the Court of First Instance of Bergen (Norway), to five five-year prison term for illegally importing on 1st June 1999 narcotic drugs such as amphetamines, cannabis, MDMA and diazepam into Norway. After serving part of his sentence, Mr Van Esbroeck was released conditionally on 8th February 2002 and escorted back to Belgium.

On 27th November 2002, a prosecution was brought against Mr Van Esbroeck in Belgium for which he was sentenced by the judgment of 19th March 2003 of the Correctional Rechtbank te Antwerpen (Antwerp Criminal Court, Belgium) to one-year imprisonment for illegally exporting the above-listed products from Belgium on 31st May 1999. That judgment was upheld on 9th January 2004 by the Hof van Beroep te Antwerpen.

The defendant filed an appeal on points of law against that judgment, pleading infringement of the *ne bis in idem* principle as enshrined in Article 54 of the CISA. The CJEU held that Article 54 of the Convention implementing the Schengen Agreement applies under the condition that the CISA was in force in the respective Contracting States when the court assessed the conditions of the *ne bis in idem* principle in the second proceedings.

The main arguments presented by the CJEU are first that the Schengen *acquis* does not include specific provisions regarding the commencement of Article 54 of the CISA or its temporal effects [38]. Second, Article 54 of the CISA becomes relevant only when criminal proceedings are initiated for a second time against the same individual in another Contracting State.

In like manner, concerning the relationship between Article 54 of the CISA and Article 50 of the Charter, the CJEU in Criminal proceedings against Piotr Kossowski [39] was asked two questions. Firstly, whether the declaration made by the Federal Republic of Germany as per Article 55(1)(a) of the CISA remains valid and secondly, if the first question is answered in the negative, whether the case of the accused had been 'finally disposed of, for the purposes of Article 54 of the CISA and Article 50 of the Charter, in circumstances such as was raised in the main proceedings. The CJEU hold that since the *ne bis in idem* principle is also set out in Article 50, Article 54 of the CISA applies if a person's trial has been finally disposed of within the meaning of Article 54 of the CISA. Secondly, since the right not to be tried or punished twice in criminal proceedings for the same offence is set out in Article 54 of the CISA and Article 50 of the Charter, then Article 54 must be interpreted in the light of Article 50.

The unique differences between Article 54 of the CISA and Article 50 of the Charter, such as the limitations on the principle of *ne bis in idem* present in the former but absent in the latter are analysed in the context of Article 52(1) of

the Charter. Additionally, the CJEU clarified that Article 50 of the Charter holds direct applicability within national legal systems.

Moreover, there are obvious differences between Article 50 of the Charter and Article 4P7 ECHR, in that Article 50 of the Charter applies within the same Member States and in a cross-border context while Article 4P7 can only apply within the same State.

In *Åklagaren v Hans Åkerberg Fransson*,^[40] at a request for a preliminary ruling under Article 267 TFEU, the CJEU stressed that even though the ECHR does not constitute a legal instrument formally incorporated into EU law, the guaranteed right of the Charter has the same meaning and the same scope as the corresponding right in the ECHR [41]. Thus, it is imperative to ensure that the interpretation of Article 50 of the Charter maintains the level of protection ensured by the ECHR whenever Article 50 contains a corresponding right to that in Article 4P7 ECHR.

However, breaches of Article 50 of the Charter and Article 54 of the CISA do not necessitate remedies allowing for the reopening of criminal proceedings. Such remedies are only available under national law in cases of ECHR infringements. In the joint Criminal proceedings against Hüseyin Gözütok and Klaus Brügge^[42], the CJEU asserted that Article 54 of the CISA inherently implies mutual trust among Contracting States in each other's criminal justice systems but which decision of the first State in question must constitute a final determination of a resolution on the merits of each case.

In the *Åkerberg Fransson* judgment mentioned above, proceedings brought against Mr Åkerberg Fransson for aggravated tax fraud, the referring court was then doubtful as to whether the action brought against Mr Åkerberg Fransson should be dismissed based on the fact that, in the other proceedings, he had already been penalised for the same facts, which could be deemed as contravening the prohibition on double punishment ('ne bis in idem'), as enshrined in Article 4 of Protocol No 7 to the European Convention on Human Rights and Fundamental Freedoms and in Article 50 of the Charter. It therefore demanded of the Court the question particularly, of whether the principle of ne bis in idem set out in Article 50 of the Charter precludes criminal proceedings for tax fraud being brought against a defendant when he has already been subject to a tax penalty for the same facts of making false declarations [43].

In examining the question concerning its jurisdiction, the Court recalled in the first instance, that the field of application of the Charter, as regards the action of Member States is defined in Article 51(1) thereof, according to which the provisions of the Charter are addressed to the Member States only when they are implementing EU law. In that regard, the Court pointed out that the fundamental rights guaranteed in the EU legal order are applicable in all situations governed by EU law, but not outside such situations. The Court was clearly stated that it had no power to examine the compatibility with the Charter of national legislation outside the scope of EU law. However, the court clarified that suppose such legislation falls within the scope of EU law, the Court when requested to give a preliminary ruling, must provide all the guidance concerning interpretation required for the national court to determine whether that legislation is compatible with the fundamental rights the observance of which the Court ensures.

3.6.1 *Criteria for the application of Material Scope of the Principle.*

According to the relevant legal framework and the interpretation provided by the Court of Justice of the European Union in the cases enumerated above, several criteria must be met for a situation to be deemed as "bis in idem". This includes the "criminal nature," which pertains to both sets of proceedings, the requirement of the "same person," which relates to the defendant, the "idem" requirement, which pertains to the same facts and the "bis" requirement, which concerns the presence of a final decision.

The criminal nature

The ne bis in idem principle in EU law presupposes as stipulated in Article 50 of the Charter that the measures already taken against the accused through a decision that has attained finality are criminal. In using the example of Kosovo, Orhan Ceku (2023) highlights the importance of this principle in protecting the rights of individuals when dealing with criminal cases before regular criminal justice systems.^[44]

In the Judgment of *Åkerberg Fransson*, the Court noted that the tax penalties and the criminal proceedings to which Mr Åkerberg Fransson has been subjected are party-related to breaches of his obligations to declare VAT. It is considered that per Article 2, Article 250 (1) and Article 273 of the VAT Directive [45] and from Article 4(3) TEU, Member States are required to take all legislative and administrative measures appropriate for ensuring collection of all the VAT due on their territory and for preventing evasion.

Thus, Libor Klimek (2022) argues that the principle incorporated into the Convention for the Protection of Human Rights and Fundamental Freedoms and the Charter of Fundamental Rights of the European Union is relevant to criminal proceedings in European states [46]. Thus, in *Parchetul de pe lângă Curtea de Apel Craiova* [47], the Court of Justice in a request for a preliminary ruling brought against NR concerning the charge of passive corruption has provided clarifications regarding the two components, 'bis' and 'idem', as enshrined in Article 50 of the Charter of Fundamental Rights of the European Union and read in conjunction with Commission Decision 2006/928/EC of 13 December 2006 establishing a mechanism for cooperation [48]. This clarification is in the context wherein criminal proceedings were initiated against an individual in a second set of proceedings but were subsequently closed by an order of a public prosecutor in the first proceedings, which mandated no further action. It is unclear from the evidence whether the legal status of the individual regarding criminal liability for the offence in question was thoroughly examined in the first proceedings.

The requirement of the same person

The application, of the *ne bis in idem* principle presupposes, that the same individual is subject to the penalties or criminal proceedings in question [49]. The wording of Article 54 of the Consolidated Version of the Treaty on European Union (CISA) and the intent behind Article 3(2) of the Treaty on the European Union (TEU) make it evident that only individuals who have undergone a trial that has reached a final disposition may avail themselves of the *ne bis in idem* principle. Therefore, the *ne bis in idem* principle does not extend to individuals beyond those whose trials have been definitively concluded in a Contracting State.

In the *Parchetul de pe lângă Curtea de Apel Craiova*, it is clear from the explanations provided by the referring court that while, in case 47/P/2016, criminal proceedings were brought against NR *in personam* for the offence of passive corruption, in case 673/P/2016, the criminal proceedings were brought *in rem* for the offence of extortion [50]. The Court of Justice has further elucidated that the *ne bis in idem* principle does not encompass individuals who were merely interrogated during a terminated criminal investigation, such as witnesses.

The idem Condition

As regards the 'idem' condition, it follows from the very wording of Article 50 of the Charter, it prohibits the same person from being tried or punished in criminal proceedings more than once for the same wrongful act [51].

In this context, the Court emphasised that to ascertain whether an individual has been 'finally acquitted or convicted,' as defined by Article 50, it must be unequivocally evident from the decision rendered that, during the antecedent investigation leading to the said decision, regardless of whether the investigation was conducted in *rem* or *personam*, the individual's legal status regarding criminal liability for the actions constituting the prosecuted offence was thoroughly examined and, in the event of a decision of non-prosecution, definitively dismissed. Should this criterion not be met, the principle does not ensue. Consequently, the individual cannot be considered to have been conclusively acquitted as per the terms of Article 50 of the Charter.

Thus, it was held in the *Parchetul de pe lângă Curtea de Apel Craiova* case that the principle applies wherein the delivery of a decision by which a person has been finally acquitted or convicted, within the meaning of Article 50 of the Charter thus implies that criminal proceedings had previously been instituted against the person concerned. In that regard, the Court has already stated that the principle of *ne bis in idem* applies only to persons finally judged in a Member State [52].

The bis Condition

Concerning the 'bis' condition, for someone to be regarded as a person who has been finally acquitted or convicted of the acts which he or she is alleged to have committed, within the meaning of Article 50 of the Charter and Article 54 of the CISA, it is required in the first place that further prosecution has been definitively barred following national law. A decision which does not definitively bar further prosecution at the national level cannot, in principle, constitute a procedural obstacle to the opening or continuation of criminal proceedings in respect of the same acts against that person. The precise interpretation of these terms has sparked numerous inquiries, yet the jurisprudence of the CJEU has shed some light on the matter. The CJEU established that two essential components are required for a decision to qualify as finally disposing of a case against an individual for *ne bis in idem*.

Firstly, in *Piotr Kossowski*, the court of justice held that it is necessary for the decision at stake to be definitively barred from further prosecution at the national level. Thus, the Court of Justice held that the assessment of the final nature of the criminal ruling must be carried out based on the law of the Member State in which that ruling was taken [54].

The second condition necessitates that the decision in question follows a thorough assessment of the case on merit, as outlined in the joint case of Gözütok and Klaus Brügge [55]. In a request for a preliminary ruling by the Higher Regional Court of Köln-Germany and the Rechtbank van eerste aanleg te Veurne (Court of First Instance, Veurne) which were referred to the Court under Article 35 EU for the interpretation of Article 54 of the CISA 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.

The questions arose in two sets of criminal proceedings in Germany against Mr Gözütok and in Belgium against Mr Brügge, for offences committed in the Netherlands and Belgium respectively despite proceedings brought in other Member States against the two accused on the same facts had been definitively discontinued after they paid a sum of money as determined by the Public Prosecutor which barred further prosecution. The CJEU emphasised the need for a comprehensive investigation, as highlighted in Piotr Kossowski. Furthermore, the CJEU clearly stated that an acquittal or a non-lieu decision indicating insufficient evidence to proceed to trial equally fulfilled the 'bis' criterion.

However, in the Miraglia Case where criminal proceedings were instituted against Filomeno Mario Miraglia, the Court of Justice of the European Union rejected the application of Article 54 of the Convention implementing the Schengen Agreement in instances where a judicial authority concluded proceedings without assessing the alleged unlawful behaviour of the defendant [56].

The question was whether Article 4 of the CISA pertained to a scenario where the judicial authorities of one Member State closed a case following the public prosecutor's decision not to pursue prosecution, solely because criminal proceedings have commenced in another Member State against the same defendant for the same actions, without any assessment of the case's merits?

The Court of Justice ruled that Article 54 of the CISA does not encompass such decisions. The court's primary reasoning was that their interpretation aligned with the core objective and intent of Article 54 of the CISA, ensuring its effective implementation and echoing the underlying principles of the pertinent TEU provisions regarding freedom, security, and justice. Secondly, any alternative interpretation would complicate, or potentially render impracticable, the prosecution of the unlawful behaviour with which the defendant is accused within the Member States in question [57].

4 Results

Our review of previous literature and case law and fact sheets of the court of justice on the material scope of application of the principle highlights the multifaceted significance of the Ne Bis in idem principle in criminal proceedings, international relations, and the harmonization of legal practices within the European Union. Despite scholars presenting diverse perspectives and analyses, their collective insights consistently reaffirm the principle's foundational importance in fostering fairness, legal certainty, and the protection of fundamental rights across a wide array of legal contexts.

5 Conclusion

The principle of ne bis in idem represents a foundational pillar of justice deeply ingrained in the tapestry of Western civilization and became integrated into international legal documents with the Europeanization of law, particularly in criminal proceedings. In an age where criminal activity cuts across borders, the internationalization of law particularly in criminal proceedings has propelled this principle to the forefront of legal discourse.

European legal instruments, especially those dedicated to safeguarding human rights, have enshrined ne bis in idem as a fundamental prerogative. Particularly, the Convention for the Protection of Human Rights and Fundamental Freedoms, supported by Protocol No. 7 introduced the ground-breaking "Right not to be tried or punished twice." Similarly, the Charter of Fundamental Rights of the European Union explicitly articulates this principle, affirming the "Right not to be tried or punished twice in criminal proceedings for the same criminal offence." While interpretations may differ, both the Convention and the Charter serve as pivotal sources of ne bis in idem in criminal proceedings across European jurisdictions.

Even within frameworks primarily aimed at facilitating the free movement of individuals, such as the CISA, provisions for police and judicial cooperation underscore the imperative of legal harmonization. Here, ne bis in idem finds expression in Articles 54-58, representing a significant milestone in multilateral recognition of this principle.

Extending beyond domestic jurisdictions, ne bis in idem offers protection in extradition and surrender proceedings. Its invocation under the European Convention on Extradition highlights the potential for broader international consensus on this matter, preventing individuals from facing multiple prosecutions for the same offence across different jurisdictions.

Within the framework established by Framework Decision 2002/584/JHA, the principle of ne bis in idem assumes significance providing a safeguard against the indiscriminate execution of European arrest warrants. A similar ethos permeates other mutual recognition measures, spanning from custodial sentences to financial penalties, underscoring a commitment to uphold the integrity of legal processes across borders.

Essentially, the principle of ne bis in idem transcends national boundaries, serving as a beacon of fairness and legal certainty in an increasingly interconnected world. Its recognition and application within European and international legal frameworks underscore its enduring relevance in safeguarding individual rights and promoting the principles of justice and equity on a global scale. By upholding the Ne Bis in Idem principle, the EU reaffirms its commitment to core values of justice, equality, and the rule of law, thereby ensuring a robust and resilient legal framework for its citizens.

Compliance with ethical standards

Disclosure of conflict of interest

No conflict of interest to be disclosed.

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