CONSEJO GENERAL DEL PODER JUDICIAL
ESCUELA JUDICIAL

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Red Europea de Formación Judicial (REFJ)
European Judicial Training Network (EJTN)
Réseau Européen de Formation Judiciaire (REFJ)

CURSO VIRTUAL
COOPERACIÓN JUDICIAL PENAL EN
EUROPA
EDICIÓN 2010

MODULE VI

UNIT XIX

Conflicts of jurisdiction, ne bis in idem and transfer of proceedings

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1. Introduction

As an approach to the subject of international conflicts of jurisdiction in criminal matters, it is necessary to begin with the idea that criminal jurisdiction, understood as the power to judge or to exercise the "*ius puniendi*" is a direct expression of the State's sovereignty and that each State unilaterally decides the criteria that define its jurisdiction. These criteria are not laid down in a coordinated way on an international scale, but rather each State applies them independently according to its interests and without there being any international mechanisms for solving the problems that arise either from overlapping or the jurisdictions' failure to act.

There are basically two types of conflicts of jurisdiction:

Positive conflicts of jurisdiction. These arise when two or more States hold jurisdiction, according to their domestic laws, and declare themselves competent for hearing and judging the same facts.

Negative conflicts of jurisdiction. These arise when no jurisdiction declares itself competent for crimes that usually involve various international connections.

Positive and negative conflicts of jurisdiction are actually two versions of the same phenomenon and arise from the division of jurisdiction in States and the non-existence or non-determination of international rules for assigning or giving priority to jurisdiction among them. Furthermore, in cases of discrepancy, no supranational instances have been created to solve the conflicts. At the present time, only the agreements between the States, reached by the States themselves or after recommendations handed down by institutions such as Eurojust in the European Union, can help solve the problem.

Positive conflicts are becoming increasingly common. Transnational crime, especially organised crime, acts in and from different territories and important crimes

often give rise to effects in different places. This is compounded by the realities created by new technologies; actions in virtual space create important difficulties for jurisdictions when determining the place where the crimes were committed.

However, conflicts are not caused only by problems arising from the determination of territoriality, in other words, the specification of the place or places understood as those where the crime was committed, but also by the the fact that the difficulties involved in the determination of territoriality are joined by the growing use of other criteria for assigning jurisdiction (active personality, passive personality, universality for determining types of crimes, etc.). The application of different criteria to the same fact leads to the exercise of different national jurisdictions for the same crime.

Positive conflicts often involve partial and parallel investigations that avoid coordination and lead to failure or the application of small, partial sentences that enable large criminal organisations to continue and reorganise themselves without too much difficulty. In addition, the possibility of double investigations, double accusations and double trials can lead to the correlative double sentences for the same facts, prohibited due to the violation of the international ne bis in idem principle.

However, it is also important to remember that the uncoordinated application of criteria for assigning jurisdiction for the same crimes, in combination with the application of discretion criteria in many States, leads to negative conflicts, which also require attention, basically because they can lead to the vulnerability of victims and allow areas of impunity that are used, in full knowledge, by transnational criminals for their own benefit.

The existence of conflicts of jurisdiction is universal and well-known. Attempts have been made for many years to remedy the situation through provisions in international conventions. The solutions that have been proposed seek to address various problems:

1. Conventions that seek to avoid impunity and contain criteria or recommendations for the States to extend their jurisdictions to crimes that have been committed outside their territories.

2. Conventions or provisions that seek to avoid violations of the ne bis in idem principle.

3. Conventions or rules that provide for the transfer of proceedings and agreement between jurisdictions to unify the investigation or trial in one single State.

No complete treatment is given in any law and, consequently, these provisions must be applied since, although partial in form, they are normally of use, despite the fact that they have been underused to date.

In this unit, we will look at the current treatment given to conflicts of jurisdiction and distinguish between positive and negative conflicts, examining the various international treaties that refer to possible agreements between States and the conventional laws that contain formulas for transferring proceedings for unification to one single jurisdiction, paying particular attention to solutions in the area of the European Union.

The prohibition of the ne bis in idem principle, which operates as a final clause and ultimate solution, or rather as a remedy for conflicts of jurisdiction, will also be examined with a special focus on its regulation in the Convention for the Implementation of the Schengen Agreement (hereinafter referred to as CISA) and on the interpretation and delimitation of its scope by the case law of the Court of Justice of the EU.

2. Negative conflicts of jurisdiction

International organisations have sought for many years to avoid impunity for certain types of crimes and have tried to guarantee that certain crimes will always be prosecuted by one jurisdiction or another.

The main conventions of the United Nations on different types of crimes contain a part designed to guarantee that all the States Parties declare themselves competent for hearing and judging certain crimes, not only when they have been committed in

their territories, but also when they have been committed by nationals or residents in the country or when there are other circumstances that provide some kind of relation with said State. Examples include Article 4 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna Convention of 1988), Article 15 of the United Nations Convention against Transnational Organised Crime (Convention of Palermo of 2000) and Article 42 of the United Nations Convention against Corruption (Merida Convention of 2003). They all contain recommendations for the States to assign jurisdiction by applying criteria of extra-territoriality.

The European Union, in its harmonisation of criminal legislation, also seeks to avoid impunity and negative conflicts, in other words, the situation in which all the States that may be related to the crime refuse to accept jurisdiction over it. European laws on the harmonisation of criminology solutions often contain directives for the States to introduce into their legislation criteria for the assignment of jurisdiction based not only on territoriality, but also on active or passive personality and other criteria. [1] The aim is to avoid the possible vulnerability of victims and the spreading of the perception of impunity.

[1] Examples: Convention of 26 July 1995 on the Protection of the European Communities' financial interests (Article 4) and its Protocol of 27 September 1996 (Article 6)

- Convention of 26 May 1997 on the fight against corruption (Article 7)
- Framework Decision on increasing penal sanctions against counterfeiting of euro (Article 7)
- Framework Decision on combating fraud and counterfeiting of non-cash means of payment (Article 9)
- Framework Decision on combating terrorism (Article 9)
- Framework Decision on combating trafficking in human beings (Article 6).
- Framework Decision on the strengthening the penal framework to prevent the facilitation of unauthorised entry, transit and residence (Article 4)
- Framework Decision on combating corruption in the private sector (Article 7)
- Framework Decision on combating the sexual exploitation of children and child pornography (Article 8).
- Framework Decision on attacks against information systems (Article 10)
- Framework Decision in the field of illicit drug trafficking (Article 9)
- Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law (Article 9)

Aware of the fact that the "international" application of this "extension of jurisdiction" may increase the number of positive conflicts, the European Union also provides the need for an agreement to centralise the action. Accordingly, it proposes the use of all the mechanisms available within the framework of the EU to enable cooperation between its judicial authorities and the coordination of their actions. Some of the said provisions also consider preferential indications of criteria for concentrating the case in one of the various competent jurisdictions.

However, with regard to conflicts of jurisdiction, the attention given to negative conflicts is somewhat scarce, probably because the specific discovery of a case of impunity in which every jurisdiction refrains from intervening is less common; investigative bodies or the victims themselves usually declare the existence of a negative conflict.

One of the solutions for negative conflicts is the intervention of Eurojust which, through recommendations by the National Member, Article 6 of Council Decision of 28 February 2002 *setting up Eurojust with a view to reinforcing the fight against serious crime* and the College (Article 7), can request a State to open investigations on certain facts.

It is interesting to note that the first joint recommendation handed down by Eurojust to solve a conflict of jurisdiction was a negative conflict. The case **"ASLEY AND JENKINS",** was one of alleged fraud on investments in works of art committed by British citizens against British citizens but with certain connections in Seville.

For more information, Note 1. Level 2.

3. Positive conflicts of exercise of jurisdiction

3.1. Causes of positive conflicts

The fact that various national jurisdictions award themselves competence for investigating and judging the same facts can be caused by the following, among others:

- When the criminal offence has been committed in the territories of various States.
- When technological communication media have been used (Internet, telephone, etc.).
- When the domestic laws for the assignment of jurisdiction also cover extraterritorial cases. The tendency to extend national jurisdiction to offences committed outside national territory is becoming increasingly common. Although territoriality remains the base for assigning jurisdiction to national courts, the States' sovereignty in the case of certain crimes or for judging or protecting its own nationals leads the States to apply more and more extraterritorial criteria for the assignment of jurisdiction.
- When the doctrine of "ubiquity" is applied, whereby the crime is considered to have been committed in all the places in which any element of the criminality has been performed.
- When the "principle of universality" is applied. The desire for avoiding impunity for crimes against humanity or very serious crimes that are not prosecuted in the State in which they were committed has led certain countries and international treaties to provide universal criminal jurisdiction for such crimes.

The frequency of said situations makes it possible to realise how real and common conflicts are, revealing the actual situation of different jurisdictions investigating the same facts without coordination. There is no need for a detailed description of the negative consequences of this duplicity of action: fragmentation of cases, partial investigations, the impossibility of obtaining evidence, problems related to international judicial assistance and, in general, an overall result of ineffectiveness of the Justice administration that continues to come up against national frontiers, limitations and barriers.

The duplication of tasks that precedes the conflict generally begins during the investigation phase, when two national jurisdictions start to investigate the same facts

independently. Traditionally, the investigation services of the States involved worked independently and unaware of what the other investigators were doing in the neighbouring country, but with the technological advances of recent years it is hard to believe that the investigation bodies of one State do not know that another is investigating the same facts. When this happens, the first reasonable measure would be to coordinate the investigations and then reach a collaboration agreement or, where applicable, an agreement for concentrating the investigations in one single State.

However, the consultations or agreements can solve specific problems, but if there is disagreement, no objective criteria are considered, not even guidelines that enable a solution for the conflict.

In addition, this type of agreement should be followed by the staying of proceedings, etc. in the State that transfers its jurisdiction, together with the material transfer of the proceedings and coordinated decisions that guarantee the maintenance and continuity of any precautionary measures that have been adopted. At the present time, these matters are not regulated in any way and this gives rise to special problems in the States that are bound by the principle of legality.

Unfortunately, at the present time, conflicts are solved by the *voie de fait* and the proceedings are directed by the first State to bring the action or that which brings the criminal before the court. It is evident that the criterion of temporal preference is not normally the most appropriate for fighting crime effectively.

Furthermore, if we consider the fundamental rights, this fragmentation, together with the lack of recognition of judicial decisions taken by the Justice Administration of another country, leads to the violation of the ne bis in idem principle and can lead to the situation where, despite the universal prohibition, criminals are subjected not only to a double trial, but also a double sentence for the same facts.

3.2 Green Paper of the European Commission on Conflicts of Jurisdiction and the Principle of ne bis in idem in Criminal Proceedings

The European Union has been aware for some time of the need for an instrument to regulate conflicts of exercise of jurisdiction. The Hague Programme Strengthening Freedom, Security and Justice in the European Union and the Communication from the Commission to the Council and to the Parliament on the Hague Programme: *Ten Priorities for the next five years. The Partnership for European renewal in the field of Freedom, Security and Justice* focused on conflicts of jurisdiction and on the convenience of a more detailed regulation of the ne bis in idem principle.[2]

In response to this undertaking, the European Commission, drafted a Green Paper in December 2005 on conflicts of jurisdiction and the ne bis in idem principle[3] as a form of general reflection on the best formula for solving conflicts of jurisdiction between States in the European Union. It considers whether or not the adoption of a common mechanism for determining competent jurisdiction could be acceptable.

In this Green Paper, the Commission submits a design of proceedings for awarding cases to one single Member State that, in short, comprises the following stages:

- **Identification and information of the "interested parties".** The Member State which has initiated or is about to initiate a criminal prosecution in a case which demonstrates significant links to another Member State, must inform the competent authorities of that other Member State, in due time. If no Member State expresses an interest, the initiating

[2] Before the coming-into-effect of the Maastricht Treaty, the Convention among the Member States of the European Communities was drafted on the application of the *ne bis in idem principle.* Its relevance has been very low-level in view of the extremely limited number of ratifications. It has been ratified only by Denmark, France, Holland and Portugal and is applied among them on a provisional basis.
However, Greece submitted a proposal for a framework decision on the *ne bis in idem* principle in 2003, an initiative by the Greek Republic for the adoption of a framework decision of the Council concerning the application of the *ne bis in idem* principle which was unfortunately never processed.

[3] http://ec.europa.eu/justice_home/news/consulting_public/news_consulting_public_en.htm

State could continue with the prosecution of the case without further consultation – unless new facts change the picture.

- **Consultation/discussion.** • When two or more Member States are interested in prosecuting he same case, their respective competent authorities should be able to examine together the question of the "best place" to prosecute the case. If need be, they could ask for the assistance of Eurojust and/or other Union mechanisms of assistance.
- **Dispute settlement.** In the case of different opinions, it proposes that Eurojust, or a new organisation created "ad hoc" to mediate in these matters, may help the interested Member States reach an agreement according to the criteria and interests involved. The Commission proposes authorising a body at EU level to take a binding decision on the choice of the Member State that is in the best situation for proceeding with judicial actions.
- **Binding decision** The green paper suggests that the Member States should be required to concentrate judicial proceedings on the same case in one "main" Member State. The applicable criteria for determining said "main" State include territoriality, the interests of the victims and the effectiveness of the proceedings. When the agreement is reached and the case is submitted to a jurisdictional body, the other Member States must stay or suspend their proceedings.
- **Judicial review.** Judicial review of the competence would be exercised, according to the Commission, by the court before which the case is brought. It advocates the need for appeals by those who, as the accused or as a victim, may be affected by the decision to concentrate jurisdiction.

The mechanism proposed by the Commission goes beyond a solution to the violation of the *ne bis in idem* principle and seeks to avoid not only double sentences or double trials, but also the duplicity of investigations. The solution sought is the resolution of the conflict as soon as it is detected, where the application of the *ne bis in idem* principle would become a residual matter for problems that may not have been noticed and solved in advance.

The Commission's proposal did not obtain a unanimous agreement or majority support and the matter remains pending progress as part of the construction of Europe.

3.3 Solutions in force for solving positive conflicts of exercise of jurisdiction

National rules for solving a conflict of jurisdiction of this kind among national authorities usually provide for the intervention of a higher judicial body given the power to decide which of the authorities in conflict is the one that is to hear the case. However, as we have stated, when the conflict arises between competent authorities in different countries, there are no rules for its solution, at least with a binding effect, and there is no court or other body that has been assigned higher jurisdiction authority. The solutions that can be applied at the present time will be presented hereinafter and are based on the agreement between States themselves or with the intervention of Eurojust or the use of international conventions if they are applicable between the parties.

It is important to point out that the concentration of jurisdiction in one single State is not always the best solution. In order to avoid macro-proceedings and given the need for preventing delays, it would be advisable in certain cases to distribute interrelated causes among two or more national jurisdictions.

3.3.1 Agreements and treaties between States Parties

The international conventions and European laws that provide recommendations for States on the criteria for assigning jurisdiction, aware of the consequent creation of conflicts, contain provisions that advise the agreement between States for the accumulation of investigations and the trial in one single country.

Examples include the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and the Convention of Palermo, the UN Convention against Transnational Organised Crime, which suggest the possibility of agreements between States to solve possible situations of double jurisdiction.

Article 8 of the Vienna Convention of 1988 provides that, "*The Parties shall give consideration to the possibility of transferring to one another proceedings for criminal prosecution of offences established in accordance with Article 3, paragraph 1 of, in cases where such transfer is considered to be in the interests of a proper administration of justice*". Similarly, Article 16.5 of the Palermo Convention recommends consultations between States in order to coordinate their actions when they become aware that another State has opened investigations on the same facts.

European laws also contain calls for agreements in the case of concurrent jurisdictions. For example, the Convention on the protection of the European Communities' financial interests of 1995 [4]and the Convention on the fight against corruption involving officials of the European Communities or Member States of the European Union recommend cooperation in investigations and agreements for centralising trials.

New Framework Decisions provide similar formulas and recommend that the States should cooperate and reach agreements. For example, Article 7.2 of the Framework Decision of 24 October 2008[5] on the fight against organised crime provides

[4]Article 6.1. If a fraud as defined in Article 1 constitutes a criminal offence and concerns at least two Member States, those States shall cooperate effectively in the investigation, the prosecution and in carrying out the punishment imposed by means, for example, of mutual legal assistance, extradition, transfer of proceedings or enforcement of sentences passed in another Member State.

2. Where more than one Member State has jurisdiction and has the possibility of viable prosecution of an offence based on the same facts, the Member States involved shall cooperate in deciding which shall prosecute the offender or offenders with a view to centralizing the prosecution in a single Member State where possible.

[5] "When an offence referred to in Article 2 falls within the jurisdiction of more than one Member State and when any one of the States concerned can validly prosecute on the basis of the same facts, the Member States concerned shall cooperate in order to decide which of them will prosecute the offenders, with the aim, if possible, of centralising proceedings in a single Member State.
To this end, Member States may have recourse to Eurojust or any other body or mechanism established within the European Union in order to facilitate cooperation between their judicial authorities and the coordination of their action.

Special account shall be taken of the following factors:
(a) the Member State in the territory of which the acts were committed;
(b) the Member State of which the perpetrator is a national or resident;

for cooperation as a way of reaching an agreement and considers the possibility of having recourse to Eurojust or whatsoever other mechanism created in the EU to facilitate cooperation.

The same bilateral agreement solution is provided in Decision of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings, as analysed in another section.

3.3.2. Intervention of Eurojust in resolving conflicts of exercise of jurisdiction.

Until another mechanism for solving conflicts is created in the European Union, Eurojust is to play a leading role in the search for specific solutions beyond any bilateral agreements that may be reached by the States on their own.

Indeed, the Council Decision of 28 February 2002 *setting up Eurojust with a view to reinforcing the fight against serious crime* awards said unit the mission of improving and encouraging the coordination of judicial investigations that affect two or more States, facilitating the enforcement of requests for cooperation and extradition and providing support for the competent judicial authorities to make their actions more effective and, in particular, it refers to the mission of favouring the resolution of conflicts of exercise of jurisdiction.

More specifically, Article 6 of the Decision on Eurojust provides various functions for the National Members of Eurojust in relation to conflicts of jurisdiction, stating that they *may ask the competent authorities of the Member States concerned to consider (ii) accepting that one of them may be in a better position to undertake an investigation or to prosecute specific acts*.

Article 7 provides another of these interventions among the functions of the College: "*in relation to the types of crime and the offences referred to in Article 4(1), it*

(c) the Member State of the origin of the victims;
(d) the Member State in the territory of which the perpetrator was found."

may ask the competent authorities of the Member States concerned, giving its reasons: (ii) to accept that one of them may be in a better position to undertake an investigation or to prosecute specific acts".

The task of mediating in conflicts of jurisdiction is probably one of the functions Eurojust has developed most successfully in recent years and, accordingly, the Decision of 16 December 2008 on the strengthening of Eurojust and amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime, introduces an amendment to the original Article 7 to focus on and award greater powers of intervention to the College on these matters.

Article 7.2 of the new Decision states that "*Where two or more national members can not agree on how to resolve a case of conflict of jurisdiction as regards the undertaking of investigations or prosecution pursuant to Article 6 and in particular Article 6(1)(c), the College shall be asked to issue a written non-binding on the case, provided the matter could not be resolved through mutual agreement between the competent national authorities concerned. The opinion of the College shall be promptly forwarded to the Member States concerned*".

As indicated, it is a non-binding recommendation whereby Eurojust still plays a role as mere mediator or adviser, but cannot impose its criterion on the States involved. In its "*Communication from the Commission to the Council and the European Parliament of 23 October 2007 on the role of Eurojust and the European Judicial Network in the fight against organised crime and terrorism in the European Union*", the European Commission proposed decision-taking powers for the College. This would be a qualitative leap forward. However, at the present time, there is still not the slightest agreement on assigning Eurojust anything more than functions as a mediator or a party that issues recommendations.

Article 85 of the new Treaty can constitute sufficient legal grounds when it states:

"*Eurojust's mission shall be to support and strengthen coordination and cooperation between national investigating and prosecuting authorities in relation to serious crime affecting two or more Member States or requiring a prosecution on common bases, on the basis of operations conducted and information supplied by the Member States' authorities and by Europol.*
In this context, the European Parliament and the Council, by means of regulations adopted in accordance with the ordinary legislative procedure, shall determine Eurojust's structure, operation, field of action and tasks. These tasks may include:

(a) the initiation of criminal investigations, as well as proposing the initiation of prosecutions conducted by competent national authorities, particularly those relating to offences against the financial interests of the Union;
(b) the coordination of investigations and prosecutions referred to in point (a);
(c) the strengthening of judicial cooperation, including by resolution of conflicts of jurisdiction and by close cooperation with the European Judicial Network".

The terms of the Treaty do not clearly award to Eurojust, not even through its actions as a College, powers of whatsoever "binding legal force"; however, it does not state the contrary anywhere in the texts[6]. The new Commission seems to be working now on a new Decision, which is to be published in 2012, in which Eurojust's powers continue to be strengthened. The assignment of new powers for the resolution of conflicts is open to discussion in this new stage.

In short, at the present time, Eurojust plays the role of mediator in the matter. When Eurojust becomes aware of parallel or convergent judicial investigations or when it seeks to bring actions in accordance with a request for cooperation in various countries that require enforcement at the same time or in a coordinated manner, a coordination meeting is called. Regardless of the meetings between the National Members, the important meetings are those referred to as level three (see graph hereinafter). The meetings involve, in the same place, not only the corresponding National Members, but also the authorities who are competent to carry out the investigations or enforce the requests for assistance, and they agree on how to coordinate the actions or, where applicable, which of the authorities involved is in the best situation for continuing the investigation and judging the facts.

[6] Notwithstanding the foregoing, there are opinions that indicate that the legislator's intention has been precisely that of awarding this decision-taking power to Eurojust's recommendations since the term "resolution of conflicts of jurisdiction" could not be interpreted in any other way,

The graph shows the different types of Eurojust meetings:

In 2003, Eurojust organised a Seminar for the study of conflicts of exercise of jurisdiction and the result of the meeting was the provision of a number of criteria to be considered when deciding which jurisdiction must be assigned the corresponding powers. The criteria are not provided on the basis of whatsoever hierarchy or priority and they are mentioned exclusively as reasons for the global assessment of the final decision. It also provides that the best solution does not always have to be the concentration of proceedings in one single jurisdiction, but rather, in certain cases, the joint assessment of all the concurrent factors leads to separate trials of the various facts and individuals even though they are interrelated.

In short, the determining criteria mentioned in the conclusions of the Eurojust Seminar and included in its 2003 Annual Report are as follows:

- The facility for locating the suspect or accused party
- The possibilities of extradition or surrender of the accused party or the party involved
- The plans for the attendance of witnesses at the trial
- The facility and need for the protection of witnesses

as provided in Article 85 of the TFEU. This has been included in the conclusions of a Seminar

- The consideration of the the length of time which proceedings will take to be concluded to avoid delays
- The interests of victims
- The acceptance of evidence

This is joined by the provision of non-determining criteria for the decision:

- Legal requirements
- The seriousness of the criminal conduct
- The recovery of the proceeds of crime
- The costs of prosecuting a case

Note 1 of Level Four: Regulation in Spain

3.3.3. Framework Decision of the EU on conflicts of exercise of jurisdiction

As already mentioned, the Hague Programme provided the resolution of conflicts of exercise of jurisdiction as a priority and, accordingly, the Programme drawn up by the Council on *measures to implement the principle of mutual recognition of decisions in criminal matters* of 30 November 2000 already considered redefining the *ne bis in idem* principle and proposed the drafting of an instrument designed to favour the resolution of conflicts of exercise of jurisdiction between Member States.

The need for a Decision of the European Union on the resolution of conflicts also appeared in the Communication from the Commission to the Council and to the Parliament on The Hague Programme: *ten priorities for the next five years. The Partnership for European renewal in the field of Freedom, Security and Justice.* In this text, the Commission undertook to draft the Green Paper on conflicts of exercise of jurisdiction and on the ne bis in idem principle to which we have already referred.

Following the opinions received in the responses to said Green Paper, the Czech Presidency launched an initiative for drafting a Framework Decision on conflicts

organised by the Belgian Presidency and Eurojust in Bruges in September 2010.

of jurisdiction. The result was the approval on 30 November 2009 of the "*Framework Decision on the prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings*".[7]

This Framework Decision has been given a cool welcome (or rather one of disappointment) by legal operators because it does not solve any of the problems that were on the table. The Framework Decision is limited to providing an obligation to consultation and communication between the States with parallel investigations and to recommend agreement as a way of preventing violations of the *ne bis in idem* principle.

An agreement was not reached in the Framework Decision for the provision of preferential criteria established on the basis of hierarchy or priority to determine the jurisdiction that was in the best situation for hearing the facts. The Framework Decision just recommends the authorities involved to take into account the criteria provided in the Directives published in the 2003 Eurojust Annual Report.

The Framework Decision starts by establishing a procedure for making contact between the competent authorities to verify the existence of parallel proceedings and to favour the exchange of information.

It is important to define what is understood by "parallel proceedings", which, according to Article 3 of the Framework Decision, "*means criminal proceedings, including both the pre-trial and the trial phases, which are conducted in two or more Member States concerning the same facts involving the same person*".

The Framework Decision provides that when a competent authority in one State has reasons to believe that a parallel process is taking place in another Member State, it must contact the competent authority of said other State to confirm the existence of the duplicity. Accordingly, it must provide minimum information: basically a description of the facts and the status of the proceedings, together with the information it has available on suspects, accused and victims. It must also provide information on the

[7] OJEU 15 December 2009

precautionary measures that have been adopted and any other additional information that may be of importance.

The contacted authority has the obligation to reply to the request for information without delay or in the terms set on the request itself and, if it cannot respond in said term, it must notify the authority of the reasons that prevent its reply and inform it of when the information will be sent. The reply must also contain minimum information about the facts and status of the proceedings that are taking place.

After the existence of parallel proceedings has been confirmed, the Framework Decision provides an obligation for direct consultation in order to reach an agreement on an effective solution that avoids the adverse consequences of a double investigation. Said solutions include the possibility of concentrating the proceedings in one single State.

If said agreement is not reached, the Framework Decision points out that any of the competent authorities can resort to Eurojust. It is the only proposal the Framework Decision contains if no agreement is reached and it is provided as optional. As already mentioned, it is a Framework Decision with no useful provision and it does not provide any new ideas about how to solve the conflict. The consultations, which are now provided as mandatory, obviously already took place before the Framework Decision and the imposition of consultations when there is no intention whatsoever of finding a solution usually causes more problems than it solves.

Together with this Framework Decision, the Swedish Presidency proposed the drafting of a Framework Decision on the transfer of proceedings. This initiative was based on the provisions of the Convention of the Council of Europe on the transfer of proceedings, seeking to update and speed up the procedure and adapted to the new bases laid down by the area of freedom, security and justice. However, the Swedish proposal failed, mainly due to the fact that it contained provisions that were too ambitious with regard to the assignment of jurisdiction.

The draft Framework Decision that was submitted not only provided a procedure for transferring proceedings when there is already an agreement in place between the States, but also, in a particularly ambitious way, started by establishing when the States had to have jurisdiction to hear facts. It included the rules of the 1972 Convention, whereby all the States should have jurisdiction to hear oral proceedings when whatsoever other Member State has it. This and other provisions, basically on the assignment of jurisdiction and the obligation to acceptance, led to the failure of the proposal, which was never adopted.

3.3.4 Transfer of proceedings. 1972 European Convention on the Transfer of Proceedingsin Criminal Matters

Having temporarily abandoned the idea of a Framework Decision on the transfer of proceedings, the only Convention in place that fully regulates the matter is the European Convention on the Transfer of Proceedingsin Criminal Matters of 17 March 1972.

Besides the fact that it provides a communication procedure that is slow and obsolete in relation to the European Union, the main problem with this Convention is its low number of ratifications,[8] [9]above all with regard to the member countries of the EU by which it has been ratified.

This Convention contains very broad regulations on the way in which proceedings that have already been opened in one State are to be transferred to another to avoid the disadvantages of conflicts of jurisdiction. However, it must be pointed out that this is not the only aim of the Convention. Title IV refers to this subject as "*Plurality of criminal proceedings*" and its general regulations are presented as ideal

[8] It has been ratified only byAlbania, Armenia, Austria, Bosnia and Herzegovina, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Latvia, Liechtenstein, Lithuania, Macedonia, Moldavia, Montenegro, Holland, Norway, Romania, Russia, Serbia, Slovakia, Spain, Sweden, Turkey and Ukraine.
[9] The status of ratifications and reservations can be consulted at http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=073&CM=8&CL=ENG

for regulating the transfer of proceedings in these cases; however, the purpose of the Convention goes beyond the mere resolution of conflicts of exercise of jurisdiction.

The Convention regulates the way in which a State asks another to bring proceedings against a citizen who has committed a crime. It is very important to point out that, according to the Convention, it is not necessary for the required State, in other words, the state asked to bring proceedings, to have prior jurisdiction for hearing the facts because the problems it seeks to solve are essentially others. The reasons for requesting the transfer are, in many cases, directly related to the situation of the suspect or the accused and his/her connection with the State assuming the jurisdiction, although there are other reasons not associated with this aim.

Consequently, what the Convention does is create the jurisdiction of the required State when it does not have it previously in accordance with its criteria for the assignment of jurisdiction. The Convention provides that "*any Contracting State shall have competence to prosecute under its own criminal law any offence to which the law of another Contracting State is applicable*".

Therefore, the required State does not have to have preliminary jurisdiction over the facts whose investigation is being requested. However, what is required is the existence of double unlawful act, in other words, the facts must constitute an offence and be subject to punishment if they have been committed in the territory of the receiving State.

This Convention has many excessively meticulous provisions. Its articles seek to respond to every possible situation and the Convention allows the States to make declarations and reservations that determine and limit the application of the Convention.

<u>Reasons for agreeing the transfer of proceedings:</u>

The reasons why a State can ask another to bring proceedings are manyfold and are specified in Article 8.1:

"*A Contracting State may request another Contracting State to take proceedings in any one or more of the following cases:*

a) if the suspected person is ordinarily resident in the requested State;
b) if the suspected person is a national of the requested State or if that State is his State of origin;
c) if the suspected person is undergoing or is to undergo a sentence involving deprivation of liberty in the requested State;
d) if proceedings for the same or other offences are being taken against the suspected person in the requested State;
e) if it considers that transfer of the proceedings is warranted in the interests of arriving at the truth and in particular that the most important items of evidence are located in the requested State;
f) if it considers that the enforcement in the requested State of a sentence if one were passed is likely to improve the prospects for the social rehabilitation of the person sentenced;
g) if it considers that the presence of the suspected person cannot be ensured at the hearing of proceedings in the requesting State and that his presence in person at the hearing of proceedings in the requested State can be ensured;
h) if it considers that it could not itself enforce a sentence if one were passed, even by having recourse to extradition, and that the requested State could do so;

Article 10 of the Convention provides various causes for rejecting the request. In fact, the reasons for rejection are simply those based on the lack of concurrence of the cause that justified the request or the conditions required for the transfer.

Together with the objective causes that justify the request for a transfer of proceedings, as already mentioned, the Convention regulates the concurrence of proceedings for the same facts and provides a process of mutual information and consultation that has been taken as a base for the failed Swedish draft Framework Decision on the transfer of proceedings.

According to Article 32 of the Convention:

> *"In the interests of arriving at the truth and with a view to the application of an appropriate sanction, the States concerned shall examine whether it is expedient that one of them alone shall conduct proceedings and, if so, endeavour to determine which one, when:*
>
> *a) several offences which are materially distinct and which fall under the criminal law of each of those States are ascribed either to a single person or to several persons having acted in unison;*
>
> *b) a single offence which falls under the criminal law of each of those States is ascribed to several persons having acted in unison.*

The procedure for transferring proceedings is thorough.

First of all, it provides **the effects in the transmission State** that will no longer be able to continue the case that is being transferred and must stay the proceedings or close the investigation. It also determines **the effects in the receiving State** that is to open proceedings according to its legislation and apply its own criminal code. However, certain limits apply, for example when its jurisdiction is based exclusively on the provisions of the Convention (in other words, when it acquires jurisdiction to hear the facts at the request of another State and did not have the original jurisdiction). In this case, the punishment that is to be given may not exceed the punishment provided in the requesting State.

When the excessively meticulous provisions of this Convention are examined (unfortunately, they are used very rarely), it is easy to see provisions that are very advanced and based on the principle of mutual recognition. For example, Article 26 provides that:

> "*Any act with a view to proceedings, taken in the requesting State in accordance with its law and regulations, shall have the same validity in the requested State as if it had been taken by the authorities of that State, provided that assimilation does not give such act a greater evidential weight than it has in the requesting State"*

It is interesting to note that such an advanced provision has been achieved by the conventional channels of the Council of Europe and yet it has not been possible to include it in the text of the (failed) Swedish initiative on a Framework Decision for the transfer of proceedings.

For more information, Level 2, Note 2.

3.3.5 Laying of information in connection with proceedings. Article 21 of the 1959 Convention

In States that have not ratified the Convention for the transfer of proceedings, conflicts are usually solved by applying the regulation of "the laying of information in connection with proceedings" provided in Article 21 of the 1959 Convention.

The regulation of this article is particularly moderate and, unlike the 1972 Convention, it does not provide the conditions for said process or the causes that justify its rejection, nor does it contain whatsoever regulation of its effects in the issuing and receiving States. The only specific provision refers to the need for the receiving State to notify the issuing State the results of the investigation or proceedings opened as a result of the laying down of information.

Article 21 Of the 1959 Convention provides that "*Information laid by one Contracting Party with a view to proceedings in the courts of another Party shall be transmitted between the Ministries of Justice concerned unless a Contracting Party avails itself of the option provided for in paragraph 6 of Article 15.*

2. The requested Party shall notify the requesting Party of any action taken on such information and shall forward a copy of the record of any verdict pronounced.

3. The provisions of Article 16 shall apply to information laid under paragraph 1 of this article."

It is important to remember that this provision has been amended by the provisions of Article 6.1, paragraph 2, of the 2000 Convention, which provides that:

> "*Any information laid by a Member State with a view to proceedings before the courts of another Member State within the meaning of Article 21 of the European Mutual Assistance Convention and Article 42 of the Benelux Treaty may be the subject of direct communications between the competent judicial authorities.*

Despite the moderation of the provision, it is being used increasingly and has enabled the solution of very important cases. For example, this article was used for the transfer of the French proceedings in the case of the sinking of the ship "Prestige" from the Court of Brest to the Court of Corcubión so that the latter could continue the investigation of the entire case.

Level 4, Note 2. Regulation on the transfer of proceedings and laying of information in connection with proceedings in Spain.

4. The *ne bis in idem* principle on an international scale

4.1 International Regulation. Scope of application.

In the case in which a conflict of exercise jurisdiction does not reach an agreement for distribution or concentration among the countries involved, the only limit in place at the present time can be found in the observance of the "*Ne bis in idem*" principle, with all the limitations and various scopes of application of this principle from the international viewpoint.

The *ne bis in idem* principle is the result of an individual's fundamental right regarding the power of punishment that corresponds to the State. Traditionally, its definition has been limited to the domestic law of a particular State. It is conceived as a citizen's right with regard to the party exercising the *ius puniendi*: the State, where a State is prohibited from punishing the same individual twice for the same facts.

However, the internationalisation of the crime represents the need for approaching a new dimension, focusing on the exterior scope of this principle and considering the situation of the individual as the holder of rights not only with regard to his/her own State, but also to the universal community.

The *ne bis in idem* principle is provided in international law as a human right and, therefore, it appears first of all in the International Conventions on Human Rights. In particular, it appears in Article 14.7 of the ICCPR[10] (International Covenant on Civil and Political Rights) and in Article 4 of Protocol 7 of the ECHR[11]. It is interesting to note

[10] **Article 14.7.ICCPR**. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

[11] **Article 4. Protocol 7** *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*

that despite what could, in principle, be understood as its inclusion in international texts, its scope of application according to the international texts is, as we have already mentioned, limited to the national stage. The protection awarded by these international conventions is only to establish the obligation that the Courts of a State do not hand down two punishments to the same individual for the same facts, which is clearly provided in the ECHR: "*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"*.

This limitation provides an obviously unsatisfactory solution from the individual's point of view and the solution can only be achieved by forcing the States to give a certain value to the previous judgement of foreign courts.

This is what has started to happen in the European Union, where, from the point of view of respect for the European citizen's rights and from the point of view of considering a common space that guarantees freedom of movement, the scope of application of the *ne bis in idem* principle cannot be limited to one single State.

Note 3. Level Four. The ne bis in idem principle in relation to foreign judgments in Spanish law

5.2 Definition of the scope of the ne bis in idem principle in the Schengen Convention

The definition and regulation of this principle in the EU is provided in Article 54 et seq. of the Convention Implementing the Schengen Agreement (hereinafter referred to as CISA), which extend the scope for the protection of the principle to all State Parties.

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.
3. No derogation from this Article shall be made under Article 15 of the Convention.

Article 54 provides the essential regulation when it states that "***A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party."***

The following articles[12] authorise the States to establish limitations through declarations that allow them not to apply the principle in certain circumstances and specify the consideration of precautionary measures that have already been applied in another country in the final calculation of the sentence.

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Article 55. CISA. 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. CISA. 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. CISA1. 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.

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 under way.

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.

When interpreting these articles, the ECJ has started to configure the right across the Union as part of a right to free circulation and as a guarantee of legal certainty for European citizens throughout its territory.[13] In addition, its meaning and value as a fundamental right moves on from the aforementioned international texts to Article 50 of the Charter of Fundamental Rights of the EU, which states:

"*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".*

In addition and from the viewpoint of conflicts of jurisdiction, the application of the *ne bis in idem* works as a last resort for the conflict. In whatsoever case, as a method for determining jurisdiction, the criterion it provides is **the application of the order of arrival** (the first State to hand down a sentence keeps the case), which is not particularly rational and does not guarantee any effectiveness in the fight against crime.

Furthermore, the interpretation of the tenor of Article 54 is essential to **avoid not only the problem of double sentences, but also the problem of lis pendens.** Traditionally, the *ne bis in idem* principle has been compared with the concept of res judicata; in other words, only when a decision has been handed down (or another equivalent resolution), which must also be final, is a further sentence prohibited, but it does not prevent double trials, which is also a problem in criminal investigations and causes unjustified problems for the individual who may be subjected to a double sentence. For more information, Note 3

The European Court of Justice (ECJ) has defined the profile and meaning of the *ne bis in idem* principle in many, important decisions.

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[13] The decision of 11 February 2003, joined cases of Gözutok C-187/01, and Brügge, C-385/01, provides that Article 54 to 58 of the CISA must be interpreted in accordance with the *"objective of maintaining and developing the Union as an area of freedom, security and justice in which the free movement of persons is assured"*.

The ECJ has made extreme references to the ne bis in idem principle in the following decisions: Judgment of the Court of 11/02/2003, joined cases C-187/01 and C-385/01 “Gozutok”. Judgment of the Court of 10/03/2005, case C-469/03, “Miraglia”. Judgment of the Court of 09/03/2006, case C-436/04, “Van Esbroeck”. Judgment of the Court of 28/09/2006, case C-150/05, “Van Straaten”. Judgment of the Court of 18 July 2007, C 288/05 “Kretzinger”. Judgment of the Court of 18 July 2008, C-367/05 "Krraaijenbrink". Judgment of the Court of 18 December 2008, C-297/07 “Bourquain”. Judgment of the Court of 22 December 2008, C-491/07 "Turansky". (The full text of these decisions in English, French and Spanish are included in an annex).

These judgments define essential issues for the profile of the principle.

The "bis" concept:

- What should be understood by finally disposed of?
- Is protection awarded against lis pendens or only against double punishment?

The “*idem*” concept:

- What should be understood by the same facts?
- What should be understood by the same person?
- Who is affected by a decision ordering the stay of proceedings based on a plea of objective responsibility, such as, for example, the statute of limitations?

When responding to these questions and other related matters, the ECJ outlines the profiles of the principle and lays down the limits for the *ius puniendi* of the Member States in relation to coexistence in an area that aspires to become a single European judicial area.

4.2 Defining the bis element

The first question that is to be solved is knowing the scope of what is supposedly a "new sentence", defining which type of decisions can be considered sufficient to understand that the case has already been judged.

Article 54 speaks of *"a person whose trial has been finally disposed of"* and Article 55 refers to foreign judgments. Which type of judgments are considered as sentences? There are many doubts here, for example: is the negotiated agreement signed by a public prosecutor in countries in which such a character exists considered as a final judgment? *How should the provisional staying of proceedings based on insufficient evidence that does not assess the facts be interpreted?*

Article 50 of the Charter of Fundamental Rights (included in Article II-110 of the Treaty for the Constitution of Europe) speaks of the final criminal judgment: *"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 huge differences in the regulation of criminal procedures among the various European countries makes one unequivocal and strict definition of final judgment impossible. A definition that only comprises the decision handed down after the public trial is considered too strict. Accordingly, said limited meaning would exclude from the scope of application of these rules judgments handed down in European countries that end the trial in advance and imply a genuine assessment of the matter and, in many cases, also include the handing-down of punishments.

The ECJ has given a more detailed definition of the term "final judgment" for these intents and purposes.

The judgment of 11 February 2003, **joined cases C-187/01, Gözutok and Brügge,** is based on the fact that, in the EU, *"the Member States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in*

force in the other Member States even when the outcome would be different if its own national law were applied". Accordingly, *"The ne bis in idem principle, laid down in Article 54 of the Convention implementing the Schengen Agreement [...]* ***also applies to procedures whereby further prosecution is barred,*** *such as those at issue in the main actions, is a procedure by which the prosecuting authority, on which national law confers power for that purpose, decides to discontinue criminal proceedings against an accused* ***once he has fulfilled certain obligations*** *and, in particular, has paid a certain sum of money determined by the prosecuting authority".*

This is the first time the extension of the *ne bis in idem* principle has been acknowledged and applied to rulings other than final convictions or acquittals and extended to decisions taken by bodies that are not strictly judicial, at the pre-trial stage, as a result of agreements/mediations or cross-border agreements.

However, not all the decisions to stay proceedings must be considered sufficient for integrating the concept of "final criminal decision", as indicated by the ECJ in the decision handed down for the ***Case* C-469/03, Miraglia, of 10 March 2005.** In this case, the ECJ did not consider the *ne bis in idem* rule applicable when the stay of the proceedings was the result of the decision taken by the Public Prosecutor to discontinue the investigation based on the existence of an accusation in another Member State against the accused for the same facts. In other words, in this case, the ECJ understood that **a decision to stay proceedings based on formal or procedural grounds that does not assess any of the facts or evidence cannot be included in the concept of final decision or judgment.** Therefore, it must be made clear that not every decision to stay proceedings has the *ne bis in idem*effect in other Member States.

The *case* C-467/04, Gasparini , whose decision was handed down on 28/09/06, also questions the meaning or value that has to be given to decisions to stay proceedings based on the statute of limitations. The point under discussion in this case was whether or not an acquittal based on the statute of limitations has a preclusion effect in relation to other proceedings against the same individual in another Member State that has different terms in its statute of limitations. Despite the

fact that there is no harmonisation of the laws of the Member States in relation to their statutes of limitation and the corresponding terms, the ECJ, again in reference to the principle of mutual trust of the States in their respective criminal justice systems, considers that **the application of the criminal law of other States Parties to the CISA must be accepted even though the application of an institution such as the statute of limitations according to its own law would have given rise to a different result.**

Subsequent judgments have insisted on applying the concept of final judgment to deny, for example in **Case C-491/07, Turansky,** that an order **to stay proceedings handed down prior to charging a suspect and which, in accordance with the legislation of the State by which it is adopted, does not definitively end the public action and does not prevent new criminal proceedings for the same facts in said State must not be considered as a final judgment** for the intents and purposes of the ne bis in idem principle and, therefore, it does not prevent later proceedings being opened in another State.

The problem of when judgments must be understood as enforced or being enforced has also been solved partially by the ECJ in its judgment for **Case C-288/05, Kretzinger, specifying that the suspension of a sentence adopted legally in accordance with the laws of the State handing down the punishment must be understood as a period of enforcement of the judgment.** The decision states that **"***For the purposes of Article 54 of the CISA, a penalty imposed by a court of a Contracting State 'has been enforced' or is 'actually in the process of being enforced' if the defendant has been given a suspended custodial sentence".*

However, it does not take into account the period of provisional custody. "For the purposes of Article 54 of the CISA, **a penalty imposed by a court of a Contracting State is not to be regarded as 'having been enforced' or 'actually in the process of being enforced' where the defendant was for a short time taken into police custody** and/or held on remand pending trial and that detention would

count towards any subsequent enforcement of the custodial sentence under the law of the State in which judgment was given".

Finally, the court has also solved dubious matters in relation to the impossibility of enforcing the sentences handed down in **Case C-297/07, Bourquain.** In this case, the accused had been sentenced to capital punishment in France in 1961, a punishment which had expired according to French Law, which applies a term of 20 years in its statute of limitations. Germany sought to open new proceedings for the same acts in 2001. The ECJ considered that the ne bis in idem principle was applicable "*to criminal proceedings instituted in a Contracting State against an accused whose trial for the same acts as those for which he faces prosecution was finally disposed of in another Contracting State, even though, under the law of the State in which he was convicted, the sentence which was imposed on him could never, on account of specific features of procedure such as those referred to in the main proceedings, have been directly enforced*".

For more information. Note 3. Ne bis in idem principle and interdiction of lis pendens

4.3 Defining the idem element

The definition of the *idem* concept, in other words, knowing what is understood by **"the same facts"** in the regulation of the CISA is also somewhat unclear and has required clarification by the ECJ.

The idem element refers to a factual identity and not to a legal classification or typification. That is what the ECJ states **in its decision of 9 March 2006, Van Esbroek C-436/04,** where it provides that the relevant criterion for the purposes of the application of the ne bis in idem in support of Article 54 of the CISA consists of "*identity of the material acts, understood as the existence of a set of facts which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected".* The court declares that "*The possibility of divergent legal classifications of the same acts in two different Contracting States is therefore no obstacle to the application of Article 54 of the CISA, just as for the same*

reasons the criterion of the identity of the protected legal interest cannot be applicable since that criterion can vary from one State to another".

This idea of association due to the facts without assessing for said intents and purposes the difference between legal classifications or the difference between protected legal interests is reiterated by the ECJ in various subsequent decisions.

In the case C-288/05 "**Kretzinger"**, the Court insists that the relevant criterion is the identity of the material facts and states that "*acts consisting in receiving contraband foreign tobacco in one Contracting State and of importing that tobacco into another Contracting State and being in possession of it there, characterised by the fact that the defendant, who was prosecuted in two Contracting States, had intended from the outset to transport the tobacco, after first taking possession of it, to a final destination, passing through several Contracting States in the process, constitute conduct which may be covered by the notion of 'same acts' within the meaning of Article 54. It is for the competent national courts to make the final assessment in that respect".*

For these intents and purposes, clarification can be found in the Decision handed down for the case C-367/05 **Krraaijenbrink,** which specifies that not all the related facts configure this "idem" element and that, accordingly, the following are different facts: **"***first, in holding in one Contracting State the proceeds of drug trafficking and, second, in the exchanging at exchange bureaux in another Contracting State of sums of money also originating from such trafficking should not be regarded as 'the same acts' within the meaning of Article 54 of the Convention implementing the Schengen Agreement merely because the competent national court finds that those acts are linked together by the same criminal intention".*

For more information, Note 4. Section 4. The ne bis in idem principle and international legal assistance.

5. Conflicts of exercise of jurisdiction and the international tribunals

When the jurisdictions of international tribunals come into play, created to hear special crimes which, owing to their seriousness, have been considered as deserving of being judged by international tribunals, such as "ad hoc" tribunals like the International Tribunal for the Former Yugoslavia, the International Tribunal for Rwanda, the Special Tribunal for Sierra Leone and the International Criminal Court, the solution to the conflict has to be considered specifically in view of the facility and evident concurrence of jurisdictions between national courts and said international tribunals.

The interrelation between these tribunals and concurrent jurisdictions is not solved, as may appear, by the idea of the precedence of international tribunals, but rather the decisions handed down by the national court must also be taken into account if they have been handed down previously and in accordance with certain conditions.

The provision of Article 10 of the Statute of the International Tribunal for the Former Yugoslavia provides (as do almost all the Statutes of the other ad hoc courts), the following:

1. No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal.

2. A person who has been tried by a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal only if:

(a) the act for which he or she was tried was characterized as an ordinary crime; or

(b) the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.

3. In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the International Tribunal shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served."

It is evident that the application of the ne bis in idem principle takes into consideration the order of priority, but only when the sentence in the first case is adopted as part of real proceedings and also corresponds to the seriousness of the facts.

The aim is to avoid the so-called "***Sham proceedings***", in other words, those brought with the sole intention of favouring impunity. In these cases, the first sentence is void when it is verified that the proceedings have been carried out with the sole intention of the punishment serving as an excuse of res judicata before subsequent proceedings.

In the International Criminal Court (hereinafter referred to as the ICC), the concurrence of jurisdictions and the ne bis in idem principle are solved differently. The ICC was created by virtue of the Statute of Rome in July 1998 and came into effect on 1 July 2002. Its powers are regulated under the principle of complementarity provided in Article 1 thereof and not on the precedence principle, as applied in ad hoc tribunals. Accordingly, the Court will intervene only when a State with jurisdiction over the matter cannot or does not want to intervene.

The Statute of the ICC provides for the ne bis in idem principle in Article 20 thereof:

"Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.

2. No person shall be tried by another court for a crime referred to in Article 5 for which that person has already been convicted or acquitted by the Court.

3. No person who has been tried by another court for conduct also proscribed under Article 6, 7, 8 or 8 bis shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:

(a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or

(b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice."

Once again, we have the guarantee that enables the admission of trials known as *"Sham proceedings"* as invalid for the intents and purposes of res judicata.

The Statute of the ICC does not provide for the deduction of the sentence previously handed down by a national court, obviously because its jurisdiction is complementary and not preferential, but the absence of this rule can give rise to problems in cases of minor sentences handed down in *Sham proceedings* or for minor crimes related to the main crime.

There are many issues open with regard to conflicts of exercise of jurisdiction between the ICC and national courts, for example the preference of the jurisdiction of the courts in a third-party State proceeding within the bounds of its jurisdiction to hear universal justice, the matters of value of certain graces, such as amnesties or pardons taken in the affected State, which must be interpreted as a lack of intention of hearing the facts, whereby they must not prevent the opening of the Court's jurisdiction.

Similarly, the interpretation of the "idem" element is problematic with regard to the ICC and to whether it reaches the factual reality of the same interrelated facts or whether it should be understood as an identity of crime and, therefore, is only integrated with the same classification. Particularly sensitive with regard to the difference between reprimand and punishment, the classification of common crimes and crimes against humanity.

Many of the questions have not been resolved and discussions continue in the doctrine and some are being put to the ICC, which has started to proceed on a practical level in recent years. The problems have been noted and are being debated until they can be solved by the ICC in the near future.

Note 4. Level 4. Spanish regulation of the ne bis in idem principle and international tribunals.

6. The Lisbon Treaty. Future solutions: the European Public Prosecutor's Office

Article 82 of the Treaty for the Functioning of the EU, which is the result of the Lisbon Treaty, continues to consider the principle of mutual recognition as a keystone in criminal cooperation and insists on the idea of finding a solution for conflicts of jurisdiction.

"1*. Judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States in the areas referred to in paragraph 2 and in Article 83.*

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures to:

(a) lay down rules and procedures for ensuring recognition throughout the Union of all forms of judgments and judicial decisions;

(b) prevent and settle conflicts of jurisdiction between Member States;

(c)……

However, this idea is nothing more than a continuation of the present situation, with the only hope of facilitating the agreement that will do away with unanimity. The real hope is that either mandatory powers of decision will be acknowledged for Eurojust or, in many cases (those which fall under its jurisdiction), the European Public Prosecutor's Office will have the power to determine the competent jurisdiction. Because the Lisbon Treaty does not create a European jurisdiction and the Public Prosecutor's Office has to exercise criminal actions before the courts of the States and because the European Public Prosecutor's Office[14] has to deal with the dispersion of investigations, resorting to one single national jurisdiction at any given time (the one that is in the best condition for hearing the case) is why the subject of the choice of jurisdiction by the European Public Prosecutor's Office becomes a focal point when discussing this figure.

It is evident that, at the present time, with different judicial systems in Europe and without the full harmonisation of the definition of the criminal offences, punishments or proceedings, the decision of it being one State and not another that will assume responsibility for hearing a specific case is not irrelevant or innocuous. Here, the decision may affect the fundamental rights of the accused and victims and it is one of the essential subjects for discussion when speaking about the European Public Prosecutor's Office.

[14] Number 2 of 86 of the Treaty on the Functioning of the EU states*: The European Public Prosecutor's Office shall be responsible for investigating, prosecuting and bringing to judgment, where appropriate in liaison with Europol, the perpetrators of, and accomplices in, offences against the Union's financial interests, as determined by the regulation provided for in paragraph 1. It shall exercise the functions of prosecutor in the competent courts of the Member States in relation to such offences.*

There is an essential need for drawing up a number of mandatory determination criteria or criteria that are at least indicative of the justification of the European Public Prosecutor's Office's choice of a specific jurisdiction in order to avoid "forum shopping".

The regulations that determine the procedures applied by the Public Prosecutor's Office must also provide an appeal system in which the affected-legitimate parties can react to the decisions. Powers for hearing this decision are awarded to state or supranational jurisdictions and the predetermination of these orientations will make it possible to put in place more appropriate control over the option that is taken.

The matter will be resolved in the future but it is appropriate to note the solutions that are being discussed at present.

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LEVEL II: TO LEARN MORE

More information.

Second level notes. Unit 19

Note 1.

Section 2

The problem with negative conflicts and their solution, through recommendations by Eurojust when it asks a State to open investigations on certain facts, is that they can have different results and special effects in countries bound to the principle of legality. For judicial authorities obliged to observe the principle of legality, it is difficult not to open investigations on facts over which their country holds jurisdiction and which are not being investigated in another country.

The differences in the criteria for assigning jurisdiction are relevant and can lead to a lack of balance and the overloading of certain judicial systems in comparison with others. It is important to remember that some countries of the European Union apply very limited criteria regarding the assignment of jurisdiction. Others, however, according to the principle of discretion, consider the unnecessary nature of certain enquiries but, at the same time, send information to other countries that apply broader criteria for the assignment of jurisdiction.

The referred case of Asley and Jenkins is one of such cases.

As explained, in this case the investigation could have been opened in the United Kingdom or Spain. The territorial references lie in both countries: in particular, for their trickery, the British suspects acted from Seville, making the deceitful calls and offers from said city to various towns and cities in the United Kingdom. Although all the victims were British and the economic transfers took place in said country, the British authorities argued lack of competence (it is important to remember that the United Kingdom applies very limited criteria for the assignment of jurisdiction, often bound to territoriality, which they usually interpret in a highly restrictive way). Considering that Spain was in a better situation

to hear the facts, Eurojust asked the General State Prosecutor, in accordance with article 7 of Eurojust's Decision, to open investigations on the crime.

Spain's General Prosecutor accepted the recommendation conditioned to the provision of assistance in the investigations by the authorities of the United Kingdom, bearing in mind that all the victims had to be questioned and informed of their rights, etc., and that they all lived outside Spain, more specifically in the United Kingdom. The commitment to collaboration means that the case can go ahead despite the difficulties of an enquiry that is more or less extraterritorial.

These cases show the need for a certain level of harmonisation of the criteria for assigning jurisdiction in Europe or the possibility of applying a provision such as that set out in Article 2 of the 1972 Convention on the Transfer of Proceedings, which allows the States to acquire jurisdiction merely due to the fact that they are sent the proceeding and accept it.

Note 2.

Section 3.3.4.

Procedure for the transfer of proceedings.

The 1972 Convention on the Transfer of Proceedings in Criminal Matters of the Council of Europe contains extremely detailed regulations on the specific way in which proceedings are to be transferred. Without prejudice to the general examination, it is basically interesting, at least for the member countries of this Convention, to analyse their procedures in more detail.

Method for sending requests: Article 13 of the Convention provides that the requests sent from one State to another for the opening of proceedings must be made in writing and sent via the Ministries of Justice, unless there are agreements in place that specify another authority. They can also be sent via INTERPOL. (When the States involved are members of the European Union, this provision is rendered completely obsolete. In my opinion, there could be direct communication between the competent authorities and a breach of said specific channel would not have a negative effect on

the validity of the process insofar as ignoring this type of formality and applying the principles of direct communication provided in the Schengen Convention and the 2000 Convention do not affect any fundamental right).

Documents sent with the request. The request must be sent with the original or a certified copy of the proceedings and relevant documents, although they may also be sent later if necessary. Furthermore, there is also the need for sending information (together with the corresponding documentary evidence) about all the measures that have been adopted. It is clear that any information on the precautionary measures that have been adopted and that are to be maintained in the receiving State is particularly relevant for guaranteeing the continuity of the proceedings.

The documents are exempt from all formalities in terms of legalisation.

Translation: In principle, the documents and the proceeding itself must not be sent translated unless declared otherwise by the State when the Convention is signed.

However, most States have reserved the possibility of requesting the translation and the rule of reciprocity can also be applied. Accordingly, with the declarations made, it is common for the translation to become a very important inconvenience. The high cost of translating documents can lead a State to decide not to send the proceedings. Therefore, in practice, particular solutions have been found in each case between the states involved. Accordingly, partial translations have occasionally been agreed, where the receiver accepts the translation of only the most important documents or even, when the receiving State is genuinely interested in the transfer of the proceedings, the request for the translation has been relinquished despite the declaration made in the Convention.

Response from the receiving State, (Art. 16)**.** The State receiving the request must notify its decision to accept or reject the proceedings as soon as possible.

Effects in the issuing State. (Art. 21 et seq.). The issuing State loses the possibility of prosecuting the suspect until the receiver replies except for the adoption of the necessary procedural measures.

However, the issuing State can recover its right to open the enquiry when the receiver rejects the request or later revokes its acceptance or when it decides not to open the proceedings or orders the stay of proceedings. The issuing State is also allowed to withdraw its request at any time before it is accepted by the receiver.

In addition, the Convention provides that the mere request sent by the issuer has the effect of extending the limitation period of the crime that is being investigated by 6 months.

Effects in the receiving State. (Art. 23 et seq.). The Convention not only provides the validity of all the actions taken appropriately in accordance with the issuer's law, which has already been examined, but also other consequences. For example, the effect of extending the limitation period of the crime by 6 months if jurisdiction is based on Article 2; in other words, if the jurisdiction of the receiving state is acquired and is based exclusively on the previous jurisdiction of the issuer.

It also provides that, in the case of crimes that can only be prosecuted upon application, the receiving state may prosecute the facts with the tacit agreement of the damaged party as long as said party does not oppose in the term of one month after he/she has been notified the transfer of the proceedings.

Precautionary measures. (Art. 27 of the Convention). The Convention provides for the adoption of precautionary measures, especially in reference to preventive detention. If the jurisdiction of the required State is based exclusively on article 2 of the Convention, in other words, on the applicant's request, the detention must be requested expressly by the providing State. Of course, the Convention allows for the adoption of other precautionary measures, as referred to in Article 28.

It is interesting to note that the Convention provides a procedure that always considers the issuing State as the one acting as the applicant. In other words, the interested party is the State that assigns the proceedings and the one that contacts the receiver to ask it to assume the case. Practical experience shows that the opposite situation is quite common, where the State that finally assumes jurisdiction is the one that is initially interested in transferring the proceedings and the one that takes the initiative of requesting the commencement of the process according to the Convention. Thus, although the issuer appears formally as the applicant, that is not actually the case.

There are different interests involved and consideration must be given to the wide variety of cases that can give rise to the transfer of proceedings, which suggests that the possibilities for applying the Convention with specific agreements are innumerable.

We can mention a few very simple examples for the application of the Convention, such as the case of injuries caused by one foreigner to another foreigner of the same nationality at a holiday resort in another country. Indeed, territorial jurisdiction corresponds to the country in which the injuries were caused, but both the aggressor and the victim are back in their own country after their holidays have finished. It seems reasonable for the judicial authorities of the country in which they both reside to hear the facts. The proceedings opened in the place where the facts occurred, the documents and evidence that have been gathered, such as the police report and the initial medical report, etc. have to be sent to the judicial authority that finally assigned jurisdiction.

Other cases in which the Convention is applied are more complicated. Cases in which the Convention is applied for the single trying of organisations dedicated to drug trafficking are common. These are cases of connections involving criminal activities in territories in different countries, with caches intervened in different territories and where the need for putting an end to the leaders of the organisation and the convenience of demonstrating the real potential and danger of the organisation recommend the

accumulation of the cases and the sending of all the enquiries and all the evidence obtained in the different countries to the one that is finally assigned jurisdiction.

Note 3.

Section 5.2

Ne bis in idem principle and interdiction of lis pendens

The interpretation of the limits and concept of the ne bis in idem principle traditionally distinguishes between "*nemo debet bis vexari pro una et eadem causa"* (no one can be tried twice for the same crime) and *nemo debet bis puniri pro uno delicto* (no one can be punished twice for the same crime).

Despite the tenor of the international Conventions that speak of the prohibition of a double trial (ICCPR, Article 7) or double accusation (protocol 7 of the ECHR), where the principle limits the impossibility of applying a double penalty, the case law of the ECtHR is clear on the fact that the *ne bis in idem* principle does not prohibit only double punishment, but also includes the interdiction of double prosecution, which also means that the taking-into-account principle is not enough for observance of the *ne bis in idem principle. This has been stated in various decisions, including the judgment of the ECtHR of 23 October 1995, Case of Gradinger against Austria, or, more recently, the judgment of the ECtHR of 2009, Case of Zolotokhine against Russia.*

Furthermore, if we accept the limit to the impossibility of a double trial, it would not prevent parallel investigations until the trial begins and until there is a final judgment on the matter in one State.

However, the subject of double prosecution is discussed greatly insofar as the European citizen should not be the object of double prosecution, which would undoubtedly reduce his/her rights.

In the event of concurrence of criminal and administrative penalties, the domestic law of many States awards priority to the former. However, some resort to the sum and compensation if double penalties are applied. In the fight between the duplicity of Community and state penalties, the ECJ itself has accepted the solution of compensation for the penalties, even though it recognises it as a clearly insufficient response.

Although the compensation finally maintains the proportionality of the penalty, it does not avoid violation of the ne bis in idem principle. It is a problem that does not deserve much discussion here and one that is applied domestically in many States to solve the possible duplicity of criminal and administrative penalties on a domestic scale when they occur.

All these problems point to the need for finding preliminary solutions and formulas that prevent concurrent proceedings. It is a question not of solving, but rather of pre-empting the problem, without the need for compensation used as a patch on a violation that has evidently occurred.

Note 4. Section 4. The ne bis in idem principle and international legal assistance.

The external dimension of the *ne bis in idem* principle has always been taken into account in the laws on mutual legal assistance. It is reasonable to think that a request for cooperation can be denied because the required State is investigating the same facts or even when it has already tried the same facts.

The ne bis in idem principle, which incorporates a fundamental right of the subject with regard to the holder of the ius punendi, has been used as a reason for rejecting judicial assistance when requested for criminal facts that have already been tried in a State other than the requiring State.

The European Convention on Judicial Assistance in Criminal Matters of 20 April 1959 makes no direct mention of the *non bis in idem* principle as a reason for rejection; however, it was incorporated as a reason for rejecting assistance in many of the reservations and declarations made by the signatories when they ratified or adhered.[15]

The interpretation of the scope and meaning of these reservations has given rise to a certain amount of discussion.

The decision handed down by the ECJ **on 10 March 2005 Case *Miraglia* (C-469/03)** seeks to set the limits for this matter. The case involves a parallel investigation on drug trafficking with criminal proceedings opened in Amsterdam and Bologna. The Amsterdam proceedings were stayed precisely because the same facts were being investigated in Bologna, whereas the proceedings in Bologna continued and information about the investigations made in Holland were requested from the Dutch authorities so that they could be incorporated into the Italian investigation. Italy's request for assistance was rejected by the Dutch authority on the basis of the *ne bis in idem* principle. The rejection is unjustifiable and has no sense since it necessarily leads to impunity. In the Miraglia decision, the ECJ maintained that a decision to stay proceedings based precisely on the existence of investigations in another country for the same facts cannot constitute the "bis" element and, therefore, the decision to stay proceedings cannot be used as grounds to reject a request for judicial assistance.

The ne bis in idem principle is constantly used as grounds for the rejection of extraditions and, as such, it is usually provided as a reason for rejecting handovers in all the multilateral and bilateral conventions on extradition. It appears in this way in the European Convention on Extradition and, consequently and with the same grounds, it has been included in the regulations on the Framework Decision on the European Arrest Warrant as a mandatory reason for rejection.

[15]More than twenty States have reserved the right to not execute a request for assistance when it may involve a violation of the *ne bis in idem* principle.

In general, violation of the ne bis in idem principle appears as a reason for rejection in all European legislation that updates the principle of mutual recognition.

Framework Decisions that include the *ne bis in idem* principle as grounds for rejection are the Framework Decision on the European Arrest Warrant; the Framework Decision of 22 July 2003 *on the execution in the European Union of orders freezing property or evidence*[16] (Art. 7.1(c)); Framework Decision 2006/783/JHA of the Council of 6 October 2006 *on the application of the principle of mutual recognition to confiscation orders*[17] *(*Art. 8.2(a)) and also in the Framework Decision on the application of the principle of mutual recognition to financial penalties (Art. 7.2(a))[18].

The ne bis in idem principle as grounds for rejection is particularly relevant in the regulation of the European arrest warrant. In this unit, we will not focus on the grounds for rejection that are studied in the unit on the European arrest warrant, but we will refer to them.

Art. 3.2 provides the ne bis in idem principle as mandatory grounds for rejection when a final decision has been handed down in a Member State.

> "*If the executing judicial authority is informed that the requested person has been finally judged by a Member State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State"*

Article 4 also provides various grounds, in this case optional, with the same or at least part of the same basis.

> "*The executing judicial authority may refuse to execute the European arrest warrant:*
>
> *1…*
>
> *2. where the person who is the subject of the European arrest warrant is being prosecuted in the executing Member State for the same act as that on which the European arrest warrant is based;*

[16] Official Journal L 195 of 02/08/2003.
[17] Official Journal L 328 of 24/11/2006.
[18] Official Journal L 7616 of 22/03/2005.

3. where the judicial authorities of the executing Member State have decided either not to prosecute for the offence on which the European arrest warrant is based or to halt proceedings, or where a final judgment has been passed upon the requested person in a Member State, in respect of the same acts, which prevents further proceedings;

4 …

5) if the executing judicial authority is informed that the requested person has been finally judged by a third State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing country"

It is obvious that the European legislator prefers to leave the case open to judicial assessment if there is a possibility of the foregoing cases violating the principle. On the one hand, Article 4.2 makes it possible to award priority to the investigation of the enforcing state, which would not be a violation of the principle, since the handover would not take place.

With the grounds provided in number 3, it admits the decision to close the investigations.

The cause for rejection provided in number 5 involves more problems, despite the fact that it demonstrates greater confidence among the Member States of the Union, since it allows for a handover that would violate the ne bis in idem principle even if the state handing down the first punishment were not European.

On the other hand, these grounds for non-delegation have been included in most of the legislation that incorporates the Framework Decision into domestic laws as mandatory grounds for rejection.