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# APPLICATION OF THE NE BIS IN IDEM PRINCIPLE IN A CRIMINAL PROCEDURE

*IVANA JANKEOVÁ – TOMÁŠ KAŠČÁK*

Faculty of Law, Masaryk University, Czech Republic

## Abstract in original language

V rámci Schengenského priestoru môže byť založená právomoc stíhať a trestať osoby podozrivé zo spáchania trestného činu pre viacero štátov. Tento príspevok sa zaoberá postupom orgánov činných v trestnom konaní v takýchto situáciách so zameraním na aplikáciu princípu ne bis in idem v trestnom konaní.

## Key words in original language

Princíp ne bis in idem, trestné konanie, Schengenský vykonávací dohovor, prejudiciálne konanie.

## Abstract

Within the Schengen area the criminal jurisdiction to investigate and prosecute persons suspected from committing a crime can be established for more States. This article deals with procedure of the criminal prosecution authorities in such situations with main focus on the application of the ne bis in idem principle in the criminal procedure.

## Key words

Ne bis in idem principle, Criminal proceedings, Convention Implementing the Schengen Agreement, Preliminary ruling.

## INTRODUCTION

The *ne bis in idem* principle is a generally recognized principle of a criminal law which prohibits repeated prosecution of an individual for the same offence.[1] This principle represents one of the fundamental human rights and due to its importance is guaranteed by the constitutions of individual states as well by international treaties.[2] International applicability of this principle results mainly from the fact that that criminal law protects the most important values and principles of every state and is also expression of its sovereignty. As a result sovereign states do not restrict the applicability of their criminal legislation only to

[1] VAN BOCKEL, B. *The ne bis in idem principle in EU law.* Alphen aan den Rijn : Kluwer Law International, 2010. s. 1 – 2.

[2] Examples could be Article 14 (7) of the International convention on Civil and Political rights or the Article 4 of protocol no. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms

the territory of their own state (territoriality principle), but extend it to the territories of other states, where the crimes were committed by their citizens (personality principle).[3] Taking into account the fact that there is constant movement of people from one country to another, there is a good chance that by a crime committed abroad will fall under the criminal jurisdiction of more states at once. Without the application of the *ne bis in idem* principle a person can be repeatedly accused and punish for the same crime, which could disrupt the proportionality between the crime and punishment, as well as the legal certainty and confidence in the judicial system.

Within the European Union the application of this principle is even more important because the free movement of people is granted as one of the four fundamental freedoms. Also among the people enjoying this freedom are criminals who would be disproportionately restricted in this freedom if they would be subject to multiple criminal prosecutions for the same act in several states. Based on this reason, the Member States of the Schengen area agreed on a regulation of the prosecution of the persons that have been prosecuted for a certain act in one of the Member States.

On 19th June 1990, the Member States of the Schengen area agreed on the Convention Implementing Schengen Agreement (hereinafter "CISA"). Article 54 of CISA regulates the multiple prosecution for the same act. "A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party." This provision expressly prohibits the accumulation of penalties for the same crime not only within the area of one state but also between the Member States. However, the CISA allows reservation to this article under some circumstances:

(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 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 party;

[3] TOMÁŠEK, M. *Europeizace trestního práva*. Praha : Linde, 2009. s. 159.

(c) Where the acts to which the foreign judgment relates were committed by officials of that party in violation of the duties of their office.

The condition for the application of this reservation is an obligation of the state to reduce any sentence of imprisonment by the time which has already been carried out in respect of the crime.[4] This condition follows the principle of proportionality of punishment, which prevents the penalty to be disproportionate to the offense.

The application of the *ne bis in idem* principle by the Member States' bodies pointed out some uncertainties which required interpretation by the European Court of Justice (nowadays the "Court of Justice" as it will be referred hereinafter). The interpretations' difficulties have dealt mainly with the definition of multiple prosecutions (bis) for the same act (idem).

**HÜSEYIN GÖZÜTOK AND KLAUS BRÜGGE**

In the joint cases *Gözütok and Brügge* the Court of Justice was dealing with the question of which kinds of decisions prevent further prosecution under the Article 54 of the CISA. In *Gözütok* case, a Turkish citizen Hüseyin Gözütok had run a coffee shop in a Heerlen, a city in Netherlands. During the two inspections the police authorities found illegal drugs. As a result the Dutch public prosecutor initiated criminal proceedings against Mr Gözütok. In respect to the lower gravity of the offence, the public prosecutor offered to Mr Gözütok to pay a fine 3,750 guldens. Mr Gözütok accepted the offer, paid the fine and consequently the prosecutor terminated the criminal proceedings.[5] Later on, the German bank informed the German prosecuting authorities of suspicious movement in Mr Gözütok's bank accounts. Mr Gözütok was arrested in Germany after the German prosecuting authorities had received relevant information on Mr Gözütok's illegal activities. The German court convicted Mr Gözütok and sentenced him to a period of one year and five months imprisonment, suspended on probation. The Appeal Court changed this decision, discontinued the criminal proceedings against Mr Gözütok on the ground that under Article 54 of the CISA the German prosecuting authorities were bound by the definitive discontinuance of the criminal

[4] Article 56 of the CISA.

[5] Joined case C – 187/01 and C – 385/01 Gözütok and Brügge [2003] ECR I-1345, paragraphs 9 – 11.

proceedings in the Netherlands. In a second appeal the court decided to stay the proceedings and refer the matter to the Court of Justice for a preliminary ruling.[6]

The second case concerned Mr Klaus Brügge, a German citizen who was charged by the Belgian prosecution authorities with having intentionally assaulted and wounded Mrs Leliaert in Belgium, which constituted a violation of the Belgian Criminal Code. Mr Brügge faced criminal prosecution in Belgium as well as in Germany. In Belgium the proceedings had a criminal and a civil aspect due to Mrs. Leliaert's working incapacity, resulting from the assault, claiming pecuniary and non-pecuniary damages in amount of approximately 495 Euro.[7] During the proceedings before the Belgian Court, the Public Prosecutor in Germany offered to Mr. Brügge an out-of-court settlement in return for payment of around 500 Euro. Mr. Brügge accepted the settlement and paid.[8] The Belgian District Court referred a question to the Court of Justice.

Because of the similarity of the subject matter of the cases the Court of Justice has decided, after the recommendation of the Advocate General, to join and examine the cases together. The national courts were essentially asking whether the *ne bis in idem* principle laid down in Article 54 of the CISA also applied to decisions by which the Public Prosecutor discontinued criminal proceedings without the involvement of court.[9] The Court of Justice has found that the Article 54 of the CISA and the *ne bis in idem* principle also applies to procedures whereby prosecution is discontinued by the Public Prosecutor in a Member State, without any involvement of a court.[10] In both cases the decision was made by the Public Prosecutor as a criminal prosecuting authority whose power to do so arises

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[6] Joined case C – 187/01 and C – 385/01 Gözütok and Brügge [2003] ECR I-1345, paragraph 14 – 18.

[7] Joined case C – 187/01 and C – 385/01 Gözütok and Brügge [2003] ECR I-1345, paragraph 19 – 20.

[8] GŘIVNA, T. *Zásada „ne bis in idem" v judikatuře Evropského soudního dvora.* [online]. 12.11.2009 [cit. 2011-09-10]. Institut pro kriminologii a sociální prevenci. Dostupné z: <http://www.ok.cz/iksp/aidp_091112.html>.

[9] Joined case C – 187/01 and C – 385/01 Gözütok and Brügge [2003] ECR I-1345, paragraph 25,

[10] FENYK, J., SVÁK, J. *Europeizace trestního práva*. Bratislava : Bratislavská vysoká škola práva, 2008. s. 85.

from national legislation.[11] The effects of such a decision are dependent upon the accused's undertaking to perform certain prescribed obligations.[12] The accused who has fulfilled all obligations must be regarded as someone whose case has been 'finally disposed of' for the purposes of Article 54 of the CISA in relation to the acts which he is alleged to have committed.[13]

The Court of Justice further explicitly stated that no provision of the EU law made the application of the *ne bis in idem* principle conditional upon harmonization or approximation of the criminal laws of the Member States. Considering the variety of criminal laws across Europe, the application of this principle presumes the mutual trust of the Member States in their justice systems as well as the mutual recognition of decisions in criminal matters even if the outcome under their own respective laws would be different.[14] According to the Court of Justice the objective of the Article 54 of the CISA, which is to ensure that no one by exercising his/her right to freedom of movement can be prosecuted on the same facts in several states, can be achieved only if it applies to all decisions definitively discontinuing prosecutions in a Member State, even where such decisions are adopted without the involvement of a court and do not take the form of a judicial decision.[15] If Article 54 of the CISA applies only to decisions discontinuing prosecutions which are taken by a court or take the form of a judicial decision, the consequence would be that the *ne bis in idem* principle would be of benefit only to defendants who were guilty of offences which, on account of their seriousness or the penalties attaching to them, preclude the use of a simplified method of disposing of certain criminal cases by a procedure whereby further prosecution is barred.[16]

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[11] Joined case C – 187/01 and C – 385/01 Gözütok and Brügge [2003] ECR I-1345, paragraph 27.

[12] LAGODNYM, O. Nemožnost podání obžaloby v trestní věci v důsledku právní moci rozhodnutí státního zástupce o zastavení trestního stíhání, jež brání dalšímu potrestání za týž skutek. *Trestněprávní revue* 2003, roč. 2, č. 9, s. 282.

[13] Joined case C – 187/01 and C – 385/01 Gözütok and Brügge [2003] ECR I-1345, paragraph 30.

[14] Joined case C – 187/01 and C – 385/01 Gözütok and Brügge [2003] ECR I-1345, paragraph 32 – 33.

[15] Joined case C – 187/01 and C – 385/01 Gözütok and Brügge [2003] ECR I-1345, paragraph 38.

[16] The opinion of Advocate General Dámaso Ruiz – Jarabo Colomer,in Joined case C – 187/01 and C – 385/01 Gözütok and Brügge [2003] ECR I-1345, paragraphs 107 and 114.

**MIRAGLIA**

Soon after the decision in the joint cases Gözütok and Brügge a new question, dealing with a nature of the decision of the Public Prosecutor, occurred in connection with Article 54 of the CISA. The Miraglia was the case where *ne bis in idem* principle was found not to apply. This case was about Mr Miraglia who was charged with having organized, with others, the transport of heroin from Netherlands to Italy.[17] Therefore criminal proceedings were initiated against him, one in Italy and the other one in Netherlands. Dutch criminal proceedings were closed without any penalty or sanction having been imposed on Mr Miraglia after the Dutch judicial authorities decided not to prosecute him on the ground that criminal proceedings against him in respect of the same facts had been initiated in Italy.[18] In this case the Dutch judicial authorities applied the *ne bis in idem* principle laid down in Article 54 of the CISA, however, this application and interpretation had been considered as incorrect by the Italian court.[19] Hence, the Italian court referred the question to the Court of Justice whether "Article 54 of the CISA applied when the decision of the first State (Netherlands) consists of discontinuing the prosecution without any adjudication on the merits of the case and on the sole ground that proceedings have already been initiated in another State (Italy)?"[20]

The Court of Justice applied the teleological approach to the interpretation of Article 54 of the CISA.[21] Therefore, the Court of Justice ruled that a judicial decision not to pursue the prosecution on the sole ground that the criminal proceedings have been initiated in another Member State against the same defendant and in respect to the same acts, while there has been no determination of the merits of the case, cannot be considered as a decision finally disposing of the case within the meaning of Article 54 of the CISA. The Court of Justice added that although the objective of Article 54 of the CISA is to ensure that no one is prosecuted on the same facts in several Member States, applying this provision to a decision to close criminal proceedings, as in this case, would make it more difficult or indeed impossible

[17] Case C – 469/03 Miraglia [2005] ECR I-2009, paragraphs 3 and 4.

[18] Case C – 469/03 Miraglia [2005] ECR I-2009, paragraph 18.

[19] Case C – 469/03 Miraglia [2005] ECR I-2009, paragraph 24.

[20] Case C – 469/03 Miraglia [2005] ECR I-2009, paragraph 27.

[21] TOMÁŠEK, M. *Europeizace trestního práva*. Praha : Linde, 2009. s. 169.

to penalize the unlawful conduct of the defendant.[22] The *ne bis in idem* principle laid down in Article 54 of the CISA does not apply to all decision discontinuing the criminal proceedings and therefore it is necessary to consider the situation case by case.

**VAN STRAATEN**

The next case Van Straaten was about Mr Straaten who was prosecuted in the Netherlands for importing heroin from Italy into the Netherlands and for the possession of heroin in the Netherlands. However, Mr Straaten has been acquitted by way of a judgment for lack of evidence. This judgment was made by the Netherlands court. In Italy, Mr Van Straaten was prosecuted in respect of the same facts and he was sentenced to a term of imprisonment of 10 years by the judgment in absentia.[23]

So the Court of Justice was faced with the question of whether an acquittal for lack of evidence can be considered as a decision finally disposing person's trial for the purposes of Article 54 of the CISA. The answer of this question was affirmative. The Court of Justice restated the objective of the *ne bis in idem* principle in Article 54 of the CISA and it held that the non-application of this provision to a final decision acquitting the accused for lack of evidence would have the effect of jeopardizing exercise of the right to freedom movement. Moreover, the bringing of criminal proceedings in another Member State in respect of the same acts would undermine the principles of legal certainty and of the protection of legitimate expectations.[24] In respect to the finding in Miraglia case, the Court of Justice added that an acquittal for lack of evidence cannot be treated as a decision which is not based on a determination as to the merits of the case.

**GASPARINI**

In this case, the Court of Justice was faced with the question whether the *ne bis in idem* principle laid down in Article 54 of the CISA also applies in respect to a decision finally acquitting the accused because prosecution of the offence was time-barred. This question arose in the criminal procedure against the shareholders and directors of the company Minerva. They agreed to import through a port in Portugal refined olive oil from Tunisia and Turkey, which was not declared to the customs authorities. The oil was then transported

[22] Case C – 469/03 Miraglia [2005] ECR I-2009, paragraphs 30 and 33.

[23] Case C – 150/05 Van Straaten [2006] ECR I – 9327, paragraphs 20 and 21.

[24] Case C – 150/05 Van Straaten [2006] ECR I – 9327, paragraphs 58 and 59.

to Spain. The defendants devised a system of false invoicing to create the impression that the oil came from Switzerland.[25]

The Portuguese Supreme Court of Justice found that the oil actually originated in Tunisia and Turkey; however the court acquitted the defendants on the ground that their prosecution was time-barred. The criminal proceedings against the defendants had been constituted in Spain for the same criminal acts.[26] The Spanish court in respect to the decision of the Portuguese court referred the question to the Court of Justice for a preliminary ruling.

The Court of Justice held that Article 54 of the CISA does apply to a decision by which the accused is acquitted finally because of the offence is time-barred. In its reasoning the Court of Justice restated the objective of the Article 54 of the CISA according to which no person may be prosecuted for the same acts in several Member State for the same acts as those in respect of which his trial has been already finally disposed of in another Member State provided that the prosecution is time-barred and therefore cannot be longer enforced. Non-application of Article 54 of the CISA to this kind of situation would undermine the implementation of that objective.[27] The Court of Justice added that the *ne bis in idem* principle laid down in Article 54 of the CISA does apply only to persons whose trial has been finally disposed of in a Member State.[28]

**TURANSKÝ**

The next case regarding the interpretation of Article 54 of the CISA is Turanský concerned a Slovak national Mr Turanský who was suspected of serious robbery under the Austrian Criminal Code. The Austrian authorities initiated the criminal proceedings against Mr Turanský and an arrest warrant had been issue for his arrest. However, according to the information received by the Austrian authorities Mr Turanský in the meantime had returned to Slovakia. Therefore Austrian authorities requested Slovak authorities to open proceedings against Mr Turanský, in accordance with Article 21 of the European Convention on Mutual Assistance in Criminal Matters.[29]

Since the Slovak authorities approved that request, criminal proceedings were reopened, however they were discontinued after

[25] Case C – 467/05 Gasparini and others [2006] ECR I – 9199, paragraph 16.

[26] Case C – 467/05 Gasparini and others [2006] ECR I – 9199, paragraphs 17 and 18.

[27] Case C – 467/05 Gasparini and others [2006] ECR I – 9199, paragraphs 27 and 28.

[28] Case C – 467/05 Gasparini and others [2006] ECR I – 9199, paragraph 37.

[29] Case C – 491/07 Turanský [2008] ECR I - 11039, paragraphs 18 and 19.

the Slovak police decided to terminate it with the reasoning that the act of Mr Turanský does not constitute a crime under the Slovak Criminal Code. Afterward the Austrian court referred the case to the Court of Justice for a preliminary ruling question whether the *ne bis in idem* principle in Article 54 of the CISA applies to a decision made by a police authority at a stage before the charging of a person suspected of a crime, suspending the criminal proceedings which had been instituted.[30]

The Court of Justice held that the decision of the Slovak police does not, under the Slovak law, definitively bar further prosecution at a national level and hence does not preclude new criminal proceedings, in respect of the same acts, in Slovakia.[31] Therefore, this decision does not have *ne bis in idem* effect laid down in Article 54 of the CISA, even if there has been some consideration of the merits of the case. The Court of Justice ruled that a decision in order to be considered as a final disposal for the purposes of Article 54 of the CISA must bring the criminal proceedings to end and definitively bar further prosecution.[32]

**VAN ESBROECK**

In the Van Esbroeck case, the Court of Justice was faced with the question regarding the interpretation of the "same acts" in the scope of Article 54 of the CISA. This case was about Mr Van Esbroeck, a Belgian national, who had been sentenced by the Norwegian court to five years' imprisonment for illegally importing narcotic drugs. After having served part of his sentence he was released conditionally and moved back to Belgium. Later on, the prosecution was brought against him in Belgium and he was sentenced in respect to the same facts to one years' imprisonment. Mr Van Esbroeck appealed and pleaded infringement of Article 54 of the CISA. The Belgian court then had referred the question to the Court of Justice of what is the relevant criterion for the purposes of the application of the meaning of "the same acts" for the purposes of Article 54 of the CISA.[33]

In respect to this question the Court of Justice stated that the wording of Article 54 of the CISA refers only to the nature of the acts and not to their legal classification. The Court of Justice also pointed out that the application of the *ne bis in idem* principle implies that the states have mutual trust in each other's criminal justice systems. The Court of Justice added that the application of the *ne bis in idem* principle laid down in Article 54 of the CISA is not dependent upon further

[30] Case C – 491/07 Turanský [2008] ECR I - 11039, paragraphs 22 and 30.

[31] Case C – 491/07 Turanský [2008] ECR I - 11039, paragraph 39.

[32] Case C – 491/07 Turanský [2008] ECR I - 11039, paragraph 45.

[33] Case C – 436/04 Van Esbroeck [2006] ECR I – 2333, paragraph 14 - 17.

harmonization or approximation of the criminal laws of the Member States.[34]

Since the legal qualification of the offences is likely to vary from one State to another, the criterion of the identity of the protected legal interest cannot be applied for the purposes of Article 54 of the CISA. The Court of Justice finally held that in those circumstances, the only relevant criterion is "identity of the material acts, understood in the sense of the existence of a set of concrete circumstances which are inextricably linked together."[35] The definitive assessment of such an identity in the specific case belongs to the competent national courts.

**KRETZINGER**

In this case, the Court of Justice was asked by the German court during the preliminary ruling to interpret the meaning of the notions of "same acts" and "enforcement" of criminal penalties. The issue in the main proceedings was about Mr Kretzinger, who on two occasions transported cigarettes from non-Member States through Greece, Italy and Germany to the United Kingdom. The cigarettes were not presented for customs clearance at any point. Therefore, Mr Kretzinger was twice sentenced in absentia by the judgment of Italian court and he faced up to one year and eight months of suspended custodial sentence and a custodial sentence of two years which was not suspended.[36] Aware of those judgments, the German court sentenced Mr Kretzinger to one year and ten months' imprisonment in respect of the first consignment and one year's imprisonment in respect of the second one. The German court justified this judgment on the ground that two final sentences in Italy had not yet been enforced.[37] Mr Kretzinger appealed against this judgment before the German Supreme Court which referred the question to the Court of Justice.

Firstly, the Court of Justice was asked the similar question of what is the relevant criterion for the purpose of the application of the "same acts" within the meaning of Article 54 of the CISA. Following its opinion in the Van Esbroeck case, the Court of Justice restated that the only relevant criterion is the identical

[34] Case C – 436/04 Van Esbroeck [2006] ECR I – 2333, paragraphs 27 - 30.

[35] Case C – 436/04 Van Esbroeck [2006] ECR I – 2333, paragraph 36.

[36] Case C– 288/05 Kretzinger [2007] ECR I – 6441, paragraph 14 - 16.

[37] Case C– 288/05 Kretzinger [2007] ECR I – 6441, paragraphs 20 and 21.

nature of the material acts.[38] Moreover, in respect to the circumstances in the Kretzinger case, the Court of Justice held that "the 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, characterized by the fact that the defendant ... had intended from the outset to transport the tobacco, after first taking possession of it, to a final destination ... constitute conduct which may be covered by the notion of 'same acts' within the meaning of Article 54."[39]

Secondly, the Court of Justice was faced with the question of whether a suspended custodial sentence must be treated as a penalty which has been enforced or is actually in the process of being enforced. The Court of Justice agreed with the Advocate General, the governments which submitted observations and the Commission, when it held that a suspended custodial sentence penalizes the unlawful conduct of the defendant and it constitutes a penalty within the meaning of Article 54 of the CISA. Therefore this "penalty has to be regarded as actually in the process of being enforced as soon as the sentences has become enforceable and during the probation period."[40] On the other hand the Court of Justice held that this does not apply for the situation when the defendant was for a short time taken into police custody 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[41].

Summarizing the aforementioned case law we can see that the Court of Justice dealt with three main issues by the interpretation Article 54 of the CISA. Firstly, the Court of Justice discussed the nature of the decision discontinuing the prosecution. It discussed the purpose of the ne bis in idem principle and stressed the need for a mutual trust in a legal systems of the Member States. The Court of Justice concluded that any decision, even made by public prosecutor, finally discontinuing the procedure has had an effect in whole Europe. Secondly, the Court of Justice dealt with the meaning of the same act. After considering all the relevant circumstances it

[38] Case C– 288/05 Kretzinger [2007] ECR I – 6441, paragraph 29.

[39] Case C– 288/05 Kretzinger [2007] ECR I – 6441, paragraph 37.

[40] Case C– 288/05 Kretzinger [2007] ECR I – 6441, paragraph 42.

[41] Case C– 288/05 Kretzinger [2007] ECR I – 6441, paragraph 46.

preferred the material identity of the act before its legal qualification under a national law. Lastly, the Court of Justice clarified the meaning of the words penalties that has been enforced or is actually in the process of being enforced when it concluded that the penalty has to be regarded as actually in the process of being enforced as soon as the sentences has become enforceable and during the probation period. This interpretation provides very broad protection for the persons who have been charged for an offence from the multiple prosecution in more states and makes the ne bis in idem principle applicable all across the Europe.

**LISBON TREATY AND THE NE BIS IN IDEM PRINCIPLE**

With the entry into force of the Lisbon Treaty, the Charter of Fundamental Rights of the European Union ("the Charter") entered into primary EU law and has become legally binding. The Charter, which was proclaimed as a non-binding document in the end of 2000 in Nice, enshrines certain political, social, and economic rights for the European Union citizens. Article 50 of the Charter provides that 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 EU in accordance with the law. The explanatory memorandum provides that "in accordance with Article 50, the *non bis in idem* rule applies not only within the jurisdiction of one State but also between the jurisdictions of several Member States. That corresponds to the *acquis* in EU law."[42]

Although Article 50 of the Charter differs from Article 54 of the CISA, it is very similar to Article 4 of protocol no. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). The Charter seems to try to provide a minimum standard similar to the ECHR, as the EU will become a party to the ECHR. While the ECHR requires the application of the *ne bis in idem* principle only within the territory of one state, the Charter is fully transnational in the EU having much broader territorial application. Moreover, the Charter applies also to the European Union organs, which makes its application even broader than CISA.[43] On the other

[42] DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION [online]. 11 October 2000 [cit. 29 November 2011]. . Dostupné z WWW: <http://www.europarl.europa.eu/charter/pdf/04473_en.pdf>.

[43] Article 50 of the Charter of Fundamental Rights of the European Union

hand the substantive applicability seems to be more restrictive than in CISA and questionable in some aspects.

Article 50 of the Charter is quite short and its wording is not always unambiguous. "*Finally acquitted or convicted within the Union"* can mean that the litigious proceeding must take place within the Union, but can also be understood as saying that the proceeding must be in front of the Member State or the Community court. Similarly, the law can refer to *the law* of the Member State as well as to EU law. Moreover, the wording *criminal proceedings for an offence* can be explained as limiting the application of this principle only to the proceedings classified as criminal.[44] Finally the word *offence* itself refers more to the identity of a legal classification of the act than to its factual identity.

According to the Article 51 of the Charter, the provisions of the Charter are addressed to the institutions and bodies of the EU ... and to the Member States only when they are implementing EU law. It could be said that the *ne bis in idem* provision applies "only to those areas of EU law and systems of criminal law of the Member States where the EU has criminal law competence and where national criminal law has implemented EU law."[45] This is, however, a very narrow interpretation that would drastically restrict the effect of the Article 50 of the Charter. It is more likely that the Court of Justice will adopt a broad interpretation of criminal proceedings similar to the concept of criminal charge by the European Court of Human Rights. Although with broad interpretation of criminal proceedings, the Charter applies only to the EU law. Therefore the proceedings not involving EU law or laws implementing EU law probably stay out of the protection from the Charter.

Therefore, it seems that the Charter aims to supplement the CISA in case of *ne bis in idem* principle when the proceeding is in front of the EU organs. In situations where national law which has been implementing the EU law applies, the Charter and the CISA could overlap. In such a situation the one more favorable version to the charged person should apply. While the Charter does not provide the clear definition of the *ne bis in idem* principle, interpretation by the Court of Justice will be important. Presumably the Court of Justice will extend

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[44] VAN BOCKEL, B. *The ne bis in idem principle in EU law.* Alphen aan den Rijn : Kluwer Law International, 2010. s. 18.

[45] VAN BOCKEL, B. *The ne bis in idem principle in EU law.* Alphen aan den Rijn : Kluwer Law International, 2010. s. 18.

the current interpretation of the CISA to the Charter and it will adopt the understanding of some expression in Article 50 of the Charter from the European Court of Human Rights due to the similarity of both versions.

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Contact – email
ijanke88@gmail.com