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*Ne bis in idem:*  
a separation of acts in transnational cases?

by

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## Abstract

This paper analyses the case-law of the European Court of Justice on the substantive scope of *ne bis in idem* in transnational cases and evaluates the findings in light of the different concepts of legal interests inherent in the concept of crime as a material notion. I argue that the application of the interpretation of the ECJ to crimes against collective interests is insufficiently justified. As a result, the interpretation of *ne bis in idem* based on material facts appears only partially correct and a sense of distrust seems to be cemented between member states creating obstacles to a successful reform of the principle. Part one attempts to defend that the reasoning put forward by the court lacks relevance and evaluates how this affects mutual trust. Part two analyses this interpretation in the light of different forms of legal interest. Part three examines how later case-law has tried to explain the problematic interpretation of early cases and its relationship with the Charter of Fundamental Rights of the European Union. The article will conclude by summarising the findings which may put into perspective the more general challenges of cooperation in criminal matters within the EU.

## Key-words

scope of the transnational *ne bis in idem*; substantive criminal law; material facts; mutual trust; freedom of movement; area of freedom, security and justice



## 1. Introduction and goal of the research

This paper analyses the case-law of the European Court of Justice (the ‘ECJ’ or the ‘Court’) on the substantive scope of *ne bis in idem* in transnational cases and evaluates the findings in light of the different concepts of legal interests inherent in the concept of crime as a material notion. I argue that the application of the interpretation of the ECJ to crimes against collective interests is insufficiently justified. As a result, the interpretation of *ne bis in idem* based on material facts appears only partially correct and a sense of distrust seems to be cemented between member states creating obstacles to a successful reform of the principle.

*Ne bis in idem* essentially means the principle that no one shall be tried twice (commonly referred to as the criterion of ‘bis’) for the same acts (commonly referred to as the criterion of ‘idem’). It is recognised as a fundamental (or in fact constitutional) principle or fundamental right by EU member states and can be found in a variety of international law instruments (for a useful overview in this regard see Conway 2003).

Introducing a principle which bars prosecution in a member state based on a prior final judgment of the authorities of another member state (the ‘transnational application’ of the principle) is a uniquely European achievement, the only successful attempt to date. The central premise of this paper will be the problematic interpretation given by the ECJ to the criterion of *idem* in that transnational context on the basis of the flexible wording of Article 54 of the Convention implementing the Schengen Agreement of 14 June 1985 (the ‘CISA’). It follows that I am not interested in the interpretation of *ne bis in idem* in all its forms, in particular when confined to a single legal order (as a general principle of EU law or as a fundamental right), or with regards to all its elements. I will focus only on the *idem* criterion in the transnational context.

It could not be deduced from the wording of Art. 54 CISA what the ‘same acts’ in a transnational context should precisely mean. Thus, the Court was led to choose between interpreting the ‘same acts’ as meaning the ‘same facts’ (the ‘factual interpretation’) or as meaning the ‘same offences’ (the ‘interpretation based on the identity of legal qualification’; on this point see also Wasmeier 2006: 127).



The ECJ opted for the factual interpretation (C-436/04, *Van Esbroeck*, paras. 35-36; C-150/05, *Van Straaten*, paras. 47-48). It held that the application of an interpretation based on the identity of legal qualification would create obstacles to the freedom of movement. Such a solution, the Court explained, would be prone to differences between the unharmonised criminal statutes and policies of the member states.

I argue that the reasoning of the Court lacks sufficient relevance to support this conclusion. Different criminal laws are not the only reason why differences in the qualification of the same material facts may occur in different member states. After assessing the origin and consequences of the resulting deficit of justification in the case-law, I will illustrate the possible effects of an alternative basis of interpretation: the systemic role of different forms of legal interests in criminal law. To do so, I will describe the role of the legal interest in national criminal laws based on the distinction between crimes against individual and collective interests inherent in the concept of crime as a material notion.

The argument of this paper will be based on Art. 54 CISA. Article 50 of the Charter of Fundamental Rights of the European Union (the ‘CFR’), binding since 1 December 2009, introduced *ne bis in idem* as a fundamental right. However, the subsequent case-law did not (yet) directly address the problem of interpreting *idem*. I will suggest, along the lines of existing arguments in the case-law and scholarship, that adherence to the factual interpretation can be anticipated in this respect.

Some authors (van den Wyngaert and Stessens 1999; Peers 2004; Vervaele 2005; Sharpston, Fernández-Martín 2008) already expressed their similar concerns with regards to the interpretation of *idem*. However, those studies were either not yet conducted on the basis of the Court’s case-law or include a more general treatment of the matter. The present study aims to be more specific and dogmatic in its comparison of the Union case-law and national criminal laws.

It is not however my goal to work out a clear reform proposal on *ne bis in idem*. I wish only to clarify that a problem exists and suggest the relevance of legal interest, as a concept, to solving it. Part one attempts to defend that the reasoning put forward by the Court lacks relevance and evaluates how this affects mutual trust. Part two analyses this interpretation in the light of different forms of the legal interest. Part three examines how the later case-law tried to explain the problematic interpretation of the early cases and its relationship



with the CFR. The article will conclude by summarising the findings which may put into perspective the more general challenges of cooperation in criminal matters within the EU.

An evaluation of the relationship between the right to free movement and *ne bis in idem* is outside the scope of this paper. I will neither endorse nor criticise the decision of the Court to identify *ne bis in idem* as an instrument functioning within the area of freedom, security and justice. Nevertheless, the story of *ne bis in idem* in transnational cases might prove as an interesting case study on how the Court uses concepts which were not primarily devised to regulate cooperation in criminal matters to do just that.

## 2. The European experience: a broad interpretation of *idem*

The Court's early case-law on *idem*, based on Art. 54 CISA, appears to raise two problems: first, the argument of the Court to support the factual interpretation of Art. 54 CISA appears to lack sufficient relevance (in C-436/04, *Van Esbroeck* and C-436/04, *Van Straaten*) and fails to justify the application of *ne bis in idem* in the cases at hand and second, the very same reasoning seems to be present in the case-law on mutual trust (Joined Cases C-187/01 and C-385/01, *Gözütok and Brügge*) giving rise to similar concerns.

### 2.1. The justification of a factual interpretation

*Ne bis in idem* as a transnational rule in Art. 54 CISA was introduced into the EU legal order by the Annex of the Treaty of Amsterdam, which came into force on 1 May 1999, with the following wording:

‘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.’ (emphasis added)

The expressions used by the contracting states to refer to the concept of *idem* within the different language versions of Art. 54 CISA provide little help in determining the meaning of the criterion of *idem*. There are also no preparatory documents of the CISA



available (van den Wyngaert and Stessens 1999: 795). The Commission Staff Working Document annexed to the Green Paper of 2005 highlighted the flexibility of the understanding of the scope of the *ne bis in idem* provision in the CISA, also comparing it to other documents as follows:

[...] the authentic 1990 versions, Dutch (“feiten”), French (“faits”) and German (“Tat”, which in the legal language refers to a factual conduct). The official English translation [...] uses a more flexible term (“same acts”). However, the EU Convention on Double Jeopardy of 1987 also refers to “same facts”. The jurisprudence of the European Court of Human Rights refers to the “same essential elements”.<sup>1</sup> (Commission Staff Working Document 2005: 56, fn. 128)<sup>1</sup>

Whether the ‘same acts’ are to be interpreted in a factual manner or on the basis of the identity of legal qualification is crucial in the transnational context. As opposed to a factual solution, the differences between legal qualifications of the same facts in different member states may lead to a very limited scope of the principle. Thus, the primary source of interpretative difficulties seemed to be at the outset the unclear text of Art. 54 CISA.

The Court correctly observed, throughout the case-law, that the environment of criminal law was (and remains) largely unharmonised and, in those circumstances, identical acts (at this point as an undefined concept) may be regulated differently by the member states. As Professor Mitsilegas highlighted, this problem was brought to the attention of the Court by the member states (Mitsilegas 2009: 149).

It is characteristic to the case-law of the Court that the key terms used by the Court in its reasoning also had no available definition in EU law. There was no general definition of the terms ‘act’ or ‘crime’ in the sense of a definition similar to the provisions of the general part of criminal law, as conceived of in civil law jurisdictions. No settled definition of the nature and role of ‘legal classification’ or the ‘legal interest’, two central terms used by the Court, was available either, nor did a clear definition of positive conflicts of jurisdiction exist.

An understanding of the latter was later mentioned by the Green Paper of 2005 referring to ‘multiple prosecutions on the same cases’ (COM(2005) 696 final: 3; the first cases were only decided one year later). The importance of defining what precisely the



same case shall mean seems trumped here by an urge to address a problem of multiple member states asserting their jurisdiction.

The Court's assessment of the first cases *Van Esbroeck* and *Van Straaten* was conducted in this rather vague legal environment. Mr Van Esbroeck was convicted by the Court of First Instance in Bergen (Norway) for the import of narcotic drugs. Sentence served, he was subsequently prosecuted by the Correctionele Rechtbank te Antwerpen in Belgium, where the substances originated from, for the export of the same drugs. The Antwerp Court of Appeal upheld conviction by the first instance, based on Art. 36(2)(a) of the applicable 1961 UN Single Convention on Narcotic Drugs, which regards those offences as different acts. Questions for preliminary reference were raised only after a subsequent (second) appeal (C-436/04, *Van Esbroeck*, paras. 14-16).

The facts of the case of *Van Straaten* were very similar. Mr Van Straaten was convicted in the Netherlands for several crimes, and acquitted for the charge of drug trafficking, concerning substantial amounts of heroin, by a final sentence. The drugs formed part of a larger consignment of which he was in earlier possession in Italy, thus the question was raised whether the acts could be considered the same and whether Italy is barred from pursuing prosecution based on the prior sentence brought in the Netherlands (C-150/05, *Van Straaten*, paras. 19-30).

It is perhaps in light of the above lack of definition that AG Ruiz-Jarabo Colomer commenced his reasoning by stating as regards the interpretation of *idem* that 'the contingent nature of criminal law policies and the characteristics of criminal proceedings are not conducive to the creation of universally valid rules.' (Opinion in C-436/04, *Van Esbroeck*, para. 39) The meaning of *idem* could not be decided solely based on the wording of Art. 54 CISA either. Therefore, he turned to the objectives of the area of freedom, security and justice and the Schengen cooperation to find interpretative guidance.

In doing so, he observed three important reasons for rejecting an interpretation based on the identity of legal qualification: first, the importance of an extensive interpretation of safeguards to personal dignity; second, to respect the declared objective of Art. 54 CISA, which is to ensure freedom of movement for persons (also enshrined in Art. 2 TEU [now Art. 3 TFEU]); and third, to observe that the Schengen *acquis* was designed in essence to remove borders for both persons and goods. (Opinion in C-436/04, *Van Esbroeck*, para. 52)



As regards personal dignity, the AG correctly grasped the essence of *ne bis in idem* in protecting the offender from the inhuman treatment represented by multiple prosecutions and punishment for the same offence (Opinion in C-436/04, *Van Esbroeck*, fn. 10). Though it was not separately mentioned by the Court, this is also inherent in the effort to prevent *ne bis in idem* to be interpreted on the basis of merely textual differences in criminal statutes.

In relation to the freedom of movement of persons, the Court followed, with slight shifts in emphasis, every measure of the Opinion of the AG (Opinion in C-436/04, *Van Esbroeck*, para. 45). The core argument of the Court to support a factual interpretation of *idem* is set out in the judgment in *Van Esbroeck* (C-436/04, *Van Esbroeck*, paras. 35-36) and was repeated verbatim in the judgment in *Van Straaten* (C-150/05, *Van Straaten*, paras. 47-48). For these reasons I bypass presenting the AG's opinion separately, and proceed directly to the reasoning of the judgments, delivered on the same day, as follows:

'35. Because there is no harmonisation of national criminal laws, a criterion based on the legal classification of the acts or on the protected legal interest might create as many barriers to freedom of movement within the Schengen territory as there are penal systems in the Contracting States.

36. In those circumstances, the only relevant criterion for the application of Article 54 of the CISA is identity of the material acts, understood in the sense of the existence of a set of concrete circumstances which are inextricably linked together.'

This reasoning was confirmed and heavily relied upon by the subsequent case-law (*cf.* C-467/04, *Gasparini and others*, para. 54; C-288/05, *Kretzinger*, para. 33; C-367/05, *Kraaijenbrink*, para. 26).

According to the judgment, an interpretation of *idem* based on the identity of legal qualification ('the same acts' equals 'the same offense') would hamper the freedom of movement *because of* the lack of criminal law harmonisation in the EU (C-436/04, *Van Esbroeck*, para. 35, C-150/05, *Van Straaten*, para. 47) and *because of* the differences which therefore remain between the criminal laws of the member states. The AG considered that such differences would create as many obstacles to the freedom of movement, as there are penal systems in Europe (Opinion in C-436/04, *Van Esbroeck*, para. 45).



The Court observed that these findings are further reinforced by the objective of Art. 54 CISA, ‘which is to ensure that no one is prosecuted for the same acts in several Contracting States on account of his having exercised his right to freedom of movement’ (emphasis added) (C-436/04, *Van Esbroeck*, para. 33; quoting: Joined Cases C-187/01 and C-385/01, *Gözütok and Brügger*, para. 38; C-469/03 *Miraglia*, para. 32). Subsequent case-law and scholarship widely confirmed that view (Mitsilegas 2009: 143; Vervaele 2005: 100; Wasmeier 2006: 121; Joined Cases C-187/01 and C-385/01, *Gözütok and Brügger*, para. 33; C-469/03 *Miraglia*, para. 32; C-436/04, *Van Esbroeck*, para. 33; C-150/05, *Van Straaten*, para. 57; C-467/04, *Gasparini and others*, para. 27; C-297/07, *Bourquain*, para. 49).

The question of national borders was only briefly included by the AG in the Opinion. Perhaps trumped by the already existing reasoning based on the freedom of movement it was not taken on board by the Court. It is nevertheless telling that besides the objective of the Schengen cooperation to remove borders, it was very hard to explain why the existence of national borders shall not be relevant to the interpretation of Art. 54 CISA. After all, import and export seemed, perhaps also to the AG, decidedly different crimes.

The Opinion in *Van Esbroeck* laconically stated that it ‘is ludicrous to refer to import and export in a territory governed by a legal system which, in essence, is designed to remove borders for both persons and goods.’ (Opinion in C-436/04, *Van Esbroeck*, para. 52) The AG quoted the argument of Brammertz who emphasised that there is no reason to divide import and export on the basis of a border which is not even physically presented in the ground (Opinion in C-436/04, *Van Esbroeck*, fn. 25).<sup>11</sup>

Based on those arguments against the interpretation based on the identity of legal qualification, the Court concluded that the ‘same acts’ must in essence be interpreted as meaning the *same set of material facts*, which are inextricably linked together (C-436/04, *Van Esbroeck*, para. 38) in time, space and by their subject-matter (C-150/05, *Van Straaten*, paras. 47 and 53) and which therefore make up an inseparable whole (C-367/05, *Kraaijenbrink*, para. 28). It is essential to disregard, in the application of *ne bis in idem*, the differences in legal qualification and legal interest which exist between the criminal laws of the contracting states (C-150/05, *Van Straaten*, paras. 47 and 53).

Even though the ECJ must leave it to the national courts to decide whether the relevant conduct constituted the same set of material facts (C-436/04, *Van Esbroeck*, para.



38; C-150/05, *Van Straaten*, para. 52), given the facts of the first cases, the above argument of the Court alone raises obvious problems.

Specifically, the relevance of the core argument of the Court can be contested. Relevance, in this context, shall mean that the premises on which the conclusion of the Court (the factual interpretation of *idem*) is based are all relevant in light of the case-file. Only such premises seem to be able to support the truth-value of the conclusion.

The Court appears to have erred at least in asserting that, in the above cases, criminal law harmonisation was absent. Partly as a consequence, the judgments inaccurately suggest that the lack of harmonisation was the reason why the application of the criminal laws of the contracting states produced a different outcome (import on one side of the border and export on the other). Given that the Court should address the facts of the cases before it and give opinion on the meaning of Community law in light of those facts, if there can be other reasons for a different outcome in legal qualification in different member states, the ECJ did not correctly select this central premise of its core argument.

Taking the judgment in *Van Esbroeck*, the harmonisation missed by the AG and the Court was in fact present in the legislation of both Norway and Belgium, though not due to EU action, but on the basis of the UN Single Convention on Narcotic Drugs, signed in New York on 30 March 1961 (the ‘Single Convention’). The offences of import and export of contraband trafficked by Mr Van Esbroeck were criminalised based on the implementation of Art. 36 Single Convention in Norway (*cf.* Article 162b of Act No. 10 of 22 May 1902 on the general civil penal code of Norway, as amended several times) and Belgium (*cf.* Article 2a, § 1 of the Law of 24 February 1921 on trafficking of poisonous substances, soporifics, narcotics, disinfectants or antiseptics). It cannot be doubted either that the legal interests protected by the criminal statutes of Norway and Belgium were therefore identical.

It is apparent that the qualification in the contracting states as import and export was not different by virtue of a lack of harmonisation. Given the criminal laws of the member states and the extensive international legislation in this field, there is no way import and export could be harmonised to realise the same crime in terms of qualification.

The Court failed to adhere to the reality of the case-files at hand. It cannot be contested that in the field of criminal law in the EU there is a lack of harmonisation in perhaps the majority of cases. ‘In those circumstances’, this absence of harmonisation can



bear relevance. It is plausible that if (and only if) *ne bis in idem* were interpreted on the basis of the identity of legal qualification, in certain circumstances one was to worry about the negative effects of that absence of harmonisation on the freedom of movement. But this was not the case here.

Subject to this assessment, the relevance of the Court's argument is prejudiced because we can indeed conceive of cases in which a set of material facts inextricably linked together realise multiple crimes yet where those crimes could never be 'harmonised' to a degree that they become identical. In lack of relevance, the Court's conclusion on the interpretation of *idem* is only true in the limited circumstances where the premises of the argument are also true. It is therefore to be accepted that in cases where the absence of law harmonisation *is* the reason of a different qualification, the material facts can provide a suitable lowest common denominator. In those circumstances the factual interpretation will eliminate from the evaluation any discrepancies resulting from different criminal policies of member states.

In trafficking cases however, such as in *Van Esbroeck* and *Van Straaten*, the reason for a different qualification in the different contracting states is something other than the absence of harmonisation. The Court failed to address the theoretical problem that arises here directly from the facts of the first cases. Its conclusions only follow from the limited premises taken for granted. It failed to explore the implications on the meaning of *idem* in a situation, where criminal authorities come to a different outcome, but not due to the absence of harmonisation.

This is even more troublesome as the first references for preliminary ruling were precisely raised to obtain an answer to this question. Because of the irrelevance of the argument it appears that the conclusion of the Court lacks justification. The Court fell short of providing a clear explanation as to why the factual interpretation shall also apply in cases where harmonisation is in fact present and is in any case not the source of the different legal qualification.

There is room for a critical appraisal of the factual interpretation of *ne bis in idem* to trafficking cases. In fact, a broader underlying problem begins to emerge. It concerns the question whether there is a group of cases, characterised by common features, to which a different interpretation of *ne bis in idem* may be preferred. I will address this question in the following, Part 3 of this paper.



Prior to that it is necessary to discuss a second preliminary question: mutual trust. Member states heavily contested the factual interpretation of the Court. In multiple cases they demanded, on the basis of the different legal interest, that *ne bis in idem* shall not apply (cf. the submissions of the Czech Government in C-436/04, *Van Esbroeck*, para. 26 and of the Spanish and German Governments in C-288/05, *Kretzinger*, para. 32). In such cases it is common to refer to member states' behaviour as distrustful (Janssens 2013: 143).

However, the irrelevance of the central argument of the Court in favour of the factual interpretation, which is now binding, has certain implications to the extent of mutual trust inherent in the Schengen *acquis*. In order to assess the level of trust that can actually reasonably be expected from member states under such circumstances, it is necessary to revisit an earlier section of the case-law of the Court.

## 2.2. The problem beyond distrust

The ECJ based its interpretation of *idem* partly on mutual trust in both of the above mentioned landmark cases (C-436/04, *Van Esbroeck*, para. 30; C-150/05, *Van Straaten*, para. 43). The problems around the arguments of the Court presented in Part 2.1. of this paper however raise questions: how much trust can be expected from the member states in such circumstances. What is the nature of mutual trust as regards *ne bis in idem* in transnational cases?

Notwithstanding the binding nature of the ECJ case-law, the submissions of member states before the Court claiming respect for the different legal interest should be taken as a sign of concern about the application of the factual interpretation. For these reasons, I find it necessary to briefly assess the origins and implications of mutual trust on the basis of the ECJ's early judgments.

*Gözütök and Brügge* (Joined Cases C-187/01 and C-385/01, *Gözütök and Brügge*) was the first landmark case in which a measure of interpretation was given to mutual trust and the relevance of criminal law qualification in the interpretation of Art. 54 CISA (Mitsilegas 2013: 144; Vervaele 2004; Thwaites 2003). Unlike in other fields of EU law, the Court held in its judgment that based solely on the existence of Art. 54 CISA, mutual trust (a 'high level' of trust) already exists between the member states as regards their cooperation through *ne bis in idem* (Mitsilegas 2009: 107; Joined Cases C-187/01 and C-385/01, *Gözütök and Brügge*, para. 33). This mutual trust is not conditional upon harmonisation nor does it



spring from a prior assessment of convergence between criminal laws (Vervaele 2005: 113); it is implied on the basis of the legislative will behind the Schengen *acquis* (Mitsilegas 2009: 106-107).

The Court in essence held that since Art. 54 CISA does not contain any further clarification, its interpretation shall give precedence to the object and purpose of the provision rather than to procedural or purely formal matters (Joined Cases C-187/01 and C-385/01, *Gözütok and Brügge*, para. 35; Vervaele 2005: 113). As the principle must have proper effect (*effet utile*), the rule of *ne bis in idem* must mean that differences in the outcome of the application of one or the other legal system to the same acts, shall not adversely influence the recognition of Union judgments.

*Ne bis in idem* therefore implies that member states have mutual trust in each other's criminal laws and 'each of them [the member states] 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.' (Joined Cases C-187/01 and C-385/01, *Gözütok and Brügge*, para. 33)

It is immediately apparent how the reasoning of the Court adhered to a logical pattern similar to that of the judgments in *Van Esbroeck* and *Van Straaten*. The Court first established that nowhere ('neither in Title VI of the Treaty on European Union [...], or in the Schengen Agreement or the CISA itself' [Joined Cases C-187/01 and C-385/01, *Gözütok and Brügge*, para. 32]) is the application of *ne bis in idem* made conditional upon the harmonisation of criminal laws. Then it determined that '[i]n those circumstances' Art. 54 CISA must imply mutual trust and recognition (Joined Cases C-187/01 and C-385/01, *Gözütok and Brügge*, para. 33).

In those circumstances, a critical approach is warranted to mutual trust and recognition along the lines already illuminated regarding the factual interpretation of *idem*. Mutual trust and recognition seem not to extend to cases in which harmonisation is not the source of the difference in legal qualification.

It cannot be contested that a direct disregard of the requirements following from Art. 54 CISA and the Court's case-law shall be viewed, besides constituting a violation of EU law, as characteristic of distrust. As Professor Mitsilegas emphasised, the later case of *Kretzinger* was an instance of outright opposition by the German authorities to recognise the decisions brought about by Italy. The existence of those decisions was well-known to the German court of first instance (Mitsilegas 2009: 150-152). Only through appeal against the



second decision was the defendant able to achieve that a question is referred to the ECJ for preliminary ruling.

However, the conclusion of the Court suggesting such a general mutual trust to exist between member states seems, subject to the above, flawed. According to the Court, mutual trust and recognition only exist due to the existence of Art. 54 CISA in a field of law characterised by the absence of law harmonisation. The judgment seems to ignore the fact that the different wording of criminal statutes is not the only reason why the acts realised by the same offender may be considered separate. What is compared is not (only and in all cases) the wording of criminal statutes, but the resulting qualification.

*A fortiori* it seems inaccurate to suggest that member states are distrustful in cases where they are suspicious about the factual interpretation of *idem*. The above described mutual trust does at all not seem to extend to cases where legal qualification differs due to reasons other than the absence of harmonisation. This restricted, implied mutual trust does not justify distrust in trafficking cases.

In the following part, I will attempt to provide a possible explanation for the relationship between the Court's general reasoning and the concepts of legal interest inherent in the criminal laws of the member states. This approach may provide an explanation also for why member states claim that the Court should have taken into consideration legal interests in the interpretation of *ne bis in idem* in such cases.

### 3. Material facts and crime as a material notion

Simply stated, the argument I wish to defend is that *committed* offences are not identified by the wording of the relevant criminal provisions. Their quantification should be based on their material content.

It appears that the Court was forced to consider the question of harmonisation as important. In interpreting Community concepts, the Court is essentially confined to Community law, unless it is otherwise specifically authorised to provide interpretation in the light of national law. Such authorisation was not present in the CISA or elsewhere. Furthermore, as I mentioned above, the Community legal order does not define the concepts of crime, legal qualification or legal interest. In fact there is very little that is offered in EU law concerning a general definition of crime or the general principles of



criminal law (essentially the provisions of the general part of criminal law, as conceived of in civil law jurisdictions).

In those circumstances, the Court could not draw conclusions from existing criminal law concepts. It arguably found itself confined to consider legal qualification in criminal law simply as an exercise of correlating material facts to criminal provisions. That situation indeed suggests, along the lines of the case-law, that the most important concepts relevant to the interpretation of *idem* are the identity of material facts and the identity of criminal provisions. The interpretation of Art. 54 CISA based on the identity of material facts would indeed, in a number of cases, imply that *ne bis in idem* does not apply because of the mere differences in how criminal provisions are formulated by member states. Thus, I cannot contest that in some cases, as I will elaborate below, the Court's decision to apply a factual interpretation is warranted.

The central argument of the Court's case-law proved nevertheless invalid. In the landmark case of *Van Esbroeck*, the different legal qualification in the different contracting states was not the result of the absence of harmonisation, as the Court suggested. This proves that the Court's above reasoning does not address all issues around the interpretation.

The case-law, due to the abovementioned contextual limitations, does not seem to bring to light the core theoretical issue around the interpretation of *idem*. Instead of attempting to improve on the available factual interpretation, it is perhaps more important to investigate from the perspective of national criminal laws, how the identical or separate nature of acts should be determined.

I argue that even in a borderless area of justice, certain forms of crime distinguish themselves from others on the basis of the interests the relevant criminal provisions protect. What can split opinions over the factual interpretation of the transnational concept of *ne bis in idem* seems to be the systemic role of the classical division of legal interests into *individual* and *collective interests* (Anastasopoulou 2005: 27; Duff 2013: Section 4; Hefendehl 2012: 507).

Member state legal orders conceive of crime in their jurisdiction not solely as qualification, but as conduct which represents harm, or at least danger, or a certain wrongdoing to interests protected by their criminal law (Roxin 2006: 13-14; Eser 1966: 347). As Professor Eser highlighted quoting Jerome Hall, 'harm is the very essence of the



crime or, as Hall calls it, the „fulcrum between criminal conduct and the punitive sanction.” (Eser 1966: 345) Harm is the *ratio essendi* of crime as committed, which – in conjunction with the subjective *mens rea* – triggers punitive reaction and is ‘in one way or another [...] almost universally recognized as a material element of criminal law.’ (Eser 1966: 363)

The resulting concept of crime can be referred to as the material notion of crime (Roxin 2006: 8-47). Whether criminal law is conceptualised as instrumental or moralistic, some form of harm or danger to certain goods or interests or wrongdoing plays an essential role in creating the basis on which certain criminalised conduct is linked to legal punishment (Duff 2013: Section 4).

The role of the legal interest is to represent and qualify the interests on which harm is inflicted (Roxin 2006: 8-47). The role of differentiating individual and collective legal interests is relevant, as it helps to specify the carrier of the legal interest<sup>III</sup>, the person or community whose interests are affected by the relevant criminal conduct.

In the case of individual interests, such as life, physical integrity, private property, etc., the carrier of the legal interest is the individual, whose dignity of existence is the basis for criminalisation (Anastasopoulou 2005: 28, quoting Baumann/Weber/Mitsch, Jescheck/Weigend, Hassemer, Martin; see also in detail Feinberg 1984). This is true even if the concept of collective interest also protects a broader trust in the security and order of a society.

The factual interpretation devised by the ECJ appears relevant and addresses an important theoretical problem in case of violations of *individual interests*. The possibility of divergent qualifications and formulations of interests by member states may create an unpredictable application of *ne bis in idem*. While this is true, the legal interest concerned in the criminal proceedings in all relevant member states will essentially be the same personal legal interest irrespective of its formulation.

Based on the identity of the holder of the legal interest, it is ensured that the member states assert jurisdiction over the same instance of harm and substantively the same crime. Therefore, in such cases the identity of material facts is likely to coincide with the identity of the carrier of the legal interest, whatever the formulation of the legal interest may be. It is clear that in the later case of *Bourquain* (C-297/07, *Bourquain*, para. 19) an act of murder



constituted both a single set of material facts and, without doubt, one single violation of an individual legal interest: human life.

In the application of *ne bis in idem* to crimes against individual interest the factual interpretation favouring free movement indeed continues to be preferable. Divergent formulations are possible in the case of the criminal provision or legal interest invoked protecting the same carrier. The Court's apt reasoning asserts that relying on the factual interpretation is necessary to avoid the negative effects on the freedom of movement and the dignity of the offender.

*Collective legal interests* on the other hand are usually carried by the entirety of society. They concern interests of the broader public, such as the undisturbed and reliable functioning of a member state's economy, public order, the integrity of essential state functions (see in detail at Hefendehl 2002). This is based on the consideration that it is the objective of criminal law to ensure the smooth functioning of society and the preservation of order (Walker 1980: 18, quoting Devlin 1965: 5). Therefore, collective or shared goods provide essential preconditions for individual flourishing ([also references by] Duff 2013: Section 4).

The member state, as a collective entity, is the carrier of the legal interest in cases of continuing transnational crime. It is (at least partially) in the interest of the entire society of a member state to repress the illegal trafficking of contraband into or from the state territory and to prevent the circulation thereof on the market. Similarly, it is in the interest of the entire society to preserve the member state's environment, to ensure budget incomes or to prevent money laundering. Collective interests appear to be relevant to a larger variety of crimes, including i.a. environmental crimes with effects across multiple member states, terrorist activities or large-scale cybercrimes against multiple (or joint) member state interests.

What distinguishes transnational crimes against collective legal interests is that the carriers whose legal interests are violated by the same material facts (the different member states) are not identical. Also in this case, the formulation of legal interests and criminal provisions may differ from member state to member state.

In light of the case-law, the conventional concept of jurisdiction in continuing transnational crimes appears to be superseded only because of the objectives of the European cooperation after the Treaty of Amsterdam (*cf.* Opinion in C-436/04, *Van*



*Esbroeck*, para. 52): to ensure the right to freedom of movement in the area of freedom, security and justice (Art. 2 TEU [now Art. 3 TFEU]) and to remove borders in the Schengen cooperation (Preamble to the CISA). Those objectives without doubt are meant to facilitate an ever closer Union (Art. 2, 2nd subpara. TFEU [former Art. 1 TEU]).

Yet in cases of trafficking in contraband, every time an offender crosses a new border, his acts violate the relevant legal interest of a new carrier, the collective in the member state he has entered. Every time the effects of the acts of an offender are felt in a new member state, those effects constitute the violation of a new carrier's legal interest. Crimes against collective interests can in this sense be considered domestic to the affected member states and materially distinct.

Van den Wyngaert and Stessens asserted convincingly in 1999 (before the case-law of the Court was available) that in case of continuing transnational crimes, Art. 54 CISA does not, in the context of international law, bar states from punishing such crimes partially committed in their territory (Van den Wyngaert, Stessens 1999: 795). That argument was based on the conventional jurisdictional principle of territoriality paired with an analysis of the wording of the CISA. They envisaged the relevance of Art. 36(2), pt. (a) of the Single Convention to the interpretation which states that, when committed in different states, acts of drug trafficking shall constitute separate offences (Van den Wyngaert, Stessens 1999: 795).

Despite the definitive interpretation of *ne bis in idem* delivered by the ECJ, the concerns raised by van den Wyngaert and Stessens appear to still be present today. In Part 2.1. of this paper I mentioned that both case-law and scholarship maintain that *ne bis in idem* avoids a scenario in which the offender is prosecuted twice for the same acts *on the account of* having exercised the freedom of movement. Exactly the contrary seems to be true in case of crimes against collective interests.

It seems more accurate to say that the offender, committing crimes against collective interests, would in fact be enabled by the factual interpretation of *ne bis in idem* to commit crimes of the same nature in a sequence of member states he enters. Art. 54 CISA clears the path in front of the offender, thus allowing him to proceed from member state to member state with impunity, trusting in the applicability of *ne bis in idem*.

An important *caveat* shall be introduced here. The definition of legal interest and the specification of the relevance of certain crimes to individual and collective legal interests is



itself much disputed (see for a cross-cut Roxin 2006: 8-47). Elaborating a definitive position seems at this point as little possible as desirable. However, the inconsistencies highlighted herein can nevertheless be addressed by a supranational discussion and eventually legislative solution.

In Part 2.2. of this paper, I show that the Court applied a very similar reasoning (based on the absence of harmonisation) to mutual trust as it did to justify the factual interpretation of *idem* later on. I also show that it is therefore inaccurate to suggest that member states behave distrustful by reason of having doubts over the justification of the factual interpretation in cases where the argument of the Court seems to misinterpret the facts.

Subject to the above discussion, I daresay that since mutual trust is restricted to harmonisation-intensive cases, in the case of crimes against collective interests a critical attitude towards the factual interpretation is a natural state of affairs in the member states. This critical attitude is not *per se* distrust, it should perhaps be viewed as a genuine claim for a clear justification of an interpretation of *ne bis in idem* faithful to the theoretical problems raised herein. This claim might be the reason for the three further preliminary references raised by national judges, asking for the interpretation of *idem*, even after the Court delivered a definitive interpretation in *Van Esbroeck* and *Van Straaten*.

#### 4. Interpreting the early case-law: later-judgments and the CFR

It remains to focus on the later developments of the ECJ case-law and European legislation. Two aspects must be assessed: how the factual interpretation has fared under the circumstances of later cases before the Court; and how the fundamental right enshrined in Art. 50 CFR might influence future interpretation. In both respects, the emphasis is on how the Court attempted to refine the early interpretation of *idem*.

##### 4.1. The later case-law: the road to the CFR

By the time the Court had to deliver on *Gasparini and others*, there was a clear tension between the interpretation of Art. 54 CISA and the interpretation of *ne bis in idem* as a general principle of EC law (Opinion in C-467/04, *Gasparini and others*, para. 63). AG Sharpston attempted a more comprehensive analysis of the context of Art. 54 CISA and



found, due to a dearth of legislative clarification, a further tension between the right to freedom of movement and a high level of safety and the effective control of crime as two equally important and fundamental objectives of the area of freedom, security and justice (Opinion in C-467/04, *Gasparini and others*, paras. 82-84 and 97).

The case of *Gasparini and others* is even more relevant here, as the objective of a high level of safety appears to counter-balance the freedom of movement as objectives of the Treaties. As the Court however did not consider this a viable basis for the limitation of the applicability of the factual interpretation, it remains to date only a possibility.

With regard to the tension between different forms of *ne bis in idem*, in its judgment in *Cement* (Joined cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, *Aalborg Portland A/S et al. v. Commission of the European Communities*), the ECJ set a higher bar to qualify the basis for the two accusations as the same acts compared to *Van Esbroeck* (Opinion in C-467/04, *Gasparini and others*, para. 155). It applied the ‘threefold condition’ of ‘identity of the facts, unity of offender and unity of the legal interest protected.’ (Joined cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, *Aalborg Portland A/S et al. v. Commission of the European Communities*, para. 338) In her Opinion, the AG proceeded to see why in such cases, and not in transnational cases, the legal interest should be endorsed, even though as matter of logical necessity substantially similar Union concepts shall be interpreted in fundamentally the same way (Opinion in C-467/04, *Gasparini and others*, para. 156; Sharpston, Fernández-Martín 2008: 445).

The AG admitted that it lies at the heart of a domestic principle of *ne bis in idem* that society has ‘one shot’ at settling its accounts with the offender (Opinion in C-467/04, *Gasparini and others*, paras. 70-72). That is the essence of the double jeopardy rule which, it should be noted, only applies with full theoretical purity in cases confined to a single legal order governed by a uniform set of rules (Opinion in C-467/04, *Gasparini and others*, para. 72).

The *transnational nature* of Art. 54 CISA distinguishes it from the general principle of EC law and warrants a departure from its interpretation. In transnational cases she did not supersede the main interpretative basis of the earlier cases, only stated that the freedom of movement would be hollowed out, were the legal interest the factor determining the identity of acts. That led to the conclusion which essentially corresponded to the Van



Esbroeck-doctrine, which was thus confirmed both by the AG and the Court (C-467/04, *Gasparini and others*, paras. 54-56). Thus, in the area of freedom, security and justice ‘different domestic legal orders may be expected to seek to protect very varied legal interests through the medium of their criminal laws.’ (Opinion in C-467/04, *Gasparini and others*, para. 158)

Despite reaching the important observation that a balance needs to be struck between the freedom of movement and a high level of safety ensured to citizens (none of which objectives of the area of freedom, security and justice was given precedence over the other by Art. 2 or 29 TEU), much like in the earlier case of *Miraglia*, the AG in *Gasparini and others* also only viewed such a balance to be relevant to require a substance-based assessment of the case in the first member state as necessary to trigger *ne bis in idem*. As in *Miraglia*, a decision on the discontinuance of investigation on the basis that a criminal procedure is already initiated in another member state did not bar further prosecution (C-469/03, *Miraglia*, para. 36), a time-bar based on the law of the first member state shall also have no such effect, subject to certain conditions (Opinion in C-467/04, *Gasparini and others*, para. 120) as that would mean a similar absence of a substance-based assessment of the case in the first member state. Such a solution would not have prejudiced the notion of mutual trust either (Opinion in C-467/04, *Gasparini and others*, para. 106 and on-going).

The reasoning of the AG was not accepted by the Court, which shows that the Court attributes even less relevance to the high level of safety in interpreting the principle. The Court concluded, based on an argument on mutual trust, that a time-bar shall also trigger the application of *ne bis in idem* (C-467/04, *Gasparini and others*, para. 28-33).

The reference to a high level of safety did not even come close to being extended to influence the general meaning of the same acts. The reasoning of the AG reinforces the idea of *ne bis in idem* as a free-standing, *propriae naturae* principle, a uniquely supranational concept within the Community (Opinion in C-467/04, *Gasparini and others*, para. 81). In that regard, the primary task of the ECJ within its ‘hermeneutic monopoly’, lacking legislative measures, is to give proper effect to the principle in the context in which it applies (Opinion in C-467/04, *Gasparini and others*, para. 80). Some reasoning can be supplied therefore to support that even in cases where a difference of qualification or the legal interests is not a result of the lack of harmonisation, *ne bis in idem* must receive that proper effect, which must be grounded in a uniform interpretation.



The main line of reasoning in *Gasparini and others* was later confirmed as an autonomous, supranational concept by the subsequent case-law (cf. C-288/05, *Kretzinger*, para. 29; C-261/09, *Mantello*, para. 39). The later case-law of the Court, before Art. 50 CFR became binding law in 2009, essentially maintained the earlier findings and even ascertained their individual implications in a variety of special circumstances.

Mr Kretzinger received multiple consignments of contraband foreign tobacco in one member state and imported the same tobacco into another member state and continued to be in possession of the same there. From the outset, he intended to transport the tobacco to a single final destination (the United Kingdom) through multiple member states. (C-288/05, *Kretzinger*, paras. 14-15) Apart from ascertaining the application of *ne bis in idem* regarding first decisions brought *in absentia*, the ECJ reaffirmed that national courts, when carrying out their assessment, must confine themselves to examining whether the relevant acts constitute a set of facts which are inextricably linked together in time, in space and by their subject-matter, and considerations based on the legal interest protected are not to be deemed relevant (C-288/05, *Kretzinger*, para. 34).

In *Kraaijenbrink*, the Court affirmed that even a chain of individual money laundering acts, relating to the proceeds of the same act of drug trafficking (C-367/05, *Kraaijenbrink*, paras. 13-14), may be considered the same acts where they proceed through the national borders. Thus, the Court itself verified that the complete identity of facts is not necessary to establish *idem* (C-367/05, *Kraaijenbrink*, para. 36). It also affirmed however that the unity of the *mens rea* alone does not suffice for an inextricable link where such a link otherwise does not follow from the material facts themselves (though it might strengthen the link between facts; C-367/05, *Kraaijenbrink*, para. 29).

In further cases closed before the CFR became binding in December 2009, the Court provided some details to the interpretation of *idem*, though the questions were aimed at essentially different points.

In *Bourquain*, the Court was presented with a case-file on an act of murder, thus the identity of material facts received less attention. The procedure essentially concerned the applicability of Art. 54 CISA subject to the enforcement requirement, where criminal proceedings instituted in a Contracting State against an accused whose trial for the same acts 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 have



been enforced. The Court affirmed the applicability of the principle and the identity of the material facts did not stand in question (C-297/07, *Bourquain*, para. 53).

In the judgment in *Mantello*, the Court laid down that the interpretation of *ne bis in idem* under Art. 54 CISA extends to the rule contained in Article 3(2) of Framework Decision 2002/584/JHA on the European Arrest Warrant. Subject to that decision, in the broader context, *ne bis in idem* is essentially interpreted in accordance with the Van Esbroeck doctrine also as regards Framework Decision 2009/948/JHA on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings (C-261/09, *Mantello*, para. 44). This reinforces observations that logically, *ne bis in idem* shall be interpreted uniformly throughout the EU legal order, which might bear, according to Tomkin, implications in favour of a factual approach in the later interpretation of Art. 50 CFR (Tomkin 2014: 1398-1399).

In essence, the core of the interpretation of the judgment in *Van Esbroeck* was carried through and further elaborated upon in the later cases, without a material restriction on the factual interpretation. In that respect the later case-law can be viewed as a bridge between the earlier cases and the case-law directly based on the CFR. A separate assessment of the latter will now follow.

#### 4.2. *Ne bis in idem* as a fundamental right of the European Union

Art. 50 CFR introduced a fundamental right not to be tried or punished twice in criminal proceedings for the same criminal offence (the ‘fundamental right’) with the following wording:

‘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.’ (emphasis added)

The CFR did not inherit the ambiguous expression ‘the same acts’ from CISA. Instead, it refers to ‘an offence’, which brings it closer to the wording of Article 4, Protocol 7 of the European Convention on Human Rights (the ‘ECHR’). The departure from the wording of CISA could suggest that the fundamental right is to be interpreted on the basis of the identity of legal qualification. This would give the fundamental right a narrower scope and,



if true, it would have changed the understanding of *ne bis in idem* in the EU significantly.

However, for structural and empirical reasons, even in the current absence of definitive ECJ case-law, such departure from the already existing case-law seems unlikely. In fact, a degree of convergence can be anticipated between the interpretation of the earlier case-law and the CFR. I will devote the remainder of this part to ascertain the basis for that proposition.

The Explanations relating to the Charter of Fundamental Rights (2007/C 303/02), which are to be considered in the interpretation of the CFR (Art. 6(1), 3rd subparagraph TEU; Art. 52(7) CFR; C-617/10, *Åklagaren v Åkerberg Fransson*, para. 20), state that the ‘very limited exceptions’ in Arts. 54 to 58 CISA which permit ‘member states to derogate from the ‘*non bis in idem*’ rule are covered by the horizontal clause in Art. 52(1) CFR concerning limitations’ (C-129/14 PPU, *Spasic*, paras. 54-55). Thus, the enforcement requirement (‘if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced’) and the requirement of final judgment specified in Art. 54 CISA both apply in case of Art. 50 CFR.

Moreover, Art. 52(3) CFR can be interpreted in a manner requiring the essential meaning of Art. 50 CFR to correspond to the meaning of Art. 4 Protocol 7 ECHR. Though since the ECHR applies only in cases confined to a single legal order, the room for uniform interpretation is difficult to delineate in transnational cases. Even so, the latest case-law yields some valuable precursors to a close relationship between the fundamental right and the ECHR, as suggested by the AG and Court in the case of *Åkerberg Fransson* (C-617/10, *Åklagaren v. Åkerberg Fransson*), probably the most significant judgment of the ECJ opening up the post-CFR period.

The case of *Åkerberg Fransson* was significant in more respects. The most important aspects relate to the application of the restriction in Art. 51(1) CFR (as regards admissibility), the extension of the applicability of the CFR to sanctions criminal in nature (administrative penalties for failing to declare and pay VAT) and the scope of the facts as suggested by AG Cruz Villalón.

As regards Art. 51(1) CFR, the Court observed that fundamental rights are only addressed to the member states where they implement Union law as, in line with Art. 6(1) TEU, the application of fundamental rights may not extend Union competences beyond the boundaries laid down in the Treaties. It follows that fundamental rights can neither be



applied in cases where the member states do not implement Union law, nor does the ECJ have jurisdiction to ascertain any such application outside the scope of Union law.

The ECJ observed that there is a direct link between the collection of VAT revenue in accordance with European Union law and the availability to the European Union budget of the corresponding VAT resources. A lack of collection in respect of the first may lead to the reduction also in the second. Besides, several legislative measures have been taken at supranational level to ensure the effective collection of VAT in the Union (*cf.* Council Directive 2006/112/EC; Art. 4(3) TEU; Art. 325 TFEU).

The Court stated that subject to the above, tax penalties and criminal sanctions constitute an implementation of the referenced Union legislation, and thus fall into the ambit of Union law for the purposes of the application of Art. 50 CFR with a view to Art. 51(1) CFR. The Court essentially held that implementation does not require the relevant national provisions to be put in place by the member state, based on a clear command of Union law with a specific content, but it is sufficient if the relevant penalties and sanctions are designed to ensure the effect of Union law (penalise the violation of its transposing measures).

As regards penalties criminal in nature, Art. 50 CFR does not preclude member states from implementing parallel administrative and criminal penalties for tax offences. Only if the tax penalty is criminal in nature is its joint application with applicable criminal sanctions precluded.

To test whether such a penalty is criminal in nature, the ECJ held that three conditions shall be assessed (the so-called *Engel* criteria in the case-law of the European Court of Human Rights [the 'ECtHR']): the legal qualification of the offence under national law, the nature of the offence, and the nature and degree of severity of the penalty that the person concerned is liable to incur. Thereby, the Court essentially imported ECtHR case-law, with the solicitation of its earlier judgment in *Bonda* (C-489/10, *Prokurator Generalny v. Bonda*, para. 37, referring to ECHR, *Engel and Others v. the Netherlands*, §§ 80 to 82 and ECHR, no. 14939/03, *Sergey Zolotukhin v. Russia*, §§ 52 and 53). Thus, the Court ascertained that even though Union law does not govern the relationship between the regime established by the ECHR and the member states legal orders, it avails itself of the ECtHR case-law under Art. 52(3) CFR where the proper effect of Union law so requires.

Finally, while the Court was not called to address directly the meaning of *idem* (the



wording ‘an offence’) in *Åkerberg Fransson*, nevertheless, AG Cruz Villalón considered what the provision might entail in this regard, given the current stage of development of both EU law and the case-law of the ECtHR. The ECtHR had previously ruled in the case *Zolotukhin v Russia* (No. 14 939/03, *Sergey Zolotukhin v Russia*) where, though in a case confined to a single legal order, the ECtHR substantially adopted the factual interpretation of *ne bis in idem* after conducting a survey on the different interpretations of *ne bis in idem* throughout major legal orders (Opinion in C-617/10, *Åklagaren v. Åkerberg Fransson*, para. 77). That interpretation was consistent with the interpretation given by the ECJ on the basis of Art. 54 CISA (Opinion in C-617/10, *Åklagaren v. Åkerberg Fransson*, para. 77).

Thus, AG Cruz Villalón subscribed to the view that, based on Art. 52(3) CFR, the *Zolotukhin* line of reasoning (No. 14 939/03, *Sergey Zolotukhin v Russia*, paras. 78-84) may be adopted for the purpose of interpreting the CFR provision (Opinion in C-617/10, *Åklagaren v. Åkerberg Fransson*, para. 91).

Even if, in the future, the ECJ would later divert from that approach, the wording of Art. 50 CFR seems to be essentially linked to the fact that (as made clear by Art. 51(1) CFR) the CFR only applies in cases where member states are implementing Union law. It forwards the view, also argued elsewhere in the case-law on Art. 54 CISA (C-467/04, *Gasparini and others*, para. 154), that a concept closer to the identity of an offense can be accepted where its application is substantially confined to a single legal order.

It shall be noted in that regard that an interpretation based on the identity of legal qualification and the legal interest could also be supported by the fact that based on Art. 51(1) CFR, the fundamental right only applies where the member states are implementing Union law. This could be considered, as we have seen in other cases, indeed a single legal order. However, the conclusions of *Åkerberg Fransson* show that it is sufficient that the case falls within the broader ambit of secondary legislation, as the Swedish provisions on sanctions for VAT evasion did. As this broad nexus does not itself equate implementation with harmonisation, as would be required by the earlier case-law on *ne bis in idem*, it appears to be a weaker reason to divert from the earlier case-law.

In those circumstances it can be assumed with a degree of probability that the interpretation of Art. 50 CFR regarding the substantive scope of the provision in transnational cases, will follow the lines of the earlier case-law based on Art. 54 CISA.

In the latest cases before the ECJ, *M* and *Spasic*, the application of the factual



interpretation of the same acts, specifically those of sexual violence against a child and counterfeiting money, did not come in question. It was neither questioned, nor in fact to be clarified, whether the acts were the same. The ECJ verified the applicability of the restrictions under Art. 54 CISA to the CFR, as indicated in the Explanations to the CFR.

In *M*, it ascertained the applicability of the criterion of final judgment in the CISA case-law as an exception to the fundamental right. Thus, a sentence on discharge, which leaves the possibility to reopen the case on the basis of new evidence, can be regarded as final also under the CFR (C-398/12, *M*, para. 25).

The question similarly only circled the topic of substantive scope in the most recent decided case of *Spasic*, where both questions with regards to the applicant were related to the application of the enforcement requirement of Art. 54 CISA under Art. 50 CFR (C-129/14 PPU, *Spasic*, para. 41). Nevertheless, AG Jääskinen specifically held that the case fully comes under the scope of Art. 54 CISA, as the requirements of the same facts are fully satisfied with a view to the commanding case-law, the proceedings ‘concern the same acts and, *mutatis mutandis*, the offence of fraud.’ (Opinion in C-129/14 PPU, *Spasic*, para. 36-37) It appeared thus that both the conditions for the application of the CISA and the CFR have been satisfied, without having to separately assess the exact meaning of Art. 50 CFR in relation to the CISA.

The Court held that the mere payment of a fine by a person sentenced by the self-same decision of a court of a member state to a custodial sentence that has not been served is not sufficient to satisfy the enforcement condition (C-129/14 PPU, *Spasic*, para. 86).

## 5. Concluding remarks

In this paper, I examined the arguments raised by the ECJ in the process of developing a uniform interpretation of Art. 54 CISA. The Court opted in a sequence of cases to base the meaning of *idem* on the identity of a set of inextricably linked material facts. Despite the strong criticism this approach elicited from member states, it appears that those early findings of the Court will, also on the basis of Art. 50 CFR, continue to determine the substantive scope of *ne bis in idem* in transnational cases.

However, the analysis also concluded that the same case-law, despite the clear questions raised by the referring judges, assessed a theoretical problem different from the



one arising from the facts. As a result, the core argument of the Court lacks the necessary relevance to support the conclusion that a factual interpretation is the most apt in *all* cases coming under the scope of *ne bis in idem*.

As a conclusion of Part 3, I suggested that the theoretical problem which should be addressed is the conceptual role of a distinction between different forms of legal interests protected by the criminal laws of the member states. The current factual interpretation appears, *ceteris paribus*, correct only in case of crimes against individual interests. Crimes against collective interests violate distinct interests of multiple carriers and are therefore considered as materially distinct crimes by national criminal laws.

Subject to the above, a reform appears desirable. A broader discussion on the treatment of different crimes under *ne bis in idem* should precede the creation of the supranational provisions. This is something the procedure of integrating the Schengen *acquis* into Union law has definitely lacked. Only after those preliminary affairs have been dealt with, can individual dignity be properly weighed against the claim of member states for the right to punish. It is of foremost importance to clearly establish the competence of the European Union to make legislation based on which individual dignity, stemming from the EU legal order, may supersede the criminal laws of the member states in the vacuum of justification elaborated in this paper.

I restricted the objective of this paper to ascertaining the core problem around the factual interpretation of *ne bis in idem*. It perhaps deserves extensive further research to ascertain how the legal framework could and should be amended.

Parallel to the discussion on *ne bis in idem*, it is often asserted that general rules on jurisdiction in criminal matters at EU level could supersede the problem. A Communication from the Commission to the Council and the European Parliament in 2000 stated that ‘an EU-wide system of jurisdiction would all but make *ne bis in idem* unnecessary at EU level, given that for each case, only one Member State would be competent to rule.’ (COM/2000/0495 final, point 6.2)

However, even a discussion on EU jurisdictional rules could not escape taking into account the role of different forms of legal interests in national criminal laws. To maintain the already afforded level of protection, the member states were to explicitly agree that only one of them shall have the right to punish offenders of transnational crimes proceeding through the territory of multiple states. Considering the general attitude of member states



and the above discussion, such an agreement will be difficult to reach (on this point I agree with the concerns raised by Peers 2006: 220).

Lifting the safeguard of *ne bis in idem* in case of offenders of crimes against collective values could be the other solution. As a serious limitation to the freedom ensured by the current interpretation, it is a less costly enhancement of criminal reaction than the adoption of additional measures to combat serious transnational criminality. Should member states decide to apply this option in the future, this must be spelled out in due legal form.

The accession of the EU to Protocol No 7 of the ECHR could be seen as an occasion to re-think how *ne bis in idem* should be interpreted in transnational cases in the EU. It is not likely though that the ECHR alone can solve the interpretative challenges in a transnational context. *Ne bis in idem* under the ECHR applies within a single national legal order and even so, as I attempted to highlight, the ECtHR itself adopted, in certain circumstances, the Van Esbroeck-doctrine.

In my view, *ne bis in idem* should remind us of the importance of taking a cautious approach to the development of complex Union concepts which are systematically opposed by member states. As we have seen in historical cases such as *Solange*, it pays to be suspicious where a distrustful attitude becomes common among member states. Acting upon that suspicion might yield the desired rewards of a progressive (or at least in-depth) discussion.

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<sup>1</sup> In addition it shall be noted that Article 4 of Protocol No 7 of the European Convention on Human Rights and Fundamental Freedoms and Article 14(7) of the International Covenant on Civil and Political Rights also use the expression 'an offence'.

<sup>11</sup> The Opinion of the AG quotes Brammertz, S., 'Trafic de stupefiants et valeur internationale des jugements répressifs à la lumière de Schengen', *Revue de droit pénal et de criminologie*, November 1996, 1077-1078: 'Why regard trafficking between Eupen and Liège as a single criminal offence and divide trafficking between Eupen and Aix-la-Chapelle into two distinct acts on the basis of a border which is not physically represented on the ground?' (Opinion in C-436/04, *Van Esbroeck*, fn. 25) One might ask whether it would have made a difference if the border were physically represented on the ground.

<sup>111</sup> The term 'carrier of the legal interest' follows the meaning of the commonly used term in German scholarship (Rechtsgutsträger). I borrowed the translation from Simester et al. (eds.) 2014: fn. 34, where further guidance can be found regarding the difficulties that characterise translating the relevant terms into the English language.



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