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Freiburg Proposal on Concurrent Jurisdictions and the Prohibition of Multiple Prosecutions in the European Union

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and the Prohibition of Multiple Prosecutions
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**With a Preface by
Albin Eser**



Freiburg im Breisgau 2003

Preface

The principle of not prosecuting a person for the same act twice, as traditionally expressed by the maxim *ne bis in idem*, has for a long time been conceived of as a merely internal rule of domestic criminal justice. Thus, if a defendant had been convicted in country A for having committed manslaughter on this territory, on return to his home country B he took the risk of being prosecuted once more - and perhaps for the graver crime of murder - by the jurisdiction of his citizenship. In such a situation, individual justice (in the sense of not being prosecuted twice) took second place behind the public sovereignty interests of the different national jurisdictions involved. Meanwhile, however, whether it be through growing sensitivity to fairness in criminal justice or because of the increasing number of transnational implications of crimes and criminals or simply for the pragmatic reason of avoiding the costs of multiple prosecutions, there has been a clear trend towards recognising the principle of *ne bis in idem* beyond national borders.

Although this common aim is still approached in different ways and to more or less far-reaching degrees, as, for instance, already prohibiting a second *prosecution* or only a second *punishment* or by merely requiring an earlier punishment to be taken into account at a second proceeding, in terms of a general tendency it is fair to say that criminal justice is more and more perceived as a global task. This task, on the one hand, asks for a complementary national and international fight against impunity, as in an exemplary way expressed by the Rome Statute for a subsidiary International Criminal Court, and, on the other hand, ensures individual justice by preventing repetitive criminal prosecutions within and beyond national borders.

Although this proposition has already found recognition in various international and European legal instruments (as cited in the following introduction), these provisions are still far from being satisfactory. This is one of the reasons why the *Association Internationale de Droit Pénal* put the problem of "Concurrent National and International Criminal Jurisdiction and the Principle *ne bis in idem*" on the agenda of its XVIIth International Conference on Criminal Law in September 2004 in Beijing, prepared by a pre-colloquium of June 2003 in Berlin (for details cf. the Report by *Anke Biehler*, "Vorkolloquium und Resolutionsentwurf zur Vorbereitung des XVII. Internationalen Strafrechtskongresses der AIDP", in: *Zeitschrift für die gesamte Strafrechtswissenschaft* 2004, forthcoming). Even in the European region where, due to common legal rules and similar cultural traditions, one might have expected an earlier acceptance of a transnational prohibition of multiple prosecutions, resolutions and conventions need further improvements to be considered as comprehensive and adequate. This is also true for the most recent "Initiative of the Hellenic Republic with a view to adopting a Council Framework

Decision concerning the application of the 'ne bis in idem' principle", proposed for the European Union by Greece during its presidency.

In face of this unsatisfactory situation, a group of four young research fellows at the Max Planck Institute for Foreign and International Criminal Law, who either as expert in European criminal law (*Anke Biehler*) or in their doctoral thesis (*Roland Kniebühler*, *Juliette Lelieur-Fischer*, *Sibyl Stein*) were working on problems of *ne bis in idem*, took the private initiative to develop a model for a comprehensive solution for the avoidance of concurrent and/or consecutive transnational criminal jurisdiction on the same facts. Although at that time I was already close to my retirement as Director of the Max Planck Institute at the end of January 2003, I gave this laudable project my full endorsement. As it appeared advisable, however, to broaden the expertise and to internationalise the spectrum of opinions, we invited other colleagues from different countries whom we knew to be experts in these matters, to participate in our project. Then, based on papers and drafts prepared by the Freiburg Team, two working sessions were undertaken at the Max Planck Institute in May and July 2003 respectively, which were – either both or at least one of them – attended by *Thomas Elholm* (Denmark), *Christopher H.W. Gane* (Scotland), *Otto Lagodny* (Austria), *A.H.J. Lensing* (The Netherlands), *Tom Ongena* (Belgium), *Michał Płachta* (Poland), *Dionysios Spinellis* (Greece), *Asbjørn Strandbakken* (Norway) and *Helge Elisabeth Zeitler* (Germany).

Whereas during the May-meeting some basic issues, such as the definition of the "same act" or the inclusion of administrative sanctions as barring a second prosecution, had to be discussed and decided upon, the July-meeting was devoted to the promulgation of a draft which had been presented by the Freiburg Team on the basis of the May-resolutions and additional suggestions which meanwhile had been turned in by the external participants. In this way the second plenary was well equipped to come to final resolutions at least with regard to the text of the provisions. Then again it was mainly the Freiburg Team which prepared the introduction and the comments to the various provisions, though assisted by the external project members with suggestions and refinements. In this context, particular thanks are due to *Christopher H.W. Gane* who as native speaker brought the English version into its final form. For more background information to the project in German see *Sibyl Stein*, "Grenzüberschreitendes *ne bis in idem*. Ein Regelungsvorschlag für die Europäische Union", in: *Zeitschrift für die gesamte Strafrechtswissenschaft* 2003 (forthcoming).

With none of the project participants having disagreed with the text and the accompanying comments, this proposal can claim unanimous approval.

This acceptance by representatives of different European countries gives hope that this *Freiburg Proposal on concurrent jurisdictions and the prohibition of multiple prosecutions in the European Union* will also find attention in the political arena.

A success of this sort would, of course, be the best reward for the immense time and energy selflessly put into this project by the Freiburg Team which in the publishing process was efficiently assisted by the secretariat of *edition iuscrim*, in particular by *Lieselotte Lüdicke*. Last but not least the student assistants *Denise Bauer* and *Michael Libota* need to be mentioned for their help organising the two working sessions. All of them deserve our most sincere thanks.

Freiburg, October 2003

Albin Eser

Prof. Dr. Dr. h.c. mult., M.C.J.

Director em. of the Max Planck Institute
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Introduction

- 1 One of the objectives of the European Union is to provide for its citizens an area of freedom, security and justice (Article 2 Treaty on European Union). This is to be achieved by developing common action among its Member States in the fields of police and judicial cooperation in criminal matters and – where necessary – approximation of rules on criminal matters in the Member States (Article 29 EU-Treaty) and by preventing conflicts of jurisdiction between Member States (Article 31 § 1 (d) EU-Treaty).

- 2 One paramount problem in the field of criminal law enforcement concerns the fact that often several jurisdictions deal with the same criminal case. This is contrary to the ideal of having only one prosecution by one jurisdiction in each case. This ideal serves legal certainty and the right of the individual to be prosecuted only once for the same criminal act. Additionally, it avoids unnecessary cost of prosecution for the Member States.

- 3 The rule of *ne bis in idem* is approved by international and European legal instruments for the national level (Article 4 Protocol 7 to the European Convention on Human Rights; Article 14-7 International Covenant on Civil and Political Rights; Article II-50 Draft/Treaty Establishing a Constitution for Europe – Draft European Constitution¹) and the international level (Article 54 of the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders – Schengen-II-Convention;² Article II-50 Draft European Constitution). In contrast to the situation at the national level, problems arising from concurrent jurisdictions have generally not been solved yet. So far, attempts to solve these problems have been restricted to the creation of a *ne bis in idem* provision. Only the recent "Initiative of the Hellenic Republic with a view to adopting a Council Framework Decision concerning the application of the 'ne bis in idem' principle"³ (Greek initiative) goes beyond this traditional approach in providing – apart from the *ne bis in idem* rule and the accounting principle – in Article 3 a special provision concerning the *lis pendens* case.

- 4 The *Freiburg Proposal on concurrent jurisdictions and the prohibition of multiple prosecutions* presented here follows a much wider approach. Instead of merely creating a European *ne bis in idem* provision, it proposes a three-stage solution: The *first stage* is an attempt to resolve problems concerning multiple prosecutions

1 Official Journal C 169, 18/07/2003, p. 1.

2 Official Journal L 239, 22/09/2000, p. 19.

3 Official Journal C 100, 26/04/2003, p. 24.

in the pre-trial-phase by coordinating concurrent jurisdictions. However, in those cases in which the coordination of jurisdictions has failed, a *ne bis in idem* provision as the *second stage* becomes relevant. The *third stage* is the accounting principle which, as a last resort, at least mitigates multiple punishments as one of the negative effects in cases where multiple prosecutions nevertheless have taken place.

Text of the Proposal

Section 1: Concurrent jurisdictions

§ 1 Determination of forum

- (1) If the prosecuting authorities of a Member State have reason to believe that a prosecution has been or could be initiated in another Member State having concurrent jurisdiction, these authorities shall be notified by describing the evidence so far collected.
- (2) If within three months the authority of that State declares its interest in prosecuting the same case, the Member States concerned shall, within another three months, agree in which State the case shall be prosecuted.
- (3) In determining the forum, preference shall be given to the Member State which will better guarantee the proper administration of justice, taking particular account of the following criteria:
 - (a) territory where the act has been committed or where the result has occurred
 - (b) nationality / residence or official capacity of the suspect / accused
 - (c) nationality of the victim
 - (d) location of evidence
 - (e) appropriate place for executing the sanction
 - (f) place of arrest and / or custody
 - (g) other fundamental interests of a Member State

§ 2 Right to judicial review

The accused has the right to apply to the Court of Justice of the European Communities for review of the Member States' decision.

§ 3 Judicial decision

Where the Member States are unable to agree in which State the prosecution should take place, the matter shall be referred to the Court of Justice for determination.

§ 4 Renunciation of proceedings

If for any reason no final decision is delivered in the Member State whose forum was preferred, the competent authority of the latter shall without delay inform the competent authorities of the other Member States having jurisdiction.

§ 5 Corresponding application

§§ 1 to 4 apply as the context requires in cases of concurrent jurisdictions where a European organ as defined in § 6 (2) (e) is involved.

Section 2: *Ne bis in idem*

§ 6 Rule and definitions

- (1) A person may not be prosecuted in the European Union for an act that has already been finally disposed of in a Member State or by a European organ.
- (2)
 - (a) "Person" may be any natural or legal person.
 - (b) "Prosecution" includes any proceeding with a repressive character. It is not necessary that the offence on which the prosecution is based is qualified as criminal by the legal system which ruled the first proceeding.
 - (c) "Act" is to be understood as substantially the same facts, irrespective of their legal character.
 - (d) "Finally disposed of" refers to a decision terminating the prosecution in a way that – according to the legal system which ruled the first proceeding – bars future prosecution and makes reopening subject to exceptional substantial circumstances.
 - (e) A "European organ" is any institution being part of the European Union which has competence to prosecute.

§ 7 Enforcement conditions

- (1) If the first decision has not been fully enforced and enforcement is still legally permitted under the law of the legal system which ruled the first proceeding, a new prosecution is only allowed if enforcement is permanently impossible.
- (2) For these purposes enforcement is impossible only if:
 - (a) the sentence cannot be enforced in the sentencing State, in particular where surrender of the sentenced person to this State for the purposes of execution cannot be performed, and
 - (b) enforcement in another State by means of recognition of the sentence cannot be performed.
- (3) However, if subsequently the second prosecuting authority receives official certification that the decision has been or is being enforced, the second prosecution shall be terminated.

§ 8 Request for information

Where the prosecution authority of a Member State or of a European organ when initiating a prosecution has reason to believe that it relates to an act that has been finally disposed of in the European Union, this authority shall request without delay the relevant information from the competent authority which has delivered the decision.

§ 9 Exclusion of abuse

(1) § 6 (1) will not apply if the first proceeding was held for the purpose of shielding the person concerned from criminal responsibility.

(2) This paragraph may only be given effect by the European Court of Justice following an application by the Member States seeking to initiate criminal proceedings.

§ 10 Reopening

The reopening of a case as referred to in § 6 (2) (d) is only permissible in the jurisdiction in which the case was first disposed of.

Section 3: Accounting principle

§ 11 Accounting principle

(1) If despite the above provisions, the same act is prosecuted in different jurisdictions, the sanctions imposed in one jurisdiction that have been already enforced must be taken into account in the other jurisdictions during both the sentencing and the enforcement process.

(2) This principle also applies in cases where sanctioning of a legal person and a natural person would essentially amount to the same effect.

Commentary

Section 1: Concurrent jurisdictions

- 1 In order to prevent multiple prosecutions in international cases, the rule of *ne bis in idem* is insufficient. The two reasons for this are that there are no common rules of competence in the European Union and that the *ne bis in idem* rule does not apply before a final decision as defined in § 6 (2) (d) was delivered. Multiple prosecutions – before a final decision was delivered – are therefore still possible. In a purely national setting, rules of competence exist and therefore the rule of *ne bis in idem* is sufficient. This is different in cases where more than one State is involved as this link of common rules of competence is absent. There are, at least,⁴ as many rules of competence as Member States in the EU. A tendency to broaden national competencies rather than to restrict them can be observed, and this is growing even stronger against the background of cross-border crimes, crimes under international law (genocide, crimes against humanity, war crimes) and terrorism. The result is a large number of positive conflicts of competencies.
- 2 Until now, the State in which the suspect is prosecuted is either determined by various forms of forum-shopping – by the prosecution authorities or by the suspect – or by chance according to the State of apprehension. This State decides on its own either to start (or to continue) proceedings or to extradite the suspect. But none of these practices provide a legitimate basis upon which to decide on the jurisdiction of the proceedings, at least as long as there is no possibility of judicial control.
- 3 The provisions on concurrent jurisdictions in this section are the first stage in which problems concerning multiple prosecutions might be solved in cross-border cases at a pre-trial stage. The avoidance of multiple prosecutions by choosing the "best" forum at a pre-trial stage secures the rights of the accused person and limits the cost of unnecessary multiple prosecutions.
- 4 The essential step of this coordination process is mutual information followed by self coordination of the authorities concerned in order to determine the appropriate forum within three months (§ 1 (1) and (2)). If the suspect claims a violation of his rights or if the authorities do not agree on the same forum within three months, the European Court of Justice has to determine the "best" forum for prosecution of a particular case (§ 2 and § 3). § 4 deals with the situation in which no final decision in the originally preferred Member State is delivered whereas § 5

4 The number of jurisdictions with differing rules of competence may, indeed, exceed the number of Member States of the European Union, because some Member States may comprise several jurisdictions (e.g. Great Britain).

contains the corresponding application of these provisions to prosecutions initiated by a European organ.

§ 1 Determination of forum

(1) If the prosecuting authorities of a Member State have reason to believe that a prosecution has been or could be initiated in another Member State having concurrent jurisdiction, these authorities shall be notified by describing the evidence so far collected.

(2) If within three months the authority of that State declares its interest in prosecuting the same case, the Member States concerned shall agree within another three months in which State the case shall be prosecuted.

(3) In determining the forum, preference shall be given to the Member State which will better guarantee the proper administration of justice, taking particular account of the following criteria:

- (a) territory where the act has been committed or where the result has occurred**
- (b) nationality / residence or official capacity of the suspect / accused**
- (c) nationality of the victim**
- (d) location of evidence**
- (e) appropriate place for executing the sanction**
- (f) place of arrest and / or custody**
- (g) other fundamental interests of a Member State**

§ 1 (1)

- 1 The first step in the pre-trial stage consists of mutual information between the authorities of the Member States which might be occupied with the case. The "reasons to believe that a prosecution has been or could be initiated in another Member State" will most of the time be linked to the traditional criteria of competence. For instance, the act might have been committed totally or partly in this State, or the suspect or the victim might be nationals or residents of that State. However, any other reason is also possible.

§ 1 (2)

- 2 The period of time in which coordination of the authorities concerned must take place has to be limited to three months in order to guarantee adequate efforts towards prompt consideration of the issues by all concerned authorities during the coordination process. On the one hand, three months are a sufficient period of time to gain all necessary information and for the authorities to consult each other.

On the other hand, the process of coordination of the authorities needs to be limited as it could otherwise hinder effective prosecution.

§ 1 (3)

- 3 The legal criteria for the choice of forum are contained in § 1(3). The order of the criteria mentioned is *not* hierarchical, in the sense that all relevant criteria have to be considered concurrently. Consequently, the determination of the forum results from a discretionary process, but one which operates within certain limits. These limits follow from the obligation to take into account all relevant criteria, which are partly aimed at the protection of the suspect's interests. Thus, there might be several possible choices for the forum in one given case.
- 4 If the suspect establishes that his interests have not been sufficiently considered, he has the right to apply to the Court of Justice of the European Communities (§ 2). Moreover, in cases where the authorities are not able to reach an agreement upon the forum within six months, the forum is to be determined by the Court of Justice of the European Communities (§ 3).

Example 1: A Dutch person injures a Spaniard in Spain, and is arrested in Belgium. Three criteria may be argued in favour of prosecuting the case in Spain: the territory where the act has been committed (a); nationality of the victim (c) and location of evidence (d). Two criteria support allocating the forum to the Netherlands: nationality of the suspect (b) and the appropriate place for executing the sanction (e). Finally, the place of arrest (f) favours Belgium.

The choice of forum is to be made between Spain, the Netherlands and Belgium. As only the criterion of the place of arrest argues in favour of Belgium, and the choice of this criterion does not take into account the suspect's interests, to choose Belgium would come close to an abuse of discretion. The prosecution authorities are therefore free to choose either Spain or the Netherlands as the forum.

- 5 The list comprehends those interests which it is legitimate to consider for the fair and effective prosecution of crimes. It is therefore intended to be complete. However, many legitimate interests can be of importance when choosing the jurisdiction in which a case is to be prosecuted and they all have to be taken into account. If therefore exceptionally the authorities concerned believe another criterion to be of equivalent importance, they are free to take it into consideration. They cannot, however, decide by neglecting the criteria on the list. All relevant criteria have to be weighed up against each other.
- 6 The criterion of "fundamental interests" (§ 1 (3) (g)) of a Member State needs to be defined more precisely. The fundamental interests of a Member State include its independence, the integrity of its territory, its internal and external security, its democratic organisation, its means of defence and its diplomatic service as well as

the safeguard of the environment and natural resources. The concept of "fundamental interests" is to be understood in a broad sense. As this draft renounces traditional exceptions to the rule of *ne bis in idem* which protect fundamental interests,⁵ these have to be considered in this early stage of coordination. If a Member State can be confident that its fundamental interests are taken into account at the level of determination of competencies, it will be more prepared to accept the absolute prohibition on second or subsequent prosecutions.

§ 2 Right to judicial review

The accused has the right to apply to the Court of Justice of the European Communities for review of the Member States' decision.

- 1 § 2 creates the possibility for the suspect to apply to the Court of Justice of the European Communities, if he claims that his interests have been violated. This right to judicial review is essential as a counterbalance to the system of self-coordination by the prosecution authorities.
- 2 The Court of Justice of the European Communities was chosen for this purpose as it is an existing judicial organ of the European Union. Naturally this requires enlargement of the competencies of the European Court of Justice.

In the above-mentioned example, where a Dutch person has injured a Spaniard in Spain and is arrested in Belgium, the suspect could apply to the Court of Justice of the European Communities, if, for example, Belgium was chosen as the forum.

§ 3 Judicial decision

Where the Member States are unable to agree in which State the prosecution should take place, the matter shall be referred to the Court of Justice for determination.

- 1 If the authorities concerned cannot reach an agreement, the European Court of Justice is required to decide in which State the prosecution will take place (§ 3). The application to the European Court of Justice is based on the idea that when the Member States cannot reach agreement between themselves quickly enough, a superior authority has to be addressed. The European Court of Justice is the best

5 E.g. Article 55 Schengen-II-Convention: "1. A Contracting Party may, when ratifying, accepting or approving this Convention, declare that it is not bound by Article 54 in one or more of the following cases: (a) where the acts to which the foreign judgment relates took place in whole or in part in its own territory; in the latter case, however, this exception shall not apply if the acts took place in part in the territory of the Contracting Party where the judgment was delivered; (b) where the acts to which the foreign judgment relates constitute an offence against national security or other equally essential interests of that Contracting Party; (c) where the acts to which the foreign judgment relates were committed by officials of that Contracting Party in violation of the duties of their office."

place because of its independence and because of the transparency of the judicial process. Additionally, it is best placed to guarantee the rights of the suspect.

Example 2: A Greek injures a Greek diplomat in Poland, and is arrested there. Three criteria argue in favour of prosecution of the case in Poland: (a) territory; (d) location of evidence and (f) place of arrest. This time there are four criteria for Greece: (g) fundamental interests because of the diplomatic status of the victim; (b) nationality of the accused; (c) nationality of the victim and (e) appropriate place for executing the sanction.

If Greece and Poland are not able to agree upon a forum because Greece claims that its fundamental interests are affected and Poland insists on the importance of the territorial criterion, the Court will be seized of the case.

§ 4 Renunciation of proceedings

If for any reason no final decision is delivered in the Member State whose forum was preferred, the competent authority of the latter shall without delay inform the competent authorities of the other Member States having jurisdiction.

- 1 The aim of this rule is to avoid a case remaining unresolved if another State having jurisdiction is in a position to give a final decision concerning that case. Furthermore, States can only be expected to accept the renunciation of their jurisdiction if the other State prosecutes "on their behalf".

§ 5 Corresponding application

§§ 1 to 4 apply as the context requires in cases of concurrent jurisdictions where a European organ as defined in § 6 (2) (e) is involved.

- 1 § 5 deals with concurrence of jurisdictions of a European organ as defined in § 6 (2) (e) on the one side and at least another Member State on the other side.
- 2 Although some rules already exist which coordinate the competencies of Member States and the European Union these are not sufficient in order to avoid all cases of concurrent competencies.

The problem arises especially in competition law. For example, an agreement between undertakings which provokes a distortion of competition may affect national markets as well as the trade between Member States, with the result that EU-competition law provisions as well as national competition law provisions are infringed. Prosecutions may be started at European level by the Commission and at national level by the competent authorities and there is a risk of violation of the rule of *ne bis in idem*. Council regulation (EC) N° 1/2003⁶ has improved the situation as

⁶ Council regulation (EC) N° 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, Official Journal L 1, 04/07/2003, p. 1.

it stipulates that the competition authorities of the Member States applying national competition law to acts which also violate EU-competition law, "shall also apply" the relevant EU-provisions to those acts (Article 3 of the regulation). Thus, only one authority is dealing with the case so that the chances of multiple prosecutions are reduced. Moreover, the regulation makes it possible for competition authorities to suspend their proceedings or to reject a complaint if another authority is dealing or has already dealt with the case (Article 13 of the regulation). However, it is only a possibility and not a duty, so that multiple prosecutions are not excluded completely.

- 3 If a European organ also investigates a particular case, the same rules that apply for the Member States also apply to it. Consequently, if a European organ is involved, the fundamental interests as mentioned in § 1 (3) (b) are to be understood as those of the European Union. It may deal, for example, with the protection of the financial interests of the Union or of the Euro.

Section 2: *Ne bis in idem*

- 1 Section 2 of the *Freiburg Proposal* contains a European *ne bis in idem* provision that is to be understood as the second stage of the solution of the problem of multiple prosecutions.
- 2 It provides for a wide approach to the rule of *ne bis in idem* in many respects. On the one hand, both the character of the proceedings and the quality of the final decision are defined in a way that includes a broad variety of proceedings and decisions. On the other hand, the *idem* is defined in a factual sense as *idem factum* (§ 6).
- 3 § 7 deals with special problems concerning the enforcement of decisions. § 8 obliges the Member States to solicit information in cases where it is likely that a prosecution has already taken place. Finally § 9 enshrines the sole exception to the *ne bis in idem* rule.

§ 6 Rule and definitions

- (1) A person may not be prosecuted in the European Union for an act that has already been finally disposed of in a Member State or by a European organ.**
- (2) (a) "Person" may be any natural or legal person.**
 - (b) "Prosecution" includes any proceeding with a repressive character. It is not necessary that the offence on which the prosecution is based is qualified as criminal by the legal system which ruled the first proceeding.**
 - (c) "Act" is to be understood as substantially the same facts, irrespective of their legal character.**

- (d) "Finally disposed of" refers to a decision terminating the prosecution in a way that – according to the legal system which ruled the first proceeding – bars future prosecution and makes reopening subject to exceptional substantial circumstances.
- (e) A "European organ" is any institution being part of the European Union which has competence to prosecute.

§ 6 (1)

- 1 § 6 (1) provides the central regulation of the *ne bis in idem* rule of the *Freiburg Proposal*: Nobody can be prosecuted a second time for an act after a final disposal concerning the same act has been taken in another Member State or by a European organ. The specific terms the provision uses are defined in § 6 (2).

§ 6 (2) (a): "Person"

- 2 In several Member States⁷ of the European Union, *legal persons* may be criminally responsible for offences they have committed. Furthermore, European legislation is encouraging Member States to provide for such responsibility in some specific areas of criminal law.⁸ Thus, the question of identity of the person cannot ignore the fact that a "person" may also be a legal one. Neither Articles 54-58 of the Schengen-II-Convention nor the Greek initiative explicitly raise this question. However, it is necessary to tackle the problem directly. This is why § 6 (2) (a) defines the term "person" as "a natural or a legal person".⁹
- 3 The inclusion of legal persons in the *Proposal* raises two different categories of problems: firstly, the case where *one legal person* is prosecuted in two different Member States or by one Member State and a EU-organ (below (a)); secondly, the case where a *legal person* is prosecuted in one Member State or by a EU-organ

7 E.g. France (Article 121-2 French Penal Code), Belgium (Article 5 Belgian Penal Code), the United Kingdom (*Smith and Hogan*, Criminal Law, 10th ed.) (*J.C. Smith*), pp. 201-209 and authorities there cited; *G.H. Gordon*, The Criminal Law of Scotland, 3rd ed. (*M.G.A. Christie*), pp. 376-394 and authorities there cited. For a comparative account of corporate responsibility, see *Guy Stessens*, Corporate Criminal Liability: A Comparative Perspective, (1994) 43 International and Comparative Law Quarterly 493.

8 Article 7 of the Council Framework Decision of 13 June 2002 on combating terrorism, (Official Journal L 164, 22/06/2002, p. 3): "1. Each Member State shall take the necessary measures to ensure that legal persons can be held liable for any of the offences referred to in Articles 1 to 4 committed for their benefit by any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person (...)."

9 This is a similar approach to e.g. the Second Protocol to the Convention on the protection of the European Communities' financial interests, 19/06/1997 (Official Journal C 221, 19/07/1997, pp. 12-22) Article 12 : "Article 7 on the understanding that the *ne bis in idem* principle also applies to legal persons (...)."

and the natural persons who are responsible for the management or direction of that legal person in another Member State or by a EU-organ (below (b)).

- 4 (a) Concerning the first category, § 6 (2) (a) stipulates that the rule of *ne bis in idem* covers also legal persons, i.e. that the same legal person cannot be prosecuted twice for the same act. However, it is not always clear, whether and when several entities are in fact *the same* legal person.

Transnational corporations for example are organised in different and complex ways. Normally, the parent company will *not* be *the same* legal person as subsidiary company. But there might be some situations where the question will arise. For example, the subsidiary company might be prosecuted for an offence, but the company turns out to be bankrupt. Would it be possible to prosecute the parent company in order to enforce a fine and confiscation? Or, if the subsidiary company has taken orders from the parent company, when the offence was committed, could both companies be held responsible? As it is impossible to foresee and regulate all different factual situations, these questions have to be answered by the courts on a case-by-case basis.

The essential guideline is that *the same* legal person cannot be prosecuted twice. However, should this exceptionally happen, the accounting principle applies as it does for the natural person (see below § 11 (1)).

- 5 (b) As to the second category of cases, the provisions of the *Freiburg Proposal* do not prohibit the prosecution of a natural person in cases where the legal person for whose management or direction this natural person is responsible has been prosecuted in another Member State or by a European organ for the same act (or vice versa). This is in accordance with existing national¹⁰ and international¹¹ *ne bis in idem* provisions. The main argument in favour of this system is that the legal and the natural person are not *the same person* and therefore the *rationale* of the *ne bis in idem* rule is not valid in those cases.

However, in a limited number of cases, there is a high degree of identity between the natural and the legal person. This is certainly true in cases where the natural person is the sole shareholder of the legal person and also fully responsible for the management and direction of the latter. But there might be other cases where prosecution of both the legal and the natural person seems to infringe the prohibition of multiple prosecutions. Nevertheless, it would be too far-reaching to *ex-*

10 See, e.g., Article 121-2 paragraph 3 of the French Penal Code: "The criminal liability of legal persons does not exclude that of the natural persons who are perpetrators or accomplices to the same act (...)."

11 Article 7 of the Council Framework Decision of 13 June 2002 on combating terrorism: "3. Liability of legal persons under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are perpetrators, instigators or accessories in any of the offences referred to in Articles 1 to 4."

clude totally a second prosecution in such cases. First, it should be observed that the question of the degree of identity may not have been dealt with in the first proceedings. Hence, it should be possible to try this question in a second one. Secondly, although in some cases, the director of a company may not be at fault – and he/she therefore cannot be held responsible according to criminal law – the company as such might be responsible. For example, in cases where a number of smaller, cumulated faults within the company leads to an offence. Thus, the acquittal of a natural person in one Member State or by a European organ should not preclude prosecution of a legal person in another Member State or by a European organ.

However, in cases where both the natural and the legal person are prosecuted and there is a high degree of identity between the two, the accounting principle should apply. This follows from § 11 (2) of the *Proposal*.

§ 6 (2) (b): "Prosecution"

- 6 The provisions of § 6 (2) (b) deal with the scope of the proposed European *ne bis in idem* rule. Prosecution today is not restricted to *criminal* prosecution in the strict sense of the word. There are *different kinds of responses* of a State to behaviour which violates the law. Some of them may involve a quite severe and painful intervention into the life of the offender although this does not result from proceedings which are categorised as criminal in the national legal system.

For example, the so-called administrative penal law as a reaction to tax evasion can result in considerable fines. So, if a person has committed tax evasion a tax authority can – by adding surcharges – increase the income tax by 90 % (see European Court of Human Rights (ECHR): *Ponsetti and Chesnel v. France*, Decision of 14 September 1999, Appl. no. 36855/97, 41731/98).

- 7 The intention of § 6 (2) (b) is, therefore, twofold: First, not only should proceedings with a criminal character in the narrow sense of the word be included with the consequent triggering of a *ne bis in idem* effect, but also proceedings which may result in sanctions that are in substance of similar severity. Second, the independent definition set out in the *Proposal* – "any proceeding with a repressive character" – serves to avoid national circumvention of the *ne bis in idem* rule by defining or characterising a certain reaction as non-criminal. This way, a homogeneous application of the proposed rules in all EU-Member States can be guaranteed.
- 8 Existing provisions or proposals concerning the European *ne bis in idem* rule do not appropriately solve the question of the field of application:

Article 54 of the Schengen-II-Convention does not take a clear stand on this question (it remains unclear whether administrative proceedings fall under its field of ap-

plication); Article II-50 of the Draft European Constitution limits itself explicitly to the "Right not to be tried or punished twice in *criminal proceedings* for the same criminal offence".

The Greek initiative does, however, include administrative proceedings by defining "criminal offences" as – among other things – "acts which constitute administrative offences or breaches of order that are punished by an administrative authority by a fine, in accordance with the national law of each Member State, provided that they fall within the jurisdiction of the administrative authority and the person concerned is able to bring the matter before a criminal court ..." (Article 1 (a)). Although the inclusion of some administrative offences by the Greek initiative can be regarded as a positive step, the chosen provision implies one decisive disadvantage: Should it really be the case that where a national legal system does not – in violation of Art. 6 § 1 of the European Convention on Human Rights – provide for "a fair and public hearing ... by an independent and impartial tribunal", the *ne bis in idem* rule additionally be inapplicable because the person concerned is consequently also denied the opportunity "to bring the matter before a criminal court" (Art. 1 (a) of the Greek initiative)?

- 9 According to § 6 (2) (b), only proceedings with a *repressive* character have a *ne bis in idem* effect. Therefore, a line must be drawn between proceedings with a repressive character and proceedings with a merely *preventive* character.

The draft might be expected to follow the interpretation of the ECHR concerning the notion of a "criminal charge" in Article 6 of the Convention. The *Court* has on many occasions been called on to determine the meaning of a "criminal charge" (see e.g. *Oztürk v. Germany, Judgment of 21 February 1984, Appl. no. 8544/79*) and it appears to apply this concept to cases concerning the (internal) *ne bis in idem* provision of Article 4 of the 7th Protocol (see e.g. *Gradinger v. Austria, Judgment of 23 October 1995, Appl. no. 15953/90* and *Fischer v. Austria, Judgment of 29 May 2001, Appl. no. 37950/97*). However, the following argument suggests that there should be only a partial reliance on the case law of the ECHR in this regard. The notion of "criminal charge" is rather vague and ambiguous. The three criteria identified in the case law of the ECHR (1. classification of the proceedings under national law, 2. the nature of the offence, 3. the nature and degree of severity of the penalty, see e.g. *Öztürk v. Germany, Judgment of 21 February 1984, Appl. no. 8544/79*, § 50) differ in importance in each individual case and make it rather difficult to decide in advance whether a prosecution is of criminal character or not.

However, the distinction put forward here between "repressive" and "preventive" measures can also be identified as a feature of the ECHR case law (see e.g. *Escoubet v. Belgium, Judgment of 28 October 1999, Appl. no. 26780/95*, § 37, where the Court ruled that a preventive measure – such as the immediate withdrawal of a driving license for precautionary purposes – does not fall under Article 6 of the Convention).

Based on examples taken from the ECHR case law, some guidelines on the application of the *ne bis in idem* rule can be given:

(a) Referring to the above-mentioned case of *Ponsetti and Chesnel v. France, Decision of 14 September 1999, Appl. no. 36855/97, 41731/98*: The administrative tax

proceedings, which led to an increase of the income tax by 90 % have the same effect as criminal proceedings. They can, therefore, be regarded as *repressive* and for that reason fall within the concept of "prosecution" in the sense of the *Freiburg Proposal*.

(b) The proceedings in relation to the imposition of the so-called Dutch Educational Measure on Alcohol and Traffic can *not* be seen as *repressive*: this measure aims at securing the safety of road-traffic. It, therefore, has a merely preventive character (see *H.P. Blokker v. The Netherlands, Decision of 07 November 2000, Appl. no. 45282/99*) and does not trigger the *ne bis in idem* effect. By contrast, the deduction of points¹² by a decision of a criminal court as (the sole or part of) a sanction has a *repressive* character and therefore bars a second prosecution. Finally, if the deduction of points from driving licences is an automatic consequence of the conviction pronounced by a criminal court, it also has a *repressive* and not merely a preventive character (see *Malige v. France, Judgment of 23 September 1998, Appl. no. 27812/95*).

(c) This question might also be raised if an administrative board revokes a license to run a restaurant, a license to practice law or to practice medicine etc. Such sanctions will *not* normally have a *repressive* character. Rather they serve the public interest in ensuring that specific occupations are conducted legally. Therefore, criminal proceedings should not bar the withdrawal of a licence independent of the outcome of the criminal trial (see *Tre Traktörer AB v. Sweden, Judgment of 07 July 1989, Appl. no. 10873/84, esp. § 46*, which concerns a licence to serve alcoholic beverages. See also *Albert and Le Compte v. Belgium, Judgment of 10 February 1983, Appl. no. 7299/75 and 7496/76*, which concerns a licence as a medical practitioner¹³). Such a licence might be revoked by an administrative board even if there had already been a criminal prosecution. In such cases the revocation is characterised by the *preventive* intention to protect the society.

(d) A preventive or security measure, applied at the pre-trial stage, will not trigger the *ne bis in idem* rule. A detention order according to the European Convention Article 5 (1) (c) does *not* have a *repressive*, but a preventive character.

(e) If the defendant is insane, the State might impose preventive measures and place him under preventive supervision inside an institution. Such a measure does *not* have a *repressive* character. And if such preventive measures are time limited, the *ne bis in idem* rule will not prevent the State prolonging such measures when the first period has expired.

- 10 Another problematic issue is the question whether *disciplinary proceedings* (applying only to persons of a specific group rather than to the general public, see *Brown v. The United Kingdom, Decision of 24 November 1998, Appl. no. 38644/97*) trigger the *ne bis in idem* effect. As a general rule, disciplinary proceedings will not bar future prosecution, even if the latter has repressive aspects.

12 Or, as in some systems, the *imposition* of penalty points.

13 However, in this case the ECHR did not decide whether there was a "criminal charge" because it had already answered the question of "civil rights and obligations" in the affirmative.

Example: A prison inmate is caught with 5 g of drugs in his cell. The imprisonment board imposes a disciplinary sanction which means that he will not be able to have contact with other inmates for a week, to watch television for this week etc. Such a sanction will not be an obstacle to a criminal sanction.

Similarly, disciplinary proceedings against persons in special occupations such as lawyers etc. might be imposed without bringing the *ne bis in idem* rule into action (see e.g. *Brown v. The United Kingdom, Decision of 24 November 1998, Appl. no. 38644/97* and *Albert and Le Compte v. Belgium, Judgment of 10 February 1983, Appl. no. 7299/75 and 7496/76, § 25*).

However, it is possible to conceive cases where, exceptionally, disciplinary proceedings might trigger a *ne bis in idem* effect. The reason for this is that some disciplinary proceedings can result in such severe sanctions – as in the *Ezeh and Connors* case – that the *ne bis in idem* protection is justified.

In the case of *Ezeh and Connors v. The United Kingdom, Judgment of 15 July 2002, Appl. no. 39665/98; 40086/98*, disciplinary sanctions were imposed on the applicants for breaches of prison disciplinary rules. The sanctions included additional days' custody, exclusion from association with other prisoners and other penalties. According to the ECHR only the disciplinary penalties of additional day's custody were – due to their severity – of relevance as regards the applicability of Article 6 of the Convention (see § 72). This decision may be regarded as providing guidance for the application of the *ne bis in idem* rule.

- 11 Finally, the order in which the respective proceedings were conducted will be of no relevance (see *Fischer v. Austria, Judgment of 29 May 2001, Appl. no 37950/97*).

§ 6 (2) (c): "Act"

- 12 In contrast to Article 54 of the Schengen-II-Convention, the *Freiburg Proposal* embodies its own definition of the term "act". This choice has been made in order to avoid different interpretations of "act", because a variety of interpretations leads to uncertainty which is incompatible with the central importance that the concept of act has in any *ne bis in idem* provision.
- 13 It is of utmost importance to define the *idem* according to simple and clear criteria. Therefore, a fact-orientated approach in the sense of *idem factum* was chosen. It defines the *idem* according to the objective criteria of the *human behaviour* at the *same place* and at the *same time*. That means that it is not necessary that both the first and the second proceeding qualify the act as the same criminal offence; such *judicial equivalence* is not needed.

This factual approach corresponds with Article 1 (e) of the Greek initiative which stipulates: "'idem' shall mean a second criminal offence arising solely from the same, or substantially the same, facts, irrespective of its legal character".

For example, if the act is qualified under the legal system of the first State as a *motoring offence* but under the legal system of the second State as *involuntary homicide*, it still has to be considered as the same act according to the factual criteria of the human behaviour at the same place and the same time.

- 14 This factual approach could be criticised by reference to the idea of *material justice*, in the sense of a demand that an act has always to be considered under all legal aspects. This latter approach – followed for instance in the wording of Article II-50 of the Draft European Constitution – would lead to the above-mentioned criteria of *judicial equivalence*, according to which the *ne bis in idem* effect would only apply in cases where the act was considered as the same criminal offence by both legal systems concerned. Yet, adopting such a narrow definition at an international level would completely undermine the *ne bis in idem* effect, because in most cases different legal systems qualify an act in a different way (e.g. because the elements of a crime that exist in State B do not exist or differ in State A). For this reason this concept had to be rejected.
- 15 According to the understanding of the *Freiburg Proposal*, it does not matter whether the legal system of the first State defines the *idem* in a factual way as *idem factum* or in a legal-orientated way as *idem crimen*: the *idem* always has to be understood as the *same facts*. The interpretation of the *idem* according to the legal system of the first deciding State would stress the principle of *mutual recognition of final decisions*.¹⁴

That is to say: If the first decision is, for example, a judgment delivered in England, the *ne bis in idem* effect would comprise only the *idem* as *idem crimen*. If, on the other hand, it is delivered in the Netherlands or in Germany, the *idem* would be the *idem factum*.

However, this would cause great uncertainty for the prosecutorial authorities of the second State, because it would require the interpretation of the foreign decision in that respect, according to whether the *idem* was defined as *idem factum* or as *idem crimen*. Therefore, the adoption of the above-mentioned factual-orientated approach is preferable.

- 16 In order to avoid problems that could arise when the two charges differ slightly in respect of the presumptive place and time, it is sufficient that they refer to *substantially* the same facts.

For example, if the charges differ only as to the date of commission of the offence, but according to the circumstances, it appears that the same local and temporal context is meant.

14 Communication from the Commission to the Council and the European Parliament – Mutual Recognition of Final Decisions in Criminal Matters, COM/2000/0495 final, <http://europa.eu.int/comm/justice_home/doc_centre/criminal/doc_criminal_intro_en.htm>.

§ 6 (2) (d): "Finally disposed of"

- 17 § 6 (2) (d) defines the *quality* that the *first decision* must have in order to bar a second prosecution for the same act in another European country. This consideration arises out of the fact that the different European criminal procedural systems are not only familiar with final judgments, i.e. convictions or acquittals. They also know decisions which terminate the proceedings at an earlier stage, either because of lack of evidence, such as the French *ordonnance de non-lieu motivée en fait*, or because of consensual settlements such as the German *Einstellung gegen Auflagen* or the Dutch *transactie*.
- 18 The present *ne bis in idem* provisions do not offer a sufficient solution to this question. So far as concerns the Schengen-II-Convention it is still highly disputed what is meant by a trial which has been "finally disposed of" (Article 54) and a "foreign judgment" (Article 55) respectively. In spite of the judgment of the European Court of Justice of 11 February 2003,¹⁵ which ruled that a decision of the prosecuting authority to discontinue criminal proceedings once the accused has fulfilled certain obligations must also be considered as triggering the Schengen *ne bis in idem*, questions regarding, for example, the French *ordonnance de non-lieu motivée en fait* remain unsolved.

The Greek initiative is not very clear on that score either: On the one hand it defines a "judgment" as "any final judgment delivered by a criminal court in a Member State as the outcome of criminal proceedings, convicting or acquitting the defendant or definitively terminating the prosecution, in accordance with the national law of each Member State, and also any extrajudicial mediated settlement in a criminal matter; any decision which has the status of *res judicata* under national law ..." (Article 1 (b)). On the other hand in the actual *ne bis in idem* provision it reads: "Whoever ... has been prosecuted and finally *judged* in a Member State ... cannot be prosecuted for the same acts in another Member State if he has already been acquitted or, if convicted, the sentence has been served ..." (Article 2). The last provision seems to be rather restrictive. Besides, what is meant by the status of *res judicata* and the concept of "finality"?

The *ne bis in idem* provision of the Draft European Constitution, Article II-50, – by saying "for which he or she has already been finally acquitted or convicted" – covers only final judgments.

- 19 § 6 (2) (d) includes every decision taken by prosecution authorities which terminates the proceedings in a way that makes reopening of the case subject to exceptional substantial circumstances. This effect which is given to the decision "according to the legal system which ruled the first proceeding" is a precondition for the application of the international *ne bis in idem* rule.

Thus, it is not necessary that this effect is called *ne bis in idem* by the internal legal system. For example, under the French legal system it is at least unclear whether the *ordonnance de non-lieu motivée en fait* causes a *ne bis in idem* effect.¹⁶ Neverthe-

15 Case C-187/01, C-385/01 (*Gözütok/Brügge*), <<http://curia.eu.int/en/content/juris/index.htm>>.

16 *G. Stefani/G. Levasseur/B. Bouloc*, Procédure pénale, 18. Aufl. Paris 2001, Rn. 981.

less, it fulfils the conditions of the *Freiburg Proposal* because it makes reopening subject to exceptional substantial circumstances.

- 20 Firstly, § 6 (2) (d) does not require that the decision causes an absolute bar to future prosecution in the sense that a resumption of the proceedings is entirely forbidden.

An absolute prohibition is, in any case, something of an exception and arises only in the case of acquittals in legal systems where detrimental reopening is not possible as in France or in the Netherlands. By contrast, in systems such as the German, the Austrian and the Greek there are provisions which allow reopening under certain conditions even following an acquittal.

- 21 Secondly, the international *ne bis in idem* effect presupposes that the possibility of reopening the case after the first decision is subject to exceptional substantial circumstances. *Exceptional* circumstances as a precondition for reopening differ from the "normal" preconditions of legal remedies. They include, for example, discovery of new evidence (see e.g. the French *ordonnance de non-lieu* or the Dutch *buitenvervolginstelling*) or subsequent finding that the act in fact does not qualify as a misdemeanour (*Vergehen*), but rather as a serious crime (*Verbrechen*) (see the German out-of-court settlement). By limiting the reopening grounds to *substantial* circumstances, it is intended to exclude merely formal thresholds such as the renewal of the indictment because of formal defects in the first one.
- 22 Two arguments may be made in favour of this wide consideration of decisions within the frame of an international rule of *ne bis in idem*. First, the legal and practical importance of alternative proceedings and forms dealing with a criminal suspicion is increasing. Second, the interest of legal certainty of the accused as well as of society, in other words, the interest to rely on a decision concerning a criminal case in one of the EU-Member States supports a broad interpretation. Consequently, in addition to *judgments*, *out-of-court settlements* and *decisions caused by lack of evidence* are also included in so far as they establish a threshold which must be crossed in the case of future prosecution.

§ 6 (2) (e): "European organ"

- 23 The concept of a "European organ" includes all bodies or institutions either being part of the European Union or set up by its Member States for the purpose of prosecution of criminal acts. Prosecution in this context means any proceeding with a repressive character as defined in § 6 (2) (b).

To date this is limited to the European Commission which is competent to prosecute fraud cases – with which the European Anti-Fraud Office (OLAF) is concerned – as well as offences in competition and agricultural law.

- 24 The term "European organ" also includes any future body or institution in the above sense such as the European public prosecutor, proposals for which are currently under discussion.¹⁷ Furthermore, it covers the possible enhancement of competencies of existing bodies and institutions (e.g. Eurojust).
- 25 At present, international *ne bis in idem* provisions are only applicable to prosecutions carried out by an authority of another State:

The Schengen-II-Convention does not mention the problem. That also applies to the Greek initiative, whereas Article II-50 Draft European Constitution leaves open the question of its applicability in the case of a prosecution conducted by a European organ, as it requires that the person "*has already been finally acquitted or convicted within the Union*".

- 26 However, because of the above-mentioned competencies of some organs of the European Union, this traditional approach has become too narrow. Today it has, therefore, become necessary to broaden the traditional *ne bis in idem* approach and to include European organs in the provision.

§ 7 Enforcement conditions

- (1) If the first decision has not been fully enforced and enforcement is still legally permitted under the law of the legal system which ruled the first proceeding, a new prosecution is only allowed if enforcement is permanently impossible.**
- (2) For these purposes enforcement is only impossible if:**
- (a) the sentence cannot be enforced in the sentencing State, especially because surrender of the sentenced person to this State for the purposes of execution cannot be performed, and**
 - (b) enforcement in another State by means of recognition of the sentence cannot be performed.**
- (3) However, if subsequently the second prosecuting authority receives official certification that the decision has been or is being enforced, the second prosecution shall be terminated.**
- 1 When the first proceeding results in the pronouncing of a sanction, in order to avoid the possibility of a sentenced offender remaining unpunished, the application of the rule of *ne bis in idem* in international cases requires that the sanction – if it is still enforceable under the law of the State of proceedings – has been executed or, at least, is in the process of being executed. The *rationale* of this rule is

¹⁷ See *Corpus Juris* 2000, Draft agreed in Florence, in: *M. Delmas-Marty/J.A.E. Vervaele* (Eds.), *The implementation of the Corpus Juris in the Member States*, Vol. I, Antwerpen/Groningen/Oxford 2000, pp. 189-210; cp. Green Paper on criminal law protection of the financial interests of the Community and the establishment of a European Prosecutor, COM (2001) 715 final of 11 December 2001.

that the protection against a second proceeding is only justified if the original sentence has been enforced. § 7 concerns this general requirement.

For example, a person is sentenced in a Member State of the Union and then eludes the enforcement of the sanction by fleeing to another country of the European Union.

- 2 The aim of § 7 is to make all efforts for the sanction to be enforced rather than to allow a new prosecution. § 7, therefore, gives priority to the enforcement of the sanction either in the sentencing State – if necessary through surrender of the offender to that State – or in another State recognising the sentence.

According to Article 54 of the Schengen-II-Convention, in cases where the first proceedings culminate in the pronouncing of a sanction, the applicability of the *ne bis in idem* rule is subject to the condition that this sanction "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". In this respect, the Schengen-II-Convention was drawn from the Council of Europe's work.¹⁸ Many EU-*ne bis in idem* provisions were also drafted on this model.¹⁹

Even the Greek initiative continues this tradition, by phrasing its Article 2 as follows: "Whoever (...) has been prosecuted and finally judged in a Member State (...) cannot be prosecuted for the same acts in another Member State if he has already been acquitted or, if convicted, the sentence has been served or is being served or can no longer be enforced, in accordance with the law of the Member State of proceedings."

Neither provision prevents the State where the person is found preferring other solutions to the re-prosecution of the person for the same act, as, for example, surrendering him or her to the sentencing State for the purpose of execution of the sanction, or itself taking on responsibility for the enforcement of the sanction, but they do not promote these solutions either.

18 Refer, e.g., to Article 53 § 1 of the European Convention on the international validity of criminal judgements, The Hague, 28.05.1970, which reads as follows: "A person in respect of whom a European criminal judgement has been rendered may for the same act neither be prosecuted nor sentenced nor subjected to enforcement of a sanction in another Contracting State: a. if he was acquitted; b. if the sanction imposed: i. has been completely enforced or is being enforced, or ii. has been wholly, or with respect to the part not enforced, the subject of a pardon or an amnesty, or can no longer be enforced because of lapse of time; c. if the court convicted the offender without imposing a sanction."

19 See, e.g., the Convention on the protection of the European Communities' financial interests, 26.07.1995, Official Journal C 316, 27/11/1995, p. 48, Article 10: "(...) a person whose trial has been finally disposed of in a Member State may not be prosecuted in another Member State in respect of the same facts, provided that if a penalty was 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 States."

§ 7 (1)

- 3 "If the first decision has not been fully enforced" includes cases in which the enforcement has not taken place at all or is still in process.
- 4 The purpose of the requirement that "the enforcement is still legally permitted" is to exclude a second prosecution in cases where enforcement is no longer permitted under the law of the legal system which ruled the first proceedings because, for example, of pardon, amnesty or prescription of enforcement.
- 5 Existing provisions do not consider the case where the enforcement of the sentence is only *temporally* impossible. However, in these cases, a new prosecution should not be initiated because enforcement in the sentencing State should be given preference. Only in the case of "permanent" impossibility of the first State enforcing the sentence can a second proceeding be considered.
- 6 The term "sentence" is to be understood as covering all decisions with a repressive character in the sense of § 6 (2) (b).

§ 7 (2)

- 7 § 7 (2) restricts the possibility of a new prosecution by defining "impossible" in a narrow way, in the sense that enforcement shall be considered as being impossible in a very small number of cases. Impossibility does not only require that the sentencing State is unable to enforce directly. It is also necessary that the enforcement cannot be achieved in other ways. This means that surrender of the sentenced person cannot be performed (a) and that the enforcement in another State is not possible (b).
- 8 It appears today that new elements of European judicial cooperation can be used to achieve the aim of enforcement of the sentence. Consequently, it is not essential that the first State is directly in the position to assure enforcement.
- 9 To uphold the *ne bis in idem* effect in these cases not only protects the individual against new proceedings and avoids the costs of a new trial. It also serves legal certainty, in the sense that a decision taken in one Member State remains valid and applicable in the entire Union. Furthermore it promotes cooperation between the judicial and enforcement authorities of different EU-Member States, which is increasingly important in the context of the free movement of persons in the Union.
- 10 The first new element – "surrender of the sentenced person to the first deciding State" – is based on the increasing opportunities for the EU-Member States to use extradition or other means of surrender for the purpose of execution of sanctions.

The foundation stone of the existing extradition system is the Council of Europe's Convention on extradition of 1957.²⁰ In 1995 and 1996, two EU-Conventions attempted to lighten the requirements for extradition and to facilitate its procedural requirements.²¹ Last but not least, a decisive step in the direction of facilitating the surrender of persons for the purpose of execution of a sanction was made very recently, as the Member States agreed on the creation of the European arrest warrant.²²

Thanks to this new tool, the surrender of sentenced persons for the purpose "of executing a custodial sentence or detention order"²³ between EU-Member States is made possible without verification of the double criminality of the acts concerning several serious crimes,²⁴ and independently of the fact that the requested person is a citizen of the requested Member State.²⁵

- 11 The other new element – "enforcement in another State by means of recognition of the sentence" – strengthens the principle of mutual recognition of judicial decisions, which was characterised by the European Council as the "cornerstone" of judicial cooperation between EU-Member States.²⁶ The first concrete measure of implementation is indeed the European arrest warrant, but many others are in preparation.²⁷ According to these measures, the enforcement of decisions in

20 Article 1 of the European Convention on extradition, Paris, 13.12.1957, reads: "The Contracting Parties undertake to surrender to each other, (...), all persons against whom the competent authorities of the requesting Party are proceeding for an offence *or who are wanted by the said authorities for the carrying out of a sentence or detention order.*" Emphasis)

21 Convention on simplified extradition procedure between the Member States of the European Union, Brussels, 10.03.1995, Official Journal C 78, 30/03/1995, p. 1 and Convention relating to Extradition between the Member States of the European Union, Dublin, 27.09.1996, Official Journal C 313, 23/10/1996, p. 11. These conventions are applicable between all Member States except France and Italy.

22 Council Framework Decision of 13.06.2002 on the European arrest warrant and the surrender procedures between Member States, Official Journal L 190, 18/07/2002, p. 1.

23 Article 1 (1) of the Council Framework Decision on the European arrest warrant.

24 Article 2 (2) of the Council Framework Decision on the European arrest warrant.

25 Article 4 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States: the nationality of the person to be surrendered is no "ground for optional non-execution of the European Arrest Warrant".

26 Tampere European Council, Presidency Conclusions, paragraph 33.

27 Communication from the Commission (26.7.2000) on Mutual Recognition of Final Decisions in Criminal Matters, COM(2000) 495 final; Initiative of the United Kingdom, the French Republic and the Kingdom of Sweden with a view to adopting a Council Framework Decision on the application of the principle of mutual recognition to financial penalties, Official Journal C 278, 02/10/2001, p. 4; Initiative of the Kingdom of Denmark with a view to adopting a Council Decision on increasing cooperation between European Union Member States with regard to disqualifications, Official Journal C 223, 19/09/2002, p. 17. Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence. Article 1: "The purpose of the Framework Decision is to establish the rules under which a Member State shall recognise

criminal matters in one Member State shall be recognised and enforceable in any other Member State. For the present, Member States may use the Council of Europe's Convention of 1970 on the international validity of criminal judgements.

- 12 Until such time as the European arrest warrant enters into operation, and for so long as the principle of mutual recognition is still under construction, the cases where "enforcement is permanently impossible" will be frequent. But little by little, the number of such cases will be reduced. The only cases remaining will be those where neither surrender for the purpose of execution of the sanction, nor enforcement in the other Member State is possible because they are not covered by the relevant provision on the European arrest warrant nor by the mutual recognition provisions. Then, progressive harmonisation of rules of criminal matters on the one hand, and EU legislation on judicial cooperation on the other should fill the gaps.

In cases where both surrender to the sentencing State and enforcement in another State are possible, the State where the person is found should act in cooperation with the other State(s) in order to find the best solution – the State where the person was found may not be able to enforce the sanction but a third one may do it, so that surrender to that State is also a possibility. In cases where enforcement has started in one Member State, surrender of the person to that Member State will probably be preferable. In cases where the sentencing State is not the "appropriate place for executing the sanction" in the sense of § 1 of this *Proposal*, enforcement in another Member State is to be preferred.

§ 7 (3)

- 13 Finally, there might be cases where the sanction has neither been enforced nor is in the process of being enforced, neither in the sentencing State nor in the other State. The authorities of the other State are therefore allowed to start new proceedings. But it may happen that after they have done so, enforcement appears after all to be possible in one or the other State. In this case, the above-mentioned priority of enforcement obliges the authorities of the second State to terminate their prosecution.

§ 8 Request for information

Where the prosecution authority of a Member State or of a European organ when initiating a prosecution has reason to believe that it relates to an act that has been finally disposed of in the European Union, this authority shall request without delay the relevant information from the competent authority which has delivered the decision.

and execute in its territory a freezing order issued by a judicial authority of another Member State in the framework of criminal proceedings."

- 1 According to § 8, any prosecution organ has an obligation to request information about any preceding treatment of the case before itself initiating a prosecution. This obligation is a logical consequence of the duty to recognise foreign decisions: in order to be able to recognise a decision, it is of course necessary to know about the existence of this decision.
- 2 Following the general aim of the *Proposal* that there shall be only one prosecution per criminal act, § 1 (1) of the draft requires any prosecution organ to notify any other prosecution organ that could initiate a prosecution in respect of the same act by reason of its concurrent jurisdiction. What is to be done in order to prevent multiple prosecutions before the first prosecution has been engaged must also be done at the later stage, when the first prosecution has already taken place. If the act has already been disposed of according to § 6 of this *Proposal*, the rule of *ne bis in idem* applies, so that a new prosecution is prohibited. In the opposite case, there is a strong possibility that the organ that has requested information has jurisdiction over the case and might be willing to initiate a prosecution. Both authorities should, thus, cooperate in order to determine the forum according to § 1 of the *Proposal*.

§ 9 Exclusion of abuse

- (1) § 6 (1) will not apply if the first proceeding was held for the purpose of shielding the person concerned from criminal responsibility.**
- (2) This paragraph may only be given effect by the European Court of Justice following an application by the Member States seeking to initiate criminal proceedings.**

§ 9 (1)

- 1 § 9 (1) reduces the exceptions to the *ne bis in idem* rule to one *sole* case. This exception concerns cases where the first decision cannot be recognised because of the abusive or deficient *character* of the first proceeding. This restrictive concept deviates from most of the *ne bis in idem* provisions (e.g. Article 55 of the Schengen-II-Convention, Article 4 of the Greek initiative) which provide a catalogue of exceptions based on special *interests* which the second State may assert.
- 2 This option was chosen because the "classical" exceptions make it too easy for a party to avoid the *ne bis in idem* effect by the unilateral declaration that the act affects significant (State) interests (because it was realised in the State's own territory or an official of the State is involved). In contrast to that unilateral declaration of *own interests*, claiming the *abusive or deficient character of the first proceeding* of another State always involves a political confrontation with that State. The other State is alleging concrete defects in the process held in the first State.

Consequently such an "accusation" of the justice organs of a State may lead to diplomatic irritations.

- 3 For this reason it is likely that the Member State will make cautious use of the clause, because its interest in having new proceedings will be balanced with the negative effects of that political confrontation. This balancing mechanism, which is missing in the concept of unilateral declaration of main interests, strengthens the *ne bis in idem* rule.
- 4 Reduction of exceptions to that sole case is facilitated by the detailed provisions in the draft dealing with the problem of concurrent jurisdictions (Article 1). (State) interests can be considered by the use of the information system, even before the case is opened.

§ 9 (2)

- 5 As a consequence of the provisions of § 9 (1), it is necessary to provide an independent authority which decides on a request alleging the abusive or deficient character of the first proceeding. Whereas in the case of the "classical" exceptions the second State decides itself whether its own interests are affected, to claim the abusive or deficient character of the first proceeding leads not only to a confrontation between the States concerned. It also means that the second State has to evaluate *foreign* proceedings. Here, a neutral and objective instance is necessary. Since in the European Union the European Court of Justice already exists, it receives yet another competence.

§ 10 Reopening

The reopening of a case as referred to in § 6 (2) (d) is only permissible in the jurisdiction in which the case was first disposed of.

- 1 § 10 deals with the question *under which legal conditions* and *where* reopening proceedings take place.

Example 1: B is acquitted by a German court of a charge of having raped a woman. However, a few months later he confesses to the crime in front of a French court. The French authorities would like to prosecute B because the rape has taken place on French territory. Should this be permissible? According to German law, reopening proceedings after a judgment of acquittal is allowed in the case of a plausible confession by the person acquitted, whereas in France it is not possible to reopen a case at all after an acquittal.

Example 2: Proceedings against A, who is suspected of having committed a murder, have been terminated by the French examining magistrate because of lack of evidence by an *ordonnance de non-lieu*. Subsequently, the German police come into the possession of fresh evidence which strongly incriminates A. Since the victim

was a German citizen the German public prosecutor is highly interested in prosecuting A. Should this be possible in Germany? According to French law, reopening of a case which has been terminated by an *ordonnance de non-lieu* is permitted if new evidence emerges.

- 2 Neither Article 54 of the Schengen-II-Convention nor Article II-50 of the Draft European Constitution provides an answer to that question.

Article 2 (2) of the Greek initiative determines that "the procedure may be repeated if there is proof of new facts or circumstances which emerged after the judgment or if there was a fundamental error in the previous procedure which could have affected the outcome of the proceedings, in accordance with the criminal law and the criminal procedure of the Member State of the proceedings". Consequently, under the Greek initiative a new prosecution will be permissible in a second State – independently of the reopening provisions of the first State – if one of the two alternatives is fulfilled. This means, for example, that new proceedings in Germany against an accused who has been acquitted by a French court would be permitted when new evidence is found, although there is no possibility at all of reopening the case in France after an acquittal. In that case the transnational European *ne bis in idem* protection would be lower than the internal protection. In addition, the second alternative (fundamental error) seems to open the door very wide for a disregard of the first decision's *ne bis in idem* effect – in particular, if the second State is meant to be authorised to establish the "fundamental error in the previous procedure".

- 3 § 10 determines, on the one hand, that the law of the State of the first decision is exclusively applicable. Only this way can the *transnational ne bis in idem* protection be guaranteed to the same extent as the *internal* protection. Moreover, the interest of legal certainty is served because the cases in which reopening is permissible can be foreseen by the accused. This could not be ensured if the law of the second or third prosecuting State were to be decisive.

On the other hand, the reopening of proceedings must take place in the first deciding State. This is important for compliance with procedural provisions which often determine the reopening of proceedings and are – at least partially – designed to protect the suspect against overhasty second proceedings.

The German detrimental reopening procedure, for example, which is allowed in exceptional cases after a final judgment has been rendered, is complex. Since French criminal procedure does not know a detrimental reopening it would not be possible for the French authorities in *Example 1* to proceed with procedural guarantees comparable to those of the German law. As a result, the accused would benefit from a lower standard of protection than in Germany. Similar arguments apply to *Example 2* because under German law it would be impossible to start the prosecution by a judicial instruction (*instruction préparatoire*) which is a precondition in French law for the reopening of the case after an *ordonnance de non-lieu* has been rendered.

Therefore, under the provisions of the *Freiburg Proposal*, in both examples reopening would only be allowed in the States of the first decision, i.e. in Germany where

the acquitting judgment (*Example 1*), and in France where the *ordonnance de non-lieu* was rendered (*Example 2*), respectively.

- 4 Where new evidence has been detected in a second State, it has to be transferred to the State of the first decision in order to be considered in the reopening proceedings.

Section 3: Accounting principle

§ 11 Accounting principle

(1) If despite the above provisions, the same act is prosecuted in different jurisdictions, the sanctions imposed in one jurisdiction that have been already enforced must be taken into account in the other jurisdictions during both the sentencing and the enforcement process.

(2) This principle also applies in cases where sanctioning of a legal person and a natural person would essentially amount to the same effect.

§ 11 (1)

- 1 The principle of accounting has to be regarded as a *minimum protective standard* which guarantees the proportionality of sanctions in those cases in which a second proceeding exceptionally takes place. It therefore makes no difference whether the second proceeding is still at the *sentencing* stage, or whether it has already reached the stage of *enforcement*: A sanction which has already been enforced has to be taken into account in either case.
- 2 In both situations, there exist two ways in which the sanction can be taken into account: Firstly, the sanction can be *changed* into a less severe one, for example, a prison sentence could be converted into a fine. Secondly, the sanction already enforced can be *deducted* from the sanction that has still to be enforced.
- 3 In accordance with § 6 (2) (a) the *minimum protective standard* given by § 11 applies regardless of whether the person that has been prosecuted twice or more is a natural or a legal person.

§ 11 (2)

- 4 In the commentaries to § 6 (2) (a), it has been suggested that there might be cases where the prosecution of a legal person and of a natural person for the same act may be problematic, although this does not conflict head-on with the *ne bis in idem* rule because of the lack of identity of the two prosecuted persons. Indeed, where, for example, the legal person is composed of one sole natural person who is liable, and both are being prosecuted for the same act, the distinction between

both persons is very subtle, because it relies on a purely technical juridical mechanism.

- 5 As has already been explained, it is very difficult to exclude totally this kind of multiple prosecution by regulation. However, it is appropriate to avoid at least one negative effect of multiple prosecutions, the pure addition of the sanctions pronounced. This is why it is proposed to make the accounting principle applicable "where sanctioning of a legal person and a natural person would essentially amount to the same effect".
- 6 It is difficult to determine in advance exactly in which cases the sanctioning of a legal and a natural person "amounts to essentially the same effect". This question is best left to the courts to decide on a case-by-case basis.

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