

# **The case-law of the ECJ in criminal matters**

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# Outline

- Areas of substantive law as interpreted by the CJEU
- Areas of procedural law as interpreted by the CJEU
- The European arrest warrant (focus on recent cases)
- The *ne bis in idem* principle (focus on recent cases)

# I. Areas of substantive law as interpreted by the CJEU

- So far, most EU instruments aiming at approximating MS' substantive criminal law were adopted in the framework of the 3rd pillar TEU
- So far, no preliminary ruling in interpretation concerning such instruments
- **BUT** 3 remarks:

# 1) Actions for annulment against some instruments of approximation of substantive criminal law (conflicts of legal bases between 1st and 3rd pillars TEU)

- ECJ, judgment of 13 Sept. 2005, *Commission v. Council*, case C-176/03 (FD protection of the environment through criminal law)
- And ECJ, judgment of 23 Oct. 2007, *Commission v. Council*, case C- 440/05 (FD ship-source pollution)

# ECJ, judgment of 13 Sept. 2005, *Commission v. Council*, case C-176/03 (FD protection of the environment through criminal law)

=> 11 MS intervened in support of the Council - the EP intervened in support of the Commission

## ⇒ Judgment :

- It is true that, as a general rule, neither criminal law nor the rules of criminal procedure fall within EC competence.
- However, this does not prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective (para 47-48).
- Consequently, the ECJ concluded that, on account of both their aim and their content, Articles 1 to 7 of the framework decision have as their main purpose the protection of the environment and they could have been properly adopted on the basis of Article 175 EC. It annulled the entire framework decision on the basis that is indivisible.

# ECJ, judgment of 23 Oct. 2007, *Commission v. Council*, case C- 440/05 (FD ship-source pollution)

- ⇒ Commission supported by the EP (extensive interpretation of the previous judgement) >< Council supported by 18 MS (restrictive interpretation of the previous judgement).
- ⇒ ECJ annulled again the entire FD
- ⇒ By this second judgment, the ECJ brought some important clarifications to some of the uncertainties which remained after its first judgment of Sept. 2005: it excluded from the scope of Community competence “the determination of the type and level of the criminal penalties to be applied” (para 70). However, it did not answer another remaining question, i.e. the question whether its decision of Sept. 2005 only applies to the EC environmental policy or whether it is also applicable to other EC policies. Indeed, it did not insist on the common transport policy and always connected it to environment protection purposes.

## 2) And numerous judgements affected MSs' substantive criminal law

- Either through the negative impact of EC law on substantive criminal law: when the ECJ “neutralised” national provisions considered as incompatible with EC law.
  - => Numerous examples:
    - incompatibility resulting from the criminalisation principle (ECJ, 29 Nov. 1978, *Pigs Marketing Board v. R. Redmond*, case 83/78; ECJ, 10 July 1980, *Commission v. France*, case 152/78...)
    - incompatibility resulting from one of the constituent elements of the offence (ECJ, 15 Dec. 1976, *S. Donckerwolcke*, case 41/76; ECJ, 28 March 1979, *M. Rivoira and others*, case 179/78; ECJ, 26 Oct. 1989, *F. Levy*, case 212/88...)
    - incompatibility residing in the sanctions (ECJ 25 Febr. 1988, *R. Drexel*, case 299/86; ECJ, 14 July 1976, *L. Watson and A. Belman*, case C-118/75, ...)

- Or through the positive impact of EC law on MSs' substantive criminal law: when the existence of a EC rule imposes the adoption of national criminal law provisions to ensure its effectiveness => Active/positive duties for the MSs in the field of criminal law in order to ensure the execution of EC obligations

⇒ Consequence

⇒ of the loyalty principle (requirement of effectiveness, proportionality and dissuasiveness, which penalties for infringement of Community provisions must satisfy)

⇒ and of the principle of assimilation (infringements of Community law must be penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance)

⇒ Wellknown in the PIF sector : see ECJ 21 Sept. 1989 in case C-68/88, *Commission v. Greece*, ("Yugoslav wheat" case)

- 3) And, prospects: since the entry into force of the Lisbon Treaty, Art. 83, para 1 and 2 TFEU = new legal bases for approximation of substantive criminal laws => Wide field open to the ECJ's interpretation power,
- new directives (trafficking in human beings, sexual exploitation of children, attacks against information systems...)
  - Art. 83 TFEU itself (its exact outlines, its relations with other articles such as Art. 325 TFEU, etc).

## II. Areas of procedural law as interpreted by the CJEU

Except the *ne bis in idem* principle and the FD of 13 June 2002 on the European Arrest Warrant (EAW), the main EU instrument which has been interpreted by the ECJ is FD 2001/220/JHA on the standing of victims in criminal proceedings.

⇒ 7 Judgments:

- ECJ, 16 June 2005, *Pupino*, Case C-105/03;
- ECJ, 28 June 2007, *Giovanni dell'Orto*, Case C-467/05;
- ECJ, 9 Oct. 2008, *Katz*, Case C-404/07;
- ECJ, 15 Sept. 2010, *Gueye et Sameron Sanchez*, Cases C-483/09 and C-1/10;
- ECJ, 21 Oct. 2010, *Eredics and Sapi*, Case C-205/09;
- ECJ, 21 Dec. 2011, *M.X.*, Case C-507/10;
- ECJ, 12 July 2012, *Giovanardi et al*, Case C-79/11.

Among the common features of several of these decisions:

- the CJ underlines the lack of precision of the Framework Decision and the wide margin of appreciation left to the MSs in order to implement the objectives (see especially *Pupino*, para 54; *Katz* para 46; *Gueye and Sanchez* para 57; *Eredics* para 37-38; *MX*, para 28 and 33).
- the CJ underlines that the provisions of the Framework Decision must be interpreted in such a way that fundamental rights are respected (see especially *Pupino* para 59; *Katz* para 48; *Gueye and Sanchez* para 55 ; *MX* para 43).

# ECJ, 16 June 2005, *Pupino* case C-105/03

- Reference for a preliminary ruling introduced by an Italian judge in the context of criminal proceedings against Mrs Pupino, a nursery school teacher charged with inflicting injuries on pupils aged less than five years at the time of the facts => Interpretation of Art. 2, 3 and 8 of the FD on the standing of victims in criminal proceedings
- ⇒ Considering the importance of the questions, 7 Governments and the Commission intervened. Some of them invoked – explicitly or implicitly – the inadmissibility of the reference: considering the limited legal impact of the 2001 FD, the ECJ ruling would anyway have no significance for the internal Italian proceedings and would thus not be useful for the solution of the case. On the contrary, defending the admissibility of the reference, the Commission considered that the interpretation of the FD would have had an impact on the main proceedings, and this on the basis of the principle of interpretation in conformity with EU law .
- ⇒ The Court had first to rule on the admissibility question; it had to decide on the extension of the principle of interpretation in conformity with EC law to the FDs adopted in the third pillar TEU. It had then to rule on the preliminary questions.

⇒ The ECJ extended the principle of interpretation in conformity with EC law to the third pillar TEU.

⇒ 2 main arguments:

⇒ binding nature of the FDs (comparison with the directives)

⇒ principle of loyal cooperation also applicable to the third pillar TEU.

⇒ Same limits admitted to the principle of interpretation in conformity as in EC law

⇒ Limits based on the general principles of law, which form part of EU law, and especially the principles of legal certainty and of non-retroactivity: these general principles of law prevent that obligation from leading to the criminal liability of persons who contravene the provisions of a framework decision being determined or aggravated on the basis of such a FD alone, independently of an implementing law (para 44 and 45)

⇒ The principle of conforming interpretation cannot serve as the basis for an interpretation of national law *contra legem* (para 47).

## Importance of the other judgments as well:

- For example concerning the personal scope of application of the FD: on the basis of a literal interpretation of its provisions (Art. 1 a)), the ECJ concludes that it only applies to natural persons and not to legal persons (see *Dell'Orto* and *Eredics and Sapi*).
- For example concerning Art 10 para 1 of the FD which concerns the promotion of the recourse to mediation in criminal matters, the ECJ states that the MSs may exclude offences committed within the family from the scope of application of mediation (see *Gueye et Sanchez*) or that the promotion duty only concerns the offences for which the Mss consider it appropriate to provide for such kind of measures (voy. *Eredics et Sapi*)...

## + Numerous judgments affected the procedural criminal law of the MSs

- Either through the negative impact of EC law on national procedural criminal law: some provisions of criminal procedure were considered incompatible with free movement because of infringement of the non-discrimination principle: ECJ, 2 Febr. 1989, *Cowan v. Treasury*, C-186/87; ECJ, 11 July 1985, *Mutsch*, C-137/84; ECJ, 24 Nov. 1998, *Bickel and Franz*, C-274/96...
- Or through the positive impact of EC law on national procedural criminal law (see assimilation principle)

+ And prospects: since the entry into force of the Lisbon Treaty, Art. 82 § 2 TFEU = new legal bases for approximation of procedural criminal legislations => Wide field open to the ECJ power of interpretation:

- New directives: interpretation and translation, letter of rights, right of access to a lawyer, minimum standards on the rights, support and protection of victims of crime...
- Outlines of Art. 82, para 2 TFEU.

# III. The EAW (and other instruments of mutual recognition)

## Main judgments (preliminary rulings) on the EAW:

- ECJ, 3 May 2007, C-303/05, *ASBL Advocaten voor de wereld*;
- ECJ, 17 July 2008, *Szymon Kozłowski*, C- 66/08;
- ECJ, 12 August 2008, *Santesteban Goicoechea*, C-296/08 PPU;
- ECJ, 1 Dec. 2008, *Leymann and Pustovarov*, C-388/08 PPU;
- ECJ, 6 Oct. 2009, *Wolzemburg*, C-123/08;
- ECJ, 21 Oct. 2010, *I.B.*, C-306/09.
- ECJ, 16 Nov. 2010, C-261/09, *Mantello*
- ECJ, 28 June 2012, *Melvin West*, C-192/12 PPU;
- ECJ, 5 Sept. 2012, *Lopes Da Silva Jorge*, C-42/11;
- ECJ, 29 January 2013, *Radu*, C-396/11;
- ECJ, 26 Febr. 2013, *Melloni*, C-399/11;
- ECJ, 30 May 2013, *Jeremy F*, C-168/13 PPU

# ECJ 3 May 2007, C-303/05, *ASBL Advocaten voor de wereld* : confirmation of the validity of the FD

2 preliminary questions in validity referred to the ECJ by the Belgian Constitutional Court (on the occasion of an action for annulment by the ASBL « *Advocaten voor de wereld* » against the Belgian law of 19 Dec 2003 concerning the EAW):

- ⇒ Is the EAW FD compatible with Art. 34(2)(b) TEU, under which framework decisions may be adopted only for the purpose of approximation of the laws and regulations of the Member States?
- ⇒ Is Art. 2 para 2 of the EAW FD, in so far as it sets aside verification of the requirement of double criminality for the offences listed therein, compatible with Art. 6(2) of the EU Treaty, and, more specifically, with the principle of legality in criminal proceedings and with the principle of equality and non-discrimination?

The Court answers yes to both questions => Confirms the validity of the EAW FD !

## **4 judgments related to Art. 4, para 6 EAW FD, i.e. *Kozlowski*, *Wolzemburg*, *IB* and *Lopes Da Silva* cases**

Reminder: according to Art. 4 para 6 EAW FD, the executing judicial authority may refuse to execute a European arrest warrant if this has been issued for the execution of custodial sentence or detention order, where the requested person is *staying in*, or is a *national* or a *resident* of the executing Member State, and that State undertakes to execute the sentence or detention order in accordance with its domestic law.

1) ECJ, 17 July 2008, *Szymon Kozlowski*, C- 66/08: it clarifies the terms 'staying' in or 'resident' of the executing State used in Art. 4, para 6:

- the definition of the terms 'staying' and 'resident' cannot be left to the assessment of each Member State but must be given an autonomous and uniform interpretation (para 41-43);
- a person 'resides' in the executing Member State when he has established his actual place of residence there, and he 'stays' there when he has acquired, 'following a stable period of presence in that State, certain connections with that State which are of a similar degree to those resulting from residence' (para 46)

2) ECJ, 21 Oct. 2010, *I.B*, C-306/09.

3) and 4) E CJ, 6 Oct. 2009, *Wolzenburg*, C-123/08 and 5 Sept. 2012, *Lopes Da Silva Jorge*, C-42/11 => Do the Netherlands and French legal provisions transposing Art. 4, para 6 of the EAW FD infringe the principle of non-discrimination on the ground of nationality?

– *Wolzenburg* : according to the Dutch law, the surrender of a Netherlands national for the purposes of execution of a custodial sentence imposed by final judicial decision will be refused. However, for nationals of other Member States, such a refusal is subject to the condition that they have lawfully resided in the Netherlands for a continuous period of five years and that they are in possession of a residence permit of indefinite duration

⇒ Is such national legislation providing for different treatment of Netherlands nationals and nationals of other Member States with regard to refusal to execute a European arrest compatible with EU law and especially with the prohibition of discrimination on the basis of nationality (Art. 12 TEC)?

⇒ To be compatible with Community law, a difference in treatment based on nationality must be objectively justified, proportionate to the objective pursued and must not go beyond what is necessary to achieve that objective

⇒ The ECJ accepts the Dutch justification: The single condition based on nationality for its own nationals, on the one hand, and the condition of residence of a continuous period of five years for nationals of other Member States, on the other, may be regarded as being such as to ensure that the requested person is sufficiently integrated in the Member State of execution. That requirement for residence for a continuous period of five years does not go beyond what is necessary to attain the objective of ensuring that requested persons who are nationals of other Member States achieve a degree of actual integration in the Member State of execution.

- *Lopes Da Silva Jorge* => The French legislation limited the possibility to refuse surrendering a person on the basis of Art. 4 para 6 to French nationals and excluded automatically and absolutely the nationals of other Member States who were staying or resident in its territory irrespective of their connections with that Member State => The ECJ considers that such difference infringes the principle of non-discrimination.

# Cases *Leymann and Pustovarov*, *Santesteban Goicoechea* and *Melvin West*

- ECJ, 1 Dec. 2008, *Leymann and Pustovarov*, C-388/08 PPU: interpretation of Art. 27 para 2 to 4 of the FD, concerning the speciality principle
- ECJ, 12 August 2008, *Santesteban Goicoechea*, C-296/08 PPU: interpretation of Art. 31 and 32 of the FD (relations of the FD with preexisting extradition and transitional provisions)
- ECJ 28 June 2012, *Melvin West*, C-192/12 PPU: interpretation of Art. 28, para 2 FD concerning successive EAWs... Melvin West had been submitted to 3 successive EAWs => Where a person has been subject to more than one surrender between Member States pursuant to successive European arrest warrants, the subsequent surrender of that person to a Member State other than the Member State having last surrendered him is subject to the consent only of the Member State which carried out that last surrender. Such conclusion is especially based on the objective pursued by the FD of accelerating and simplifying judicial cooperation between the Member States.

## ECJ, 16 Nov. 2010, C-261/09, *Mantello*

⇒ Preliminary questions in interpretation concerning Art. 3 para 2 EAW FD, i.e. mandatory ground for refusal based on *ne bis in idem*.

- Art. 3 para 2 : The judicial authority of the Member State of execution shall refuse to execute the EAW (...) if the executing judicial authority is informed that the requested person has been finally judged by a Member State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State

- 2 preliminary questions :

- should the term « same acts » (*idem*) be understood according to the law of the issuing MS, the executing MS, or according to a Union-wide autonomous definition? Answer : Union-wide autonomous definition

- Is the idem realised when a first conviction intervened for isolated facts of drugs importation although the investigating authorities had sufficient evidence in respect of the membership in a criminal organization, but did not prosecute the person on that basis due to tactical considerations. The ECJ reworded the question so as to concern the bis. The ECJ referred to the position of the **issuing authority** according to which the first judgment could not be regarded as having definitively barred further prosecution at national level in respect of the acts referred to in the arrest warrant issued by it (point 49). In circumstances such as those at issue in the main proceedings where, in response to a request for information made by the executing judicial authority, the issuing judicial authority, expressly stated that the earlier judgment delivered under its legal system did not constitute a final judgment covering the acts referred to in the arrest warrant issued by it, the executing judicial authority has no reason to apply, in connection with such a judgment, the ground for mandatory non-execution provided for in Art. 3(2) of the Framework Decision(para 51).

=> Very disappointing in comparison with AG Yves Bot conclusions concerning the extent of the judicial control to perform in the executing MS

# **ECJ 29 January 2013, *Ciprian Vasile Radu*, C-396/11: the work around of the sensitive question of the ground for refusal based on a violation or on a risk of violation of human rights**

- 4 EAWs issued by the German authorities against Mr Radu, a Romanian national for the purposes of prosecution in respect of acts of aggravated robbery .
- 6 preliminary questions submitted by a Romanian Court (*Curte de Appel Constanta*), all linked to the protection of human rights.
- Conclusions of AG E. Sharpston of 18 Oct 2012 (para 63 – 97): analyses especially the question whether an executing authority may refuse to execute a European arrest warrant on the grounds of infringement or risk of infringement of the individual rights based on Art. 5 and 6 of the ECHR and Art. 6, 48 and 52 of the Charter of Fundamental Rights of the EU => Gives a positive answer to this question and proposes to depart from the test laid down by the ECHR (para 81-84) and to adopt a more extensive protection (see for instance para 97) .

- § 97: « The competent judicial authority of the Member State executing a European arrest warrant can refuse the request for surrender without being in breach of the obligations authorised by the founding Treaties and the other provisions of European Union law, where it is shown that the human rights of the person whose surrender is requested have been infringed, or will be infringed, as part of or following the surrender process. However, such a refusal will be competent only in exceptional circumstances. In cases involving Articles 5 and 6 of the Convention and/or Articles 6, 47 and 48 of the Charter, the infringement in question must be such as fundamentally to destroy the fairness of the process. The person alleging infringement must persuade the decision-maker that his objections are substantially well founded. Past infringements that are capable of remedy will not found such an objection ».

## Compared to the AG's conclusions, very disappointing judgment:

- ⇒ The ECJ limits very much the scope of the questions: it considers that the referring Court essentially asked whether the EAW FD, read in the light of Art. 47 and 48 of the Charter and of Art. 6 of the ECHR, must be interpreted as meaning that the executing judicial authorities can refuse to execute a EAW issued for the purposes of conducting a criminal prosecution on the ground that the issuing judicial authorities did not hear the requested person before the arrest warrant was issued (para 31).
  - ⇒ The answer of the CJ is negative
    - ⇒ Not a ground for refusal provided for in the FD (para 38);
    - ⇒ Need for effectiveness of the very system of surrender and the damage, which could be caused by the introduction of an obligation for the issuing judicial authorities to hear the requested person before issuing an EAW (para 40);
    - ⇒ Right to be heard must anyway be observed in the executing Member State (para 41 – 42).
  - => Quite brief – Did not exploit the opportunity that was given to it...
- BUT** see also ECJ, 21 Dec. 2011 *NS and others*, C-411/10 and C/493/10 (EU asylum policy – Dublin system)

# ECJ, 26 Febr. 2013, *Melloni*, C-399/11 : conflicting standards of protection of human rights

Preliminary questions of the Spanish Constitutional Court on the interpretation and validity of Art. 4a, para 1, of the EAW FD, as amended by FD of 26 Febr. 2009 on *in absentia* proceedings.

Reminder: Art. 4a, para 1: ground for optional non execution if the person did not appear in person at the trial, except in 4 different cases (for instance when informed about the scheduled date and place of the trial and informed that a decision may be handed down in case of non appearance at trial; being aware of the scheduled trial, having given a mandate to a legal counsellor and having been defended by him/her) => In these 4 cases, the executing authority may not refuse execution !!!

## ⇒ 3 questions referred to the ECJ :

⇒ Must Article 4a(1) of FD be interpreted as precluding national judicial authorities from making the execution of a EAW conditional upon the conviction in question being open to review, in order to guarantee the rights of defence of the person requested under the warrant? => The Court examines the wording, scheme and purpose of the provision (para 39 to 43) => Yes it precludes...

⇒ Is Article 4a(1) of FD compatible with the requirements deriving from the right to an effective judicial remedy and to a fair trial, provided for in Article 47 of the Charter and from the rights of defence guaranteed under Article 48(2) of the Charter=> Yes, compatible (para 47 to 54)

⇒ Must Article 53 of the Charter be interpreted as allowing the executing Member State to make the surrender of a person convicted *in absentia* conditional upon the conviction being open to review in the issuing Member State, in order to avoid an adverse effect on the right to a fair trial and the rights of the defence guaranteed by its constitution ? NO

⇒ Principle of the primacy of EU law (para 58-59)

⇒ Principles of mutual trust and mutual recognition and efficacy of the EAW FD(para 63).

=> Mutual trust justifies that the executing MS puts aside its own vision of human rights protection

# ECJ, 30 May 2013, *Jeremy F*, C-168/13 PPU: looking for a balance between the efficiency of mutual recognition and the protection of human rights

- Jeremy F, a United Kingdom national (teacher) had fled to France with one of his minor students. Arrested in France on the basis of a EAW issued for prosecution purpose for child abduction. Jeremy F agreed to be surrendered, without, however, waiving the speciality rule.
- After his surrender, the UK authorities asked the French ones to give consent to the request to extend the surrender with a view to new criminal proceedings being brought against the applicant in the main proceedings for the acts of sexual activity with a child under 16 (committed before the surrender).
  - ⇒ The indictment division of the Cour d'appel de Bordeaux gave consent but the applicant appealed to the Cour de cassation, and the Cour de cassation referred to the Conseil constitutionnel (Constitutional Council) a priority question of constitutionality relating to Article 695-46 of the Code of Criminal Procedure, which states that the indictment division shall give its ruling, not subject to appeal => The priority question of constitutionality concerned the principle of equality before the law and the right to an effective judicial remedy.
  - ⇒ The Conseil constitutionnel referred a preliminary question to the ECJ: must Articles 27 and 28 of the FD be interpreted as precluding Member States from providing for an appeal with suspensive effect against a decision to execute a European arrest warrant or a decision giving consent to an extension of the warrant or to an onward surrender ?'

## Ruling of the ECJ divided into 2 different steps:

- As regards the possibility of bringing an appeal with suspensive effect against a decision to execute a European arrest warrant or a decision giving consent to an extension of the warrant
  - The FD makes no express provision for such a possibility (§37). Does not mean that the Framework Decision prevents the Member States from providing for such an appeal or requires them to do so (§38). Leaves the national authorities a discretion as to the specific manner of implementation of the objectives it pursues (§ 52).
  - Recalls the provisions of the FD concerning the human rights (ex : Art. 1 § 3 FD). Insist on the importance of the right to an effective remedy (§ 42), on the judicialisation and judicial control in the EAW FD (§ 45 and 46). That obligation reinforces the high level of confidence between Member States and the principle of mutual recognition (§49)
  - => Art. 27 and 28 FD do not preclude Member States from providing for an appeal suspending execution of the decision (but quid obligation to provide such appeal?)
- As regards the limits of a right of appeal with suspensive effect => Takes into account the simplification, acceleration and efficiency purposes of the FD => Must comply with the time-limits laid down in Article 17 of the Framework Decision for making a final decision.

# Assessment of the case-law on the EAW

Very interesting case-law, brings essential clarifications

**BUT**, on some aspects, ECJ feels uncomfortable. Some judgments witness its difficulties when confronted with the EU penal area and especially when it must find right balances, as the one between efficiency of mutual recognition and mutual trust, on the one hand, and the control of protection of human rights, on the other hand: see *Mantello* and *Radu* cases

- See rephrasing of questions, in order to restrict the scope of its answers and work around some difficulties ...
- See some brief and disappointing decisions which mostly focus on the efficiency of mutual recognition and tend to limit the scope of control to perform in the executing MS

However evolution: see *Jeremy F. case* => Seeking a compromise between efficiency and protection of human rights...

# + On other mutual recognition instruments

⇒ **ECJ, 14 Nov. 2013, C-60/12, *Balaz***

⇒ Interpretation of the FD of 24 Febr. 2005, on the application of the principle of mutual recognition to financial penalties, and especially interpretation of the notion of “court having jurisdiction in particular in criminal matters” within the meaning of Article 1(a)(iii) of the Framework Decision (defining the issuing authorities).

# IV. The *ne bis in idem* principle

Essential case-law of the ECJ on the *ne bis in idem* principle:

- Series of judgments interpreting the principle as implemented by Art. 54 CISA: " 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. »
- Judgment of 26 Febr. 2013, C-617/10, *Åklagaren v. Hans Åkerberg Fransson* which interpretes Article 50 of the Charter of Human rights of the EU: « 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. ».

# 1) Judgments interpreting Art. 54 CISA

- 11 Febr. 2003, Joined cases C-187/01 and C-385/01, *Hüsein Gözütok and Klaus Brügge* ;
- 10 March 2005, C-469/03, *Miraglia* ;
- 9 March 2006, C-436/04, *Van Esbroeck* ;
- 28 Sept. 2006, C-150/05, *Van Straaten* ;
- 29 Sept. 2006, C-467/04, *Gasparini* ;
- 18 July 2007, C-288/05, *Kretzinger* ;
- 18 July 2007, C-367/05, *Kraaijenbrink*;
- 11 Dec. 2008, C-297/07, *Klaus Bourquain*;
- and 22 Dec. 2008, C-491/07, *Vladimir Turansky*.

- Most of the time, extensive interpretation of the principle and of its constituent elements (*bis and idem*) :
  - Mutual trust => Art. 54 not subordinated to the approximation or to the harmonisation of criminal laws of the MSs
  - Objective of free movement of persons
- Sometimes, limits to the principle: for prevention purposes and for the purpose of fighting against crime (*Miraglia and Turansky* cases)

⇒ Essential lessons concerning:

- the outlines of the *idem* (a)
- the outlines of the *bis* (b)
- the limits to the application of Art. 54 CISA in case of conviction (c)

## a) The outlines of the *idem*

Central question: identity of the material acts (*idem factum*), of legal qualifications (*idem crimen*) or of the protected legal interests?

=> Different wording in Art. 54 CISA (« same acts ») and in Art. 50 Charter (« offence »)

=> Variable interpretations

The ECJ decided in favour of the *idem factum* in its judgment of 9 March 2006 in the *Van Esbroeck* case.

# ECJ, 9 March 2006, *Van Esbroeck case*

- The only relevant criterion for the application of Article 54 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 (para 36).
  - 3 main arguments:
    - Wording of Art. 54 CISA « same acts » (para 27 and 28) ;
    - Mutual trust (para 29 to 32) ;
    - Right to free movement (para 33 to 35).
- => The situation such as that at issue in the main proceedings may, in principle, constitute a set of facts which, by their very nature, are inextricably linked (para 37) but the definitive assessment in that regard belongs to the competent national courts which are charged with the task of determining whether the material acts at issue constitute a set of facts which are inextricably linked together in time, in space and by their subject- matter (para 38).

## Same approach on the *idem* confirmed and clarified in 4 cases:

- *Gasparini* (para 53 and f.),
- *Van Straaten* (para 49 and 50) => « In the case of offences relating to narcotic drugs, the quantities of the drug that are at issue in the two Contracting States concerned or the persons alleged to have been party to the acts in the two States are not required to be identical. It is therefore possible that a situation in which such identity is lacking involves a set of facts which, by their very nature, are inextricably linked » => The identity must not be complete.
- *Kretzinger* (para 34 and f.)
- and *Kraaijenbrink* (para 29 and f.): the mere fact that the court before which the second prosecution is brought finds that the alleged perpetrator of those acts acted with the same criminal intention does not suffice to indicate that there is a set of concrete circumstances which are inextricably linked together covered by the notion of 'same acts' within the meaning of Article 54 of the CISA. A subjective link between acts which gave rise to criminal proceedings in two different Contracting States does not necessarily mean that there is an objective link between the material acts in question.

## b) The outlines of the *bis*

- Consensus to say that the decisions on which the *bis* is based must be final: the person must have been ‘finally judged’, but the exact meaning of these words gives rise to many questions.
- The ECJ brought some essential clarifications:
  - In many judgments (mainly in the joined cases *Gözütok* and *Brügge*, in the *Van Straaten* case and in the *Gasparini* case), extensive interpretation
  - In 2 other judgments (*Miraglia* and *Turansky* cases), limits.

# ECJ, 11 Febr. 2003, joined cases "Gözütok » and « Brügge »

- "the *ne bis in idem* principle laid down in Article 54 of the CISA also applies to procedures whereby further prosecution is barred, such as the procedures at issue in the main actions, by which the Public Prosecutor in a Member State discontinues, without the involvement of a court, a prosecution brought in that State once the accused has fulfilled certain obligations and, in particular, has paid a certain sum of money determined by the Public Prosecutor" (para 48).
- 3 main arguments:
  - Authority required to play a part in the administration of criminal justice in the national legal system and use of the *jus puniendi* (para 27 to 31) ;
  - Mutual trust (para 32 - 33) ;
  - Free movement of persons and AFSJ (para 35 and f.)

# ECJ, 28 and 29 Sept. 2006, cases *Van Straaten* and *Gasparini*

Quid of a final acquittal decision adopted by a Court?

- *Van Straaten* case: a decision of the judicial authorities of a Contracting State by which the accused is acquitted for lack of evidence (implying a assessment of the merits of the case)
- *Gasparini* case: acquittal on the grounds that proceedings were time-barred under the Portuguese Criminal Code (no assessment of the merits of the case).

⇒ In both cases, the ECJ admits the *bis*

⇒ But, in the second case, against the advice of AG E. Scharpston => « procedural or formal approach » (ECJ) >< « approach on the merits » (E. Scharpston) => Questionable...

# ECJ, 10 March 2005, *Miraglia* case

Any judicial decision having a definitive effect in a country's internal order would not be such as to serve as a basis for the *bis* within the meaning of Art. 54 CISA .

The principle of *ne bis in idem* does not apply to a decision of the judicial authorities of a Member State declaring a case to be closed, after the Public Prosecutor has decided not to pursue the prosecution on the sole ground that criminal proceedings have been started in another Member State against the same defendant and for the same acts, without any determination whatsoever as to the merits of the case.

Applying Art. 54 CISA to a decision to close criminal proceedings, such as that in question in the main proceedings,

- would make it more difficult, indeed impossible, to penalise in the Member States concerned the unlawful conduct with which the defendant is charged (para 33)
- would clearly run counter to the very purpose of the provisions of Title VI of the Treaty on European Union, as set out in the fourth indent of the first subparagraph of Article 2 EU, namely: 'to maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to ... prevention and combating of crime' (para 34).

## ECJ 22 Dec. 2008, *Turansky* case

- => Does the *ne bis in idem* principle enshrined in Art. 54 CISA apply to a decision such as that at issue in the main proceedings, whereby a police authority, after examining the merits of the case brought before it, makes an order, at a stage before the charging of a person suspected of a crime, to suspend the criminal proceedings, which had been instituted?
- ⇒ The ECJ does not exclude that a police decision could serve as a basis for the *bis*.
- ⇒ But, in order to assess whether a decision is ‘final’ for the purposes of Article 54 of the CISA, it is necessary to ascertain that the decision in question is considered under the law of the Contracting State which adopted it (Slovak law) to be final and binding, and to verify that it leads, in that State, to the protection granted by the *ne bis in idem* principle (para 35-36).
- ⇒ Under Slovak law, a decision ordering the suspension of the criminal proceedings at a stage before a particular person is charged, does not preclude the institution of new criminal proceedings in respect of the same acts in the territory of the Slovak Republic (para 40) => Does not constitute a final decision under Art. 54 CISA.

## C) Limits to the application of Art. 54 CISA in case of conviction

Reminder: Art. 54 CISA : if a penalty has been imposed, the *ne bis in idem* is applicable only under the condition that it has been enforced, it is actually in the process of being enforced or it can no longer be enforced under the laws of the sentencing Contracting Party.

⇒ Numerous questions

⇒ The ECJ brought some clarifications in its judgments *Kretzinger* and *Bourquain*

## **ECJ, 18 July 2007, *Kretzinger* case**

- A suspended custodial sentence, which penalises the unlawful conduct of a convicted person, constitutes a penalty within the meaning of Art. 54 CISA. That penalty must be regarded as ‘actually in the process of being enforced’ as soon as the sentence has become enforceable and during the probation period. Subsequently, once the probation period has come to an end, the penalty must be regarded as ‘having been enforced’ within the meaning of that provision (para 42 and f.).
- For the purposes of Art. 54 CISA, a penalty imposed by a court of a Contracting State is not to be regarded as ‘having been enforced’ or ‘actually in the process of being enforced’ where the defendant was for a short time taken into police custody and/or held on remand pending trial and that detention would count towards any subsequent enforcement of the custodial sentence (para 52).

# Assessment of such case-law?

Essential contribution to the establishment of an EU area for criminal justice:

- Helped clarifying essential issues in a way which is rather favourable for the individuals (extensive interpretation of the *bis* and of the *idem*)
- Had an inspiring influence on the Eur. Court HR (see *Van Esbroeck* case => *Sergeï Zolotoukhine v. Russia* case)

## ⇒ But:

- No uniform case-law of the ECJ: see in the field of competition law (judgment 12 Febr. 2012, *Toshiba Corporation e.a.* >< *idem factum*)
- Remaining unanswered questions, especially concerning the articulation between Art. 54 CISA and f., on the one hand, and Art. 50 of the Charter, on the other? Quid compatibility of the limits of Art. 54 CISA and of the exceptions of Art. 55 CISA with Art. 50 of the Charter? Art. 52 para 1 of the Charter admits limitations to the enshrined rights and freedoms but only under 4 conditions: legality (provided for by law), respect of the essence of those rights and freedoms, necessity and proportionality!

## 2) ECJ, 26 Febr 2013, C-617/10, *Åklagaren v. Hans Åkerberg Fransson*

⇒ Does not concern Art. 54 CISA but Art. 50 Charter.

⇒ Main question: may criminal proceedings for tax evasion be launched against a person who was already targeted by tax penalties for the same acts of providing false information concerning VAT?

⇒ Yes but...

# Conclusions

- Overview => Not exhaustive (example ECJ case-law on terrorist black lists as ECJ, 18 July 2013, *Kadi*, C-584/10P, C-593/10 and C-595/10P...)
- Interesting prospects: case-law that will develop (see extension of the ECJ competences as from 1st Dec. 2014, directives on procedural guarantees...)
  - + Interesting pending cases, as for example C-398/12, *M* (interpretation Art. 54 CAAS) => Conclusions by AG E. Sharpston of 6 Febr. 2014.