

# The case-law of the ECJ in criminal matters

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## Introduction

- Development of the case-law of CJEU in the field of criminal law => Not exhaustive.
- Most judgments concern procedural aspects of criminal law.
- So far, to my knowledge, no preliminary ruling concerned EU instruments of approximation of substantive criminal law. But many judgments have affected MSs' substantive criminal law
  - Either through the negative impact of EU law on substantive criminal law
  - Or through its positive impact.

- I. A few annulments (especially relating to conflicts of legal bases) or invalidation decisions by the ECJ
- II. ECJ judgments interpreting procedural law (victims' rights and suspects' rights)
- III. ECJ judgments in the field of mutual recognition in criminal matters (especially European arrest warrant)
- IV. ECJ judgments interpreting the *ne bis in idem* principle

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## **I. Annulments or invalidation decisions**

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## **A. Annulment decisions (mainly conflicts of legal bases)**

- Before the entry into force of the Lisbon Treaty
- After the entry into force of the Lisbon Treaty

## **B. Invalidation decisions**

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## **A. Annulment decisions (mainly conflicts of legal bases)**

### **1. Before Lisbon**

Actions for annulment against some instruments approximating 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 => annulment of FD protection of the environment through criminal law
  - ECJ, judgment of 23 Oct. 2007, *Commission v. Council*, case C-440/05 => annulment of FD ship-source pollution
- + ECJ, 30 May 2006, C-317/04 and C-318/04, *Parliament v. Council and Commission* => Acts related to the EU-US PNR Agreement (annulment)

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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.

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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.

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## 2. Post-Lisbon

=> New conflicts of legal bases => ECJ, 6 May 2014, C-43/12, *Commission v. Parliament and Council*

- ⇒ Directive 2011/82/EU of 25 October 2011 facilitating the cross-border exchange of information on road safety related traffic offences, adopted after the entry into force of the Lisbon Treaty, on the basis of Art. 87, § 2 TFEU (Police cooperation).
- ⇒ Annulment by the ECJ because it should have been grounded on Art. 91, para 1, c) TFEU related to transport policy and improvement of road safety. But, it maintained the effects of Directive 2011/82 until the entry into force within a reasonable period of time — which may not exceed twelve months as from the date of delivery of the present judgment — of a new directive based on the correct legal basis

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- ECJ, 16 April 2015, C-540/13, *European Parliament v. Council of the EU* and 16 April 2015, C-317/13 and C-679/13, *European Parliament v. Council of the EU* => EP launched annulment actions against decisions adopted after entry into force of the Treaty of Lisbon but implementing / based on provisions of Council Decisions adopted on the basis of the former third pillar => Concern the interpretation of Art. 9 of Protocol 36 on transitional provisions.

⇒ 2 EP's arguments

- invalid legal basis (Art. 34 para. 2 c) EU)
- breach of an essential procedural requirements, namely EP absence

ECJ gives a nuanced answer:

- provisions contained in former third pillar instruments continue to produce their legal effects until it is repealed, annulled or amended => Legal basis ok
- But adoption of the acts submitted to Art. 39, § 1 EU requiring a EP consultation

=> Annulment (but effects maintained until entry into force of the new acts).

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## B. Invalidation decisions

- ECJ, 8 April 2014, C-293/12 and C-594/12, *Digital Rights Ireland*

=> Preliminary ruling in validity concerning Directive 2006/24/EC of 15 March 2006 on data retention

⇒ Compatibility with Art. 7 (privacy), 8 (data protection) and 11 (freedom of expression) of the Charter

⇒ Invalidity ab initio. Reasoning in 2 stages :

- Important interference in privacy
- Examination of proportionality of this interference...

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## Important interference in privacy

- The data collected may allow “very precise conclusions to be drawn concerning the private lives of the persons whose data has been retained, such as the habits of everyday life, permanent or temporary places of residence, daily or other movements, the activities carried out, the social relationships of those persons and the social environments frequented by them” (para. 27).
- The effects of the interference are “multiplied by the importance acquired in modern societies by electronic means of communication (...) and their massive and intensive use by a very significant proportion of European citizens in all areas of their private or professional life” (para. 56).

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## Which does not satisfy the proportionality test

- Objective of general interest (public security)
- But not limited to what is strictly necessary:
  - no clear and precise rules governing its scope and application nor impose minimum safeguards to guarantee the protection of personal data against the risk of abuse or any unlawful access and use of that data (paras. 54 – 69).
  - the text covers all subscribers and registered users (para. 56), without the persons being even indirectly in a situation which is liable to give rise to criminal prosecutions (para. 58).
  - it fails to lay down objective criteria determining the limits of the access of the competent national authorities to the data and their subsequent use (para. 60), or limiting the number of persons authorised to access and use the data (para. 62).
  - Finally the data retention period (6 months, that can be extended to 24 months) does not make distinction between the categories of data (para. 63), and its determination seems not based on objective criteria (para. 64).

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## II. ECJ judgments interpreting procedural law

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## ❑ Impact of the ECJ case-law on national procedural criminal law

- Either through the negative impact of EU law on national procedural criminal law
- Or through its positive impact

## ❑ But focus on the case-law interpreting the EU acts approximating procedural criminal law

- A. Rights of victims
- B. Rights of suspects

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## A. Rights of victims

### ❑ 7 preliminary rulings concerning FD 2001/220/JHA of 2001 on the standing of victims in criminal proceedings

- 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.

### ❑ Directive 2012/29/EU of 25 Oct. 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing FD 2001/220/JHA

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## 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.

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⇒ The ECJ extended the principle of interpretation in conformity with EC law to the FDs adopted on 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.

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⇒ 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).

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## Other « lessons »

- 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).
- Need to interpret the FD in the light of fundamental rights (see especially *Pupino* para 59; *Katz* para 48; *Gueye and Sanchez* para 55 ; *MX* para 43).
- personal scope of application of the FD limited to natural persons (see *Dell'Orto* and *Eredics and Sapi*).

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## B. Rights of suspects

- 3 Directives announced in the Roadmap have been adopted :
  - Directive 2010/64/EU of 20 Oct 2010 on the right to interpretation and translation in criminal proceedings
  - Directive 2012/13/EU of 22 May 2012 on the right to information in criminal proceedings
  - Directive 2013/48/EU of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in EAW proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty

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## ECJ, 15 Oct. 2015, C-216/14, *Gavril Govaci*

- Preliminary reference from the German *Amtsgericht Laufen*, asking to interpret some provisions of Directives on the right to interpretation and translation and on the right to information
  - Conformity with the 1<sup>st</sup> Directive of a national legislation that requires accused persons to bring an appeal only in the language of the court (German), even though they do not understand that language => Margin of appreciation of competent authorities
  - Conformity with the 2<sup>nd</sup> Directive of the obligation for accused persons who do not reside in the national territory, to appoint a judicial representative, who will receive the notification of the court's decision => OK but ...

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## Pending case *István Balogh* (C-25/15)

=> Request of a Hungarian Court to give a preliminary ruling concerning the interpretation of Directive on the right to interpretation and translation in criminal proceedings (interpretation of the expression “criminal proceedings”, wondering whether it refers only to procedures which conclude with a decision concerning the criminal liability of the defendant).

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## **III. ECJ judgments in the field of mutual recognition in criminal matters (especially European arrest warrant)**

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## **A. Judgments relating to FD of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States**

## **B. Judgments relating to other mutual recognition instruments**

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## **A. Judgments relating to the EAW FD**

- 1) Confirmation of the validity of the EAW FD:  
ECJ, 3 May 2007, C-303/05, *ASBL Advocaten voor de wereld*;
- 2) Decisions related to Art. 4, para 6 EAW FD
  - ECJ, 17 July 2008, *Szymon Kozlowski*, C- 66/08;
  - ECJ, 6 Oct. 2009, *Wolzemburg*, C-123/08;
  - ECJ, 21 Oct. 2010, *I.B.*, C-306/09
  - ECJ, 5 Sept. 2012, *Lopes Da Silva Jorge*, C-42/11;
- 3) Decisions concerning the extent of control by the executing authorities and linked to protection of human rights
  - ECJ, 16 Nov. 2010, C-261/09, *Mantello*
  - 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
  - Pending cases
- 4) Others
  - ECJ, 12 August 2008, *Santesteban Goicoechea*, C-296/08 PPU;
  - ECJ, 1 Dec. 2008, *Leymann and Pustovarov*, C-388/08 PPU;
  - ECJ, 28 June 2012, *Melvin West*, C-192/12 PPU.
  - ECJ July 2015, *F. Lanigan*, C-237/15 PPU

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## **1) Confirmation of the validity of the FD**

**ECJ 3 May 2007, C-303/05,**  
***ASBL Advocaten voor de wereld***

2 preliminary questions of 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 FD may be adopted only for the purpose of approximating the laws and regulations of the Member States?
- ⇒ Is Art. 2(2) 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) TEU and, concretely, 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 !

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## **2) Judgments relating to Art. 4, para 6 EAW FD:**

***Kozlowski, Wolzemburg, IB, Lopes Da Silva***

Art. 4 para 6 EAW FD: the executing judicial authority may refuse to execute a European arrest warrant if it has been issued for the execution of a custodial sentence or a 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.

- => *Szymon Kozlowski* : clarifies the terms 'staying' in or 'resident' of the executing State
- => *Wolzemburg*, C-123/08 and 5 Sept. 2012, *Lopes Da Silva Jorge*: 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?

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### 3) Decisions concerning the extent of the control of executing authorities and the protection of human rights

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*.

« 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"»

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⇒ 2 preliminary questions :

- ⇒ the term « same acts » (*idem*) must be understood according to a Union-wide autonomous definition
  - ⇒ Is there *idem* when there is a first conviction for drugs importation, but not for participation in a criminal organization (choice of prosecutor not to prosecute on that basis for tactical reasons)? The ECJ rephrased the question linking it to the *bis*, and left the issue to the **issuing authority**, according to which the first judgment had not definitively barred further prosecution in respect of participation in a criminal organization as included in its EAW (point 49 and 51).
- ⇒ Very disappointing if compared to AG Yves Bot's conclusion concerning the extent of judicial control performed in the executing MS

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**ECJ 29 January 2013, *Ciprian Vasile Radu*, C-396/11:  
the sensitive issue of the ground for refusal based  
on a violation or 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) .

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

⇒ The ECJ limits the scope of the questions: 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 authorities can refuse the execution of a prosecution EAW on the ground that the issuing judicial authorities did not hear the requested person before the arrest warrant was issued (para 31).

⇒ No

⇒ Not a ground for refusal provided for in the FD (para 38);

⇒ Need to ensure the effectiveness of the system of surrender + damage associated to 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 be observed in the executing MS (para 41 – 42).

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## BUT see:

- ECJ, 21 Dec. 2011 *NS and others*, C-411/10 and C/493/10 (EU asylum policy – Dublin system)
- Pending joined cases, C-404/15, *Aranyosi* and C-659/15, *Caldararu* (PPU), submitted by the same court (*Hanseatisches Oberlandesgericht in Bremen*), raising the same question: should surrender on a EAW be refused if there is reason to fear the wanted person will be exposed to inhumane prison conditions in the requesting state? (Hearing on 15 Febr., conclusions of AG Y. Bot to be published...)

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

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 specific cases (e.g, when aware of the date and place of the trial and informed that a decision could be handed down in case of non appearance; awareness of the scheduled trial, mandate to a legal counsellor who defended him/her) => In those 4 cases, the executing authority may not refuse execution !!!

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⇒ 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

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**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 ?

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## The ECJ reasons in 2 steps:

- Possibility of bringing such an appeal
  - The FD makes no express provision for such a possibility (§37), so MS are neither prevented nor required to do so (§38), the issue is left to MS discretion (§ 52).
  - The ECJ recalls the references to human rights in the FD (eg : Art. 1§3 FD). It insists on the importance of the right to an effective remedy (§ 42) and the 'judicialisation' and judicial control (§ 45 and 46). That obligation reinforces the high level of confidence between MSs and the principle of mutual recognition (§49)
  - => Arts. 27 and 28 FD do not preclude MS from providing for an appeal suspending the execution of the decision (but no obligation to provide such appeal)
- Limits to the appeal → The ECJ takes into account the objectives of simplification, acceleration and efficiency => Obligation to comply with the time limits laid down in Art.17 FD.

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## 4) Others

- 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, on the FD's relations 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 EAW. Melvin West had been subject to 3 successive EAWs => The ECJ ruled that the subsequent surrender of a person to a Member State is only subject to the consent of the last executing Member State. That conclusion is based on the objective pursued by the FD of accelerating and simplifying judicial cooperation in the EU.

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## ECJ July 2015, *F. Lanigan*, C-237/15 PPU

2 questions referred by the High Court (Ireland) to the CJEU (EAW issued in UK):

- first question concerns the effect a failure to meet the time limits set out in Art. 17 may have on the obligation of national executing judicial authorities to decide upon the execution of the EAW => An interpretation according to which national judicial authorities could no longer pursue the execution of the warrant after the prescribed time has expired would run counter to the objective of the FD of accelerating and simplifying judicial cooperation (para. 40) => The mere expiry of the time limits to take a decision on the execution of a EAW cannot relieve the executing court of its obligation to carry out the execution procedure and adopt the decision on the execution thereof (para. 42).

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- second question seeks to answer whether such failure gives rise to rights on the part of the individual placed into custody

=> No provision of FD provides that the person being held in custody must be released once the time limits have expired (paras 44 -46). A general and unconditional obligation to release the person upon expiry of these time limits could reduce the effectiveness of the surrender system and jeopardise the attainment of its objectives (para. 50).

**But**, the FD must be interpreted in the light of the EU Charter of Fundamental Rights, particularly Art. 6 on the right to liberty and security (para. 54) => A person may be held into custody as long as the total duration of this custody is not excessive. The executing judicial authority must carry out a concrete review of the situation at issue, taking account of all of the relevant factors, such as the possible failure to act on the part of the authorities concerned, or any contribution of the requested person to that duration (para 59).

Finally, the ECJ noted that if the executing judicial authority decides to end the requested person's custody it is required to accompany the provisional release of that person by any measures it deems necessary so as to prevent him from absconding and to ensure that the material conditions necessary for his surrender remain intact until a final decision on the execution of the EAW is taken (para. 61).

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## **B. Judgments relating to 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 FD (defining the issuing authorities).

+ Pending cases: for example C-554/14, *Ognyanov*, concerning the interpretation of a provision of the FD 2008/909/JHA of 27 Nov. 2008 on the transfer of sentenced persons (mutual recognition of custodial sentences and measures involving a deprivation of liberty)...

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## **IV. ECJ judgments interpreting the *ne bis in idem* principle**

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## A. Judgments interpreting 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. »

## B. ECJ, 26 Febr. 2013, C-617/10, *Åklagaren v. Hans Åkerberg Fransson* - Art. 50 of the Charter HR

=> « 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. ».

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## A. 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*;
- 22 Dec. 2008, C-491/07, *Vladimir Turansky*;
- 27 May 2014, C-129/14 PPU, *Zoran Spasic*
- 5 June 2014, C- 398/12, *M.*

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- 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)

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## The outlines of the *idem*

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

⇒ The ECJ decided in favour of the *idem factum* in its judgment of 9 March 2006 in the *Van Esbroeck* case (confirmed in *Gasparini*, *Van Straaten*, *Kretzinger* and *Kraaijenbrink*)

! Inspiring influence on the ECtHR (see *Van Esbroeck* case => *Sergeï Zolotoukhine v. Russia* case)

But No uniform case-law of the ECJ: cf. competition law (judgment 12 Febr. 2012, *Toshiba Corporation e.a.* >< *idem factum*)

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## 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).

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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.

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## The outlines of the *bis*

- 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.
- Extensive interpretation in *Gözütok and Brügge, Van Straaten, Gasparini and M.*
- Logical limits set out in *Miraglia and Turansky*

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### **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.)

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## **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 an 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...

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## **ECJ 5 June 2014, C-398/12, *M.***

- The *Tribunale di Fermo* referred a preliminary question to the ECJ: does a final judgment of “non-lieu” that terminates criminal proceedings after an extensive investigation but which permits the proceedings to be reopened in the light of new evidence, given by a court, preclude the initiation or conduct of proceedings in respect of the same facts and the same person in another Contracting State?
- ECJ: YES!

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## 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).

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## 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.

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### **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*

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

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

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### **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).

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### **Articulation of Arts. 54 ff. CISA with Art. 50 Charter**

Are the limits of Art. 54 CISA *in fine* and the exceptions of Art. 55 CISA compatible with Art. 50 of the Charter?

⇒ Partly answered by the Court in *Spasic*: the ECJ examined Art. 54 *in fine* against the conditions of Art. 52 para 1 of the Charter, which subjects limitations to rights and freedoms to the following conditions:

- legality (provided for by law),
- respect of the essence of the concerned rights and freedoms,
- necessity and proportionality!

⇒ Yes, the limits in art. 54 CISA fulfil these conditions and are thus compatible with Art. 50 of the Charter

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## B. ECJ, 26 Feb. 2013, C-617/10, *Åklagaren v. Hans Åkerberg Fransson*

⇒ Concerns Art. 50 Charter

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

⇒ Yes, but only in so far as the first penalty is not criminal in nature, a matter which is for the national court to determine

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## Conclusions

- ❑ Very interesting case-law, brings essential clarifications **BUT** some judgments are representative of the ECJ difficulties 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)
- ❑ Overview => Not exhaustive
- ❑ Interesting prospects:
  - case-law that will develop (see extension of the ECJ competences since 1st Dec. 2014, mutual recognition, directives on procedural guarantees, ...)
  - Pending cases to follow, for instance
    - FD EAW: C-404/15 *Aranyosi* and C-659/15 *Caldararu* (PPU); C-241/15, *Bob-Dogi*.
    - *Ne bis in idem*: C-486/14, *Kossowski*...
- ❑ More than ever the future of the EU area of criminal justice lies in the hands of the ECJ

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