Articles

Ne Bis Interpretatio In Idem? The Two Faces of the *Ne Bis In Idem* Principle in the Case Law of the European Court of Justice

By Alessandro Rosanò[*]

Abstract

The meaning of *idem* in the *ne bis in idem* principle is controversial in the case law of the Court of Justice of the European Union. In interpreting the provision of Article 54 of the Convention Implementing the Schengen Agreement, the court has emphasized the necessary requirement in the identity of the material acts while in antitrust law three requirements have been deemed necessary: (1) Identity of the facts, (2) unity of offender, and (3) unity of the legal interest protected. Despite the opinions of some Advocates General, the court has confirmed different interpretations of the same principle, depending on differences of the legal scope in question. A few years ago, however, the European Court of Human Rights proclaimed the criterion based on the identity of the material acts as the most suitable. This might push the Court of Justice of the European Union to correct its position in the antitrust field. Should this happen, this adjustment might serve as grounds to recognize the existence of a regional custom concerning the *ne bis in idem* principle.

[*] Alessandro Rosanò, Ph.D. is Teaching Fellow of International Law and European Union Law at the Law School of the University of Padova (Italy). Email: alessandro.rosano@studenti.unipd.it. The Author wishes to thank Tommaso Pavone, Chi Ewusi, and the anonymous reviewer for their valuable contributions and comments on earlier version of this Article. The usual disclaimers apply.

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A. Introduction

Over the past sixty years, the birth and development of the European Communities and subsequently the European Union (EU) have favored—among other things—a significant mobility of people, which has posed a challenge to the laws summoned to adjudicate this growingly transnational reality. Among the many challenges is the issue of transnational crime:[1] The phenomenon of cross-border crimes has raised many questions regarding the reaction of Member States, the identification of the proper *locus delicti commissi*, and how conflicts of jurisdiction can be mitigated. That is why the issue of the *ne bis in idem* principle—the double jeopardy clause—is relevant.

One should consider a definition of that principle provided in a monograph that still is a landmark among the Italian studies on the topic: *Ne bis in idem* should be understood as the principle which excludes the renewability of criminal proceedings concerning a matter that has already been definitively judged by a judicial authority of a legal system different from the potentially competent one.[2] But this definition is just a starting point, for it fails to provide a definition for a matter that has already been definitively judged. In fact, it could be understood as referring either to a matter as the material reality manifested in the historical context or a matter as the legal characterization of that reality.

This issue has also emerged in the case law of the Court of Justice of the European Union (CJEU),[3] both in criminal and antitrust law, leading to different solutions within each branch of law.[4] This Article first retraces the most important CJEU judgments in this field, subsequently trying to tackle two problems: The first problem concerns unifying the concept of *idem* in the *ne bis in idem* principle in EU law, regardless of the legal scope.[5] The

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[1] *See generally* TRANSNATIONAL ORGANISED CRIME (Adam Edwards & Peter Gill eds., 2003); ANNAMARIA PECCIOLI, UNIONE EUROPEA E CRIMINALITÀ TRANSNAZIONALE: NUOVI SVILUPPI (2005); HANDBOOK OF TRANSNATIONAL CRIME AND JUSTICE (Philip Reichel ed., 2005).

[2] NOVELLA GALANTINI, IL PRINCIPIO DEL "*NE BIS IN IDEM*" INTERNAZIONALE NEL PROCESSO PENALE 6 (1984).

[3] BAS VAN BOCKEL, THE *NE BIS IN IDEM* PRINCIPLE IN EU LAW: A CONCEPTUAL AND JURISPRUDENTIAL ANALYSIS 225 (2010) noted that in a legal system characterized by the presence of a number of States in which free movement of individuals is granted, the territorial scope of *ne bis in idem* must necessarily coincide with the territorial scope of the legal system.

[4] On the topic, one may want to check the following: Robin Lööf, *54 CISA and the Principles of* Ne Bis in Idem, 15 EURO. J. CRIME, CRIM. L. & CRIM. JUSTICE 309 (2007); Chiara Amalfitano, *Il Principio del* Ne Bis in Idem *tra CAAS e Carta Dei Diritti Fondamentali Dell´Unione Europea*, 52 CASSAZIONE PENALE 3889 (2012); Juliette Lelieur, *"Transnationalising"* Ne Bis in Idem*: How the Rule of* Ne Bis in Idem *Reveals the Principle of Personal Legal Certainty*, 9 UTRECHT L. REV. (2013) *available at* http://www.utrechtlawreview.org.

[5] For that purpose, this author takes into account both horizontal transnational enforcement (when the same offense is considered in two or more EU Member States, or an EU Member State and another third country) and

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second problem relates to the identification of *ne bis in idem* as a principle of customary international law. To address this second problem, this Article also considers the case law of the European Court of Human Rights (ECtHR) because that court faced an interpretative challenge when dealing with that principle and has only overcome the problem in recent years.

B. The CJEU Case Law: *Ne Bis In Idem* as a Criminal Procedure Principle

First of all, one should note that significant CJEU case law concerning *ne bis in idem* as a criminal procedure principle has been developed only after the communitarization of the Schengen Agreements in 1997, in light of Article 54 of the Convention implementing the Schengen Agreement (CISA). Under Article 54, 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 in process of being enforced, or can no longer be enforced under the laws of the sentencing Contracting Party.[6]

This explains why the first judgment in this field dates back to the beginning of the new millennium[7] and concerns cross-border crime. In *Gözütok and Brügge*, Advocate General (AG) Ruiz-Jarabo Colomer highlighted that *ne bis in idem* rests on two principles underlying every legal system: Those of legal certainty and of equity. In fact, he wrote: "When the offender is prosecuted and punished, he must know that, by paying the punishment, he has expiated his guilt and need not fear further sanction. If he is acquitted, he must have the certainty that he will not be prosecuted again in further proceedings"; he subsequently added that "the classic formulation of the *ne bis in idem* principle requires that three identical circumstances should be present: the same facts, the same offender and the same legal principle–the same value–to be protected."[8] The CJEU did not follow Colomer's

vertical application of the principle (where the same offense is considered by EU antitrust authorities and national antitrust authorities).

[6] One should remember that, pursuant to Article 50 of the Charter of Fundamental Rights of the European Union, no one shall be liable to be tried or punished again in criminal proceedings for an offense for which he or she has already been finally acquitted or convicted within the EU.

[7] See also Joined Cases 18 and 35–65, Gutmann, 1967 E.C.R. 75 for some hints.

[8] Opinion of Advocate General Ruiz-Jarabo Colomer, Joined Cases C-187 and C-385/01, Gözütok and Brügge, 2003 E.C.R. I-1348, paras. 49 and 56.

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approach; by relying on the textual interpretation of Article 54, the court ruled that only the same acts should be taken into account.[9]

Immediately thereafter, the CJEU faced the challenge of discerning the actual meaning of "same acts." The nature of the topic was explained in the Opinion of AG Ruiz-Jarabo Colomer in *Van Esbroeck*. Here, it was conceptualized as referring to the purely factual aspect of a historical occurrence, to the legal characterization of the act, or to the legal interests protected by the characterization of the offense. From the AG´s point of view, the second and third approaches are problematic, for the peculiarities of every national legal system may lead to the delineation of different offenses and may identify a different legal interest deserving of protection. Such delineation could require an important limitation of the freedom of movement in the Schengen area.[10] For these reasons, same acts must be identified as all the acts being prosecuted, historically laid out for the national court to assess.[11]

The CJEU agreed and ruled that the only relevant criterion for the application of Article 54 of the CISA is the identity of the material acts, understood as meaning a set of concrete circumstances which are inextricably linked together in time and space and by their subject-matter as assessed by national judges.[12] This interpretation was consistently confirmed in *Gasparini*,[13] *van Straaten*,[14] *Kretzinger*,[15] *Kraaijenbrink*,[16] *Bourquain*,[17] and *Turanský*.[18]

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[9] Joined Cases C-187 and C-385/01, Gözütok and Brügge, 2003 E.C.R. I-1378, para. 44. For a review, see John A. E. Vervaele, *The transnational* ne bis in idem *principle in the EU. Mutual recognition and equivalent protection of human rights*, 1 UTRECHT L. REV. (2005), available at http://www.utrechtlawreview.org.

[10] This issue is also underlined in Case C-469/03, Miraglia, 2005 E.C.R. I-2009 where the Court ruled out the application of *ne bis in idem* to a decision declaring a case to be closed on the sole ground that criminal proceedings have been started in another Member State against the same defendant and for the same fact. For a review, see Chiara Amalfitano, Bis in idem *per il* "ne bis in idem*": Nuovo Quesito alla Corte di Giustizia*, 40 RIVISTA DI DIRITTO INTERNAZIONALE PRIVATO E PROCESSUALE 85 (2004).

[11] Opinion of Advocate General Ruiz-Jarabo Colomer, Case C-436/04, Van Esbroeck, 2006 E.C.R. I-2336, paras. 43–45.

[12] Case C-436/04, Van Esbroeck, 2006 E.C.R. I-2333, paras. 36, 38.

[13] Case C-467/04, Gasparini and Others, 2006 E.C.R. I-9245. In *Gasparini*, the CJEU ruled that *ne bis in idem* applies to a court decision of a Member State by which the accused is acquitted finally because prosecution of the offense is time-barred.

[14] Case C-150/05, van Straaten, 2006 E.C.R. I-9327. In *van Straaten*, the court acknowledged that the principle applies to a decision by which the accused is acquitted finally for lack of evidence.

[15] Case C-288/05, Kretzinger, 2007 E.C.R. I-6441. In *Kretzinger*, the CJEU ruled that, for the purposes of Article 54 CISA, also a suspended custodial sanction is relevant.

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The concept of same acts also applies with reference to the European arrest warrant framework decision.[19] According to the CJEU, the need for a uniform application of EU law requires that it be given an autonomous and uniform interpretation throughout the EU.[20]

Finally, one should thoroughly consider the analysis of AG Ruiz-Jarabo Colomer in *Bourquain*, where he underlined how the *ne bis in idem* principle has undergone a structural change produced by the evolution of case law. Initially, the concept was closely tied to the idea of cooperation between states founded on mutual trust; with time, it has become the expression of a form of judicial protection from the *ius puniendi*, whose logic is ground in the right to a fair trial.[21]

Thus, one may say that the approach followed by the CJEU in criminal matters is consistent in that it has highlighted the relevance of the concept of same act while also solving some tough procedural issues while identifying—and reaffirming—the very nature of the principle.

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[16] Case C-367/05, Kraaijenbrink, 2007 E.C.R. I-6619. In *Kraaijenbrink*, the court held that it is up to national courts to assess whether the degree of identity and connection among all the facts is such that it is possible to find that they are the same act within the meaning of Article 54 CISA.

[17] Case C-297/07, Bourquain, 2008 E.C.R. I-9425. In *Bourquain*, the CJEU acknowledged that the *ne bis in idem* principle also applies to cases where a sentence cannot be directly enforced on account of specific features of procedure, such as in an *in absentia* trial. For a review, see Silke Brammer, *Case C-297/07, Reference for a preliminary ruling from the* Landgericht *Regensburg in the criminal proceedings against* Klaus Bourquain*, Judgment of the Court (Second Chamber) of 11 December 2008*, 46 COMMON MKT. L. REV. 1685 (2009).

[18] Case C-491/07, Turanský, 2008 E.C.R. I-11039. In *Turanský*, the court held that the *ne bis in idem principle* does not apply to a suspension decision which does not definitively bar further prosecution. This therefore does not preclude new criminal proceedings of the same act in the same state.

[19] See Article 3(2) of the Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States—Statements made by certain Member States on the adoption of the Framework Decision, 2002 O.J. L 190/1.

[20] Case C-261/09, Mantello, 2010 E.C.R. I-11477. For a review, see Jannemieke Ouwerkerk, *Case C-261/09,* Criminal proceedings against Gaetano Mantello*, Judgment of the Court of Justice (Grand Chamber) of 16 November 2010*, 48 COMMON MKT. L. REV. 1687 (2011).

[21] Opinion of Advocate General Ruiz-Jarabo Colomer, Case C-297/07, Bourquain, 2008 E.C.R. I-9425, paras. 48–49.

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C. The CJEU Case Law: *Ne Bis In Idem* and Antitrust Law

With respect to the *ne bis in idem* case law in the field of antitrust law—and, more specifically, in the field of anti-competitive agreements—the CJEU has had to deal with the application of sanctions against cartels by both EU and national authorities.

In *Wilhelm*, AG Roemer stated there is no reason not to apply national law, despite the substantial similarity between EU and national bans and even though the *ne bis in idem* principle represents an integral part of EU law.[22] On the one hand, he argued that in spite of an evident homogeneity of protected legal interests—competition in international trade and competition in domestic trade, with a clear interpenetration between the two dimensions—it cannot be ruled out that their diversity of fundamental principles could produce totally different assessments in the same case.[23] On the other hand, because the principle emerged in the criminal law framework, it is not simple to apply it to sanctions that are administrative in nature.[24] The CJEU agreed with the AG but stressed the role of equity in such situations; applying two sanctions implies that the severity of the former is taken into account when determining the latter.[25]

A few years later, in *Boehringer Mannheim*, the court ruled again in the case of a company fined both by U.S. authorities and the European Commission. AG Mayras raised a preliminary problem: He wondered if a principle criminal in nature may apply to antitrust law—a system which is administrative in nature. He viewed *ne bis in idem* as a humanitarian principle aimed at ensuring the protection of the individual as a natural person against a number of sanctions, especially in the case of custodial sentences.[26] Under antitrust law, sanctions are fines that affect legal entities. Therefore, according to AG Mayras, it was not possible to apply the principle to those cases without adapting it to the specific branch of law.[27] Under criminal law, it is possible to limit the reference to the identity of the material acts, because one is asked to consider behaviors such as murder, injuries, theft that are committed by one or more individuals in specific place at a precise time. The case of anti-competitive agreements is completely different; cartels are based on several acts whose spatial and chronological dimension cannot be easily determined.

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[22] Opinion of Advocate General Roemer, Case 14/68, Walt Wilhelm and Others v. Bundeskartellamt, 1969 E.C.R. I-17, para. 3.

[23] *Id.* at para. 2.

[24] *Id.*

[25] Case 14/68, Walt Wilhelm and Others v. Bundeskartellamt, 1969 E.C.R. 2, para. 11.

[26] Opinion of Advocate General Mayras, Case 7/72, Boehringer Mannheim, 1972 E.C.R. I-1291, para. 2.

[27] *Id.* at para. 3.

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Consequently, a *quid pluris* is needed, even if the AG did not identify it.[28] As for the reduction of the amount of the sanctions imposed by the Commission in light of the sanction already imposed by U.S. authorities, the AG gave a negative answer. It is one thing to consider agreements restricting competition in the supranational framework in light of the peculiar relationship between the EU and Member States; therefore, cumulative sanctions should be avoided. A completely different aspect concerns those agreements having effects both in the legal and economic systems of the EU and its Member States, as well as the legal systems of other countries. If the severity of a sanction imposed by the European Commission were derivative of the fact that in third states the same company was already fined, the aims of the EU could not be achieved.[29] In short, the swift analysis of the CJEU excluded that decisions taken in a legal system completely alien to the process of European integration may be taken into account in the exercise of the controlling and sanctioning functions of the Commission.[30]

Eventually, case law evolved to clarify the scope of the *quid pluris* mentioned by AG Mayras and endowed it with meaning. In *Aalborg Portland*, the CJEU ruled that when observing *ne bis in idem*, the application of that principle "is subject to the threefold condition of identity of the facts, unity of offender and unity of the legal interest protected. Under that principle, therefore, the same person cannot be sanctioned more than once for a single unlawful course of conduct designed to protect the same legal asset."[31] Moreover, as far as the unity of legal interest is concerned, the Opinion of AG Ruiz-Jarabo Colomer in *Italcementi* is quite important because he asserted:

> The unity of the legal right to be protected is beyond doubt. In the arrangement designed to ensure free competition, it is not possible to speak, within the European Union, of separate spheres, the Community sphere and the national spheres, as though they were watertight compartments. Both sectors seek to protect free and open competition

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[28] *Id.* at para. 4.

[29] *Id.*

[30] Case 7/72, Boehringer Mannheim, 1972 E.C.R. 1281. On a similar topic, see Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, Limburgse Vinyl Maatschappij, 2002 E.C.R. I-8375; Case C-289/04 P Showa Denko, 2006 E.C.R. I-5859; Case C-308/04 P, SGL Carbon, 2006 E.C.R. I-5977. *See also* Case T-141/89, Trefileurope, 1995 E.C.R. II-791; Case T-149/89, Sotralentz, 1995 E.C.R. II-1127; Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01, Tokai Carbon, 2004 E.C.R. II–1181.

[31] Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, Aalborg Portland, 2004 E.C.R. I-123, para. 338.

> in the common market, one contemplating it in its entirety and the other from its separate components, but the essence is the same.[32]

D. Two Meanings for the Same Principle: The Doubts Cast by the Advocates General

It is worth recalling how the AGs have criticized the existence of two different interpretations of the *ne bis in idem* principle, particularly with regard to the second interpretative option concerning antitrust law.

In *Gasparini*, AG Sharpston stated that, in order for the principle to apply, it should be given a substance-based approach that binds *ne bis in idem* to the essence of the facts.[33] This choice is necessary in order to ensure the consistency of the case law of the CJEU when interpreting Article 54 CISA and the rules concerning competition law. Despite the recognition that she could not "see how a core element of a fundamental principle could vary substantially in its content depending on whether *ne bis in idem* is being applied under Article 54 of the CISA or generally as a fundamental principle of Community law,"[34] AG Sharpston did not support her thesis to the end, for she asserted:

> In a strictly supranational context and with respect to a single legal order governed by one uniform set of rules . . . the legal interest protected is, by definition, already established by the EC competition rules; and is one and the same for the whole Community. It is therefore reasonable for the Court to require, in that 'unitary' context, that there should be 'unity of the legal interest protected' as one of the conditions for the application of the *ne bis in idem* principle.[35]

Nevertheless, the CJEU did not take this analysis into account. It was AG Kokott who tried to definitively solve the issue. In the *Toshiba Corporation* opinion, she raised some serious concerns about the requirement of the unity of the protected legal interest. From her point of view, there was no reason to apply the *ne bis in idem* principle to antitrust law any differently than it would apply to other fields.[36] In fact, under Article 54 CISA, the principle aims at ensuring free movement of EU citizens within the Union as an area of freedom,

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[32] Opinion of Advocate General Ruiz-Jarabo Colomer at para. 91, Case C-213/00 P, Italcementi—Fabbriche Riunite Cemento, (Jan. 7, 2004), http://curia.europa.eu/juris/liste.jsf?language=en&num=C-213/00%20P.

[33] Opinion of Advocate General Sharpston, Case C–467/04, Gasparini and Others, 2006 E.C.R. I-9203, para. 92.

[34] *Id.* at para. 103.

[35] *Id.* at para. 157.

[36] Opinion of Advocate General Kokott at para. 118, Case C-17/10, Toshiba Corporation and Others (Sep. 8, 2011), http://curia.europa.eu/juris/celex.jsf?celex=62010CC0017&lang1=en&type=TXT&ancre=

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security, and justice while, under competition law, it aims at improving and facilitating business in the internal market by creating a level playing field throughout the European Economic Area. Aware of the reason behind the development of the unity-of-the-legal-interest requirement—namely, punishing anti-competitive agreements even if a sanction has already been imposed outside the EU—AG Kokott denied that that reason represented a real problem:

> In the context of cartel offences, the material acts to which the *ne bis in idem* principle is then applicable necessarily always include . . . the period of time and the territory in which the cartel agreement had anti-competitive effects . . . or could have had such effects . . . . This has nothing to do with the legal interest protected or the legal characterisation of the facts. Rather, the actual or potential effects of a cartel are an indispensable component of the facts on account of which the undertakings participating in the cartel are prosecuted by a competition authority and cannot thereafter be prosecuted for a second time (*ne bis in idem)*. The prohibition under EU law against prosecution and punishment for the same cause of action (the *ne bis in idem* principle) prevents more than one competition authority or court from imposing penalties for the anti-competitive consequences of one and the same cartel in relation to the same territory and the same period of time within the European Economic Area.[37]

Crucially, here too, the CJEU did not agree with the AG. In light of the aforementioned judgments, the court confirmed the traditional interpretation using the three requirements of identity of the facts, unity of offender, and unity of the legal interest protected.[38]

E. Hints in the Case Law of the ECtHR Concerning the *Ne Bis In Idem* Principle

For the purposes of this analysis, it is useful to draw upon the ECtHR's approach with regard to *ne bis in idem*.[39]

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[37] *Id.* at paras. 130–31.

[38] Case C-17/10, Toshiba Corporation and Others (Feb. 14, 2012). AG Kokott confirmed her ideas in Opinion of Advocate General Kokott at para. 80, Case C–489/10, Bonda (June 5, 2012), http://curia.europa.eu/juris/recherche.jsf?language=en but the CJEU did not give any useful answer on the topic. *See* Arianna Andreangeli, Ne bis in idem *and administrative sanctions*, 50 COMMON MKT. L. REV. 1827 (2013).

[39] *See also* Opinion of Advocate General Cruz Villalón, Case C-617/10, Åkerberg Fransson (June 12, 2012), http://curia.europa.eu/juris/celex.jsf?celex=62010CC0617&lang1=en&type=TXT&ancre= which represents a useful guide to the case law of the CJEU and the ECtHR.

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First of all, it should be noted that, over time, the ECtHR has developed three different interpretations on the meaning of *idem* in *ne bis in idem* under Article 4 of Protocol No. 7 to the European Convention on Human Rights (ECHR),[40] highlighting either the import of the identity of the material act, the identity of legal characterization, or the identity of the essential elements.

In *Gradinger*, the ECtHR had to deal with the case of an Austrian citizen who, while driving his car, had caused an accident leading to the death of a cyclist. The driver was first sentenced to a fine for causing death by negligence pursuant to the Austrian Criminal Code, and he was subsequently imposed another fine for driving under the influence of alcohol pursuant to the Austrian Road Traffic Act. On the alleged violation of Article 4 of Protocol No. 7, the ECtHR, being fully aware that the national provisions differ with regard to the designation, nature, and purpose of the offenses, ruled that both impugned decisions were based on the same conduct, thereby focusing on the identity of the material act and holding Austria responsible for a violation of Article 4.[41]

With time, the ECtHR's opinion changed. In *Oliveira*,[42] a Portuguese citizen living in Switzerland caused a car accident and was sentenced to both a fine pursuant to the Federal Road Traffic Act for the accident itself and another fine pursuant to the Swiss Criminal Code for negligently causing physical injury to another driver. Although the Zürich District Court held that any part of the former fine that had already been paid had to be deducted from the latter, the Portuguese citizen lodged an application before the ECtHR for violation of Article 4 of Protocol No. 7. The Court ruled that this was "a typical example of a single act constituting various offences," where "a single act is split up into two separate offences." The Court thus held by eight votes to one that there had been no violation of the *ne bis in idem* principle. In his dissenting opinion, Judge Repik recalled *Gradinger*. In light of that reference and of the terminology used by the Court—criminal

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[40] Pursuant to which,

> 1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State. 2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case. 3. No derogation from this Article shall be made under Article 15 of the Convention.

[41] Gradinger v. Austria, App. No. 15963/90, paras. 54–55 (Oct. 23, 1995).

[42] Oliveira v. Svizzera, App. No. 25711/94, para. 26 (July 30, 1998).

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act and offense—it seems that, in this case, the ECtHR interpreted the *idem* as conveying the idea of identity of legal characterization.

Some years later in *Franz Fischer*, a case very similar to *Gradinger*, the Court reasoned as follows:

> The wording of Article 4 of Protocol No. 7 does not refer to "the same offence" but rather to trial and punishment "again" for an offence for which the applicant has already been finally acquitted or convicted. Thus, while it is true that the mere fact that a single act constitutes more than one offence is not contrary to this Article, the Court must not limit itself to finding that an applicant was, on the basis of one act, tried or punished for nominally different offences. The Court . . . notes that there are cases where one act, at first sight, appears to constitute more than one offence, whereas a closer examination shows that only one offence should be prosecuted because it encompasses all the wrongs contained in the others . . . . An obvious example would be an act which constitutes two offences, one of which contains precisely the same elements as the other plus an additional one. There may be other cases where the offences only slightly overlap. Thus, where different offences based on one act are prosecuted consecutively, one after the final decision of the other, the Court has to examine whether or not such offences have the same essential elements.[43]

That interpretation was then confirmed in *Sailer*,[44] yet shortly thereafter in *Göktan*,[45] the Court backtracked to *Oliveira*.

The ECtHR solved the foregoing interpretative enigma in *Zolotukhin*. In that case, the applicant had been sentenced for a number of violations of administrative and criminal regulations based on the same set of facts. First of all, the court recalled the three aforementioned approaches and considered that the existence of a variety of approaches engenders legal uncertainty incompatible with a fundamental right, namely the right not to be prosecuted twice for the same offense.[46] Hence, harmonizing the interpretation in that

[43] Franz Fischer v. Austria, App. No. 37950/97, para. 25 (May 29, 2001).

[44] Sailer v. Austria, App. No. 38237/97 (June 6, 2002).

[45] *See* Göktan v. France, App. No. 33402/96 (July 2, 2002). *See also* Gauthier v. France, App. No. 61178/00 (June 24, 2003).

[46] Zolotukhin v. Russia, App. No. 14939/03, para. 78 (Feb. 10, 2009).

field was necessary. Because the ECHR must be "interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory"[47] and the approach which emphasized the legal characterization of the two offenses was too restrictive,[48] the court held that the *idem* element must be understood as expressing the idea of facts which constitute "a set of concrete factual circumstances involving the same defendant and inextricably linked together in time and space, the existence of which must be demonstrated in order to secure a conviction or institute criminal proceedings."[49] The court thus ruled in favor of Mr. Zolotukhin.[50]

Such an approach perfectly overlaps the one followed by the CJEU when interpreting Article 54 CISA, and it is for this reason that in paragraph 37 of *Zolotukhin*, the ECtHR made reference to *van Esbroeck*, adopting a cross-fertilization perspective when adjudicating the issue at stake.

F. How to Unify the Meaning of *Idem* in the *Ne Bis In Idem* Principle in the CJEU's Case Law (?)

Returning to the CJEU's case law, one should be aware of the contrast between the two different meanings of the *idem* in the *ne bis in idem* principle: Article 54 CISA is interpreted as expressing the requirement of identity of material facts, but when it comes to antitrust law, it is interpreted as expressing the requirements of identity of the facts, unity of the offender, and unity of the legal interest protected.

As far as the first meaning is concerned, it seems both correct and obvious to say that the requirements are two-fold: Identity of the facts and unity of the offender. In fact, *ne bis in idem* cannot be relied upon by a person other than the one the final judgment was passed upon. This realization, however, allows only minimal approximation, for the main problem concerns the unity of the legal interest protected as the nullifying element. It therefore seems appropriate to try to understand the reason behind such a requirement.

First of all, one should remember that the antitrust declination of the *ne bis in idem* principle arose between the late sixties and the early seventies, during a time period when the European Communities did not have competence in criminal matters. After all, antitrust law is a branch of administrative—and not criminal—law. That has legitimized—

[47] *Id.* at para. 80.

[48] *Id*. at para. 81.

[49] *Id.* at para. 84.

[50] The interpretation given in *Zolotukhin* was later applied in Grande Stevens and Others v. Italy, App. No. 18640/10, 18647/10, 18663/10, 18668/10 and 18698/10 (Mar. 4, 2014).

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as mentioned in the aforementioned opinion of AG Mayras—the idea that the criminal procedure principle of *ne bis in idem* had to be adapted to a different area of law in which it would—or would not, depending on the case—be applied. This conclusion was understandable at the time, but it seems less appropriate now, that is to say, after almost fifty years and in light of the significant development of the EU competence in criminal matters.[51] The CJEU strongly defends its case law and that seems to legitimize the idea that the aim of that case law is to fully suppress phenomena that harm competition through a joint effort of EU and national authorities. This new *modus operandi* should justify a different interpretative approach.

This conclusion does not seem acceptable due to its Machiavellian undertones—the end that justifies the means in the antitrust field. Traditionally, the *ne bis in idem* principle is a humanitarian principle which aims to protect anyone from being prosecuted and punished twice for the same offense. Therefore, it cannot lead to the result of making it easier to punish twice; that would represent a severe distortion of its meaning.

Of course, if the traditional interpretation of the principle prevailed, the European Commission and national authorities would have only one chance to hit anti-competitive agreements, potentially involving powerful economic entities.[52] This does not, however, change the fact that the goal is not to hit them hard, but to hit them good—namely, to hit them *secundum legem*.

Therefore, a *revirement* by the CJEU would be highly appropriate, especially if one considers that it could be done in a rather elegant fashion. When dealing with the *ne bis in idem* principle in the antitrust field, the CJEU has recalled the case law of the ECtHR.[53] In light of *Zolothukin* and of the need for an interpretative harmonization expressed by the ECtHR on the *ne bis in idem* topic, it would not be difficult for the CJEU to acknowledge that will and overhaul its position. That could be based on the aforementioned Article 52(3) of the Charter of Fundamental Rights of the EU; Pursuant to this article, in so far as

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[51] *See generally* VALSAMIS MITSILEGAS, EU CRIMINAL LAW (2009); ESTER HERLIN-KARNELL, THE CONSTITUTIONAL DIMENSION OF EUROPEAN CRIMINAL LAW (2012); ANDRÉ KLIP, EUROPEAN CRIMINAL LAW: AN INTEGRATIVE APPROACH (2012).

[52] *See* Bas van Bockel, Case C-436/04*,* Criminal Proceedings against Léopold Henri Van Esbroeck*,* Case C-150/05, Jean Leon Van Straaten v. Netherlands and Italy, Case C-467/04, Criminal proceedings against G. Francesco Gasparini, José Ma L.A. Gasparini, G. Costa Bozzo, Juan de Lucchi Calcagno, Francesco Mario Gasparini, José A. Hormiga Marrero, Sindicatura Quiebra, 45 COMMON MKT. L. REV. 223 (2008).

[53] *See, e.g.,* Limburgse Vinyl Maatschappij and Others v. Commission case. For a review, see Rein Wesseling, *Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P,* Limburgse Vinyl Maatschappij NV (LVM) and Others v. Commission, 41 COMMON MKT. L. REV. 1141 (2004).

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the Charter contains rights which correspond to rights guaranteed by the ECHR, the meaning and scope of those rights shall be the same as those laid down by the ECHR, although EU law may provide more extensive protection. Because *ne bis in idem* is guaranteed by both the Charter and the ECHR, its meaning and scope should be the same both in the EU and the ECHR legal system but the interpretation provided by the CJEU in the antitrust field cannot be considered consistent with the interpretation provided by the ECtHR. And, of course, one cannot say that the former provides a more extensive protection in that it makes it more difficult for the principle to apply.[54]

Given that judgments on this topic are increasing in frequency, it is certain that the CJEU will tackle the issue again.[55] Consequently, the only thing to do is to wait and see if the ideas expressed by AG Kokott will be accepted by the court.[56]

G. Perspectives: Might the *Ne Bis In Idem* Principle Be a Regional Custom?

Achieving a uniform approach to the matter would be significant not only in itself and for consistency reasons, but also in that it might pave the way to an interesting outcome recognizing that a regional custom has come into existence.

First of all, on the relevance of *ne bis in idem* as a principle of customary international law it could be useful to recall the Opinion presented by AG Tizzano in *Archer Daniels*

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[54] On Article 52 of the Charter, see Koen Lenaerts, *Exploring the Limits of the EU Charter of Fundamental Rights*, 8 EUROPEAN CONSTITUTIONAL LAW REVIEW 375 (2012). On the EU Charter of Fundamental Rights in general, see THE EU CHARTER OF FUNDAMENTAL RIGHTS AS A BINDING INSTRUMENT: FIVE YEARS OLD AND GROWING (Sybe de Vries et al. eds., 2015); MAKING THE CHARTER OF FUNDAMENTAL RIGHTS A LIVING INSTRUMENTS (G. Palmisano ed., 2014); THE EU CHARTER OF FUNDAMENTAL RIGHTS: A COMMENTARY (S. Peers et al. eds., 2014).

[55] *See generally* Case C-390/12, Pfleger and Others (Apr. 30, 2014), http://curia.europa.eu/juris/liste.jsf?num=C-390/12; Case C-398/12, M., (June 5, 2014), http://curia.europa.eu/juris/liste.jsf?num=C-398/12&language=EN; and Case C-129/14 PPU, Spasic (May 27, 2014), http://curia.europa.eu/juris/documents.jsf?num=C-129/14. For a review, see John A. E. Vervaele, *Schengen and Charter-related* ne bis in idem *protection in the Area of Freedom, Security and Justice: M and Zoran Spasic*, 52 COMMON MKT. L. REV. 1339 (2015). On the topic of harmonization, see Martin Wasmeier, Ne bis in idem *and the Enforcement Condition: Balancing Freedom, Security and Justice?*, 5 NEW J. EURO. CRIM. L. 534 (2014).

[56] In light of the above, this author must challenge the wording of Article 50 of the Charter of Fundamental Rights of the European Union, which states that no one shall be liable to be tried or punished again in criminal proceedings "for an *offence*" (emphasis added) for which he or she has already been finally acquitted or convicted within the Union in accordance with the law. The word "offence" poses a problem since it seems to recall the legal characterization of the act rather than the act as an historical event. The Explanations relating to the Charter do not let overcome the issue since they make reference to both the antitrust case law and *Gözütok and Brügge* as if the CJEU ruled the same way: Actually, the concept of offense is more linked to the first interpretation rather than the second one. Therefore, it would be more correct to speak of an act rather than an offense, as this may be a harbinger of problems. A rewording would be welcome but it seems to presuppose a *revirement* in the CJEU antitrust case law.

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Midland.[57] According to the AG, there is no principle of public international law that prevents the authorities or courts of different States from trying and convicting a person for the same facts since the *ius puniendi* is still considered a fundamental expression of national sovereignty. Hence while there are many treaties that confirm the *ne bis in idem* principle, as a general rule, they tend to limit its applicability to judicial decisions within the same State. Focusing on international treaties, this conclusion is confirmed by Article 14(7), of the International Covenant on Civil and Political Rights[58] and by Article 4 of Protocol No. 7 to the ECHR. Pursuant to Article 8(4) of the American Convention on Human Rights,[59] an accused person acquitted by a nonappealable judgment shall not be subjected to a new trial "for the same cause" which is interpreted as expressing the idea of identity of material acts.[60]

The list may be further enriched. For instance, think of Article 10 of the Model Treaty on the Transfer of Proceedings in Criminal Matters adopted by the United Nations General Assembly,[61] under which from the date when the requested State informs the requesting State that a case has been finally disposed of, the requesting State shall definitively refrain from prosecuting the same offense. Pursuant to Article 53 of the European Convention on the International Validity of Criminal Judgments,[62] a person in respect of whom a European criminal judgment has been rendered may neither be prosecuted nor sentenced nor subjected to enforcement of a sanction in another Contracting State for the same act under any of the following circumstances: (a) If he was acquitted; (b) if the sanction imposed has been completely enforced, is being enforced, 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; or (c) the court convicted the offender without imposing a sanction. The same provisions can be found in Article 35 of the European Convention on the Transfer of Proceedings in Criminal Matters.[63]

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[57] Opinion of Advocate General Tizzano at paras. 95–96, Case C-397/03 P, Archer Daniels Midland and Archer Daniels Midland Ingredients (June 7, 2005), http://curia.europa.eu/juris/recherche.jsf?language=en.

[58] International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Exec. Rep. 102–23, 999 U.N.T.S. 171.

[59] American Convention on Human Rights, Nov. 21, 1969, 1144 U.N.T.S. 143.

[60] *See* Loayza-Tamayo v. Peru, Merits Judgment, Inter-Am. Ct. H.R. (ser. C) No. 33, para. 66 (Sept. 17, 1997).

[61] Model Treaty on the Transfer of Proceedings in Criminal Matters, adopted Dec. 14, 1990 A/RES/45/118.

[62] European Convention on the International Validity of Criminal Judgements, adopted May 28, 1970. The Convention has been signed by 28 States and ratified by 22.

[63] European Convention on the Transfer of Proceedings in Criminal Matters, adopted May 15, 1972. The Convention has been signed by 32 States and ratified by 25.

This prohibition against prosecuting for the same offense also exists in the Statute of the International Criminal Court[64] and the Statute of the Special Court for Sierra Leone.[65] Under Article 20(2) of the former, no person shall be tried by another court for a crime within the jurisdiction of the court for which that person has already been convicted or acquitted. Under Article 9(1) of the latter, no person shall be tried before a national court of Sierra Leone for acts for which he or she has already been tried by the Special Court.

EU law also contains examples of this prohibition. One could mention—apart from Article 54 CISA—Article 7 of the Convention on the protection of the European Communities´ financial interests[66] and Article 10 of the Convention on the fight against corruption involving officials of the European Communities or officials of EU Member States.[67] Additionally, the Member States of the European Communities signed the Convention on double jeopardy, which proclaims under Article 1 that a person whose trial has finally been disposed of in a Member State may not be prosecuted in another Member State in respect of the same facts, provided that a sanction was imposed, has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing State.[68]

Further, one can highlight the framework decision on the principle of mutual recognition to judgments in criminal matters: Pursuant to Article 9(1)(c), the competent authority of the executing states may refuse to recognize a judgment—and enforce a sentence—if it would be contrary to the principle of *ne bis in idem*.[69] Under Article 1 of the framework decision on conflicts of jurisdiction in criminal matters, the objective of the regulation is to promote closer cooperation between Member States in order to prevent situations that may

[64] Rome Statute of the International Criminal Court, adopted July 17, 1998.

[65] Agreement between the United Nations and the Government of Sierra Leone and Statute of the Special Court for Sierra Leone, adopted Jan. 16, 2002.

[66] Council Act of July 26, 1995, Drawing Up the Convention on the Protection of the European Communities´ Financial Interests, 1995 O.J. C 316/48.

[67] Council Act of May 26, 1997, Drawing Up the Convention Made on the Basis of Article K.3(2)(c) of the Treaty on the European Union, on the Fight Against Corruption Involving Officials of the European Communities of Officials of Member States of the European Union, 1997 O.J. C 195/2.

[68] Convention between the Member States of the European Communities on double jeopardy, adopted May 25, 1987. The Convention never came into force, even if it applied to the relations between Austria, Belgium, Denmark, France, Germany, Ireland, Italy, the Netherlands, and Portugal.

[69] Council Framework Decision 2008/909/JHA of Nov. 27, 2008, on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, 2008 O.J. L 327/27.

constitute an infringement of the *ne bis in idem* principle.[70] Finally, the European Commission expressed the will to relaunch a debate on the principle in a Green Paper stating—among other things—that the principle applies only where the imposed penalty has been enforced, is actually in the process of being enforced, or can no longer be enforced. This would have been justified in a system based on mutual assistance, but it is questionable in an area of freedom, security, and justice, where cross-border enforcement takes place through EU mutual recognition instruments.[71]

Clearly, one can neither deny the huge interest in the *ne bis in idem* principle[72] nor that a European consensus on this principle has developed both in regulations and in case law. According to some legal doctrine, the substantial number of international agreements and European regulations concerning the principle should confirm the idea that *ne bis in idem* has already become an international custom.[73] In a well-known 1967 judgment,[74] however, the Italian Constitutional Court denied the nature of the *ne bis in idem* as a principle of customary international law in light of the relevance of the principle of territorial sovereignty since the social and political assessment of human acts, especially in the criminal law field, tend to vary significantly from state to state. After thirty years, the court revisited the same topic and slightly changed their mind:[75] While still denying its nature as

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[70] Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings, 2009 O.J. L 328/42. Because the third paragraph of the Whereas section recalls the *ne bis in idem* principle as set out in Article 54 CISA, one may think that the case law concerning that article is recalled as well.

[71] Green Paper on conflicts of jurisdiction and the principle of *ne bis in idem* in criminal proceedings, COM(2005) 696 (not published in the O.J.).

[72] See also the Initiative of the Hellenic Republic with a view to adopting a Council Framework Decision concerning the application of the "ne bis in idem" principle, 2003 O.J. C 100/24. For a review, see Chiara Amalfitano, *La risoluzione dei conflitti di giurisdizione in materia penale nell´Unione europea*, 15 DIRITTO PENALE E PROCESSO 1293 (2009).

[73] Novella Galantini, *Una nuova dimensione per il* ne bis in idem *internazionale*, 44 CASSAZIONE PENALE 3474 (2004) implies from that statement that the *ne bis in idem* should become a principle of custom international law in a short time. *See also* FAUSTIN HÉLIE, TRAITÉ DE L´INSTRUCTION CRIMINELLE 656 (1866); HENRI DONNEDIEU DE VABRES, LE PRINCIPES MODERNES DU DROIT PÉNAL INTERNATIONAL 311 (1928); Gerard Conway, Ne bis in idem *in International Law*, 3 INT'L CRIM. L. REV. 217 (2003).

[74] *See* Corte Costituzionale Italiana [Italian Constitutional Court], Apr. 12, 1967, http://www.cortecostituzionale.it/actionSchedaPronuncia.do?param_ecli=ECLI:IT:COST:1967:48; *see also* Corte costituzionale italiana [Italian Constitutional Court] Mar. 25, 1976, http://www.cortecostituzionale.it/actionSchedaPronuncia.do?param_ecli=ECLI:IT:COST:1976:69.

[75] *See* Corte costituzionale italiana [Italian Constitutional Court], Apr. 14, 1997, http://www.giurcost.org/decisioni/1997/0058s-97.htm.

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principle of customary international law, the judges defined it as a trend principle that inspires international law and which aims at protecting the individual from the concurring *iura puniendi* of States. This suggests that something has changed during the past thirty years and that, in the long run, profound changes may once again emerge. But, is this true? Has something really changed?

Truth be told, in order to recognize the *ne bis in idem* principle as a part of customary international law, one should take in account the generalization of the practice of states, including the attitude of states as a whole, their national legislations, case laws, and their interrelationships, especially concerning acquiescence and protests.[76] When one thinks, for instance, of the International Covenant on Civil and Political Rights or the ECHR, it is not difficult to realize that a problem continues to linger: In fact, those treaties do not refer to an international *ne bis in idem* but to a national one, meaning that the principle may only apply within the legal system of a state and not in the relations between two or more states.

Therefore, the best solution is to leave apart the international *ne bis in idem* and to focus on a new, European *ne bis in idem* instead, which applies in the relations between Member States of the EU, a sort of stand-alone principle of exclusively EU territorial application which should be construed as a regional custom.

As ruled by the International Court of Justice in the *Asylum case*,[77] the party which relies on a regional custom has the burden of establishing that the custom exists in such a way that it has become binding on other parties through constant and uniform usage, even if there is no need to verify that all the states belonging to a certain geographical area concurred in the establishment of that custom.[78]

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[76] Case of the S.S. "Lotus" (France v. Turkey) (Merits) 1927 P.C.I.J. Rep Series A No 10 (Sept. 7), Fisheries Case (United Kingdom v. Norway) (Merits) 1951 I.C.J. 3 (Dec. 18); Right of Passage over Indian Territory (Portugal v. India) (Merits) 1960 I.C.J. 6 (Apr. 12), Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua) 2009 I.C.J. (July 13). *See* ANTHONY A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW (1971); DAVID J. BEDERMAN, CUSTOM AS A SOURCE OF LAW (2010); JAN KLABBERS, INTERNATIONAL LAW 26–32 (2013); MICHAEL N. SHAW, INTERNATIONAL LAW 63 –65 (2014); Hugh Thirlway, *The Sources of International Law*, *in* INTERNATIONAL LAW 97–105 (Malcolm D. Evans ed., 2014).

[77] Asylum case (Colombia v. Peru) (Merits) 1950 I.C.J. 6 (Nov. 20).

[78] *See* Anthony A. D'Amato, *The Concept of Special Custom in International Law*, 63 AJIL 211-223 (1969); BENEDETTO CONFORTI, DIRITTO INTERNAZIONALE 45 (2014); JAMES CRAWFORD, BROWNLIE´S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 29–30 (2012). John A. E. Vervaele, Ne Bis In Idem*: Towards a Transnational Constitutional Principle in the EU?*, 9 UTRECHT L. REV. (2013) *available at* http://www.utrechtlawreview.org> (last visited Nov. 7, 2015). This confirmed that *ne bis in idem* is not yet a principle of customary international law because it is regionalizing in the EU, but not globalizing, and that substantiates the idea that *ne bis in idem* may be seen only as a regional custom.

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As already noted, the EU may contribute to the development of international law in the same ways as States do: (a) Through concluding treaties with non-EU States or international organizations; (b) through its activity as a member of multilateral organizations; and (c) through its unilateral practice.[79]

Decisions of competent organs affecting the legal obligations of states may be taken into account when assessing customary international law[80] and because the role played by the CJEU in the EU legal framework is paramount,[81] one should have no problems admitting that the interpretation provided by the Court on a specific subject may be regarded as the proper basis for confirming or even developing an international custom. With regard to the EU, Member States are bound by the Treaties and the sources of EU secondary law and the interpretation provided by the CJEU. Above all, one should consider the role played by the preliminary reference mechanism in the EU judicial protection system and in the development of the EU legal framework, whose essential function is to ensure that EU law is applied uniformly by national courts.[82] Subsequent state practice cannot change that interpretation.[83] Therefore, the views expressed by the Court in their judgments may lead to the development of a custom, especially where those views are confirmed by the ECtHR.

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[79] Bruno de Witte, *EU Law: Is It International Law?, in* EUROPEAN UNION LAW 192 (Catherine Barnard & Steve Peers eds., 2014). On the topic, see Trevor C. Hartley, *International Law and the Law of the European Union*, 72 BRIT. Y.B. INT'L L. 1 (2001); THE WORLDS OF EUROPEAN CONSTITUTIONALISM (Gráinne de Búrca & Joseph H. H. Weiler eds., 2011); THE EU'S ROLE IN GLOBAL GOVERNANCE: THE LEGAL DIMENSION (Bart Van Vooren et al. eds., 2013).

[80] DONALD W. GREIG, INTERNATIONAL LAW 22 (1976).

[81] For an introduction to this topic, see L. NEVILLE BROWN & TOM KENNEDY, THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES (2000); THE EUROPEAN COURT OF JUSTICE (Gráinne de Búrca & Joseph H. H. Weiler eds., 2001); ANTHONY ARNULL, THE EUROPEAN UNION AND ITS COURT OF JUSTICE (2006); TAKIS TRIDIMAS, THE EUROPEAN COURT OF JUSTICE AND THE EU CONSTITUTIONAL ORDER (2009).

[82] For an introduction to the topic, see KOEN LENAERTS ET AL., PROCEDURAL LAW OF THE EUROPEAN UNION (2006), KOEN LENAERTS ET AL., EU PROCEDURAL LAW (2014).

[83] Case C-327/91, France v. Commission, 1994 E.C.R. I-3641, para. 36, Avis 1/94, Competence of the Community to conclude international agreements concerning services and the protection of intellectual property, 1994 E.C.R. I-5389, paras. 52, 61. That is what the CJEU ruled with regard to the European Community Treaty, which was characterized by the so-called Community method. In light of the Treaty of Lisbon and the communitarisation of the third pillar, that reasoning may now apply to the EU legal framework as a whole, with the only exception being the Common Foreign and Security Policy, which is instead characterized by the so-called intergovernmental method. In this case, the practice of Member States still prevails. For more on this topic, see Frank Hoffmeister, *The Contribution of EU Practice to International Law*, *in* DEVELOPMENTS IN EU EXTERNAL RELATIONS LAW 56–57 (Marise Cremona ed., 2008).

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As far as *ne bis in idem* is concerned, however, new problems arise when one ponders the aforementioned interpretative issues. After *Zolothukin*, the case law of the ECtHR seems to be settled[84] while the CJEU case law is not;[85] the unsolved dichotomy between interpretation of Article 54 CISA and interpretation of antitrust law provides little guidance for discerning the ultimate meaning of the custom.

Consequently, the only way to achieve this objective is for the CJEU to begin the highly desirable work of clarification. This is a development that would be as welcome as it appears unlikely, at least for the time being.

H. Conclusion

This Article has shown that the *ne bis in idem* principle is a key topic in the case law of the CJEU as it has been analyzed from both the criminal procedure law perspective and the antitrust law perspective. The different approaches followed by the CJEU in these fields have also been highlighted by underlying the relevance attached to the requirements of the identity of the material act and identity of the protected legal interest.

In light of the criticism expressed by AG Kokott, it is this author's opinion that it would be possible to overcome this dystonia in order to achieve a uniform approach consistent with the very nature of the principle. In fact, the purpose of the *ne bis in idem* principle is to protect individuals and legal entities from being punished twice. Thus, the line of reasoning expressed by the CJEU in antitrust matters should change as it makes it more difficult to avoid double punishment. The CJEU could provide an interpretation which is consistent with the one provided by the ECtHR in light of Article 52(3) of the Charter of Fundamental Rights of the EU. That interpretation would strengthen the protection of fundamental rights in the EU legal framework in an area of law where this issue is often neglected[86] and further enhance the import of Article 52(3) as a tool to achieve a higher level of protection in the EU legal system.

Also, a reinterpretation could make it possible to solve a longstanding problem regarding customary international law as *ne bis in idem* could be construed as a regional custom. This remarkable outcome, however, cannot be achieved as long as the CJEU has not definitively solved the consistency issues discussed above.

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[84] *See, e.g.,* the abovementioned *Grande Stevens and Others* case.

[85] *See, e.g.,* the abovementioned *Spasic* case.

[86] *See generally* ARIANNA ANDREANGELI, EU COMPETITION ENFORCEMENT AND HUMAN RIGHTS (2008); Marco Bronckers & Anne Vallery, *No Longer Presumed Guilty: The Impact of Fundamental Rights on Certain Dogmas of EU Competition Law*, 34 WORLD COMPETITION 535 (2011); MEL MARQUIS, ROBERTO CISOTTA, LITIGATION AND ARBITRATION IN EU COMPETITION LAW 144 (2015).

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