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Transnational Law Enforcement in the European Union and the *Ne Bis In Idem* Principle

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Abstract

Article 50 of the Charter of Fundamental Rights contains the ne bis in idem principle. The extent to which that principle also applies to the relationships between Member States and the relationship between the Member States and European institutions is a well-known issue. One of the aspects over which there is uncertainty at this time is whether the ne bis in idem principle applies to punitive administrative sanctions or to combinations of criminal and administrative sanctions. It is submitted in this contribution that Article 50 CFR is indeed applicable to all punitive sanctions, regardless of whether the case involved administrative or criminal law, or application in a national or transnational context

1 Introduction

The process of European integration presents problems for law enforcement. These problems concern not only the effectiveness of such enforcement, but also which legal principles, including fundamental rights, limit and regulate this enforcement. This article focuses on one of those fundamental rights, i.e. the *ne bis in idem* principle. The extent to which that principle also applies to the relationships between Member States and the relationship between the Member States and European institutions is a well-known issue. It has resulted in a great deal of literature and jurisprudence concentrating mainly on competition law, and, in connection with Articles 54-58 of the Convention Implementing the Schengen Agreement (CISA), criminal law. One of the aspects over which there is uncertainty at this time is whether the *ne bis in idem* principle likewise applies to punitive administrative sanctions or to combinations of criminal and administrative sanctions. In the national context, the European Court of Human Rights has more or less resolved this issue and accepted such applicability.[1] But is that also so in situations involving sets of facts which go beyond national borders? That question has not been answered yet, and is the focus of this article.

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1 Cf. ECrtHR 10 February 2009 (Grand Chamber) *Zolotukhin* v. *Russia*, appl.no. 14939/03.

It is not entirely clear why this question has not yet cropped up. It might be that this is simply not a real problem,[2] but, given the regularity with which such questions come before courts in the Netherlands alone, that seems unlikely. One factor is presumably that neither of the two, most important (until recently, anyway) sources of the principle in the EU – Article 4 of the 7th Protocol to the European Convention on Human Rights (P7 ECHR) and Article 54 of the CISA – pertain to the situation at hand here. The first source is expressly limited to the national context, while the second one merely relates to 'true' criminal law (criminal law *sensu stricto*).[3] Because Article 50 of the EU Charter of Human Rights (Charter/CFR) has been made binding (Article 6(1) Treaty on European Union (TEU)), this may change, however. The number of potential examples of application is large, encompassing, in theory at least, all areas in which the EU is competent. Regulations regarding the environment, customs, cross-border services and so forth could be affected. In each instance in which the EU has formulated standards of conduct and has required the Member States to enforce these, a situation may arise in which the one Member State enforces this standard through administrative law and the other Member State chooses criminal law enforcement, while yet another Member State leaves both options open. Depending in part on how this standard has precisely been formulated and what it protects, all those Member States may feel obliged to enforce it. This may lead to jurisdictional conflicts. Additionally, if the concept of *idem* is understood to mean *idem factum* instead of *idem crimen*, there will be an overlap with general criminal provisions which are not directly intended to transpose EU law. The *ne bis in idem* principle's scope of application will thereby become even greater.

The structure of this article is as follows. Section 2 will further examine the importance of the topic and will describe in general terms what the status of the *ne bis in idem* principle is at this time. That will lead to a discussion in Section 3 about Article 50 of the Charter, on which a transnational *ne bis in idem* principle will have to be based. It will become apparent that this Article can be interpreted in several ways. To determine which interpretation is the right one, the role and significance of the principle in light of the treaty freedoms will be analysed in Section 4. The arguments in favour of this interpretation and the consequences that this approach has for the interpretation of Article 50 of the Charter will be looked at in this section. Section 5 will address which limitations the principle could have placed upon it. Finally, in the concluding observations

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2 See however the reference for a preliminary ruling from the Swedish Haparanda Tingsrätten, lodged on 27 December 2010, in Case C-617/10 *Åklagaren* v. *Hans Åkerberg Fransson*, currently pending before the ECJ.

3 See *infra* section 3.

(Section 6), the findings will be placed back in the larger context described in Section 2.

2 Background and Importance of the *Ne Bis In Idem* Principle in the EU

The *ne bis in idem* principle does not easily lend itself to a brief characterisation. The scope and objectives of the principle may vary between Member States. At the national level, the principle serves many different functions, which broadly speaking, can be divided into two categories, with the legal certainty principle as the underlying concept.[4] On the one hand, this legal certainty comes into play with the formal legal effect of judicial decisions (*res judicata*), but on the other hand, it is also given shape as an individual right for citizens. For example, the principle is articulated as a human right in Article 4 of P7 ECHR, for which hardly any limitations are possible, not even in emergency situations (Article 15 ECHR).

The *ne bis in idem* principle as set forth in Article 4 P7 ECHR consists of two elements. First, a person who has already been finally acquitted or convicted may not be *prosecuted* again for the same offence. Second, a person may not be *punished* twice for the same offence. The relationship between these two elements is not very clear.[5] After all, one would expect that, if a person cannot be prosecuted twice, he cannot in any event be punished twice. Still, it is possible to imagine cases in which such a situation might arise. In view of the *ne bis in idem* principle as a human right, it could be argued, for example, that a second prosecution which leads to a substantially more favourable result for the accused than the first proceedings is not contrary to the first part of Article 4 P7 ECHR, provided of course, that this person is not punished twice for the same offence. The second element is indeed meaningful in and of itself then.[6]

The certainty, which the principle affords individuals, is different from the requirement of legal certainty that flows from Article 7 of the ECHR (the legality principle under criminal law).[7] The legality principle requires criminal provisions

4 W.B. van Bockel, *The 'ne bis in idem' principle in EU law*, Alphen aan de Rijn: Kluwer Law International 2010, p. 25-30; S. Trechsel, *Human Rights in Criminal Proceedings*, Oxford: Oxford University Press 2005, p. 383-384.

5 Van Bockel 2010, p. 33-36.

6 Cf. J.L. De la Cuesta, 'Concurrent national and international criminal jurisdiction and the principle "ne bis in idem"- General report', *Revue Internationale de Droit Pénal* (73) 2002, p. 714.

7 They are, incidentally, closely connected; see A.H. Klip & H. van der Wilt, 'The Netherlands – Non bis in idem', *Revue Internationale de Droit Pénal* (73) 2002, p. 1094.

to be clearly laid down in the law beforehand. Only in this way can the criminal law achieve one of its core objectives, i.e. the prevention of (future) crime. In contrast, the *ne bis in idem* principle does not similarly require statutory jurisdictional regulations enabling individuals to determine beforehand by whom and in which manner an offence committed by them will be dealt with.[8] Rather, as a human right, the principle entails that an individual must be confident that a case against him will be over and done with after the final judgment in the first proceedings. It is thus directed against the government itself. Yet, even under this meaning of 'legal certainty', the impact of the principle on the national prosecution policy is enormous. Once the government initiates a second prosecution for the same offence, it violates the principle. The *effect* is that society only gets one chance to take action against perceived wrongs.[9] That requires the necessary efforts by the legislative and executive powers, which, if there is overlapping jurisdiction, will have to be prepared to prevent positive jurisdictional conflicts. In this regard, it should be remembered that in the national context, the term 'offence' in Article 4 P7 ECHR, has the same meaning as that in Article 6 ECHR. It encompasses both criminal and administrative punitive sanctions. To avoid unpleasant surprises (for example, dismissal of the case in the second set of proceedings), the administrative and criminal law enforcement authorities will therefore have to cooperate with each other. Partly because of this, the number of countries which have brought the Seventh Protocol into effect is limited. They have reserved the *ne bis in idem* principle for the criminal law *sensu stricto*. Because of Article 50 of the Charter (to be discussed below), this issue is now specifically relevant again.[10]

In the multi-level setting of the EU, the coordination and cooperation problems arising from a transnational *ne bis in idem* principle will only grow in importance. It is by no means settled yet that the aforementioned effect of this principle should be accepted in transnational situations too.[11] Law enforcement, after all, is a matter for the Member States, which even after the Treaty of Lisbon, have considerable discretion in choosing the manner of enforcement and which stand in a horizontal relationship with each other and thus cannot affect each

8 Incidentally, some have argued that the *ne bis in idem* principle indeed incorporates a 'Forderung systemorganisierter Freiheit'; cf. M. Mansdörfer, *Das Prinzip ne bis in idem im europäischen Strafrecht*, Berlin: Duncker & Humblot 2004, p. 32-40.

9 Cf. Trechsel 2005, p. 384, 398.

10 Cf. A. Eser, 'Justizielle Rechte', in: J. Meyer, *Kommentar zur Charta der Grundrechte der Europäischen Union*, Baden-Baden: Nomos 2006, p. 521.

11 Cf. Advocate General Sharpston in Case C-467/04 *Gasparini* [2006] *ECR* I-9199, para 76. Mansdörfer 2004, p. 37-39, however, seems to be of the opinion that there is no fundamental difference with the national, intrastate context.

other's actions. For that reason, it might be argued that the prosecution decision[12] in the EU must, for as long as no agreements have been made as in Article 54 CISA, be considered as being within the discretionary power of the prosecuting authorities, or that the principle cannot be recognised, so long as no provisions have been made for reversing the undesirable effects, such as jurisdictional conflicts, 'races to the bottom' or forum-shopping by the accused.

Objections may be raised to this interpretation though. The fact that the *ne bis in idem* principle reduces the risk of unnecessary, duplicate work has been pointed out,[13] although in itself that does not seem a reason to recognise *ne bis in idem* as a human right. But it might also be asserted that the protagonists of discretionary power have not made clear how such discretion comports with, say, the proportionality principle or the five treaty freedoms (hence including the rights enunciated in Article 21 of the Treaty on the Functioning of the European Union/TFEU). It is primarily the last aspect, in conjunction with the fact that the Charter now has the same legal status as the treaties, which explains why the discussion concerning the transnational scope of application of the *ne bis in idem* principle laid down in Article 50 of the Charter has such huge academic and practical significance: The discretionary power just described, which the national prosecuting authorities already possess *de lege lata*, may not be consistent with the Charter. And, if that is indeed not the case, the *ne bis in idem* principle will probably generate new legislative initiatives to prevent the undesirable consequences. Unlike now, those will no longer be avoidable. Examples of such dynamics are already apparent in terms of cooperation in the criminal law area.[14]

3 The Interpretation of Article 50 of the Charter

The most comprehensive provisions regarding the *ne bis in idem* principle in a transnational setting can currently be found in Articles 54-58 CISA. Those articles' scope of application, however, is limited. They are included in that portion of the Schengen *acquis* which is part of the previous 'third pillar', with Articles 31 and 34 of the former TEU as their legal basis.[15] The pro-

12 I.e. a decision to start proceedings which may lead to the imposition of punitive sanctions under the criminal or administrative law.

13 Cf. W.P.J. Wils, 'The principle of Ne Bis in Idem in EC antitrust enforcement: a legal and economic analysis', *World Competition* (26) 2003, p. 131-148.

14 Cf. M.J.J.P. Luchtman, 'Choice of Forum in an Area of Freedom, Security and Justice', *Utrecht Law Review* (7) 2011, p. 78-82.

15 Council Decision of 20 May 1999 determining the legal basis for each of the provisions or decisions which constitute the Schengen acquis (1999/436/EG), OJ EU 1999 L 176/17; see also Van Bockel 2010, p. 61 e.v.

visions thus do not apply to punitive sanctions outside the criminal law *sensu stricto*.[16] This appears to be true in any event for the administrative punitive sanctions which may be appealed to administrative courts.[17] In competition law, the principle has not been statutorily regulated. Nonetheless, it has long been recognised there by the European Court of Justice and applied in the vertical relationship between the Commission and the Member States.[18]

Outside of competition law and the criminal law *sensu stricto*, the *ne bis in idem* principle has been regulated in a fragmented way. In many cases, it might be recognised as a (generally discretionary) ground for rejecting transnational administrative cooperation.[19] In other cases, it can be seen an imperfect elaboration of the German principle of *Vorrang des Strafverfahrens*, meaning that, if both administrative and criminal actions are pending, the first category of actions needs to take the second into account.[20] In other cases, all that is necessary is that a previously imposed punishment be taken into account when a second punishment is imposed (*Anrechnung*).[21] To my knowledge, the principle has not been recognised anywhere in so many words as a ground for excluding prosecution with transnational effect.

As already mentioned, the question is how much the Treaty of Lisbon has changed this. Specifically, Article 50 of the Charter includes wording expressly giving the *ne bis in idem* principle transnational effect. It states: 'No one shall be liable to be tried or punished again in criminal proceedings for an offence

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16 Idem, S. Brammer, *Co-operation Between National Competition Agencies in the Enforcement of EC Competition Law*, Oxford: Hart 2008, p. 370-373. Van Bockel 2010, p. 22, 146, is not certain on the issue. See also R.M. Kniebühler, *Transnationales 'ne bis in idem': zum Verbot der Mehrfachverfolgung in horizontaler und vertikaler Dimension*, Berlin: Duncker & Humblot 2005, p. 250-254, who pays no attention to the legal basis of Articles 54-58 CISA.

17 This is doubtful, though with respect to sanctions which may be appealed to a court with jurisdiction in, in particular, criminal cases. On the one hand, these have been placed within the scope of the Schengen Agreement (cf. Art. 49 CISA, which was revoked through art. 3 of the EU Convention on Mutual Assistance in Criminal Matters, OJ EU 2000 C 197/3); on the other hand, the criminal law *sensu stricto* is not involved here. In its case law, the European Court of Justice in fact seems to consider embodiment in the national criminal justice system important for the interpretation of art. 54 CISA; cf. Joined Cases C-187/01 and C-385/01 *Brügge and Gözütok* [2003] *ECR* I-5689, para 28.

18 Cf. Case 14/68 *Walt Wilhelm/Bundeskartellamt* [1969] ECR 1.

19 Cf. art. 59 (b) and (c) of Directive 2004/39/EC of 21 April 2004 on markets in financial instruments, OJ EU 2004 L 145/1; art. 15 (3)(c) of Regulation 2006/2004 of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws, *OJ EU* 2004 L 364/1.

20 'Taking into account' may, moreover, assume many forms in this respect; see, for instance, Article 6 Regulation No. 2988/95 on the protection of the European Communities financial interests, OJ EU 1995 L 312/1.

21 Cf. A.M. Keessen, *European Administrative Decisions: How the EU Regulates Products on the Internal Market*, Utrecht: Utrecht University 2009, p. 102.

for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.' The article applies to the Union as such and is not limited to the separate territories of the Member States.[22] This formulation though, does give rise to the assumption that it is only applicable to the criminal law *sensu stricto*.[23]

Accordingly, the last word has not yet been uttered on the interpretation of Article 50 of the Charter. From the text of the article and the explanation, arguments could be found for the position that, in transnational situations, it does in fact apply to *all* punitive sanctions, but arguments to the contrary could be made too. The first interpretation is supported by the fact that, in essential components, Article 50 of the Charter utilises the same wording as Article 4 of P7 ECHR, while the European Court of Human Rights has now accepted the proposition that, in the national context and despite the apparently clear wording of this article, Article 4 P7 ECHR also regulates the relationship between punitive administrative and criminal sanctions.[24] Why should that be different in the transnational context?[25] Others would note, however, that the two articles should only be interpreted similarly when they are applicable in similar situations (cf. Article 52(3) Charter). Article 4 P7 ECHR merely relates to the national context. Thus, this broad interpretation does not necessarily have to be followed in the transnational context. They would also point to the text of the Explanation to the Charter, the English language version of which states that the principle refers to 'two penalties of the same kind, that is to say *criminal-law penalties* [italics added, ML].'[26]

The problem is that a choice cannot be made between these opposing views if it cannot be identified *why* the *ne bis in idem* principle ought to be interpreted in a different, more restricted way in the transnational context. I will attempt to answer this question below. Consumer law will repeatedly be referred to as

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22 OJ EU 2007 C 303/13, p. 31.

23 Cf. P.C. Adriaanse, T. Barkhuysen and M.L. Emmerik, 'Het EU-recht en bestuurlijke punitieve sancties', in: E. Ankaert e.a., *Europeesrechtelijke eisen bij de toepassing van bestuurlijke punitieve sancties*, Alphen aan de Rijn: Kluwer 2006, p. 35 (in Dutch); Van Bockel 2010, p. 18.

24 The wording of Article 4 P7 ECHR also put the European Court of Justice on the wrong track initially; see Case C-436/04 *Van Esbroeck* [2006] ECR.I-2333, para 28. This decision preceded *Zolotukhin*, *supra* note 1.

25 Van Bockel 2010, p. 208-209.

26 OJ EU 2007 C 303/17, p. 31; see also the French, Spanish and German language versions. The German version reads: 'Es ist darauf hinzuweisen, dass die Regel des Verbots der Doppelbestrafung sich auf gleichartige Sanktionen, in diesem Fall *durch ein Strafgericht verhängte Strafen* [italics added], bezieht,' thus suggesting that the principle only encompasses court decisions. Yet other language versions even seem to include other sanctions than criminal law sanctions. The Dutch version, for instance, reads '*met name* strafrechtelijke sancties [italics added]'.

an example. Some parts of that area of law have been harmonised to a significant extent, with the major benefit that, as a result, presumably few problems will arise regarding Article 51(1) Charter. That paragraph of the article states that the Charter only applies to the Member States when they are implementing Union law. The assumption is that, because this is an area which has been significantly harmonised, the Member States' own discretion has correspondingly decreased *and* that implementation (transposition, operationalisation, application and enforcement)[27] of *directives* by Member States is likewise implementation of EU law as referred to in Article 51(1).[28]

4 The Transnational Effect of the N*e Bis In Idem* Principle

4.1 The *Ne Bis In Idem* Principle in Light of the Treaty Freedoms

Unlike the area of freedom, security and justice, to which Article 54 CISA applies, the internal market does not lack for harmonisation of national law. As soon as divergent national legal systems cause competitive distortions at the European level or impede free movement, the European legislator may opt to intervene. History shows that this power is frequently exercised. Under Article 114 TFEU, the legislature can define standards of conduct directed at individuals or economic actors. These standards must be transposed into national law and must be enforced through national mechanisms. For instance, pursuant to Article 95 of the EC Treaty (now Article 114 of the TFEU), the EU has promulgated directives relating to consumer protection. Several standards of conduct for traders have been formulated socomprehensively in the Unfair Commercial Practices Directive that they no longer afford the Member States latitude for deviation in transposing those standards into national law.[29] By what (private, administrative and/or criminal law) means the Member States then choose to enforce these standards is in principle up to them, as long as deterrent, effective and proportional sanctions are available (Article 13). This means that Member States have discretion here, which is in keeping with a

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27 Cf. J.H. Jans *et al.* (eds.), *Europeanisation of public law*, Groningen: Europa Law Publishing 2007, p. 13-18.

28 For further information, see K. Lenaerts & P. Van Nuffel, *European Union Law,* London: Sweet & Maxwell 2011, p. 834-838; R. Barents, *Het Verdrag van Lissabon*, Deventer: Kluwer 2008, p. 547-549; Hatje, notes 15-19 to Art. 51 GRC/CFR, in: J. Schwarze *et al.* (eds.), *EU-Kommentar*, Baden-Baden: Nomos 2009, and the Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union, COM(2010) 573, p. 3, 10-11. In section 5.2, I will briefly pay attention to the situation in which the applicability of the Charter is less clear.

29 Directive 2005/29/EG, OJ EU 2005 L 149/22.

system of indirect enforcement. In combination with the duty of sincere cooperation (Article 4(3) TEU), this system, which is based on the conferral principle (Article 5(1) TEU),[30] allows the Member States to decide in principle what works and what doesn't.

However, in the transnational context indirect enforcement without coordination causes problems, to which secondary EU law very often does not provide a clear solution. Violations of standards of conduct to be implemented by Member States, such as those pertaining to unfair commercial practices, can easily affect the legal systems of multiple Member States. The perpetrator and victims of such conduct may be located in different jurisdictions, for one thing. This may prompt the States involved to take enforcement action and to impose sanctions. In such a situation, it is often not obvious from the secondary law what the individual Member States need to do.[31] Article 3(7) of the Unfair Commercial Practices Directive merely says that this directive has no bearing on the rules for determining private-law jurisdiction. And while Article 4 includes an internal market clause which compels recognition of the requirements stated by the country of origin, the directive does not provide that this country has exclusive jurisdiction to take enforcement action. As a result, each Member State itself must determine whether and when it will engage in enforcement, with positive and negative jurisdictional conflicts between Member States possibly ensuing. Even if there is consensus about the desirability and interpretation of a specific standard of conduct at the European level, multiple punishment or prosecution is certainly not thereby made impossible.

It is likely that, where secondary EU law does not prevent or exclude such jurisdictional conflicts and leaves the resolution of these to the national level, the permissibility of these solutions must be assessed in light of the treaty freedoms. The European Court of Justice employs this approach as well to other areas in which secondary EU law gives Member States some discretion.[32] National measures which might hinder, or make less attractive, the exercise of the freedoms safeguarded in the treaty must satisfy strict conditions.[33] From the perspective of the wording of Article 26(2) TFEU, it seems incorrect to make

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30 E. Schmidt-Aβmann, *Das allgemeine Verwaltungsrecht als Ordnungsidee*, Berlin/Heidelberg/New York: Springer 2004, p. 381 *et seq.*; the same author, p. 1-2, 4-8, in: O. Jansen & B. Schöndorf-Haubold (eds.), *The European Composite Administration*, Cambridge/Antwerp/Portland: Intersentia 2011.

31 If I understand her correctly, one of the key findings of Keessen 2009, p. 196-198, is that 'divisions of labour' regarding European decision making are not necessarily in line with European mechanisms for the enforcement of those decisions. Regarding enforcement, Keessen is clearly in favour of what she calls 'network control', p. 119-123.

32 Cf. A. Klip, *European criminal law*, Antwerp/Oxford/Portland: Intersentia 2009, p. 95, 106-109.

33 Cf. Case C-167/01 *Inspire Art* [2003] *ECR* I-10155, para 133.

a distinction in this respect between a restriction on the freedoms caused by one or by more than one Member State. What matters is *whether* the freedoms are being limited and not so much by whom.[34]

Moreover, the assertion that the treaty freedoms make multiple punishment by multiple States for the same actions or omissions problematic is an extension of the European Court of Justice's case law holding that the application of sanctions must not impede free movement.[35] Admittedly, this case law likewise concerns situations in which the legal system of a *single* Member State threatens someone with punishment for violation of a standard, which is permissible under European law. In our situation, by contrast, *multiple* Member States are implementing EU law. Each of those Member States may even have separately transposed the European standard into national law in an exemplary manner, and may also be enforcing this with due observance of all the requirements which the European Court of Justice or secondary law imposes. Hence, the problem is not that the national transposition measures as such are in conflict with the treaty, but rather the uncoordinated application of these by various Member States. Nevertheless, based once again on reasoning from the perspective of Article 26(2) TFEU, the starting point must be that, where possible, the imposition of a disproportionate punishment which restricts the free movement of persons must be avoided.

The parallel with the case law regarding Article 54 CISA becomes inescapable. The area of freedom, security and justice has certainly not been subjected to a large degree of harmonisation. The European Court of Justice has expressly acknowledged this.[36] Still, in what is now settled case law, the Court has emphasised that multiple punishment is problematic, given the free movement of persons. In *Van Esbroeck*, it found that the objective of Article 54 CISA 'is to ensure that no one is prosecuted for the same acts in several Contracting States on account of his having exercised his right to freedom of movement' and that 'that right to freedom of movement is effectively guaranteed only if the perpetrator of an act knows that, once he has been found guilty and served his sentence, or, where applicable, been acquitted by a final judgment in a Member State, he may travel within the Schengen territory without fear of prosecution

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34 Cf. Case C-265/95 *Commission/France* [1997] ECR, p. I-6959, para. 30-31. In this case, dealing with State responsibility (for failure to act) with respect to action by private parties hampering free movement, the Court for one reiterated that 'as an indispensable instrument for the realization of a market without internal frontiers, Article 30 [TEC (old)] therefore does not prohibit solely measures emanating from the State which, in themselves, create restrictions on trade between Member States.'

35 Cf. Case C-193/94 *Skanavi and Chryssanthakopoulos* [1996] *ECR* I-929, para 36; Case C-230/97 *Awoyemi* [1998] *ECR* I-6781, para 26; Case C-378/97 *Wijsenbeek ECR* 1999, I-6207, para 44.

36 Joined Cases C-187/01 and C-385/01 *Brügge and Gözütok* [2003] *ECR*. I-5689, para 31-33.

in another Member State on the basis that the legal system of that Member State treats the act concerned as a separate offence.'[37]

These findings translate the core idea of the *ne bis in idem* principle from the national context to the integrated legal system of the EU and link this principle to the free movement of persons. The legal certainty principle embedded in Article 54 CISA is thereby given an interpretation which transcends the territories of the individual Member States; it encompasses the entire area of freedom, security and justice.[38] It is precisely this last step which makes this reasoning appropriate as well for application outside the framework of Articles 54-58 CISA,[39] although – I will revisit this point in the next section – this does not mean that the legal consequences which Article 54 CISA attaches to this can automatically be applied outside that article's scope of application. Of course, free movement is also an issue in the internal market if, because of, for example, the performance of work in another Member State, the cross-border provision of services or the transnational sale of goods, the party concerned is successively prosecuted by various Member States for the same conduct or same negligence.[40] He is then being prosecuted and/or punished multiple times, *because* he exercised the freedoms guaranteed by the treaty.

A different question is whether restrictions must be accepted on the full exercise of those freedoms, and, if so, which ones specifically. However, then the issue is no longer *whether* multiple punishment is inconsistent with the freedoms, but whether there are justifications for this. It must be possible to point to a public interest justifying the second prosecution. This interest must consequently be balanced against the freedoms. The result must be reasonable, and may not create any more restrictions on the freedoms than is necessary.

4.2 The Limits of the Analogy to the Treaty Freedoms

The above-asserted analogy to the Schengen jurisprudence does not entirely hold true. The added value of Article 54 CISA is that this article assures the application of the *ne bis in idem* principle, independently of any accompanying provisions concerning harmonisation of substantive or procedural criminal law or the law on cooperation in criminal matters (including choice

37 Case C-436/04 *Van Esbroeck* [2006] *ECR* I-2333, para 33 and 34.
38 Cf. J.A.E. Vervaele, 'Fundamental Rights in the European Space for Freedom, Security and Justice: the Praetorian ne bis in idem principle of the Court of Justice', in: E.J. Hollo, *National Law and Europeanisation*, Helsinki: 2009; V. Mitsilegas, *EU criminal law*, Oxford/Portland/Oregon: Hart 2009, p. 143, 147; Luchtman 2011, p. 76, 92-95.
39 Brammer 2008, p. 372, does not share this view.
40 Case C-469/03 *Miraglia* [2005] *ECR* I-2009, para. 32.

of jurisdiction). In other words, Article 54 CISA is a *legal rule* which does not allow an inquiry into justifications for multiple prosecutions for the same offence.[41] The Member States have thus expressed confidence in each other's criminal justice systems. Yet this is not to say that there cannot be any justification for restrictions on the full exercise of treaty freedoms outside the scope of application of Articles 54-58 CISA (the criminal law *sensu stricto*), for these freedoms are not inviolable under European law.

What considerations might justify a restriction of the treaty freedoms? As I see it, differences in the appreciation of the underlying legal interest can only play a minor role. Specifically, in our consumer law example at least, those differences are small or even non-existent, because of harmonisation. Yet the overarching importance of effective law enforcement could be at stake in another manner and might constitute such a justification. This might be divided up into two sub-arguments, with the first concentrating on the lack of coordination between the Member States' legal systems as such, and the second, on the discretion afforded the Member States in choosing between criminal or administrative law enforcement.

With regard to the first argument, it could be claimed that the State which prosecutes first, especially if it does so without further coordination or consultation with other Member States, leaves the latter States in a position in which they cannot fully protect the interests which they claim to be protecting. Moreover, the EU Member States are in a horizontal, equal relationship to each other in that respect. Unlike the cases mentioned in the previous section, in which national law, because of a conflict with Union law, cannot be applied, the second Member State is dealing here with a situation in which it cannot exert much or any influence. In this instance, the question therefore arises as to who is responsible for the undesirable situation created. Is this really merely the State initiating the second conviction? Or perhaps the State with the first conviction, just because it pulled the rug out from under the second State's feet? Or both of them? Perhaps even the EU as a whole, because it neglected to provide coordination? If it is so difficult to pinpoint exactly where the responsibility lies, it is also not precisely clear why the second State should be prohibited from commencing a second prosecution.

The second argument, too, revolves around the question of whether it is not asking too much of the EU and its Member States to apply Article 50 of the Charter transnationally. While the EU is an integrated legal system, the powers under this system are allocated through the conferral and subsidiarity principles.

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41 Save for the exceptions and modifications already mentioned in arts. 55-58 CISA, of course.

As was seen, whether the Member States enforce a standard harmonised with the European law through criminal law, administrative law and/or private law is, within certain European pre-conditions,[42] up to them. Unlike in the national context, where the European Court of Human Rights has, as a justification for the application of the principle to criminal *and* quasi-criminal proceedings, stated that "[o]therwise, the application of this provision would be left to the discretion of the Contracting States to a degree that might lead to results incompatible with the object and purpose of the Convention",[43] decision-making power in the EU is found at several levels. It is thus by no means certain that, in this multi-layered legal system, the effect of the *ne bis in idem* principle, to wit, that 'society' only gets one chance to adjudicate wrongs, will apply in full.[44] That is also true, now that Article 82(2) TFEU grants the EU the power to compel Member States to undertake criminal enforcement action in EU policy areas. This power will not eliminate the Member States' discretion and may even cause the number of double prosecutions to increase.[45]

In short, the question is not just whether the desire for full exercise of the treaty freedoms encounters institutional limitations here, but also whether, if the answer to that question is 'no', this *must* mean that the State wishing to initiate the second prosecution no longer has any right to prosecute.[46] The latter conclusion need not *per se* be the result of the balancing of interests between free movement and effective control of crime. Other results are conceivable as well, for example, that the second State – in the event of punishment – reduces the punishment by the previously imposed sanction (*Anrechnung*). Even though double prosecution *and* punishment has occurred in that case, the freedoms may in this way also be balanced against the requirements of effective law enforcement.[47] This article, however, takes another approach, to be discussed in the next section.

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42 Cf. Case 68/88 *Commission/Greece* [1989] *ECR* 1989, 2965.

43 ECrtHR, *Zolotukhin* v. *Rusland*, *supra* note 1, para 52.

44 *Supra* note 11.

45 This is because mandatory criminal law enforcement does not exclude the possibility of (simultaneous) administrative law enforcement; cf. the Preamble, Recital 8, of Directive 2009/123/EC of 21 October 2009 amending Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements, OJ EU 2009 L 280/52.

46 Advocate General Sharpston in her opinion on Case C-467/04 *Gasparini* [2006] *ECR* I-9199, para 84.

47 For this reason, I do not agree with the criticism that the European Court of Justice has reduced *ne bis in idem* in its Schengen jurisprudence to a question of free movement; cf. R. Lööf, '54 CISA and the Principles of ne bis in idem', *European Journal of Crime, Criminal Law and Criminal Justice* (15) 2007, p. 324-325. The *ne bis in idem* principle has, as I hope to show below, its own place and significance. Conversely, unlike *ne bis in idem*, free movement may also become an issue when a single perpetrator commits multiple offences or multiple perpetrators commit a single offence. Hence, these are doctrines which only partially overlap with each other.

4.3 The EU's Imperfect Network Structure

It is precisely the indirect enforcement system that has led to a big rise in European networks where enforcement issues are also increasingly being addressed.[48] That is, of course, related to the 'second pillar' on which the indirect enforcement system is based: the obligation of 'sincere cooperation' (Article 4(3) TEU). Going back to the example of consumer law, one can see a network of consumer regulatory authorities,[49] which has fleshed out the sincere cooperation principle through regulations regarding the exchange of information, operational cooperation and inter-state coordination of enforcement, including sanctions.[50] Through such networks, cases can be distributed among the Member States. For 'outsiders',[51] it is often somewhat unclear what the initial and final terms for such a consultation are.[52] The same is true for the decision-making procedures or criteria. But even though these networks therefore have the traits of a 'black box', so that one simply has to wait and see which country will begin prosecution, they also illustrate that transnational law enforcement is indeed viewed as a joint responsibility,[53] for which, often based on Article 114 TFEU, the necessary structures have been created. Those structures enable mutual cooperation and coordination. The Commission's report on the application of Regulation 2006/2004, for example, mentions a cooperative effort between the Spanish and French authorities which resulted in the arrest of 87 people in April 2008 and which made it possible to put a halt to a lottery scam set up from Spain.[54] It then seems that having it both ways is not possible: Where such networks provide a forum for avoiding jurisdictional conflicts, it

48 For an excellent example of this in the area of financial services, see P. De Sousa Mendes, 'Was tun im Falle von transnationalem Marktmissbrauch? – Der Fall Citigroup', *ZIS* 2009, p. 55-58, and Regulation No 1095/2010 of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), OJ EU 2010 L 331/84. Of course, Eurojust should be mentioned here as well. Reference may also be made to the recently established Eurofisc, see Council Regulation No 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax, OJ EU 2010 L 268/1.

49 Regulation No 2006/2004 of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws, OJ EU 2004 L 364/1.

50 See in particular art. 9 of the regulation and the Commission Decision of 22 December 2006 implementing Regulation No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws as regards mutual assistance, OJ EU 2007 L 32/192, based upon it.

51 That is, anyone not participating in such networks, including the accused, as well as other government bodies with the responsibility to enforce the law (for example, public prosecutors).

52 By 'initial terms' I mean the conditions under which cases must be reported to networks, by 'final terms', the results to which consultation may lead, more specifically, how cases will be divided up between the Member States.

53 Advocate General Bot in his opinion on the Wolzenburg case refers to a joint responsibility of the Member States, see Case C-123/08 *Wolzenburg* [2009] ECR I-9621, para 105.

54 COM(2009) 336, p. 10.

must also be recognised that citizens cannot be made to pay for unsuccessful coordination (or even a total lack thereof).

These networks are often organised along formal, organic lines; administrative law authorities work together, while the criminal law authorities have their own networks.[55] This may limit the unimpaired application of the *ne bis in idem* principle. Despite the network structure, the competent authorities may still not be in contact with each other. Article 2(3) of regulation 2006/2004 merely states that this regulation does not affect the application of measures relating to judicial cooperation in criminal matters.[56] In such cases, the other relevant national authority can, at most, be contacted through the representative of the Member State who is a member of the network.[57] Assuming that, as far as the regulatory authority in the area is concerned, the administrative authorities will generally be the first to become aware of any wrongdoing, the administrative networks will be able to guide the criminal authorities in the vast majority of cases. The participants in such a network may agree on which of them will engage its public prosecutor's office or police. In this way it is they, instead of, say, Eurojust, who will determine which country will actually criminally prosecute.[58] This state of affairs can, on the one hand, be considered practical; on the other hand, it also raises questions about how amenable it is to control.

The *current* network structure therefore does not fill all the holes (positive and negative jurisdiction conflicts) that might arise in the European indirect enforcement system. Inter-state coordination of enforcement efforts is not always possible *de lege lata*. That problem mainly plays out at the intersection of criminal and administrative enforcement and may be an argument against full application of the principle outside the Schengen context. This conclusion is nevertheless not inevitable. Two points of view may be distinguished, both of which take the principle of legal certainty as their starting point.

On the one hand, it might be argued that the current legislative framework (including its limitations) enables the party concerned to form a judgment about what he may expect if he is prosecuted for a certain offence. If the applicable

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55 Cf. M.J.J.P. Luchtman, *European cooperation between financial supervisory authorities, tax authorities and judicial authorities*, Antwerp/Oxford: Intersentia 2008, p. 128-138.

56 In a similar vein, the (amended) Eurojust Decision does not pay attention to the cooperation within the administrative law enforcement networks; see Decision 2009/426/JBZ, OJ EU 2009 L 138/14.

57 For this reason the Netherlands Consumer Authority and the Dutch prosecution service (*Openbaar Ministerie*), for example, have made arrangements with a view to their mutual division of labour in this regard, see the attachment to the Dutch parliamentary records, *Kamerstukken I* 2008/09, 30 928, G.

58 This happened, for instance, in the above-mentioned CITI Group case, *supra* note 48.

instruments indicate, for instance, that cooperation in criminal cases remains unaffected by a regulation,[59] or that a particular directive or regulation does not mandate any criminal sanctions,[60] or that, conversely, an instrument for criminal cooperation does not apply to, say, competition law,[61] it may be inferred that the concerned party's reliance on the belief that he would not be prosecuted again was not valid in this respect. The legislature specifically excluded this possibility beforehand.

On the other hand, it can also be asserted that the degree to which the legislature has been active or the choices which it has made should not be decisive. Under this second interpretation, the legal certainty principle is not limited by what the legislature has in fact done or not done, but by what it could have done. This interpretation is defended here. Support for it is provided by the rationale of the substantive equivalency of Article 6 ECHR and Article 4 P7 ECHR. Since the European Court of Human Rights has autonomously defined the punitive arm of Article 6 ECHR so as not to make the application of the guarantees set out in the treaty dependent on the legislature's actions,[62] it seems logical, based on the same argument, to interpret Article 4 P7 ECHR the same way, even though, like Article 50 of the Charter, the text of that article explicitly refers to '*criminal* proceedings'.

4.4 The *Ne Bis In Idem* Principle as a Building Block of the Multi-layered European Legal System

Following the reasoning just stated, Article 50 of the Charter would apply to all punitive sanctions, regardless of whether the case involved administrative or criminal law, or application in a national or transnational context, thereby emphasising that, also in a system of indirect enforcement, the consequences of the national choice for a certain enforcement system are not entirely at the Member States' 'unbridled discretion', but are regulated by legal principles. Specifically, this means that Member States may not block cooperation with other Member States by invoking this discretion and thus erode an individual's legal position through multiple punishments for the same offence. This would undermine the second pillar of the indirect enforcement system – sincere cooperation. In addition, the advantage of the approach opted for here is that it is consistent with a criterion about which there is more con-

59 Cf. art. 2(3) Regulation 2006/2004.
60 Cf. art. 23(5) Regulation No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ EU 2003 L 1/1.
61 Cf. art. 2(2) Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings, OJ EU 2009 L 328/42.
62 *Supra* note 43.

sensus at the European level than about what it is and is not part of the criminal law *sensu stricto*. The criminal charge concept must be interpreted autonomously.

At the same time, though, it must be acknowledged that even though the rationale underlying the *ne bis in idem* principle fully applies in a transnational context, the system of allocating powers in the EU differs considerably from the national context. This was already noted above. National legislatures have *Kompetenz-Kompetenz*; the European legislature does not, although the boundaries of Article 114 TFEU are difficult to indicate. The EU's powers are limited. In an area falling outside these powers, this limitation means that the EU cannot guarantee to a person who has already been tried once that he will not be prosecuted again under another legal system. Conversely, in these situations, the EU also cannot ensure that the legal system wishing to prosecute the person will take into account the fact that another legal system may have an interest in prosecution as well. Accordingly, the limits of legal certainty are found where such certainty *can* no longer be provided by the EU. The institutional (and not the applicable statutory) framework is decisive.

Although the European Court of Justice itself has not said this in so many words, this could explain the rather formalistic case law of the Court in the area of competition law. In particular, it could explain why, in the Court's interpretation of what constitutes an *idem* under competition law, the Court also considers the protected legal interest,[63] while it does not do so in its jurisprudence under Article 54 CISA.[64] While it is virtually impossible to separate the application and enforcement of national and European competition law from each other these days, they still need to be clearly distinguished from each other from an institutional point of view.[65] Use of the term 'legal interest' must therefore serve to distinguish the application of EU competition law from that of the Member State and third countries. Precisely because the *ne bis in idem* principle has not been statutorily developed in competition law, but rather

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63 Cf. Joined Cases C-204/00 P *et al.Aalborg Portland A/S et.al./Commission* [2004] *ECR* I-123, para. 338: 'As regards observance of the principle 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.' This criterion was repeated by the CFI, under the new Regulation 1/2003 and after the decision of the ECrtHR in *Zolotukhin,* in CaseT-24/07 *ThyssenKrupp Stainless AG* [2009] *ECR* II-2309, para. 179.

64 Cf. recently Case C-261/09 *Gaetano Mantello*, nyr, para. 39: 'In that context [of art. 54 CISA], the concept [of the "same acts"] has been interpreted as referring only to the nature of the acts, encompassing a set of concrete circumstances which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected.'

65 National competition law is, after all, not an area as such in which the EU is competent. In contrast, the EU has exclusive competence in the European competition law area (Article 3(1)(b) TFEU). This is not altered by the fact that the EU has now largely 'decentralised' the enforcement of this area of law. See also Van Bockel 2010, p. 139 *et seq*.; Brammer 2008, p. 359 *et seq*.

regulates action taken by the authorities as a principle, this limitation must be put in place. In contrast, in the area of freedom, security and justice, the wording and context of Articles 54-58 CISA make clear that the principle need only be applied with regard to the transnational relationships in the area of freedom, security and justice. There is no need for a demarcation with respect to the European level (which is lacking in the criminal law) or third countries, because the aforementioned articles do not pertain to this. Viewed in this way, the discrepancy between the two lines of jurisprudence is not significant or perhaps even non-existent.

To what should this institutional power of the EU extend then? First, it should be noted that, as a result of the Treaty of Lisbon's having taken effect, the EU not only has the power to compel Member States to impose administrative sanctions, but also criminal sanctions with regard to EU policy (Article 83(2) TFEU). The procedure which must then be followed is the same as for the adoption of the relevant harmonisation measures. Moreover, Article 81(1)(d) TFEU can be seen as the EU's having imposed a duty on itself to resolve jurisdictional conflicts in criminal cases.[66]

Thus, not only does the EU have the power to define substantive standards of conduct, but it can also compel the Member States to enforce these and can even mandate the enforcement modalities. Such mandatory provisions are generally promulgated to bring the internal market's operation into balance with other conflicting public interest goals. Legislative intervention is therefore the first step towards creating a level playing field. What is then critical is whether the EU can also regulate the inevitable jurisdictional conflicts occurring where criminal and administrative enforcement overlap. Saying that this is not possible is difficult to accept. It would mean that, after the phase in which EU law is transposed, the EU must accept that the Member States will each go their own ways in implementing the law and enforcing it, resulting in countless jurisdictional conflicts. This undermines the operation of that level playing field just as much as divergent national regulatory frameworks and likewise falls under the operation of, in this case, Article 114 TFEU.

Furthermore, denial of the existence of such a power seems inconsistent with what goes on in practice, although a wide variety of solutions can in fact be seen in this area.[67] Financial law is one example of an area in which European law has also divided up the law enforcement responsibilities between the Member States to a rather far-reaching extent (and thereby reduced the risk of jurisdic-

66 See also Luchtman 2011.
67 Keessen 2009 discusses different other examples in the environmental law area.

tional conflicts and multiple punishments). Pursuant to Article 47(2) of the former EC Treaty, supervision of investment firms has, to a large extent, become a European matter. Although the Member States are responsible for law enforcement, the EU has a major impact here. Under the system fleshed out by Directive 2004/39/EC ('the MiFID Directive'), the Member State of origin not only has the exclusive power to issue a licence granting access to the European market (the European licence), but also, in terms of cross-border services or operations from branch offices in other Member States, is charged in principle with monitoring compliance and imposing sanctions.[68] Support for these activities is received from the European Securities and Markets Authority ('ESMA').[69]

The MiFID Directive allows the Member States to choose how they wish to punish violations of the standards of conduct. Still, in that system, if a Member State opts for criminal law enforcement, the national criminal justice system will not be able to thwart this European allocation of power. In principle,[70] the recipient Member State may not, by calling in its Public Prosecutor's Office, suddenly gain jurisdiction in a matter for which the directive has designated the competent authority of the Member State of origin. This would, after all, undercut the system. In that sense, these jurisdictional regulations also affect criminal enforcement in the form of a negative obligation not to subvert this system with criminal measures. It seems that, if this leads to problems regarding the national criminal justice system, supplemental legislative measures pursuant to, for example, Article 83(2) (harmonisation of substantive criminal law, including jurisdiction law), Article 85 (Eurojust) and/or even Article 86 (European Public Prosecutor's Office) TFEU are necessary. But whichever way you look at it, the fact remains that the treaties offer the EU an institutional framework for resolving such jurisdictional conflicts and that this is recognised in practice as well. That this framework is not always utilised is another matter.

4.5 Conclusion

The foregoing implies that Article 50 of the Charter must be interpreted to mean that, besides applying to national legal systems, the *ne bis*

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68 For instance, the Preamble, 32nd Recital of the MiFID-directive, OJ EU 2004 L 145/1, refers to (deviations from) to 'the principle of home country authorisation, supervision and enforcement', and so do arts. 31, 32 (in particular section 7) and 62.

69 Cf. note 48.

70 I would take this to be the general rule as far as the criminal offences involved serve to implement the relevant EU directive. See, however, G. Dannecker, 'Die Dynamik des materiellen Strafrechts unter dem Einfluss europäischer und internationaler Entwicklungen', *ZStW* (117) 2006-4, p. 714-716; M. Böse & F. Meyer, 'Die Beschränkung nationaler Strafgewalten als Möglichkeit zur Vermeidung von Jurisdiktionskonflikten in der Europäischen Union', *ZIS* 2011, p. 340.

in idem principle not only regulates the area of freedom, security and justice (hence, the criminal law *sensu stricto*), but the internal market as well. It applies to all punitive sanctions in that context. This broad, autonomous interpretation makes the enjoyment of the treaty freedoms in the European territory paramount, and prevents this enjoyment from being frustrated by legislative intervention (or inaction) at the European or national level. In a certain sense, then, the EU faces a repeat of the debate which took place in the national context. As the EU also includes criminal law within its policy areas, the conclusion that the *ne bis in idem* principle only regulates the criminal law *sensu stricto* may have strange consequences. Given that the national legislatures and, increasingly, the European legislature are the ones who decide how a standard emanating from European law is to be enforced, this principle might easily be set aside, perhaps even deliberately. In light of the freedoms, this interpretation is difficult to swallow, for it reverses the basic assumption: Instead of it having to justify why a restriction of those freedoms is necessary and allowing for parliamentary and judicial control in this regard, the government would retain the exclusive decision-making power. If we accept that the EU has the power to regulate interstate jurisdictional conflicts, there must be a justification for restricting the treaty freedoms. The fact that European and national lawmakers have not provided for adequate cooperation and coordination mechanisms cannot, in my opinion, be seen as such a justification. To wit, they have the power to do this.

5 The Limits of the Transnational *Ne Bis In Idem* Principle

5.1 The Charter's Limitation System

A couple of additional remarks about two potential limits on a transnational *ne bis in idem* principle are in order. First, these are contained in Article 52(1) of the Charter, which states that, under certain circumstances, exceptions to the exercise of fundamental rights may be accepted. These exceptions must be provided for by law and respect the essence of those rights and freedoms. Further, they must be subject to the principle of proportionality. The Explanation to the Charter states that the limitations on the *ne bis in idem* principle in, for instance, Article 55 CISA might fall under this Article.[71]

This limitation power could conceivably be exercised if it were recognised that the *ne bis in idem* principle applies to all punitive sanctions. If the principle were

71 OJ EU 2007 C 303/17, p. 31

to apply in full, undesirable situations might arise, certainly if the European Court of Justice would in that case – and I think this is likely – continue adhering to the broad concept of the 'same acts' which it is now using under Articles 54-58, CISA.[72] For example, a certain set of facts might constitute serious fraud in State A, but may have been previously dealt with in State B as a simple administrative irregularly. Such a practice will, moreover, promote forum-shopping by accused persons; they opt for punishment in the country with the lightest penalties and then need not worry any further.

It is partly for this reason that some countries regard full application of the *ne bis in idem* principle to all punitive sanctions as problematic even in the national context. Germany, for instance, stipulated a reservation concerning Article 4 P7 ECHR (which protocol, incidentally, did not take effect in Germany), with the scope of that article being limited to the criminal law *strictu senso*. Article 103 of the German Constitution is limited to this too.[73] Germany applies the principle of 'Vorrang des Strafverfahrens' to the relationship between criminal law and administrative law. Criminal law prevails over administrative law. If, say, an administrative financial penalty was already imposed, this will not preclude a second criminal law action from being initiated, unless a final court judgment on the penalty ruling has been rendered in the meantime. In that case, the amount already paid will be deducted from any subsequent criminal penalty (*Anrechnung*).[74]

Bearing the European Court of Justice's comments in *Brügge and Gözütok* in mind, the Court is unlikely to accept such a system at the European level without resistance. If the aforementioned findings were to result in limitations to the principle in the transnational context, its full effect would, as the Court found with respect to Article 54 CISA 'apply only to decisions discontinuing prosecutions which are taken by a court or take the form of a judicial decision', so that 'the *ne bis in idem* principle laid down in that provision (and, thus, the freedom of movement which the latter seeks to facilitate) would be of benefit only to defendants who were guilty of offences which – on account of their seriousness or the penalties attaching to them – preclude use of a simplified method of disposing of certain criminal cases by a procedure whereby further prosecution is barred, such as the procedures at issue in the main actions.'[75] Furthermore, what '*Strafverfahren*' precisely means cannot be clearly defined at the European level. In Germany, these types of proceedings are initiated by the Public Prose-

72 See *supra* note 63.
73 Kniebühler 2005, p. 32.
74 Cf. Kniebühler 2005, p. 249-250.
75 Joined Cases C-187/01 and C-385/01 *Brügge and Gözütok* [2003] *ECR* I-5689, para. 40.

cutor, who – as a rule – brings the matter before a criminal court. In other countries, administrative bodies may play a similar role in the criminal justice system; they serve the same function as the Public Prosecutor. Therefore, the ideas behind this priority principle – priority for the weightier proceedings, because of the seriousness of the underlying offences[76] – would not automatically be realised, while a substantial infringement of the *ne bis in idem* principle's scope would thereby be accepted.

Consequently, it must be said that the unrestricted application of the *ne bis in idem* principle can lead to problems. Exceptions may therefore be necessary, for example, if it turns out that the initial proceedings were unfair or if new evidence is discovered. Whatever the case may be, the precise details of this thought experiment are not even the most critical issue at this time. Rather, as I see it, the issue is that acceptance of the *ne bis in idem* principle puts the ball back in the legislature's court. If lawmakers want to place such limitations on the principle, they must specify how this is to work, while observing the requirements in Article 52(1) of the Charter.

5.2 The Limits of the Charter

The preceding discussion related to the applicability of Article 50 Charter to situations in which it is clear that the authorities of the Member State are carrying out EU law. There is no reasonable doubt in those situations that the Charter applies (cf. Article 51(1) Charter).[77] Consumer law and financial supervision were therefore repeatedly referred to. In both areas, European law has a huge impact, and the Member States' authority is correspondingly limited. Do the above-mentioned conclusions also apply, however, if just one of the two States is carrying out EU law? Or if neither of the States is carrying out EU law, but the party concerned is restricted in his freedom of movement anyway, because of the multiple sanctions? Or if both Member States are engaged in implementing different areas of EU law?

The problem that arises in such cases can be illustrated again with reference to the enforcement of the Unfair Commercial Practices Directive. The Dutch legislature, for instance, has chosen to enforce this directive through private and administrative law. The directive has not been transposed into criminal provisions. Nonetheless, unfair commercial practices, as defined in the directive, almost automatically have a criminal connotation too, with offences under general criminal law such as forgery of documents (Article 225 Dutch Criminal

76 Cf. Kniebühler 2005, p. 32.
77 *Supra* note 27.

Code), sales fraud (Article 329 Dutch Criminal Code) and assault (Article 300 Dutch Criminal Code) coming to mind.[78] If the Netherlands prosecutes a person under these provisions, when that person has already been fined in another country based on legislation implementing the Unfair Commercial Practices Directive, does Article 50 of the Charter apply? After all, it is not absolutely clear in such cases that the Netherlands, under a strict interpretation of Article 51(1) Charter at least, has implemented EU law. The party concerned is being prosecuted pursuant to articles which are not directly intended to transpose the Unfair Commercial Practices Directive and, besides that, have a much broader scope.

Because the ambiguity concerning the interpretation of Article 51(1) of the Charter is a topic which goes beyond the subject matter of this article, it will not be discussed any further. The problem does not specifically lie so much in the fact that the reasoning developed above would no longer be valid, but rather, in the interpretation of Article 51(1) of the Charter itself. Once this article is interpreted consistently with the European Court of Justice's existing case law that national conduct falling within the scope of EU law may also be tested in relation to the fundamental rights, most problems appear to be solved. If it still must be acknowledged then that the EU has no authority in this respect, the undesirable effects of double punishment could be compensated through a power to reduce the sanction based on considerations of fairness.[79]

6 Concluding Observations

This article has argued that the *ne bis in idem* principle articulated in Article 50 of the Charter should be interpreted in such a way that it is applicable to all punitive sanctions imposed for the purpose of implementing of EU law, regardless of whether they are of a criminal or administrative nature, or concern a national or transnational sets of facts. This potentially has far-reaching effects for what might be termed 'the organisation of transnational law enforcement'. The reason for this is related to the fact that the effect of *ne bis in idem* means that the authority which acts first will continue to handle the matter with priority over any other authorities. It may result in a repeat of the debate which is also being conducted in connection with the area of freedom, security and justice. At the same time, it will complicate that debate. A provision such as Article 2(2) of the Framework Decision on Prevention and Settlement of Conflicts of Exercise of Jurisdiction in Criminal Proceedings,[80] which states

78 See also the Dutch parliamentary records, *Kamerstukken II* 2006/07, 30 928, nr. 3, p. 9.
79 Case 14/68 *Walt Wilhelm/Bundeskartellamt* [1969] ECR 1.
80 *Supra* note 61.

that the framework decision does not apply to proceedings falling under Regulation No. 1/2003 (competition law),[81] will, for example, no longer suffice.

The applicability of the principle thus has potentially major consequences. Much will depend on the interpretative given to such key concepts as *bis* and *idem*. These questions have inevitably remained somewhat on the sidelines in this article. It seems obvious to me though, that an autonomous, substantive interpretation has also been designated for the concept of the 'offence' under Article 50 of the Charter. That is not necessarily the case for the term *bis*, about which the European Court of Justice recently gave a decision in the *Mantello* case.[82] That decision makes apparent that splitting up an investigation for tactical reasons and bringing it before the court at various moments does not automatically violate the *ne bis in idem* principle. That is true even if important evidentiary material was already in the authorities' possession at the time of the first prosecution. Whether there is a *bis* in such a case is a matter which is determined under national law.

In which direction might the debate go if the principle must indeed be interpreted in the manner argued here? The *ne bis in idem* principle does not mean that it must be clear beforehand exactly which authority has the jurisdiction to impose punishment.[83] It need not lead to harmonisation of jurisdiction law. *Ex post*[84] coordination and designation of the competent authority is also sufficient, and provides more flexibility.[85] In my estimation, then, transnational application of the *ne bis in idem* principle will, in particular, boost the role of networks in the mutual coordination of punitive sanction investigations enormously. Insofar as they do not already do so, networks of regulatory bodies and judicial authorities will be increasingly involved in coordinating operations. With jurisdictional conflicts more likely to occur as a result of *ne bis in idem*, these networks may be entrusted with binding, conflict-solving powers.

It will also no longer be possible to have separate debates on the issue for each policy area. I believe it is inevitable that the relationships between the various networks – for example, between the European Competition Network (ECN) and Eurojust (and thereby competition law *and* criminal law) – must be engaged

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81 Incidentally, it is unclear to me why only the ECN is explicitly taken into account. Other administrative networks also operate in the field of punitive sanctioning, see *supra* note 48.

82 Case C-261/09 *Gaetano Mantello*, nyr.

83 *Supra* section 2.

84 That is: after the offence, liable to criminal or administrative law sanctioning, is discovered by the authorities.

85 Cf. M. de Visser, *Network-based governance in EC law – The example of EC competition and EC communications law*, Oxford/Portland/Oregon: Hart 2009, p. 302.

in full. This may lead to many different outcomes. A European *una via* provision, for instance, is conceivable (cf. Article 5:44 Dutch General Administrative Law Act and Article 243 Dutch Code of Criminal Procedure),[86] as well as a more sweeping option in which the responsible authorities jointly decide which of them will prosecute the party concerned. A minimal option, providing only for mutual notice and consultation obligations, as now occurs under the aforementioned framework decision, is even imaginable. This latter option, however, will ultimately prove to be inadequate to turn back the undesirable effects of a *ne bis in idem* principle. Notice alone does not prevent a State from being the first to commence and complete prosecution.

Finally, *ne bis in idem* can also give new energy to the discussion concerning the institutional embodiment of such law enforcement networks. If I am not mistaken, that discussion currently focuses strongly on the 'how and why' of transparency and accountability of those networks operating within the EU's unique institutional structure. As coordination of punitive sanctions is increasingly considered as part of their duties, the question arises, whether the discussion may be limited to this. Although in many instances it will currently formally be the authorities of the Member States (and not the network itself) who decide whether they will start a punitive investigation or not,[87] the fact remains that the legal position of the accused will largely be determined within those networks, when the choice is made which Member State will prosecute and which will not. After all, there are big differences between the Member States' legal systems. Whether the accused is tried in State X or Y is therefore extremely important to him.[88] At the same time, he is hardly able to assess what occurs in those networks.[89] Similar remarks apply to other 'outsiders': If, within a network of regulatory authorities, it is determined, say, that State A or State B will take up a matter, the position of the relevant criminal law enforcement authorities there (at least if those countries engage in criminal enforcement) will be indirectly affected, too. The issue is no longer just the legitimacy of those networks and their activities, but the lawfulness thereof as well.[90] This question will become ever more important as the role of networks grows larger.

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86 For an explanation of what *una via* means in the Dutch national context, see Klip & Van der Wilt 2002.

87 Cf., with regard to competition law, De Visser 2009, p. 223, 292.

88 Cf. Luchtman 2011, with further references.

89 *Supra* section 4.3.

90 Cf. M. Busuioc, *The Accountability of European Agencies – Legal Provisions and Ongoing Practices*, Delft: Eburon 2010, p. 35-49, who uses the concept 'accountability' in clear demarcation of the concept 'control'. The latter concept seems to refer to what I would consider to be the legality of the actions of, in her study, European agencies. De Visser 2009, p. 253 *et seq.*, in particular p. 260, notes that the mandate structure for the ECN remains somewhat unclear.