Double Jeopardy and EU Law: Time for a Change?

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A. Introduction

No-one should be tried twice for the same offence. This principle, known as the double jeopardy or *ne bis in idem* rule, has been recognized for centuries and enshrined in the domestic law of many States and several international human rights treaties. The rule is apparently both simple and attractive. But given the complexity of the criminal law and procedure in any jurisdiction, difficulties of interpreting the rule arise when States attempt to apply it in practice. Furthermore, where a strict application of the rule would prevent a fresh prosecution in a case where new evidence arises or where a person has been in fact sheltered from criminal prosecution by proceedings designed to confer impunity, it could be argued that applying the rule without limitation would frustrate basic principles of criminal justice. This issue could be seen as a particular case study of the tension between the objectives of protecting civil liberties and of ensuring public safety.

The international application of the principle, preventing a fresh prosecution in a second State after a first trial has taken place in another State, compounds these difficulties, given the divergences in substantive criminal law, criminal procedure and enforcement practice as between States, even within the European Union's Member States.

For some years, the EU has recognized and applied an international double jeopardy rule as between EU Member States,[1] resulting in a number of judgments of the Court of Justice interpreting that rule, along with a failed attempt at legislative reform, with a further attempt planned. What rules apply within the EU, and how do they compare to other double jeopardy rules enshrined within international treaties?[2] How have the EU rules been interpreted? Should the EU rules be reformed, and if so, how?

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[1] This paper does not examine the established EU rules concerning the application of the double jeopardy rule to administrative proceedings (particularly competition proceedings). *See* the Opinion in *Gasparini* (*see infra* note 20) for a comparison of the criminal law and administrative law rules. Nor does this paper examine the question of the application of an international double jeopardy rule between EU Member States and non-Member States (other than the non-Member States which have associated themselves with the EU's version of international double jeopardy rules).

[2] This paper does not compare the EU rules to the diverse purely domestic versions of the double jeopardy rule.

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The following paper answers these questions in turn, arguing that there is broadly speaking (with one significant exception) no need to reform the rules, and in particular that the distinctive 'free movement' model of international double jeopardy which has been developed by the Court of Justice is justified and appropriate within the context of the European Union.

B. Background

I. The Human Rights Approach

A first model for the regulation of the double jeopardy rule by international treaties can be found in human rights instruments. Article 4 of Protocol 7 to the European Convention on Human Rights (ECHR), which has been ratified by 39 states, including 22 of the 27 EU Member States,[3] provides as follows:

> 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.
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> 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.
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> 3. No derogation from this Article shall be made under Article 15 of the Convention [concerning derogations in the event of emergencies].

A similar provision appears in Article 14(7) of the International Covenant on Civil and Political Rights (ICCPR), which has been ratified by all Member States:

> No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Unlike the ECHR clause, this provision *is* subject to a possible derogation in an emergency, under the circumstances set out in Article 4(1) of the Covenant:[4]

> In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

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[3] The States which have not ratified the Protocol are (among the EU Member States) the UK, Spain, Germany, the Netherlands and Belgium, along with (among non-Member States) Andorra and Turkey. All of these states have signed the Protocol, except for the UK and Andorra.

[4] Art. 4(3) of the Covenant sets out a procedure that States must apply in the event that such a derogation is invoked.

However, on the other hand, the relevant provision of the Covenant, unlike the ECHR, is *not* subject to the possibility of reopening the case in the event of the discovery of new facts or a defect in the previous proceedings.

It is clear that the ECHR provision only applies to double jeopardy within the *same* State. Although arguably the slightly different wording of the Covenant suggests an international ban on double jeopardy (so that a judgment in France would preclude a prosecution in Germany), the Human Rights Committee, which has the task of interpreting the Covenant, has ruled otherwise.[5]

Both provisions have attracted reservations from EU Member States. In particular, the ECHR provision has attracted five reservations. Austria, Germany, Italy and Portugal have all stated that Article 4 of the Seventh Protocol applies only to acts which are regarded as criminal offences under national law. France has a wider reservation, confining the application of Article 4 to offences which "fall within the jurisdiction of the French criminal courts."

As for the ICCPR, eight Member States (plus associate Iceland) have reservations. Denmark states that Article 14(7) is "not binding" upon it, in particular because national law allows for the resumption of criminal cases in which the accused party was acquitted. Sweden has similarly reserved the right not to apply Article 14(7). The remaining reservations are more limited, with Austria, Finland and the Netherlands effectively preserving existing national legislation that allows for the reopening of proceedings after a final judgment, and France, Ireland and the UK stating that Article 14 of the Covenant will not change certain aspects of military law. It is not clear whether the latter reservations have any relevance for the double jeopardy rule.

There is some case law of the European Court of Human Rights interpreting the double jeopardy rule, but the case law has taken conflicting approaches to the question of whether the rule applies to preclude proceedings for separate *offences* arising from the same *acts*.[6]

II. The Criminal Law Approach

The second established model for the regulation of the double jeopardy rule by international treaties can be found in international criminal law instruments. Unlike the human rights treaties, these measures provide expressly for international application of the double jeopardy rule, but the issue is regulated by reference to divergent national rules on criminal procedure.[7] In particular, within the Council of Europe, a broad rule concerning double jeopardy in criminal matters was inserted into the 1970 Convention on the international validity of criminal judgments and the 1972 Convention on the transfer of criminal proceedings.[8] These Conventions provide that if a "criminal judgment" has been rendered "for the same act" in

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5 *See* chapter 16 of S. Trechsel, Human Rights in Criminal Proceedings (2005).

6 *Id.*

7 *See in particular* the discussion by J. Vervaele, *The Transnational ne bis in idem Principle in the EU: Mutual Recognition and Equivalent Protection of Human Rights*, 1 Utrecht Law Review 100 (2005).

8 Arts. 53-55 (ETS 70) and Arts. 35-37 (ETS 73).

another Contracting Party, a person can "neither be prosecuted nor sentenced nor subjected to enforcement of a sanction" in another Contracting Party, if that person was acquitted, if the sentence has been enforced, or if the sentence cannot be enforced due to amnesty, pardon or lapse of time, or if a conviction without a sanction was imposed (the 'enforcement condition').

As an exception, unless a Contracting Party has requested the proceedings, it is not obliged to apply the double jeopardy rules if the act concerned "was directed against either a person or an institution or any thing having public status in that State, or if the subject of the judgment had himself a public status in that State." Furthermore, a double jeopardy effect does not necessarily apply where the act in question falls within the territorial jurisdiction of a Contracting Party, according to its law. However, these exceptions do not apply if the State in question had asked for proceedings to be brought. Furthermore, if new proceedings are brought in a second State "against a person who has been sentenced for the same act" in a first State, then "any period of deprivation of liberty arising from the sentence enforced shall be deducted from the sanction which may be imposed" (a 'set-off' requirement).

The broad scope of these rules is undercut by the limited enthusiasm which States have demonstrated for these two treaties. The 1970 Convention has been ratified by only 19 States, including ten EU Member States,[9] while the 1972 Convention has been ratified by 23 States, including thirteen EU Member States.[10]

In the sphere of extradition, a 1975 Protocol to the 1957 Council of Europe Convention on extradition provides for a very similar rule. Article 9 of the original Convention, to which all EU Member States are parties, provided that extradition requests had to be refused if the requested party's authorities had issued a "final judgment" in respect of the offences or offences for which extradition was requested. Also, requests could optionally be refused if the requesting State had decided not to institute, or to terminate, proceedings for the same offence or offences.

The 1975 Protocol, to which 19 Member States are parties,[11] amended Article 9 of the original Convention to provide that extradition could not be granted if a "final judgment has been rendered" in any Contracting Party to the Convention other than the requested or requesting State, for the same "offence or offences." The definition of the judgments covered and the enforcement condition is otherwise identical to the two earlier Conventions, as are the exceptions to the rule, except that the Protocol states expressly that the territorial jurisdiction

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[9] Austria, Bulgaria, Cyprus, Denmark, Estonia, Latvia, Lithuania, Romania, Spain and Sweden. Sweden has limited the effect of the double jeopardy rules in the Convention by means of a reservation.

[10] These are the same Member States that ratified the 1970 Convention, plus the Czech Republic, the Netherlands and Slovakia. Again, Sweden has limited the effect of the double jeopardy rules in the Convention by means of a reservation.

[11] The eight exceptions are the UK, Ireland, Italy, Germany, Greece, Austria, Finland and France. Also, although Luxembourg has ratified this Protocol, it does not apply the provision extending the double jeopardy rule.

exception applies even where the offence took place 'partly' in the requesting State's territory, and there is no prohibition on using the exceptions where the State concerned requested the proceedings. Again, States are permitted to retain in force a wider provision on double jeopardy, but there is no requirement to set-off the any previous sentence imposed against any new sentence imposed.

As regards confiscation of criminal assets, the Council of Europe Convention on this issue, which has been ratified by all Member States, contains an optional double jeopardy exception.[12] The Council of Europe Convention on sentenced persons contains an implied but limited double jeopardy rule, as it specifies that the State from which a prisoner is transferred may no longer enforce the sentence.[13] Finally, as regards mutual assistance in criminal matters, the relevant Council of Europe Convention, which has also been ratified by all Member States, contains no express double jeopardy exception, but ten EU Member States have invoked reservations allowing them to uphold some variation of the principle.[14]

C. EU Double Jeopardy Rules

I. General Rules

The EU's Member States initially agreed on a Convention on international double jeopardy in criminal cases in 1987. But due to limited ratifications, this Convention never entered into force, and so its provisions were inserted into the Convention implementing the Schengen Agreement, which was then under negotiation. The Schengen Convention subsequently was applied among several Member States from 1995, and was extended to other Member States later. It was also integrated into the EU's legal framework with the entry into force of the Treaty of Amsterdam on 1 May 1999. As of the start of 2007, although some provisions of the Convention have limited application to only thirteen Member States, the criminal law provisions, including the double jeopardy rules, apply to every Member State except Ireland.[15] They also apply to Norway and Iceland, pursuant to an association agreement which entered into force in 2001, and will apply in future to Switzerland and Liechtenstein, pursuant to association agreements which were agreed in 2004 and 2006 respectively, but which have not yet entered into force.[16] In all, then, 26 Member States, and 28 States in total,

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[12] Art. 18(1)(e) of the Convention (ETS 141). Art. 28(1)(f) of the revised 2005 version of the Convention, which is not yet in force, retains this exception (ETS 198).

[13] Art. 8 of the Convention (ETS 112), ratified by all Member States. The explanatory memorandum to the Convention makes clear the intention to apply a double jeopardy rule.

[14] ETS 30. *See* the reservations of Belgium, Bulgaria, Cyprus, Denmark, Finland, Ireland, Luxembourg, Malta, the Netherlands, and the UK.

[15] *See* S. Peers, EU Justice and Home Affairs Law, 2nd ed (2006), at 55-62. Ireland has in fact accepted the criminal law rules in principle, but the Council has not yet taken a decision to put these rules into effect in Ireland.

[16] *See id.*, at 62-64, and now COM (2006) 752, 1 Dec. 2006 (proposal for signature and conclusion of the Schengen association agreement with Liechtenstein).

currently apply the Schengen double jeopardy rules as of the start of 2007 – a higher success rate (particularly as regards large EU Member States) than the Council of Europe measures have achieved.

The double jeopardy rules appear in Articles 54-58 of the Schengen Convention. Articles 54-56 provide as follows:

> Article 54
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> A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party.
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> Article 55
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> 1. A Contracting Party may, when ratifying, accepting or approving this Convention, declare that it is not bound by Article 54 in one or more of the following cases:
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> (a) where the acts to which the foreign judgment relates took place in whole or in part in its own territory; in the latter case, however, this exception shall not apply if the acts took place in part in the territory of the Contracting Party where the judgment was delivered;
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> (b) where the acts to which the foreign judgment relates constitute an offence against national security or other equally essential interests of that Contracting Party;
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> (c) where the acts to which the foreign judgment relates were committed by officials of that Contracting Party in violation of the duties of their office.
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> 2. A Contracting Party which has made a declaration regarding the exception referred to in paragraph 1(b) shall specify the categories of offences to which this exception may apply.
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> 3. A Contracting Party may at any time withdraw a declaration relating to one or more of the exceptions referred to in paragraph 1.
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> 4. The exceptions which were the subject of a declaration under paragraph 1 shall not apply where the Contracting Party concerned has, in connection with the same acts, requested the other Contracting Party to bring the prosecution or has granted extradition of the person concerned.
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> Article 56
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> If a further prosecution is brought in a Contracting Party against a person whose trial, in respect of the same acts, has been finally disposed of in another Contracting Party, any period of deprivation of liberty served in the latter Contracting Party arising from those acts shall be deducted from any penalty imposed. To the extent permitted by national law, penalties not involving deprivation of liberty shall also be taken into account

Article 57 of the Convention provides for the exchange of information relevant to the application of the double jeopardy principle between national authorities. Finally, Article 58 provides that Member States may establish "broader national provisions ... with regard to judicial decisions taken abroad."

It can be seen that the Schengen provisions follow the model of the Council of Europe criminal law conventions, rather than the human rights model. However, there are certain differences between the Schengen rules and their Council of Europe precursors, which presumably demonstrate the intention of EU Member States to achieve further integration than proved possible among the wider membership of the Council of Europe. There is a different wording of the type of proceedings which give rise to the application of the rule (a "trial" which has been "finally disposed of", rather than a "criminal judgment" or "final judgment"), with no express reference to acquittal, and a less precise definition of the enforcement condition, with no express reference to amnesties, pardons, lapse of time or the non-imposition of a penalty as a consequence of conviction. The double jeopardy rule applies to "acts" (as in the two Council of Europe Conventions), not to "offences" (as in the Protocol to the extradition Convention).

Most notably, the Schengen rules limit the exceptions to the double jeopardy principle, both substantively and procedurally. Substantively, the exceptions cannot apply if the second Member State has *either* requested proceedings *or* requested extradition for the acts concerned; the two Council of Europe Conventions applied only the first limit, and the Protocol to the Extradition Convention had applied neither limit. The exceptions themselves are narrower, in that the territorial jurisdiction exception only applies if the first Member State lacked territorial jurisdiction over the offence. Since it is likely that the first Member State will usually be exercising its territorial jurisdiction (at least where the act took place partly in its territory), this clearly significantly limits the potential application of this exception. As for the other two exceptions, the exception for acts against a person, institution or other thing with "public status" has been limited to an exception regarding acts against the "national security or other equally essential interests" of the second State, and the exception regarding offenders with public status has been limited to an exception regarding offences "committed by officials of that Contracting Party in violation of the duties of their office."

Procedurally, the exceptions can only be invoked where a declaration was made at the time of ratification of the Schengen rules, and the national law applicable to the exception for "national security" or other equally "essential interests" must be specified. These declarations have unfortunately not been published, but the Commission has revealed that seven Member States have made use of the territorial jurisdiction exception, four have made use of the national security exception, and none have made use of the 'public officials' exception.[17] However, there is a dispute as to whether purported reservations by other Member States (France and Italy) are procedurally valid, and as to whether new Member States may make reservations to the double jeopardy rules.[18]

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[17] *See* the working paper annexed to the Green Paper on criminal jurisdiction and the double jeopardy principle (SEC (2005) 1767, 23 Dec. 2005), at 47. Austria, Denmark, Germany, Greece, Sweden, Finland and the UK have entered reservations under Art. 55(1)(a) of the Convention; Austria, Denmark, Greece and Finland have entered a reservation under Art. 55(1)(b).

[18] *See* Council Doc. 10061/06, 1 June 2006.

Also, the Schengen rules differ from the prior Council of Europe Conventions in providing for a procedure for exchange of information between Member States to ascertain whether the double jeopardy rules apply, and in providing for a wider application of the 'set-off' rule, applicable wherever a previous trial for the same facts has taken place (not just where a person was sentenced), and applicable to any deprivation of liberty "arising from" those acts, not just that period of deprivation of liberty deriving from an enforced sentence.

A different version of the double jeopardy rule appears in Article 50 of the EU's Charter of Fundamental Rights, agreed in 2000,[19] which provides that "[n]o-one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already finally been acquitted or convicted within the Union in accordance with the law." This provision is identical to the double jeopardy rule in the ECHR Protocol and the ICCPR, except for the addition of the words "within the Union"; the deletion of the words, "... and penal procedure of that State" appearing in the ECHR Protocol (or the words "... and penal procedure of each country" in the ICCPR); and the deletion of the words "under the jurisdiction of the same State", which appear in the ECHR Protocol. The Charter clause is therefore clearly intended to cover both the cross-border and purely domestic application of the principle, although it should be recalled that the Charter only applies within the scope of EU law (as defined by Article 51 of the Charter). Moreover, there is no provision in Article 50 concerning derogation from the right, but the same could be said of almost all rights recognized by the Charter. Derogations and limitations from Charter rights are instead provided for by general provisions set out in Article 52 of the Charter.[20]

II. Specific EU Rules on Double Jeopardy

There are rules on the double jeopardy issue in two third pillar Conventions concluded by the Member States.[21] These two Conventions contain a basic double jeopardy rule and exceptions to it which are identical to the rules in the Schengen Convention. However, neither Convention contains a provision on cooperation; there is no requirement to specify which provisions of national law are governed by the derogation for national security, et al; there is no provision on withdrawing derogations; relevant agreements between Member States are not affected by the provisions; and (in the fraud Convention only) there is no reference to the 'accounting' principle. These measures, unlike the Schengen double jeopardy

[19] OJ 2000 C 364.

[20] For an analysis of the derogations and limitations issue, *see* S. Peers, *Taking Rights Away? Derogations and Limitations*, *in* S. Peers & A. Ward (Eds.), The EU Charter of Fundamental Rights: Politics, Law and Policy (2004).

[21] Art 7 of the Convention on Protection of the EC's Financial Interests (OJ 1995 C 316/48) and Art 10 of the Corruption Convention (OJ 1997 C 195/1).

rules, apply to Ireland,[22] but they do not apply to several Member States,[23] or to any non-Member States.

More importantly, perhaps, there are a number of specific rules on double jeopardy as an exception to EU measures regarding mutual recognition in criminal matters. In fact, all adopted or proposed EU measures in this field contain a double jeopardy exception. However, these measures differ significantly. It should also be noted that these measures do not apply to any non-Member States, except that Norway and Iceland have agreed a treaty to apply the European Arrest Warrant (with certain variations from the EU legislation).[24]

First of all, the initial measure in this field, the Framework Decision establishing the European Arrest Warrant,[25] provides for a mandatory refusal of execution of a warrant on ne bis in idem grounds, using identical wording to Article 54 of the Schengen Convention, including the enforcement condition.[26] It appears from the negotiating history of the Framework Decision that this provision was deliberately intended to parallel the Schengen Convention rules,[27] although it should be noted that there is no express reference to the exceptions to the Schengen double jeopardy rules, or to the limits on those exceptions, as set out in Article 55 to the Convention.

However, the Framework Decision goes on to provide for optional exceptions to recognition where the executing Member State has decided not to prosecute or to halt proceedings for the offence upon which the arrest warrant is based, or where any Member State has issued a final judgment relevant to the same facts which prevents further proceedings.[28] There is a further optional exception where the proceedings are statute-barred according to the law of the executing Member State, and that State has jurisdiction to try the offence.[29] Finally, there is also an optional exception where a third State has already issued a judgment for the same acts, subject to the enforcement condition,[30] but as noted above, the external application of the double jeopardy rule is outside the scope of this analysis.

Do these optional exceptions limit the scope of the mandatory double jeopardy exception? In the *Gasparini* judgment, the Court of Justice ruled that the optional exception for statute-barring did not limit the scope of the Schengen double jeopardy rule, since in order for that optional exception to apply, "a judgment whose basis is that a prosecution is time-barred does not have to exist." Rather, "[t]he situation where the requested person has been finally judged by a Member

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[22] The financial interests Convention also applied to the UK from its entry into force in autumn 2002, before the Schengen double jeopardy rules applied to the UK from 1 Jan. 2005.

[23] For ratification details, *see* the Appendix to Peers (*supra* note 20).

[24] OJ 2006 L 292 (not yet in force). The variations from the EU legislation do not affect the double jeopardy rule.

[25] OJ 2002 L 190/1.

[26] Art. 3(2) of the Framework Decision (*id.*).

[27] *See* Council Doc. 14867/01, 4 Dec. 2001, which comprises the largely final text of the Framework Decision. The footnote to Art. 3(2) states expressly that "[t]he wording of this Article is based on that of Article 54 *et seq.* of the Schengen Convention."

[28] Art. 4(3) of the Framework Decision.

[29] Art. 4(4) of the Framework Decision.

[30] Art. 4(5) of the Framework Decision.

State in respect of the same acts is governed by Article 3(2) of the framework decision, a provision which lays down a mandatory ground for non-execution of a European arrest warrant."[31]

By analogy, it could be concluded that the optional exception in the Framework Decision relating to halting or prosecuting proceedings in the executing Member State, or where a Member State has issued a final judgment which prevents further proceedings, must also be interpreted to avoid impinging upon the scope of the Schengen double jeopardy rules. So the reference to halting or prosecuting proceedings could be understood to refer to cases like *Miraglia*, where the Schengen double jeopardy rule does not oblige all Member States to refrain from a second prosecution following the termination of proceedings in the first Member State.[32] And the reference to optional non-execution following a final judgment of a Member State could be understood to refer to cases where the exception to the double jeopardy rules in Article 55 of the Schengen Convention applies, or where the enforcement condition in Article 54 of the Convention has not been satisfied.

Article 31 of the Framework Decision also permits Member States to maintain existing bilateral agreements, or to negotiation new bilateral agreements, to facilitate the application of the European Arrest Warrant. This could prima facie entail a restriction of the double jeopardy exception.

According to the Commission's report on implementation of the Framework Decision, three Member States have not applied Article 3(2) correctly. In particular, the UK applies Article 3(2) only where an act would benefit from the protection of a double jeopardy rule if it had been committed in the UK, and Ireland only applies Article 3(2) where a fugitive is sought for the purposes of a prosecution, but not where a fugitive is sought for the purposes of enforcing a conviction.[33] Also, only six Member States provide for mandatory non-execution in the case where prosecutions are halted, which concerns the Commission in light of the jurisprudence of the Court of Justice (see further below). Mandatory non-executions in the case of final judgments are mandatory in nine Member States and optional in nine Member States, while the exception for statute-barred cases is mandatory in fourteen Member States, and optional in ten. Finally, the Commission reports that there are six existing bilateral agreements pursuant to Article 31 of the Framework Decision, but that no new agreements had been notified. No further details of these bilateral agreements were supplied.[34]

Member States objected in detail to the Commission's critical report on national implementation of the Framework Decision.[35] In particular, Belgium claimed

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[31] Para. 31 of the judgment (*infra* note 60).

[32] *See id.*

[33] *See* SEC (2006) 79, 24 Jan. 2006, updating (following implementation of the Framework Decision by Italy) the prior report in SEC (2005) 267, 23 February 2005; *see also* COM(2005)63, 23 February 2005.

[34] Information is available on a recent treaty between Nordic states (Council Doc. 5573/06, 24 Jan. 2006). This treaty abolishes the optional exception for cases which are statute-barred in the executing State, but does not otherwise alter the double jeopardy exceptions.

[35] Council Doc. 11528/05, 2 September 2005.

that the Court's case law does not apply a double jeopardy effect to all cases of discontinuation of proceedings. As discussed below, while it is certainly true that not all discontinuations of proceedings result in a double jeopardy effect, some such proceedings clearly do, and so national implementation of the Framework Decision therefore still needs to be scrutinized. Next, Denmark observes that the provision for non-execution in case of discontinuation of proceedings is optional; but this fails to address the Commission's point that the mandatory double jeopardy principle applies to some such cases. According to Danish law, Danish authorities would not execute an arrest warrant where those authorities had decided not to prosecute on the merits, but would execute an arrest warrant where the authorities had decided not to prosecute due to lack of jurisdiction. As will be seen below, the case law has not yet clarified whether this is a correct interpretation of the double jeopardy rule.

Ireland states simply that Article 3(2) of the Framework Decision is correctly implemented in its legislation, while the UK claims that its provisions on double jeopardy do not apply a 'dual criminality' rule (requiring the act in question to be criminal in both States), as the Commission has alleged. While the UK is technically correct that its law does not require a substantive dual criminality test, it would appear that the law requires a procedural dual criminality test. At any rate, the requirement that the double jeopardy rule can only apply to foreign decisions where the British definition of the double jeopardy rule would apply to such a decision, if that decision had been taken in the UK, is manifestly contrary to the Schengen double jeopardy rules as interpreted by the Court of Justice (see below).

Next, the Framework Decision on freezing orders states that an executing State may only refuse to recognize a freezing order if "it is instantly clear" from the information in the standard form that the subsequent transfer of evidence or confiscation of assets "would infringe" the double jeopardy principle.[36] Originally this proposal contained no double jeopardy exception,[37] but one was inserted at the demand of the Netherlands and particularly Denmark; in fact, this issue was hotly disputed throughout negotiations on the Framework Decision and was one of the final issues agreed.[38]

Thirdly, the Framework Decision on the mutual recognition of financial penalties provides for an optional ground of non-execution on the grounds that "a decision in respect of the same acts" has been delivered regarding the person concerned has been delivered in any State other than the Member State issuing a certificate requesting recognition of a judgment.[39] The Framework Decision also provides for a further optional ground for non-recognition where the action is statute-barred under the executing State's law and where that State had jurisdiction

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[36] Art. 8 of the Framework Decision (OJ 2003 L 196/45), which Member States had to apply by August 2005.

[37] Council Doc. 5126/01, 2 Feb. 2001.

[38] *See* Council Doc. 6552/02, 22 Feb. 2002.

[39] Art. 7(2)(a) of the Framework Decision (OJ 2006 L 76/16), which must be applied by 22 March 2007.

to prosecute.[40] However, this provision is identical to the corresponding provision of the Framework Decision on the European Arrest Warrant, and therefore, by analogy with the Gasparini judgment, it does not appear to limit the scope of the main double jeopardy clause. Member States are allowed to adopt measures which further facilitate mutual recognition.[41]

Next, the fourth and latest measure adopted by the Council in this field is the Framework Decision on the mutual recognition of confiscation orders.[42] This measure specifies that an optional ground for non-recognition where "execution of the confiscation order would be contrary to the principle of *ne bis in idem*,"[43] as well as a further optional ground for non-recognition where the action is statute-barred under the executing State's law and where that State had jurisdiction to prosecute.[44] Again, by analogy with the Gasparini judgment, the latter clause should not be interpreted to limit the scope of the double jeopardy clause. Again, Member States are allowed to adopt measures which further facilitate mutual recognition.[45]

Two mutual recognition measures had been agreed in principle, but not yet adopted, as of the end of 2006. First of all, the agreed text of the Framework Decision on the European evidence warrant provides for an option to refuse execution where the execution of a warrant "would infringe the *ne bis in idem* principle."[46] Secondly, the agreed text of the Framework Decision on taking account of prior convictions contains no clause on this issue.[47] While the Commission had proposed a mandatory exception for double jeopardy,[48] the final text of this Framework Decision implicitly incorporates the domestic application of the principle, since the obligation to take account of prior convictions will apply by way of treating a conviction in a first Member State as if it were a conviction issued in the second Member State. It is expressly clear that this obligation does not restrict the cross-border double jeopardy rule, since the Framework Decision will only oblige Member States to take account of convictions handed down in respect of "different facts in other Member States."[49]

As for the three proposed measures under discussion at the end of 2006, first the proposed Framework Decision on the transfer of prisoners would provide for an optional exception where "enforcement of the sentence would be contrary to the principle of *ne bis in idem*."[50] A further optional provision would permit non-

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[40] Art. 7(2)(c) of the Framework Decision (*id*).

[41] Art. 18 of the Framework Decision.

[42] OJ 2006 L 328/19. The Framework Decision must be applied by 24 Nov. 2008.

[43] Art. 8(2)(a) of the Framework Decision (*id*).

[44] Art. 8(2)(h) of the Framework Decision (*id*).

[45] Art. 21 of the Framework Decision.

[46] Art. 15(2)(a) of the agreed text (Council doc. 16870/06, 19 Dec. 2006). The Commission had proposed a mandatory exception (*see* Art. 15(1) of the proposal, COM (2003) 688, 14 November 2003).

[47] Council Doc. 15445/1/06, 24 Nov. 2006.

[48] *See* Art. 4(a) of the proposal (COM (2005) 91, 17 March 2005).

[49] Arts. 1(1) and 3(1) of the final agreed text. The point is made explicitly in the explanation of Art. 3 in the Commission's explanatory memorandum (*id*).

[50] Art. 9(1)(ac) of the latest text (Council Doc. 15875/1/06, 30 November 2006).

recognition on grounds of statute-barring, without the condition that the executing State which invokes this exception would have been able to exercise jurisdiction over the offence.[51] This measure would also allow Member States to retain existing agreements or adopt new agreements which facilitate the enforcement of sentences.[52]

Secondly the proposed Framework Decision on the disqualification of sex offenders would permit optional non-execution if a conviction was handed down on the person concerned for the same offences in the enforcing State, a rather limited application of the double jeopardy rule.[53] It would also be optional to refuse recognition if the offence was time-barred and also fell under the jurisdiction of the enforcing State.[54] However, it is possible that the list of grounds for non-execution of a foreign disqualification will be dropped in favour of a 'conversion' approach (as applied to the agreed text of the Framework Decision on taking account of foreign convictions).

In fact, it is questionable whether the double jeopardy rule should apply to disqualifications at all (except to the extent that the conviction giving rise to the disqualification was itself in breach of the double jeopardy rule, in particular where it followed a prior acquittal).[55] While it is obviously inappropriate for a person guilty of sexual offences or other relevant crimes to be prosecuted or punished repeatedly for the same acts in multiple Member States, or to be subjected to further prosecution following an initial acquittal, it is surely not inappropriate for a person convicted of sufficiently serious sexual offences involving children (or a sufficiently serious road traffic offence, for instance) to be prohibited from working with children or from driving across the entire European Union. On the one hand, a criminal sentence has the purpose of punishing and deterring criminal activity in proportion to the seriousness of the wrongdoing; it follows that imposing further criminal sentences for the same acts would be disproportionate. But on the other hand, a disqualification concerns a determination that a person is unfit to carry out certain activities because of their criminal conviction; this determination of unfitness is surely equally relevant for the entire European Union and it is not disproportionate to extend the geographic scope of the disqualification. After all, it could equally be said, in the context of free movement rights, that a custodial sentence imposed by a single Member State also has an EU-wide effect, since it prevents the person concerned from travelling or moving throughout the entire EU while the sentence is being enforced.

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[51] Art. 9(1)(c) of the latest text (*id.*).

[52] Art. 20 of the latest text (*id.*).

[53] Art. 7(1)(c) of the latest draft under discussion (Council doc. 15357/06, 22 November 2006).

[54] Art. 7(1)(a) of the latest draft (*id.*).

[55] Even if a disqualification stems from an underlying conviction which breaches the double jeopardy rule, there should be no objection in this scenario to recognizing a disqualification which resulted from the conviction in the *first* Member State (assuming that there was a conviction). There would of course be no objection to recognizing a disqualification arising from a second conviction that was valid according to the double jeopardy rules (in accordance with the exceptions in Art. 55 of the Convention, or because the enforcement condition in Art. 54 was not satisfied).

Finally, the proposed Framework Decision on the recognition of pre-trial supervision orders would provide for a mandatory exception where criminal proceedings for the requested offence "would infringe the *ne bis in idem* principle."[56]

D. Interpreting the Double Jeopardy Rules

Since the integration of the Schengen *acquis* into the EU legal order in May 1999, the EU's Court of Justice has had jurisdiction to rule on the interpretation of the Schengen rules falling within the scope of the 'third pillar', following references from national courts, to the extent that Member States have opted in to such jurisdiction.[57] Fourteen Member States have opted in to this jurisdiction,[58] although two Member States permit only their final courts to send references to the Court of Justice.[59]

To date, ten national courts have sent questions to the Court of Justice on the interpretation of these rules. The Court has ruled in six of these cases;[60] two cases have been withdrawn;[61] and the other two cases are still pending.[62] These judgments have answered a number of key questions concerning application of the double jeopardy principle, but a number of issues remain outstanding.

The Court has not followed either the international criminal law or the human rights model for interpretation of the Convention. In fact, it has specifically rejected an approach to interpretation based on comparison with the prior international treaty among the Member States on double jeopardy or the position of national parliaments when ratifying the Schengen rules, on the grounds that the Schengen rules can now only be interpreted as part of the EU legal order since their integration within that order.[63] In fact, neither the Court nor any Advocate-General's Opinions in double jeopardy cases have referred to the Council of Europe measures which clearly appeared to serve as a template for drafting the Schengen double jeopardy rules.

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[56] Art. 10(1) of the proposal (COM (2006) 468, 29 August 2006).

[57] *See* Art. 35 EU and the Protocol on the Schengen *acquis* attached to the EC and EU Treaties by the Treaty of Amsterdam. The Court also has jurisdiction to settle disputes between Member States, and (as regards Conventions) between Member States and the Commission, but this jurisdiction has never been exercised.

[58] *See* OJ 2005 L 327/19. All of the first fifteen Member States except the UK, Denmark and Ireland have accepted jurisdiction, while only the Czech Republic and Hungary among the newer Member States have accepted it.

[59] These Member States are Spain and Hungary.

[60] Joined Cases C-187/01 and C-385/01 *Gözütok and Brugge* [2003] ECR I-1345; Case C-469/03 *Miraglia* [2005] ECR I-2009; C-436/04 *van Esbroek* [2006] ECR I-2333; and Cases C-467/04 *Gasparini* and C-150/05 *Van Straaten*, Judgments of 28 Sep. 2006, not yet reported.

[61] Cases C-491/03 *Hiebeler* and C-272/05 *Bowens*.

[62] Cases C-288/05 *Kretzinger* and C-367/05 *Kraaijenbrink*. There were Advocate-General's Opinions in both these cases in Dec. 2006.

[63] Para. 46 of *Gözütok and Brugge*.

Also, the Court has explicitly rejected, at least in part, a comparison with the international human rights rules, because of a difference in wording (the Schengen rules apply to the same 'facts', whereas the human rights rules refer to the same 'offences').[64] Moreover, the Court has not referred to the EU's Charter of Rights when interpreting the Schengen double jeopardy rules, although several Advocate-General's Opinions have.[65] The Court has, on the other hand, apparently ruled that the general principles of EU law, which include the administrative application of the double jeopardy rule, also encompass the international application of that rule in criminal law cases.[66]

Instead, the Court has apparently developed a third model, based on two principles stemming from the EU legal order: mutual trust and mutual recognition between Member States in the field of criminal law;[67] and free movement of persons.[68] The Court has derived both principles from the wording of Article 2 of the EU Treaty, which sets out the objectives of the EU, including "maintaining and developing the Union as an area of freedom, security and justice in which the free movement of persons is assured,"[69] which takes place "in conjunction with appropriate measures with respect to ... prevention and combating of crime."[70] More precisely, although the principles of mutual trust and mutual recognition are not expressly mentioned in Article 2 of the EU Treaty (or anywhere else in that Treaty), the Court has stated that "there is a necessary implication that the Member States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Member States even when the outcome would be different if its own national law were applied."[71] The Court has also repeatedly stressed that the application of double jeopardy principle is not made subject to any harmonization of substantive or procedural criminal law.[72]

Turning to free movement, the Court has stated that the objective of Article 54 of the Schengen Convention "is to ensure that no one is prosecuted on the same facts in several Member States on account of his having exercised his right to freedom of movement."[73] Specifically, "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 in another Member State on the basis that the legal system

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[64] *Van Esbroek*, para. 28, and *Van Straaten*, para. 42.

[65] *See* the Opinions in *Gözütok and Brugge, Van Straaten* and *Gasparini.* No Opinion was released in the *Miraglia* case.

[66] Para. 40 of the *Van Esbroek* judgment.

[67] *Gözütok and Brugge*, paras. 32 and 33; *Van Esbroek*, paras. 29 and 30; and *Gasparini*, paras. 29 and 30.

[68] *Gözütok and Brugge*, para. 38; *Miraglia*, para. 32; *Van Esbroek*, paras. 33 to 35; *Van Straaten*, paras. 45-47 and 57-58; and *Gasparini*, paras. 27 and 28.

[69] For example, *see Gözütok and Brugge*, para 36.

[70] *Miraglia*, para 34.

[71] For example, *see Gözütok and Brugge*, para 33 and *Van Esbroek*, para 30.

[72] For example, *see Gözütok and Brugge*, para 32 and *Van Esbroek*, para 29.

[73] For example, *see Gözütok and Brugge*, para 38; *Miraglia*, para 32; and *van Esbroek*, para 33.

of that Member State treats the act concerned as a separate offence."[74] Bringing together the mutual recognition and free movement principles, an interpretation of the double jeopardy rules which was deferential to different national criminal laws "might create as many barriers to freedom of movement within the Schengen territory as there are penal systems in the Contracting States."[75]

It is striking that the 'free movement' principle has been applied even where the person moving was a third-country national (the *Gözütok* case), and even though some Member States do not yet apply (or, in the case of the UK and Ireland, will probably not *ever* apply) the free movement aspects of the Schengen *acquis*. Of course, even the UK and Ireland are subject to EU free movement law (as distinct from the abolition of internal border checks pursuant to the Schengen rules), although there will be a lengthy delay before these rules will be fully applied to most new Member States.

It might be questioned whether the 'free movement' principle should be applied where the person concerned did not move within the Community, but rather (say) is a German national who faced one prosecution in Germany for an act committed on German territory, but another prosecution in France pursuant to the extraterritorial application of that State's criminal law.[76] But even in those cases, the 'free movement' principle of interpretation should logically apply, for the Court has rightly pointed out, the double jeopardy principle should be interpreted to ensure that a person can travel between Member States *in future* without the threat of further prosecution. To return to our example, the German national concerned should be free to travel to Austria without fear of detention there and subsequent extradition to France.[77] This point may have less salience now that nationality is no longer in principle a ground to refuse extradition within the EU, thus removing the German citizen's protection from extradition from German territory. Nevertheless, as is well known, several Member States still refuse to extradite their nationals despite the adoption of the Framework Decision on the European arrest warrant, and in any case, there is still a disincentive to travel in this scenario because the person concerned will lose the possible benefit of certain protections for a State's own nationals still provided for in that Framework Decision,[78] and/or the protection conferred by provisions of the Framework Decision which can only be exercised if the executing State had jurisdiction over an offence.[79] In any case, the very fact that a person is subjected

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[74] *Van Esbroek*, para. 34; *Van Straaten*, para. 46; and *Gasparini*, paras. 27 and 28.

[75] *Van Esbroek*, para. 35 and *Van Straaten*, para. 47.

[76] *See* the facts of Case C-7/98 *Krombach* [2000] ECR I-1935, which concerns non-recognition of a civil law judgment rendered following such a scenario.

[77] *See* the further developments as set out in the judgment of the European Court of Human Rights in Krombach *v.* France (Reports 2001-II). It appears that the Austrian courts ultimately released Mr. Krombach and refused the extradition request, as they took the view that the French conviction had breached the Schengen double jeopardy rules. Both the Court of Justice and Court of Human Rights also ruled that the French conviction had violated his human rights.

[78] Arts. 4(6) and 5(3) of the Framework Decision.

[79] *See* Arts. 4(4) and (7) of the Framework Decision. Art. 4(1) to (3) might also be relevant. In fact, Art. 4(3), part 1, and/or Art. 4(7) would still constitute grounds for *Germany* to refuse to execute

to the extraterritorial jurisdiction of another Member State indicates that *some* form of free movement within the EU has been exercised.[80]

More generally, the Court has ruled that, "the integration of the Schengen *acquis* (which includes Article 54 of the [Schengen Convention] into the framework of the European Union is aimed at enhancing European integration and, in particular, at enabling the Union to become more rapidly the area of freedom, security and justice which it is its objective to maintain and develop."[81] It has also ruled that a wide application of the double jeopardy rule enhances the principles of legal certainty and legitimate expectations.[82]

As for the detailed substance of the Schengen double jeopardy rules, first of all, in the *Van Esbroek* judgment, the Court of Justice ruled on the temporal scope of the rule. In the Court's view, in the absence of any provisions on the issue of temporal scope in the Schengen Convention, the rule prohibited a second prosecution in a State applying the double jeopardy rules even where the first prosecution had taken place in another State *before* that State applied the Schengen rules.[83]

As for the material scope of the double jeopardy provisions, the Court has not yet had the opportunity to define the scope of 'criminal law' for the purposes of the rules. However, the Court has ruled on several occasions on the key issue of the definition of the 'same acts'. The Court first addressed this issue in its *Van Esbroek* judgment, ruling that the term did not require identical classification of the relevant acts in national criminal law, but rather "the only relevant criterion is the...identity of the material acts, understood in the sense of the existence of a set of concrete circumstances which are inextricably linked together." The movement of drugs from one Member State to another (constituting the export of drugs from one Member State and import of drugs into another) "may, in principle, constitute a set of facts which, by their very nature, are inextricably linked," but "the definitive assessment" of the issue belongs to "the competent national courts" to determine whether the acts "constitute a set of facts which are inextricably linked together in time, in space and by their subject-matter."[84] The Court did not attach any relevance to the provisions of Article 71 of the Schengen Convention, which refers specifically to measures to be taken to combat drug

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an EAW for Mr. Krombach; so might Art. 4(4), depending on the facts. Art. 4(3), part 2 could still constitute (optional) grounds for *another* Member State to refuse execution.

[80] In the *Krombach* case, Mr. Krombach was accused of responsibility for the death of his French step-daughter. Another example would be a British citizen resident in the UK who denies the Holocaust on a website; access to the Internet from other Member States could entail the exercise of their criminal jurisdiction, but would also entail the free movement of services. In this scenario, the UK could refuse to extradite a German EAW pursuant to Art. 4(7)(a) of the Framework Decision, but this protection is optional, and would be lost if the British citizen travelled to another Member State, in which case he or she could only travel to Member States which apply the optional Art. 4(7)(b) and moreover would not have asserted extraterritorial jurisdiction over such acts.

[81] *Gözütok and Brugge*, para 37.

[82] *Van Straaten*, para. 59.

[83] *Van Esbroek*, paras 18-24.

[84] *Van Esbroek*, paras 36-38.

trafficking. Moreover, the Court specifically distinguished the Schengen rules (preventing prosecution for the same '*act*') from the international human rights rules (preventing prosecution for the same '*offence*').[85]

This approach was followed in the judgment in *Van Straaten*,[86] in which the Court added that in drugs cases, it was not necessary that the quantities of drug concerned or the persons alleged to have been party to the alleged acts were identical, as the set of facts concerned could nevertheless be linked by their very nature.[87] In *Gasparini*, the Court ruled that importation of (smuggled) goods into one Member State, followed by the marketing of those goods in another Member State, could also in principle be considered "the same acts."[88] In a pending case, the Opinion in *Kraajenbrink* argues that the existence of a common intention linking different acts may be relevant for determining whether the test for assessing whether acts are sufficiently linked to fall within the scope of the double jeopardy principle, but is not itself a criterion.[89] Also, the same Opinion argues that 'ancillary' acts can fall within the scope of the double jeopardy rule if they are sufficiently linked to the acts which have already been the subject of a final judgment in the first Member State.[90] The Opinion in *Kretzinger* applies the same rule to the smuggling of goods across the EU.[91]

As for a second key issue, the Court has on several occasions ruled on the definition of the phrase, "a person whose trial has been finally disposed of." In *Gözütok* and *Brugge*, the Court decided that the double jeopardy rule applies not merely following a judgment of a court, but also where a prosecutor decides to discontinue proceedings because a person has admitted his or her guilt and made a payment to expiate it.[92] Next, the Court ruled in *Miraglia* that where a first Member State's authorities decide to terminate criminal proceedings merely because a second Member State has also opened them, the double jeopardy rule does not have the effect of requiring the second Member State to terminate proceedings in turn. According to the judgment in *Van Straaten*, an acquittal on the merits constitutes final disposal of a trial; according to the *Gasparini* judgment, acquittal due to time-barring also constitutes final disposal of a trial. It remains unclear whether many other types of decisions which could be made pursuant to national rules will confer a double jeopardy effect.[93] Finally, the Opinion in *Kretzinger* argues that an *in absentia* judgment also falls within the scope of Article 54, except where that judgment breaches basic human rights principles.

Moving on to the personal scope of the rules, the *Gasparini* judgment confirmed that double jeopardy protection only applies to those persons who

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[85] Para 28 of the judgment.
[86] Paras. 40-53 of the judgment.
[87] Paras 49-50 of the judgment.
[88] Paras. 53-57 of the judgment.
[89] Paras. 27-44 of the Opinion.
[90] Paras. 45-69 of the Opinion.
[91] Paras. 34-40 of the Opinion.
[92] *See* particularly paras 25-31 of the judgment.
[93] For example, the decisions taken by the German authorities in the *Krombach* case (*supra* note 77), where the Austrian courts assumed that the double jeopardy rule applied.

were the subject of the prior proceedings in another Member State. Other persons being prosecuted in the second Member State, who were not subjected to any prior proceedings in another Member State, cannot benefit from the principle.

The Court of Justice has not yet ruled on the interpretation of the 'enforcement condition' set out in Article 54 of the Convention, although the Opinion in *Kretzinger* argues that a suspended sentence constitutes a sentence which is being enforced, and that imprisonment on remand does not constitute enforcement of a sentence. The Opinion also argues that the possibility of enforcing a sentence in another Member State pursuant to the Framework Decision on the European arrest warrant is irrelevant to the interpretation of the rules; presumably this is equally valid as regards other post-trial mutual recognition measures (as regards financial penalties, confiscation and transfer of prisoners).

Next, the derogations set out in Article 55 have yet been interpreted by the Court of Justice, except that the Court stated in its *Gözütok and Brugge* judgment that the derogations listed in Article 55 were exhaustive, and moreover that Article 55 referred to the same acts as Article 54.[94]

Finally, the Court has not yet ruled on the interpretation of the 'set-off' rules in Article 56, although the Opinions in *Kretzinger* and *Kraajenbrink* argue that the set-off applies regardless of whether a second prosecution took place because the exceptions in Article 55 apply or because the enforcement condition in Article 54 is not satisfied. These Opinions also argue that the set-off rule applies to time spent in police custody or on remand awaiting trial, and that the principle of 'set-off' is a general principle of EC law. If this is correct, it might be presumed that the principle also applies to the set-off of financial penalties, despite the lack of express wording on this point.

E. Amending the Double Jeopardy Rules

I. Greek Proposal, 2003

In 2003, the Greek Presidency of the EU Council proposed to replace these provisions with a third pillar 'Framework Decision'.[95] The Greek proposal would have defined three key elements of the double jeopardy rule: 'criminal offences'; 'judgment'; and 'idem'. A 'criminal offence' would have been defined as either an act which constituted a crime under the law of a Member State, or which constituted an administrative offence or breach of order punishable by a fine, if the person concerned was able to bring the matter before a criminal court.[96] A 'judgment' would have been defined as a final judgment of a criminal court in criminal proceedings, "convicting or acquitting the defendant or definitively terminating proceedings, and also any extrajudicial mediated settlement in a criminal matter"; a 'final judgment' would be any judgment which has the status

[94] *Gözütok and Brugge*, para 44.
[95] OJ 2003 C 100/24.
[96] Art. 1(a) of the proposal.

of *res judicata* in national law.[97] Finally, an 'idem' would be "a second criminal offence arising from the same, or substantially the same, facts, irrespective of its legal character."[98]

The basic rule preventing a second prosecution would have been reiterated in the Framework Decision, subject still to the 'enforcement condition' (the requirement that the first sentence must have been served, or be in the process of being served, or no longer able to be served), and also to the new proviso that "[t]he procedure may be repeated if there is proof of new facts or circumstances which emerged after the judgment, or if there was a fundamental error in the previous procedure which could have affected the outcome of proceedings," in accordance with the national law of the State of proceedings.[99] This new proviso would have been very similar, but not quite identical, to the exception to the *national* double jeopardy rule permitted by the Seventh Protocol to the ECHR.

An exception to the principle would have been permitted (as at present) if the offences were committed by civil servants and in the event of "security or other equally essential interests" were involved; this would apparently have been a wider exception than the present '*national* security' exception in Article 55 of the Convention. However, the exception for cases of territorial jurisdiction would have been suppressed. The same procedural rules as the Convention would apply, but there would no longer be a temporal limitation permitting a Member State to declare an exception only when ratifying the original Schengen implementing Convention.[100]

The Greek proposal would have amended the rules regarding the 'accounting principle' in Article 56 of the Convention, which requires (as seen above) that in the event of a "further prosecution" for the "same acts", then "any period of deprivation of liberty served in the latter Contracting Party arising from those acts" must be deducted from any penalty imposed in the second Member State. According to the proposal, this rule would also have applied to the imposition of fines, but its application would have been different.[101] The rule would apply where a person had been "definitively convicted" in the first State and the sentence "handed down by that State in respect of those offences" would have had to be deducted from the second State's sentence. This changed wording would apparently have suggested that the rule would not apply to time spent on remand pending prosecution and moreover would not have applied in the event of acquittal in the first Member State (where the set-off would still be relevant if the accused person had, despite the acquittal, spent some time in prison on remand).

The existing provisions on exchange of information and broader national provisions would have been retained.[102] Finally, a significant feature of the Greek

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97 Art. 1(b) of the proposal.
98 Art. 1(e) of the proposal.
99 Art. 2 of the proposal.
100 Art. 4 of the proposal.
101 Art. 5 of the proposal.
102 Arts. 6 and 7 of the proposal.

proposal would have been a new rule on *lis pendens* (cases pending in more than one Member State simultaneously).[103]

The Greek proposal was extensively discussed throughout 2003, but negotiations were terminated because there seemed to be no reasonable prospect of agreement between Member States.

II. Commission Green Paper

In late 2005, the Commission released a Green Paper on jurisdiction in criminal matters and the double jeopardy rule.[104] The first part of this Green Paper addresses the issue of criminal jurisdiction, arguing that there should be a binding consultation and dispute settlement system to assign a single appropriate jurisdiction to take charge of prosecutions which are actually or potentially pending in multiple Member States. The second part then addresses the double jeopardy rules, questioning whether the rules need to be reformed, in particular to clarify the material scope of the rule (which type of proceedings are covered), the concept of the 'same acts', the removal of the enforcement condition and the exceptions to the rule, the concept of a final judgment, and the application of double jeopardy rules to other mutual recognition measures. A proposal for legislation is expected early in 2007.

F. Reform Suggestions

Do the EU rules need to be reformed at all? First of all, it is submitted that in general, the Court of Justice has taken the right general approach to the interpretation of the Schengen rules. Even leaving aside the free movement context of the EC Treaty and the objectives of the EU Treaty, the Schengen Convention on its own terms was intended primarily to facilitate the development of free movement within the EU. This interpretation is simply reinforced following integration of the Schengen *acquis* into the EU legal framework.

It is more problematic to interpret the Schengen rules in light of the principles of mutual recognition and mutual trust, since these principles are not referred to in either the Schengen Convention or (notwithstanding the Court's judgments) Article 2 of the EU Treaty. But this interpretation can be defended to the extent that it is a corollary of the interpretation in light of free movement law. As the Court points out, a failure to recognize the judgments of other Member States will create barriers to free movement.

As for the details of the double jeopardy rules, do they need to be amended? The Commission's Green Paper argues strongly for regulation of the separate issue of pending prosecutions, and suggests that if agreement can be reached on that issue, then the enforcement condition and the exceptions to the double jeopardy

[103] Art. 3 of the proposal.

[104] COM (2005) 696, 23 December 2005; *see also* the working paper of the same date (SEC (2005) 1767).

principle can be dropped. *If* an appropriate binding system for determining jurisdiction can be agreed, then it does indeed make sense to remove or at least severely restrict the limits placed upon the double jeopardy principle. But this is a huge assumption. The risk is that Member States will not be able to agree at all on the issue of pending multiple prosecutions, or alternatively able to agree on an inappropriate system, but will nonetheless take the opportunity to weaken the double jeopardy principle.

The issue of jurisdiction is outside the scope of this paper, but it is submitted that the best approach to this issue is to agree binding and objective rules which give precedence to the Member State where the acts took place (territorial jurisdiction), indeed giving that State a veto over the exercise of extraterritorial jurisdiction by other Member States.[105] The rules could even provide that in any case, only one pending prosecution could be carried out.

In the event of overlapping territorial jurisdiction, precedence should be given to the Member State where the effects, or the majority of the effects, of the criminal activity occurred. Perhaps the implications of this rule could be spelled out in detail if necessary, for example to indicate that acts of terrorism or organized crime planned in one Member State but carried out in another fall within the jurisdiction of the latter State, and that trafficking and smuggling offences should be prosecuted in the State where the goods were sold (or, as an exception, where the smugglers or traffickers were stopped *en route* to their intended destination). This approach would give the greatest preference possible to territorial jurisdiction, and would prevent the unprincipled approach of prosecutorial forum-shopping (or more implausibly, forum-shopping by the defence). However, the Commission suggests only a procedure with certain criteria to take account of when determining jurisdiction, rather than a set of binding objective rules. It is very unlikely at present that the Member States would agree upon binding objective rules, and even the Commission's suggestions may be too ambitious for them.

In the absence of agreement upon appropriate jurisdictional rules, the Council should be careful about restricting the application of the enforcement condition or the exceptions to the current double jeopardy rules, since the underlying condition for reconsidering these rules would not be present. This is because the current exceptions in Article 55, and the 'enforcement condition' in Article 54, constitute part of a balanced approach to the issue of double jeopardy, and should not be significantly altered unless jurisdiction rules are agreed. It is certainly appropriate in the interests of criminal justice to provide that, if a sentence has not in fact been enforced and is otherwise still valid, that another Member State can in effect take steps to ensure that the crime in question is punished.

As for the impact of EU mutual recognition measures on the enforcement condition, it should not be forgotten that there are many conditions and exceptions applicable to such measures. On the other hand, it does make sense to give priority to the possibility that a Member State might wish to take steps to ensure mutual

[105] For the case for the primacy of territorial jurisdiction generally, *see* Peers, *supra* note 15, ch. 9.

recognition of its initial sentence, over the possibility that a second Member State might wish to begin fresh proceedings. Any reform measure should therefore specify that the mutual recognition of the initial sentence, where this is possible under the applicable rules and where the first Member State chooses to enforce that sentence, should take priority over bringing a second set of proceedings where the enforcement condition is not met.

Moreover, the prospect that the negotiation of new rules could provide an opportunity for Member States to make fresh declarations regarding the exceptions is highly problematic. This would mean that even if the double jeopardy rules and exceptions were not amended, or were made more generous to defendants, the level of protection in practice could be reduced due to the new national declarations. So fresh declarations should be ruled out; if necessary, it would be preferable to drop the idea of a reform of the existing rules, in order to avoid them. It would not be appropriate to allow the second Member State to bring second proceedings because there was a defect in the prior proceedings or new evidence; as the Commission points out, the mutual recognition principle suggests that such second proceedings should only be brought in the first Member State.

As for the core rules, it would be useful to determine the criminal proceedings which are covered by the double jeopardy rules. The most appropriate approach would be to specify that any proceedings which have gone or could go before a criminal court in a Member State are covered. For the reasons set out above, there seems no reason to re-examine the definition of the 'same acts' as set out by the Court. As for final judgments, the best approach would be to revise the Court's case law and to state a general rule that only a final judgment on the merits precludes a further proceeding in another Member State. This approach would provide the appropriate balance between securing free movement rights and ensuring that crimes do not go unpunished in the EU.[106]

The 'set-off' rule should apply also to financial penalties, to give full effect to the mutual recognition principle. Also, in order to ensure greater coherence and legal certainty, it should be specified that the Schengen double jeopardy rules should be regarded as a *lex specialis* on the issue of double jeopardy, which takes precedence over the rules in the two Conventions and in all EU mutual recognition measures. This would entail a mandatory application of the rules to the mutual recognition measures.

Furthermore, a revision of the rules should confirm that the double jeopardy principle applies to legal persons. This is appropriate because EC free movement law, which the Schengen double jeopardy rule supplements, also provides for the free movement of legal persons. Also, EU third pillar measures require Member States to provide from criminal or administrative liability of legal persons which are responsible for acts of terrorism and other crimes, along with the mutual recognition of criminal law fines applicable to legal persons. It is only fair that legal persons can also benefit from the cross-border effect of the double jeopardy principle.

[106] *See* the convincing argument in the *Gasparini* opinion on this point.

There should be an express legal obligation to publish all declarations relating to the double jeopardy rules in the EU's Official Journal. This corresponds to the normal approach to publishing reservations to international treaties. Transparency is particularly important in this case order to ensure that individuals know how their free movement rights might be affected by national restrictions upon the application of the double jeopardy rules.

It might be useful to provide a further definition of the meaning of the obligation not to prosecute again which is incumbent upon Member States according to the double jeopardy rules. This should loeically require that any steps taken prior to a prosecution, such as extradition, detention, freezing of assets, questioning or arrest and the gathering of evidence (most obviously by means of searches) should be ruled out, as soon as it is clear that the double jeopardy priniciple is applicable.

Finally, it might be useful to provide explicitly that Member States must provide for the possibility of legal challenge in the event that the double jeopardy principle is allegedly being breached at any stage of criminal proceedings, and for the provision of effective remedies, such as immediate release from detention and compensation for wrongful prosecution or detention, in order to give full effect to the double jeopardy rights. The Court of Justice is likely to rule, if asked, that such rights are inherent already in the EU legal order in respect of the Schengen rules; but it would be useful to clarify the position unambiguously.