Judicial Cooperation in Criminal Matters: Concurring Jurisdictions, Ne Bis In Idem and Transfer of Criminal Proceedings

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Summary

1. *Cooperation* among jurisdictions and *interference* among criminal proceedings

2. The principle of "*ne bis in idem*" and its case law


4. Transfer of proceedings
29 Legal Systems...
Adozione e (concreta) attuazione

La situazione italiana (e qualche luce all'orizzonte…)

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1. **Cooperation** among jurisdictions and **interference** among criminal proceedings

- Increasing cases of **concurring jurisdictions** (i.e. having competence on the same facts and the same persons)

- True at international level but even more at the **EU level**, due to the **deeper integration** among our Countries and to the fundamental **freedoms of circulation** we all benefit of.
1. From cooperation among jurisdictions to interference among criminal proceedings

- Our legal systems usually know quite extensive criteria of competence which allow for a large extensive competence;

- It is our "cultural heritage" in a world where not being in a position to prosecute by yourself an offence is often considered only as a missed opportunity of prosecution...
1. From cooperation among jurisdictions to interference among criminal proceedings

- States are always very reluctant to give up to their competences and to their “right to prosecute”.

- The issue is even more sensitive for those States which have the principle of mandatory prosecution, like Italy, inscribed in their Constitution.

- We will come back on this...
2. The principle of "ne bis in idem"
2. The principle of "ne bis in idem":
   in general

In international law there isn’t any mandatory rule ("ius cogens") imposing a duty to respect the *ne bis in idem* principle among States.
2. The principle of "ne bis in idem": in general

The possible application of the principle depends on the concrete content of international treaties or instruments.
2. The principle of "ne bis in idem": in general

We can even say that the *ne bis in idem* principle **cannot be considered** as an agreed principle of International Law and is recognized as such only in a few Countries (The Netherlands...?)
2. The principle of "ne bis in idem": in general

Very few countries also recognize the validity of foreign judgments in criminal matters for execution or enforcement in their national legal order lacking a treaty basis.

States have considered (and still consider) a fully fledged *ius puniendi* as essential to their sovereignty.
2. The principle of "ne bis in idem": in general

The “Ne bis” principle is an essential component of a “fair trial”

At the same time...

“Ne bis” in the procedure: an important clause for refusing cooperation.
2. The principle of "ne bis in idem": legal sources

The *ne bis in idem* principle was first established as an individual right in the *International Covenant on Civil and Political Rights* of 19 December 1966 (Article 14 (7)) while...

... the *European Convention on Human Rights (ECHR)* does not contain such a provision
2. The principle of "ne bis in idem": legal sources

Ne bis in idem: (one of) the most traditional grounds for refusing cooperation
2. The principle of "ne bis in idem": legal sources

CoE EXTRADITION 1957

The *ne bis in idem* principle was included in the convention on Extradition of the Council of Europe of 13 December 1957.

Article 9 provided not only for the classic formulation of the *ne bis in idem* principle dealing with final judgments (*res judicata*), but included also final decisions of a procedural character.
2. The principle of "ne bis in idem": legal sources

CoE EXTRADITION 1957

However, the former ground for refusal (final judgments) is mandatory,...

... while the latter (final decisions of a procedural character) is only an optional one.
2. The principle of "ne bis in idem": legal sources

Other CoE Conventions

» The ne bis in idem principle has been introduced in an "indirect" way in other CoE instruments and it is provided for as mandatory under the


and under the

2. The principle of "ne bis in idem": legal sources

» In these Conventions the *ne bis in idem* principle has mainly for objective the prevention and avoidance of *double sentencing/punishment*, *not* the prevention of *double prosecution* or investigation.

» That is the reason why *we do not find* *ne bis in idem* provisions in the Council of Europe Convention of 20 April 1959 on mutual assistance in criminal matters or in the additional protocols dealing with judicial letters rogatory
2. The principle of "ne bis in idem":
legal sources

European Political Cooperation (1987)

In the framework of the European Political Cooperation (EPC), well before the coming into force of the Maastricht Treaty with its Third Pillar on Justice and Home Affairs, the 1987 Convention on Double Jeopardy was elaborated among the Member States of the EC.
2. The principle of "ne bis in idem": legal sources

European Political Cooperation (1987)

The Convention has been poorly ratified, but its substance has been integrated into the Convention Implementing Schengen Agreements to such an extent that it may qualify with reason as the first multilateral convention establishing an international ne bis in idem principle as an individual right erga omnes.
2. **The principle of "ne bis in idem": “Schengen”**

Article 54 of the Convention implementing the 1990 Schengen Agreement of 14 June 1985 (and following)

- 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.
2. **The principle of "ne bis in idem": “Schengen”**

The (3) exceptions to the principle (art. 55)

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:

   (a) **TERRITORIALITY CLAUSE**: 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;

   (b) **NATIONAL SECURITY**: where the acts to which the foreign judgment relates constitute an offence against national security or other equally essential interests of that Contracting Party;

   (c) **ITS OWN OFFICIALS**: 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.
2. The principle of "ne bis in idem": “Schengen”

Article 56

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.
2. The principle of "ne bis in idem": “Schengen”

Article 57

Where a Contracting Party charges a person with an offence and the competent authorities of that Contracting Party have reason to believe that the charge relates to the same acts as those in respect of which the person's trial has been finally disposed of in another Contracting Party, those authorities shall, if they deem it necessary, request the relevant information from the competent authorities of the Contracting Party in whose territory judgment has already been delivered.
2. The principle of "ne bis in idem": “The EU Charter of Fundamental Rights”

Article 50. Right not to be tried or punished twice in criminal proceedings for the same criminal offence

No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.
2. The principle of "ne bis in idem": “The Greek initiative”

Initiative from the Greek (2003) Presidency aimed to define what is a “bis” and what is an “idem”.

The initiative eventually failed...

We still live with Schengen as interpreted by the ECJ
2.  The principle of "ne bis in idem": Case Law of the ECJ

- 11.2.2003, Gözütok et Brügge (C-187/01 et C-385/01, Rec._p._I-1345) (cf. points 27-33)
- 9.3.2006, Van Esbroeck (C-436/04, Rec._p._I-2333) (cf. point 24)
- 18.7.2007, Kretzinger (C-288/05, Rec._p._I-6441) (cf. point 37)
- 18.7.2007, Kraaijenbrink (C-367/05, Rec._p._I-6619) (cf. p. 33-35)
- 11.12.2008, Bourquain (C-297/07, Rec._p._I-9425) (cf. point 30)
- 26.2.2013, Äkerberg Fransson (C-617/10) (cf. p. 34-35, 37)
3. Conflicts of jurisdictions

This framework decision on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings aims to enhance judicial cooperation between EU countries, in order to prevent unnecessary parallel criminal proceedings concerning the same facts and the same person.

Exchange of information

• If the competent authority of an EU country has reasonable grounds to believe that parallel proceedings are being conducted in another EU country, it must seek confirmation on the existence of such parallel proceedings from the competent authority of that country.

• The contacted authority must reply without undue delay or within the deadline set by the contacting authority.

**Direct consultations**

- If parallel proceedings exist, the relevant authorities shall enter into direct consultations *in order to find a solution aimed at avoiding the negative consequences arising from these proceedings. This may lead to the concentration of the proceedings in one EU country.*

- When the relevant authorities enter into direct consultations they must take into consideration all the facts and merits of the case and all other relevant factors. If no solution is found, the case shall be referred to [Eurojust](https://www.eurojust.europa.eu) if appropriate and provided that it falls under its competence.
3. Conflicts of jurisdictions: A role for Eurojust

The role of Eurojust:

• At present: the criteria elaborated by Eurojust to prevent conflict of Jurisdictions
• The new proposal for a Regulation
• In the future: art. 85 TFUE... (?!?)
3. **Conflicts of jurisdictions: A role for Eurojust**

The new proposal of Regulation

4.4 Where two or more Member States *cannot agree* on which of them should undertake an *investigation* or prosecution following a request made under point (b) of paragraph 2, Eurojust shall issue a *written opinion* on the case. The opinion shall be promptly forwarded to the Member States concerned.
4. Transfer of proceedings
4. Transfer of proceedings

Transfer of proceedings *seems to be an option* when *the suspect is a habitual resident* or *national* of the requested state, or when the state in question is this person's *country of origin*. It is also possible for the proceedings to be transferred for various other practical reasons, e.g. when the suspect is undergoing or is about to undergo custodial measures in the requested state or when proceedings have been initiated against him in that state for the same offence or some other offence.
4. Transfer of proceedings

A transfer of proceedings *can also be an option* when *extradition has not been possible*. This, in turn, is connected with the prohibition which exists in many states against extradition of their own nationals. In such cases, if the country of domicile was unable to take over the proceedings, there would be a risk of the suspect escaping all liability for his act.
4. Transfer of proceedings


Chapter VI – Laying of information in connection with proceedings (Dénonciation aux fins de poursuites) - Article 21

Information laid by one Contracting Party with a view to proceedings in the courts of another Party shall be transmitted between the Ministries of Justice concerned ...

The requested Party shall notify the requesting Party of any action taken on such information and shall forward a copy of the record of any verdict pronounced.
4. Transfer of proceedings


Under this Convention any Party may request another Party to take proceedings against a suspected person in its stead.
4. Transfer of proceedings
The CoE 1972 Convention

Such a request may be made:
• if the suspected person is normally resident in the requested State or if he/she is a national of that State;
• if he/she is to serve a prison sentence or face other proceedings in that State;
• if the transfer of proceedings is warranted in the interests of a fair trial or if the enforcement in the requested State of a sentence, if one were passed, is likely to improve the prospects of his/her social rehabilitation.
4. Transfer of proceedings

The CoE 1972 Convention

The requested State may not refuse acceptance of the request except in specific cases and in particular if it considers that the offence is of a political nature or that the request is based on considerations of race, religion or nationality.
4. Transfer of proceedings

The CoE 1972 Convention

Moderate use of this convention: only 12 MS have ratified (25 States parties to CoE).
(BG e RO, but not GR)
4. Transfer of proceedings

EPC: The 1990 Convention among EC Member States

Scope: increased judicial cooperation in view of an European area without internal boarders

Supplementing, by more precise rules, the provisions of art. 21 of the MLA 1959 Convention to facilitate their application

Only F and PT have ratified
4. Transfer of proceedings

A number of UN instruments also contain (soft law) provisions on the transfer of proceedings, such as:

• UN Convention on Drugs 1988 (art. 8);
• UNTOC 2000 (art. 21);
• UNCAC 2003 (art. 47)
4. Transfer of proceedings

The real aim of transferring a proceeding...

A possible (additional) way forward to face Courts and prisons overcrowding...?
Conclusions
A single space of justice is a place where judicial decisions are mutually recognized but also where:
- jurisdictions may compete
- conflicts may be raised
- proceedings may be transferred
but also where
- the principle of mandatory prosecution ("principle of legality") should be regarded under different eyes...
Grazie...!!!