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REPORT

on the initiative by the Hellenic Republic with a view to adopting a Council Framework Decision concerning the application of the "ne bis in idem" principle
(7246/2003 – C5-0165/2003 – 2003/0811(CNS))

Committee on Citizens' Freedoms and Rights, Justice and Home Affairs

Rapporteur: Maurizio Turco

PE 329.873

Symbols for procedures

- * Consultation procedure
majority of the votes cast
- **I Cooperation procedure (first reading)
majority of the votes cast
- **II Cooperation procedure (second reading)
*majority of the votes cast, to approve the common position
majority of Parliament's component Members, to reject or
amend the common position*
- *** Assent procedure
*majority of Parliament's component Members except in cases
covered by Articles 105, 107, 161 and 300 of the EC Treaty and
Article 7 of the EU Treaty*
- ***I Codecision procedure (first reading)
majority of the votes cast
- ***II Codecision procedure (second reading)
*majority of the votes cast, to approve the common position
majority of Parliament's component Members, to reject or
amend the common position*
- ***III Codecision procedure (third reading)
majority of the votes cast, to approve the joint text

(The type of procedure depends on the legal basis proposed by the Commission)

Amendments to a legislative text

In amendments by Parliament, amended text is highlighted in ***bold italics***. Highlighting in *normal italics* is an indication for the relevant departments showing parts of the legislative text for which a correction is proposed, to assist preparation of the final text (for instance, obvious errors or omissions in a given language version). These suggested corrections are subject to the agreement of the departments concerned.

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PROCEDURAL PAGE

By letter of 4 April 2003 the Council consulted Parliament, pursuant to Article 39(1) of the EU Treaty, on the initiative by the Hellenic Republic with a view to adopting a Council Framework Decision concerning the application of the "ne bis in idem" principle (7246/2003 – 2003/0811(CNS)).

At the sitting of 10 April 2003 the President of Parliament announced that he had referred the initiative by the Hellenic Republic to the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs as the committee responsible and the Committee on Legal Affairs and the Internal Market for its opinion (C5-0165/2003).

The Committee on Citizens' Freedoms and Rights, Justice and Home Affairs appointed Maurizio Turco rapporteur at its meeting of 23 April 2003.

The committee considered the initiative by the Hellenic Republic and draft report at its meetings of 23 April, 12 June and 10 July 2003.

At the last meeting it adopted the draft legislative resolution unanimously.

The following were present for the vote Jorge Salvador Hernández Mollar (chairman), Robert J.E. Evans (vice-chairman), Johanna L.A. Boogerd-Quaak (vice-chairman), Giacomo Santini (vice-chairman), Maurizio Turco (rapporteur), Mary Elizabeth Banotti, Kathalijne Maria Buitenweg (for Alima Boumediene-Thiery), Marco Cappato (for Mario Borghezio), Michael Cashman, Charlotte Cederschiöld, Carmen Cerdeira Morterero, Carlos Coelho, Gérard M.J. Deprez, Anne Ferreira (for Adeline Hazan pursuant to Rule 153(2)), Francesco Fiori (for Marcello Dell'Utri pursuant to Rule 153(2)), Marie-Thérèse Hermange (for The Lord Bethell), Margot Keßler, Eva Klamt, Alain Krivine (for Giuseppe Di Lello Finuoli), Jean Lambert (for Pierre Jonckheer), Baroness Sarah Ludford, Lucio Manisco (for Ole Krarup), Patricia McKenna (for Patsy Sörensen), Manuel Medina Ortega (for Sérgio Sousa Pinto), Arie M. Oostlander (for Giuseppe Brienza), Marcelino Oreja Arburúa, Elena Ornella Paciotti, Paolo Pastorelli (for Timothy Kirkhope), Hubert Pirker, José Ribeiro e Castro, Martine Roure, Heide Rühle, Ole Sørensen (for Bill Newton Dunn), Ilka Schröder, Joke Swiebel, Fodé Sylla, Anna Terrón i Cusí, Christian Ulrik von Boetticher, Olga Zrihen Zaari (for Walter Veltroni).

The opinion of the Committee on Legal Affairs and the Internal Market is attached.

The report was tabled on 14 July 2003.

DRAFT EUROPEAN PARLIAMENT LEGISLATIVE RESOLUTION

on the initiative by the Hellenic Republic with a view to adopting a Council Framework Decision concerning the application of the "ne bis in idem" principle (7246/2003 – C5-0165/2003 – 2003/0811(CNS))

(Consultation procedure)

The European Parliament,

having regard to the initiative by the Hellenic Republic (7246/2003)¹,

having regard to Article 34(2)(b) of the EU Treaty,

having regard to Article 39(1) of the EU Treaty, pursuant to which the Council consulted Parliament (C5-0165/2003),

having regard to Rules 106 and 67 of its Rules of Procedure,

having regard to the report of the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs and the opinion of the Committee on Legal Affairs and the Internal Market (A5-0275/2003),

1. Approves the initiative by the Hellenic Republic as amended;
2. Calls on the Council to amend the text accordingly;
3. Calls on the Council to notify Parliament if it intends to depart from the text approved by Parliament;
4. Calls on the Council to consult Parliament again if it intends to amend the initiative by the Hellenic Republic substantially;
5. Instructs the President to forward its position to the Council and Commission, and the government of the Hellenic Republic.

Text proposed by the Hellenic Republic

Amendments by Parliament

Amendment 1
Recital 1

(1) The principle of "ne bis in idem", or the prohibition of double jeopardy, *i.e. that*

(1) The principle of "ne bis in idem", or the prohibition of double jeopardy,

¹ OJ C 100, 26.4.2003, p. 24.

no-one should be prosecuted or tried twice for the same acts **and for the same criminal** behaviour, is established as an individual right in international legal instruments concerning human rights, such as the Seventh Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (Article 4) and the Charter of Fundamental Rights of the European Union (Article 50) and is recognised in all legal systems which are based on the concept of respect for and protection of fundamental freedoms.

according to which no-one should be prosecuted or tried twice for the same acts, **facts or** behaviour, is established as an individual right in international legal instruments concerning human rights, such as **the International Covenant on Civil and Political Rights (Article 14.7) of 19 December 1966**, the Seventh Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (Article 4) and the Charter of Fundamental Rights of the European Union (Article 50) and is recognised in all legal systems which are based on the concept of respect for and protection of fundamental freedoms. **It is an essential bulwark against oppressive use of State powers over human beings.**

(The amendment ('acts, facts, behaviour') applies throughout the text. Adopting it will necessitate corresponding changes throughout.)

Justification

The International Covenant on Civil and Political Rights shall also be recalled, because it is one of the first international law instrument on the ne bis in idem principle.

Amendment 2 Recital 2 a (new)

(2 a) This initiative is in line with the Treaty on the European Union according to which the development of an area of freedom, security and justice is one of the main objectives of the EU (Art. 2 (4)) and specifies that common action in the field of judicial cooperation in penal matters shall aim at avoiding conflicts of jurisdiction among Member States (Art. 29). The Treaty furthermore affirms that the Union is founded on the respect for human rights and fundamental freedoms as common principles of Member States (Art. 6).

Justification

It is important to recall that the current act is based on the Treaty provisions concerning the development of an area of freedom, security and justice, cooperation in penal matters, human rights and fundamental freedoms.

Amendment 3 Recital 2 b (new)

(2 b) The progressive harmonisation of penal law at the EU level, the adoption of the European Arrest Warrant and the implementation of the principle of mutual recognition of decisions in criminal matters urges the need to establish common minimum procedural guarantees in order to assure full respect of the right to a fair trial, as requested by the European Parliament and by the Commission in its Green Paper. This Framework Decision contributes to this aim.

Justification

This visa explains how this act shall complement current EU work in the field of common minimum procedural guarantees.

Amendment 4 Recital 5

(5) The Communication from the Commission to the European Parliament and the Council of 26 July 2002 on the mutual recognition of final criminal judgments acknowledges the positive contribution of the application of the "ne bis in idem" principle to the mutual recognition of judgments and the strengthening of legal certainty within the Union, ***which presupposes confidence in the fact that judgments recognised are always delivered in accordance with the principles of legality, subsidiarity and proportionality.***

(5) The Communication from the Commission to the European Parliament and the Council of 26 July 2002 on the mutual recognition of final criminal judgments acknowledges the positive contribution of the application of the "ne bis in idem" principle to the mutual recognition of judgments and the strengthening of legal certainty within the Union.

Justification

The deleted text is superfluous in this context.

Amendment 5
Recital 7

(7) The application of the "ne bis in idem" principle has thus far raised many serious questions as to the interpretation or acceptance of certain substantive provisions or more general rules (e.g. the concept of "idem") because of the different provisions governing this principle in the various international legal instruments and the difference in practices in national law. The aim of this Framework Decision is to provide the Member States with common legal rules relating to the "ne bis in idem" principle in order to ensure uniformity in both the interpretation of those rules and their practical implementation.

(7) The application of the "ne bis in idem" principle has thus far raised many serious questions as to the interpretation or acceptance of certain substantive provisions or more general rules (e.g. ***problems of interpreting*** the concept of "idem" ***or 'same' in relation to, for example 'same charge', 'same acts', or 'same facts' or 'same behaviour'***) because of the different provisions governing this principle in the various international legal instruments and the difference in practices in national law. The aim of this Framework Decision is to provide the Member States with common legal rules relating to the "ne bis in idem" principle in order to ensure uniformity in both the interpretation of those rules and their practical implementation.

Justification

This slight expansion of the original text makes it more readily intelligible to the ordinary non-expert lawmaker.

Amendment 6
Recital 7 a (new)

(7 a) It seems appropriate for the EU to address also the issue of the application of the ne bis in idem principle to those proceedings involving the same acts, facts or behaviour and the same parties, which are considered by one Member State as a civil matter and by another Member State as a criminal matter.

Justification

The EU shall in the nearby future solve the problems arising from the fact that some crimes - such as fraud - are defined in different ways in the different Member States. Some Member States consider these matters as belonging to civil law, where others would consider them to be part of criminal law. There is currently no EU instrument which takes this into account or which provides for trans-procedural instances of “ne bis in idem” across the criminal/civil divide. This issue shall be solved as soon as possible. Unfortunately the legal base of this Act (Third Pillar) does not provide for such a possibility, since civil law is part of the First Pillar. A request for further EU action in this field is to be welcomed.

Amendment 7 Recital 7 b (new)

(7 b) It seems appropriate exceptionally, and notably on the request of the sentenced person, to repeat the procedure as provided by the 4th Protocol to the European Convention on Human Rights if there is proof of new facts or circumstances which emerged after the judgment and which could not reasonably have been discovered by the prosecuting authorities at the time of the trial or if there was a fundamental error in the previous procedure which could have affected the outcome of the proceedings, in accordance with the criminal law and the criminal procedure of the Member State in which a person was finally judged, provided that, according to the law of that Member State, such a fresh procedure would be competent by way of a vertical application of ne bis in idem.

Violation of the rights of the accused shall in all cases be deemed a fundamental error in the previous procedure.

Justification

This is a new exception to the cross-border ne bis in idem rules in the 1990 Schengen Implementing Convention. It comes from the 4th Protocol to the European Convention on Human Rights, but there it only applies to ne bis in idem within one State. If the proposal intends to allow a second Member State to reopen a judgment that has already been laid down in a first Member State, this is objectionable because the second Member State does not have the capability to judge whether there were flaws in the previous proceedings or to

search for new evidence. It is also open to abuse because the first Member State might try to get around national limits on reopening cases by encouraging a second Member State with more lax rules on this issue to reopen a case. If the proposal instead simply intends to point out that the first Member State can reopen its own judgments in accordance with the conditions in the Fourth Protocol, there is a legal problem because the EU does not have the competence to deal with such 'internal' issues and the proposal is only intended to deal with cross-border cases in any event. That is why the rapporteur proposes to place the clause in the preamble, since it is purely declaratory, and the words 'the Member State of the proceedings' are replaced by the words 'the Member State in which a person was finally judged' so it is clear which Member State the proposal is referring to. Further provisions are added to better guarantee a correct application of the ne bis in idem principle and limit exceptions.

Amendment 8

Article 1, point (a), first indent

(a) "criminal offences" shall mean:
- acts which constitute crimes under the law of each Member State;

(a) "criminal offences" shall mean:
- acts, **facts or behaviour** which constitute crimes under the law of each Member State;

Justification

Clarification of the text. (This amendment applies throughout the text. Adopting it will necessitate corresponding changes throughout.)

Amendment 9

Article 1, point (b)

(b) "judgment" shall mean
any final judgment delivered by a **criminal** court in a Member State as the outcome of criminal proceedings, convicting or acquitting the defendant or definitively terminating the prosecution, in accordance with the national law of each Member State,
and also any extrajudicial mediated settlement in a criminal matter;
any decision which has the status of res judicata under national law **shall be considered a final judgment**;

(b) "judgment" shall mean:
- any final judgment **or non-appealable decision** delivered by a court in a Member State as the outcome of criminal proceedings, convicting or acquitting the defendant or definitively terminating the prosecution, in accordance with the national law of each Member State,
- any extrajudicial mediated settlement in a criminal matter;
- any decision, **whether issued by a court or not**, which has the status of res judicata under national law;

Justification

*Clarification of the text in accordance with the latest developments in ECJ case-law (Gözütok-Brügge case of 11 February 2003, Joined Cases C-187/01 and C-385/01): a prosecutorially exercised power of formally discontinuing proceedings brings double jeopardy into operation in circumstances where such an act, albeit not by a court, has the force of *res judicata*.*

Amendment 10 Article 1, point (ca) (new)

(c a) 'Forum Member State' means any Member State in which a relevant case is pending before a court;

Justification

The concept 'forum Member State' is used in Article 3(a), and for completeness and clarity should be defined in the definitions section of Article 1.

Amendment 11 Article 1, point (e)

(e) "idem" shall mean a second criminal ***offence*** arising solely from the same, or substantially the same, facts, irrespective of its legal character.

(e) "idem" shall mean a ***possible*** second criminal ***charge or indictment*** arising solely from the same, or substantially the same, ***acts, facts or behaviour***, irrespective of ***the*** legal character ***of the offence charged***.

Justification

It is important, for accuracy, to make the point that double jeopardy concerns being charged twice, and subjected to legal proceedings twice, in relation to the same acts, facts or behaviour. To state the point in terms of 'offences' rather than 'charges' involves tacitly eliding the presumption of innocence.

Amendment 12 Article 2, paragraph 1

1. Whoever, as a result of ***committing*** a criminal offence, has been prosecuted and finally judged in a Member State in accordance with the criminal law and the

1. Whoever, as a result of ***an allegation that he has committed*** a criminal offence, has been prosecuted and finally judged in a Member State in accordance with the

criminal procedure of that State cannot be prosecuted for the same acts in another Member State if he has already been acquitted or, if convicted, the sentence *has been served or is being served or can no longer be enforced*, in accordance with the law of the Member State of the proceedings.

criminal law and the criminal procedure of that State cannot be prosecuted for the same acts in another Member State if he has already been acquitted or, if convicted, *has served or is serving the sentence, is fulfilling or has fulfilled the conditions imposed by the sentence, or if the sentence has become unenforceable*, in accordance with the law of the Member State of the proceedings.

Justification

Again, it is important to make the point that double jeopardy concerns being charged twice, and being subjected to legal proceedings twice, in relation to the same acts, facts or behaviour. To speak of a person's 'committing' an offence in this context is to assume that has to be proved when allegations of crime are concerned. The other parts of the amendment aim at clarifying the text.

Amendment 13 Article 2, paragraph 2

2. The 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 the proceedings, in accordance with the criminal law and the criminal procedure of the Member State of the proceedings.

2. *Exceptionally*, the procedure may be repeated if there is proof of new facts or *circumstances* which emerged after the judgment *and which could not reasonably have been discovered by the prosecuting authorities at the time of the trial* or if there was a fundamental error in the previous procedure which could have affected the outcome of the proceedings, in accordance with the criminal law and the criminal procedure of the Member State of the proceedings, *provided that, according to the law of the Member State of proceedings, such a fresh procedure would be competent by way of a vertical application of ne bis in idem.*

Justification

This is an important amendment of substance, aimed at preventing unreasonable dilution of the protection afforded by the 'ne bis in idem' principle. It must be made clear that powers to re-charge and re-try are exceptional, and that they cannot be invoked to cure culpable errors by State officials. New evidence must be genuinely new, not simply evidence held in reserve in case a first prosecution is unsuccessful. Where a flaw in prosecution conduct entails an

absolute bar to retrial in the original Member State of proceedings, it would be unjust if that bar could be lifted by the simple expedient of shifting a second prosecution to a different Member State.

Secondly, the term 'fundamental error in the previous procedure' is imprecise. Under the principle of the rule of law, any violation of the rights of the accused should be expressly deemed to be a fundamental error, so that there is no room for differing interpretations in the application of the provision.

Amendment 14
Article 3, point (a)

Lis pendens

If, while a case is pending in one Member State, a criminal prosecution is brought in respect of the same criminal offence in another Member State, the following procedure applies:

(a) Preference is given to the forum Member State ***which will better guarantee the proper administration of justice,*** taking account of the following criteria:

(aa) the Member State on whose territory the offence has been committed,

(bb) the Member State of which the perpetrator is a national or resident,

(cc) the Member State of origin of the victims,

(dd) the Member State in which the perpetrator was found.

Lis pendens

If, while a case is pending in one Member State, a criminal prosecution is brought in respect of the same criminal offence in another Member State, the following procedure applies:

(a) Preference is given to the forum Member State taking account of the following criteria ***in the order in which they appear:***

(aa) the Member State on whose territory the offence has been committed,

(bb) the Member State of which the perpetrator is a national or resident,

(cc) the Member State of origin of the victims,

(dd) the Member State in which the perpetrator was found.

Until determination of the Member State to be given preference, all proceedings shall be suspended.

Justification

The criterias to determine the preferred forum Member State shall be clear and objective. This is why the reference to the State "which will better guarantee the proper administration of justice" is deleted, while it is proposed to apply the four listed criterias in the order in which they appear.

Amendment 15
Article 3 point (b)

(b) Where a number of Member States have jurisdiction and the possibility of bringing a criminal prosecution in respect of a criminal offence based on the same **actual events**, the competent authorities of each of those States **may**, after consultation taking account of the criteria mentioned in paragraph (a), choose the forum Member State to be given preference.

(b) Where a number of Member States have jurisdiction and the possibility of bringing a criminal prosecution in respect of a criminal offence based on the same **acts, facts or behaviour**, the competent authorities of each of those States **shall**, after consultation taking account of the criteria mentioned in paragraph (a), choose the forum Member State to be given preference.

Justification

The language of the Framework Decision shall be harmonised, and the term "events" shall be substituted with "acts, facts or behaviour" as in the rest of the text. Furthermore the decision to choose a single Member State to prosecute should be mandatory, not optional.

Amendment 16
Article 3, point c (a) (new)

c (a) If more judgments concerning the same criminal acts are issued in violation of the "ne bis in idem" principle in different Member States, the "favor rei" principle shall apply.

Justification

In order to solve possible problems arising from violations of the ne bis in idem principle, it shall be clear that the "favor rei" principle shall apply.

Amendment 17
Article 4

Exceptions

1. A Member State may make a declaration informing the General Secretariat of the Council and the Commission that it is not bound by Article 2(1) and (2) if the acts to which the foreign judgment relates constitute

deleted

offences against the security or other equally essential interests of that Member State or were committed by a civil servant of the Member State in breach of his official duties.

2. A Member State which makes a declaration pursuant to paragraph 1 shall specify the categories of offence to which the exception may apply. *deleted*

3. A Member State may at any time revoke the declaration concerning the exceptions set out in paragraph 1. Such revocation shall be notified to the General Secretariat of the Council and to the Commission and will take effect from the first day of the month following the date of notification. *deleted*

4. An exception which may be the subject of a declaration pursuant to paragraph 1 will not be applied if the Member State concerned has asked for the same offences to be prosecuted by the other Member State or has ordered the extradition of the person involved. *deleted*

Justification

The exceptions provided in this article are too vague, broad and consequently open to abuse. If a European wide definition of ne bis in idem is to be implemented, there is no justification to allow exceptions to the application of that principle based on the nature of particular offences or the status of the defendant.

Amendment 18

Article 5

If a new prosecution is brought in a Member State against a person who has been definitively convicted for the same offences in another Member State the period of deprivation of freedom or fine handed down by that State in respect of those offences shall be deducted from the sentence which he would probably receive. As far as allowed by national law, any penalties other than deprivation *deleted*

of freedom which have been imposed, or penalties imposed in the framework of administrative procedures, shall also be included.

Justification

The rapporteur proposes to delete all exceptions to the application of the ne bis in idem principle, and consequently also this article, that is linked to art. 4 and former art. 2(2), shall be deleted.

Amendment 19 Article 6, paragraph 1

Exchange of information between competent authorities

1. If a prosecution has been brought against a person in a Member State and ***the competent authorities of the latter have*** reasons to believe that the charge concerns the same acts for which he has been definitively convicted in another Member State, ***those*** authorities shall request the relevant information from the competent authorities of the Member State of the proceedings.

Co-operation and exchange of informations between competent authorities ***of Member States***

1. If a prosecution has been brought against a person in a Member State and ***there are*** reasons to believe that the charge concerns the same acts, ***facts or behaviour*** for which he has been definitively convicted in another Member State, ***the competent authorities of the latter, notably on the request of the person concerned or of the defence,*** shall request the relevant information from the competent authorities of the Member State of the proceedings.

Justification

The amendment introduces a possibility for the person concerned by the application of the ne bis in idem principle or by the defence to ask for an exchange of information with other Member States to demonstrate that he has already been definitively convicted.

Amendment 20 Article 6, paragraph 3

3. Each Member State shall make a declaration to the General Secretariat of the Council and to the Commission indicating the authorities which are authorised ***to request and receive the information*** referred to in paragraph 1.

3. Each Member State shall make a declaration to the General Secretariat of the Council and to the Commission indicating the authorities which are authorised ***comply with the tasks*** referred to in paragraph 1 ***and in Article 3.***

Justification

Also article 3 on lis pendens provides for cooperation among Member States authorities, which shall be clearly indicated.

Amendment 21

Article 6, paragraph 3 a (new)

Data protection

3 (a) The provisions of Directive 95/46¹ shall apply to data exchanged pursuant to this framework decision, until the adoption of a further Framework Decision establishing a high level of protection for data protection applicable whenever Member States implement the Union's policing and criminal law acts.

¹ OJ L 281, 27.11.1995, p. 31-50

Justification

The data protection rules of Schengen do not apply to this issue, and it is necessary to ensure that some minimum level of effective rules apply above and beyond the Council of Europe data protection Convention.

Amendment 22

Article 8, paragraph 3

3. On the basis of this information the Commission shall submit before [...] a report to the European Parliament and the Council on ***the application of this Framework Decision***, accompanied where necessary by legislative proposals.

3. On the basis of this information the Commission shall submit before ***1 year after the entry into force of the Framework Decision*** a report to the European Parliament and the Council on ***its*** application, accompanied where necessary by legislative proposals.

Amendment 23

Article 9 a (new)

Article 9 a

Provisions relating to the Schengen Acquis

Provisions of Articles 1, 2, 4, 5, 6, 7, 8, 9 and 10 constitute measures amending or building upon the provisions referred to in Annex A to the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the latter's association with the implementation, application and development of the Schengen Acquis.¹

¹ OJ L 176 , 10.7.1999, p. 36.

EXPLANATORY STATEMENT

The Greek Presidency of the Council has proposed a draft Framework Decision concerning the application of the "ne bis in idem" principle at the EU level. Before analysing in depth the contents of the proposal, the rapporteur wants to underline that he fully welcomes the first concrete proposal aimed at assuring citizens' fundamental rights and freedoms in the framework of judicial co-operation in penal matters, and more in general in the field of the area of freedom, security and justice. Developments in this area have until now mainly concerned repressive aspects, while leaving aside the strengthening of citizens' freedoms, and notably procedural guarantees, the right to a fair trial and the rights of the defence. The EU Commission has launched - notably at the European Parliament's request - a Green paper on procedural safeguards for suspects and defendants, aimed at redressing some of the aforementioned unbalances. The Greek proposal is a positive and concrete contribution to this process, and the rapporteur wants to thank the Greek Presidency for this effort.¹

1. The legal principle of "ne bis in idem" and the EU

The legal principle of "ne bis in idem" affirms that nobody shall be tried and prosecuted twice for the same criminal offence. This classical principle of penal procedure, already known in Roman Law, is widely recognised and applied. A number of International Conventions have regulated this principle², that is now either codified in legislation and/or acknowledged as a general principle of law by national Courts. At the EU level, the ne bis in idem principle is regulated by the Convention implementing the Schengen Agreement in its articles 54-58.

The Schengen Convention has marked a number of steps forward in the application of this principle in EU Member States. First, it bound Member States to apply the principle not only "vertically", that is to say at the national level³, but also "horizontally", or at the transnational level, prohibiting that a person that has committed a crime involving a foreign element be tried and prosecuted more times by different Member States' Courts.

Second, the Schengen Convention - when compared to other international treaties (for instance art. 14 of the International Covenant on Civil and Political Rights and art. 4 of the 7th Protocol to the ECHR) - has clarified the meaning of "idem", interpreting it in the sense of same facts (and not offences). This means that if somebody is prosecuted for instance in country A for illegal exporting drugs from country A to country B, the latter will be precluded from prosecuting again for the different offence of importing drugs illegally, since the facts

¹ The rapporteur wants to thank Anita Bultena, of the LIBE Secretariat, and Ottavio Marzocchi, advisor to Radical MEPs, for their contribution to this report.

² Among others, the United Nations International Covenant on Civil and Political Rights, Article 14(7); the 7th Protocol of the European Convention on Human Rights, article 4; the EC 1987 Double Jeopardy Convention (not ratified by all Member States).

³ Article 14 par. 7 of the International Covenant on Civil and Political Rights has been interpreted - although its general wording - by the UN Human Rights Committee as applying only in the national sphere, that is to say "vertically", and not in cross-national co-operation, that is to say "horizontally" (recommendation CPPR/C/31/D 204, 1986, 2 November 1987, AP vs Italy).

are the same although the offences are, from the different countries' legal perspectives, different.

Third, the provisions of the Schengen Convention cover now a large number of penalties to be considered as having a "non bis in idem" effect, such as out-of-Court settlements, thanks to the interpretation given by the Court of Justice Gözütok-Brügge case. The Court was asked in this case to interpret the scope of application of art. 54 by a German and a Belgian Courts to clarify if out-of-Court settlements or "transactions" that do not involve a final decision by a judge shall be considered as having a ne bis in idem effect. The Court answered positively, and stated that in out-of-Court settlements the prosecution is discontinued by the decision of an authority which plays a part in the administration of criminal justice in the national legal system concerned. In addition, when the accused complies with the obligations imposed by the Public Prosecutor, the unlawful conduct with which he is charged is penalised. Consequently, that person must be regarded as someone whose case has been "finally disposed of" (*res judicata*) in relation to the acts which he is alleged to have committed, even if no court has been involved in the procedure and the decision taken on conclusion of the procedure does not take the form of a judicial decision.

2. The Greek proposal and the proposed amendments

The Framework Decision - that shall substitute articles 54-58 of the Schengen Convention on the ne bis in idem principle - changes and clarifies the text of the EU law to take into full account the judgement issued by the Court of Justice in the Gözütok-Brügge case. The definitions given in article 1 are much wider and cover a larger number of offences, from criminal to administrative offences or breaches and of judgements. A further important element is the inclusion of an article 3 concerning the *lis pendens*, that provides a procedure and criterias to determine which Member State shall be responsible for prosecuting when more cases are pending in different Member States in respect of the same criminal offence.

As the rapporteur already has stated, he supports the Greek proposal, and the amendments tabled are mainly aimed at further clarifying the text. The rapporteur has furthermore introduced in his report the majority of the amendments tabled by the Legal Affairs Committee rapporteur, Mr McCormick, and has benefited from the valuable comments and proposals coming from non-governmental organisations.

The rapporteur attaches particular importance to the issues raised in the following amendments:

amendments 1, 3, 4 are aimed at underlining the fact that the proposal guarantees human rights and fundamental freedoms;

amendment 7 calls the EU to take action on the issue of the trans-procedural application of the ne bis in idem principle across the criminal/penal divide;

amendment 8 aims at clarifying and limiting the possibilities for repeating a trial;

amendment 15 determines an order in which the criterias for determining the responsible MSs shall be applied when more cases are pending in different Member States;

amendment 18 deletes article 4 of the framework decision that concerns a list of exceptions for MSs in the application of the ne bis in idem principle.

11 June 2003

OPINION OF THE COMMITTEE ON LEGAL AFFAIRS AND THE INTERNAL MARKET

for the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs

on the initiative by the Hellenic Republic with a view to adopting a Council Framework Decision concerning the application of the 'ne bis in idem' principle
(7246/2003 – C5-0165/2003 – 2003/0811(CNS))

Draftsman: Neil MacCormick

PROCEDURE

The Committee on Legal Affairs and the Internal Market appointed Neil MacCormick draftsman at its meeting of 23 April 2003.

It considered the draft opinion at its meetings of 21 May and 10 June 2003.

At the last meeting it adopted the following amendments unanimously.

The following were present for the vote Giuseppe Gargani (chairman), Bill Miller (vice-chairman), Paolo Bartolozzi, Ward Beysen, Bert Doorn, Janelly Fourtou, Evelyne Gebhardt, José María Gil-Robles Gil-Delgado, Piia-Noora Kauppi (for The Lord Inglewood), Malcolm Harbour, Kurt Lechner, Klaus-Heiner Lehne, Manuel Medina Ortega, Angelika Niebler (for Anne-Marie Schaffner), Marcelino Oreja Arburúa (for Rainer Wieland), Marianne L.P. Thyssen, Diana Wallis, Matti Wuori (for Ulla Maija Aaltonen) and Stefano Zappalà.

SHORT JUSTIFICATION

The principle of 'ne bis in idem', or the prohibition of double jeopardy, is the principle according to which no one should be prosecuted or tried twice on the same criminal charge with reference to the same, or substantially the same, acts and facts. Freedom from double jeopardy is established as a basic individual right in many international legal instruments concerning human rights, including both the Union Charter of Fundamental Rights and the European Human Rights Convention. It is justly esteemed as an essential bulwark against oppressive use of state powers over human beings, and its non-observance is a sure index of disregard for the Rule of Law, a grave derogation from the character of a Rechtsstaat.

The Council's proposed Framework Decision seeks to realise one essential condition for a genuine area of freedom, security and justice in the Union. It does so by enacting that 'ne bis in idem' be given horizontal application across Member States, so that citizens and others lawfully resident in the EU cannot suffer double jeopardy by facing trial on indictment for the same offence based on the same facts in several Member States cumulatively.

The measure clearly satisfies the principle of subsidiarity, since only Union-level framework legislation can achieve the objectives in question, to which Member States have committed themselves; it also satisfies proportionality, since the Member States retain a substantial discretion how to implement the Framework Decision in the context of their own legal systems.

The proposal is greatly to be welcomed, and Parliament should lose no time in giving a fair wind to so desirable a Framework Decision.

The amendments proposed on behalf of the Legal Affairs Committee in the present opinion are aimed at enhancing the legal accuracy of the terms in which the decision is framed, and at giving sharper definitions to the permitted exceptions to the ban on double jeopardy, also at ensuring that the presumption of innocence is not tacitly elided in speaking of 'offences' rather than 'charges' or 'allegations'.

AMENDMENTS

The Committee on Legal Affairs and the Internal Market calls on the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs, as the committee responsible, to incorporate the following amendments in its report:

Amendment 1

Recital 1

(1) The principle of "ne bis in idem", or the prohibition of double jeopardy, *i.e. that* no-one should be prosecuted or tried twice for the same acts **and for** the same criminal behaviour, is established as an individual right in international legal instruments concerning human rights, such as the Seventh Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (Article 4) and the Charter of Fundamental Rights of the European Union (Article 50) and is recognised in all legal systems which are based on the concept of respect for and protection of fundamental freedoms.

(1) The principle of "ne bis in idem", or the prohibition of double jeopardy, **according to which** no-one should be prosecuted or tried twice **on the same criminal charge** for the same acts **constituting** the same criminal behaviour, is established as an individual right in international legal instruments concerning human rights, such as the Seventh Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (Article 4) and the Charter of Fundamental Rights of the European Union (Article 50) and is recognised in all legal systems which are based on the concept of respect for and protection of fundamental freedoms. **It is an essential bulwark against oppressive use of State powers over human beings.**

Justification

It is important, for accuracy, to make the point that double jeopardy concerns being charged twice, and subjected to legal proceedings twice, in relation to the same acts and facts. That this principle is an essential bulwark against abuse of state power is also worth stating.

Amendment 2

Recital 7

(7) The application of the "ne bis in idem" principle has thus far raised many serious questions as to the interpretation or acceptance of certain substantive provisions or more general rules (e.g. the concept *of "idem"*) because of the different provisions governing this principle in the various international legal instruments and the difference in practices in national law. The aim of this

(7) The application of the "ne bis in idem" principle has thus far raised many serious questions as to the interpretation or acceptance of certain substantive provisions or more general rules (e.g. **problems of interpreting** the concept *idem* **or 'same' in relation to, for example 'same charge', 'same acts', or 'same facts'**) because of the different provisions governing this principle in the various

¹ OJ C 100, 26.4.2003, p. 24.

Framework Decision is to provide the Member States with common legal rules relating to the "ne bis in idem" principle in order to ensure uniformity in both the interpretation of those rules and their practical implementation.

international legal instruments and the difference in practices in national law. The aim of this Framework Decision is to provide the Member States with common legal rules relating to the "ne bis in idem" principle in order to ensure uniformity in both the interpretation of those rules and their practical implementation.

Justification

This slight expansion of the original text makes it more readily intelligible to the ordinary non-expert lawmaker.

Amendment 3 Article 1, paragraph b)

(b) "judgment" shall mean any final judgment delivered by a criminal court in a Member State as the outcome of criminal proceedings, convicting or acquitting the defendant or definitively terminating the prosecution, in accordance with the national law of each Member State, and also any extrajudicial mediated settlement in a criminal matter; any decision which has the status of res judicata under national law shall be considered a final judgment;

(b) "judgment" shall mean any final judgment delivered by a criminal court in a Member State as the outcome of criminal proceedings, convicting or acquitting the defendant or definitively terminating the prosecution, in accordance with the national law of each Member State, and also any extrajudicial mediated settlement in a criminal matter; any decision (***whether issued by a court or not***) which has the status of res judicata under national law shall be considered a final judgment;

Justification

This amendment makes clear a point already determined in ECJ case-law, to the effect that a prosecutorially exercised power of formally discontinuing proceedings brings double jeopardy into operation in circumstances where such an act, albeit not by a court, has the force of res judicata .

Amendment 4 Article 1, paragraph (ca) (new)

(c a) 'Forum Member State' means any Member State in which a relevant case is pending before a court;

Justification

The concept 'forum Member State' is used in Article 3(a), and for completeness and clarity should be defined in the definitions section of Article 1.

Amendment 5 Article 1, paragraph e)

(e) "idem" shall mean a second criminal **offence** arising solely from the same, or substantially the same, facts, irrespective of *its* legal character.

(e) "idem" shall mean a **possible** second criminal **charge or indictment** arising solely from the same, or substantially the same, facts, irrespective of **the** legal character **of the offence charged**.

Justification

It is important, for accuracy, to make the point that double jeopardy concerns being charged twice, and subjected to legal proceedings twice, in relation to the same acts and facts. To state the point in terms of 'offences' rather than 'charges' involves tacitly eliding the presumption of innocence.

Amendment 6 Article 2, paragraph 1

1. Whoever, as a result **of committing** a criminal offence, has been prosecuted and finally judged in a Member State in accordance with the criminal law and the criminal procedure of that State cannot be prosecuted for the same acts in another Member State if he has already been acquitted or, if convicted, the sentence **has been served or is being served or can no longer be enforced**, in accordance with the law of the Member State of the proceedings.

1. Whoever, as a result **of an allegation that he has committed** a criminal offence, has been prosecuted and finally judged in a Member State in accordance with the criminal law and the criminal procedure of that State cannot be prosecuted for the same acts in another Member State if he has already been acquitted or, if convicted, **has served or is serving** the sentence, or **if the sentence has become unenforceable** in accordance with the law of the Member State of the proceedings.

Justification

Again, it is important to make the point that double jeopardy concerns being charged twice, and subjected to legal proceedings twice, in relation to the same acts and facts. To speak of a person's 'committing' an offence in this context is to assume the very thing that has to be proved when allegations of crime are concerned.

The second part of the amendment is for stylistic clarity, and may concern only the English language version.

Amendment 7
Article 2, paragraph 2

2. The 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 the proceedings, in accordance with the criminal law and the criminal procedure of the Member State of the proceedings.

2. ***Exceptionally***, the procedure may be repeated if there is proof of new facts or *circumstances* which emerged after the judgment ***and which could not reasonably have been discovered by the prosecuting authorities at the time of the trial*** or if there was a fundamental error in the previous procedure which could have affected the outcome of the proceedings, in accordance with the criminal law and the criminal procedure of the Member State of the proceedings, ***provided that, according to the law of the Member State of proceedings, such a fresh procedure would be competent by way of a vertical application of ne bis in idem.***

Violation of the rights of the accused shall in all cases be deemed a fundamental error in the previous procedure.

Justification

This is an important amendment of substance, aimed at preventing unreasonable dilution of the protection afforded by the 'ne bis in idem' principle. It must be made clear that powers to re-charge and re-try are exceptional, and that they cannot be invoked to cure culpable errors by State officials. New evidence must be genuinely new, not simply evidence held in reserve in case a first prosecution is unsuccessful. Where a flaw in prosecution conduct entails an absolute bar to retrial in the original Member State of proceedings, it would be unjust if that bar could be lifted by the simple expedient of shifting a second prosecution to a different Member State.

Secondly, the term 'fundamental error in the previous procedure' is imprecise. Under the principle of the rule of law, any violation of the rights of the accused should be expressly deemed to be a fundamental error, so that there is no room for differing interpretations in the application of the provision.

Amendment 8
Article 3, paragraph 1, point (a)

(a) **Preference** is given to the forum Member State which will better guarantee the proper administration of justice, taking account of the following criteria:

(a) **preference** is given to the forum Member State which will better guarantee the proper administration of justice, taking account of the following criteria, **which are normally to be accorded relative weight in the order stated here**:

Justification

It is unhelpful to state four criteria with no reference to their relative weight. If the suggested prima facie weighting is not that which is intended, nevertheless an alternative statement should be adopted.

Amendment 9
Article 4, paragraph 1

1. A Member State may make a declaration informing the General Secretariat of the Council and the Commission that it is not bound by Article 2(1) and (2) if the acts to which the foreign judgment relates constitute offences against the security or other equally essential interests of that Member State or were committed by a civil servant of the Member State in **breach** of his official duties.

1. A Member State may make a declaration informing the General Secretariat of the Council and the Commission that it is not bound by Article 2(1) and (2) if the acts to which the foreign judgment relates constitute offences against the security or **stated** other equally essential interests of that Member State or were committed by a civil servant of the Member State in **breaches** of his official duties, **in cases in which breaches of such duties are themselves criminal offences**.

Justification

The Amendment to paragraph 1 simply ensures conformity with the principle nulla poena sine lege, in its special application to civil servants.

The Amendment to paragraph 2 ensures that States must specify in exact and clear terms the extent of the derogation they make from the normal rule of double jeopardy.

The two amendments together ensure that the principles of Proportionality and of the Rule of Law will be observed where States exercise their power of declaring themselves not bound by 'ne bis in idem'.

Amendment 10
Article 4, paragraph 2

2. A Member State which makes a declaration pursuant to paragraph 1 shall specify the categories of offence to which the exception *may* apply.

2. A Member State which makes a declaration pursuant to paragraph 1 shall specify ***exactly and in detail*** the categories of offence to which the exception ***is to*** apply.

Justification

See justification to Article 4 paragraph 1.

Amendment 11
Article 5

If a new prosecution is brought in a Member State against a person who has been definitively convicted for the same offences in another Member State ***the period of deprivation of freedom or fine handed down by that State in respect of those offences shall be deducted from the sentence which he would probably receive***. As far as allowed by national law, any penalties other than deprivation of freedom which have been imposed, or penalties imposed in the framework of administrative procedures, shall also be ***included***.

If, by virtue of the exceptions covered by Article 2 (2) or Article 4 hereof, a new prosecution is brought in a Member State against a person who has been definitively convicted for the same offences in another Member State, and if the new prosecution results in a conviction, the period of deprivation of freedom or the fine to which that person may be sentenced shall take account of prior custodial sentences served or fines paid in the former member State of proceedings, by deduction of such period or sum of money from the custodial or pecuniary sentence which would otherwise be justified according to law in the current Member State of proceedings. As far as allowed by national law, any penalties other than deprivation of freedom which have been imposed, or penalties imposed in the framework of administrative procedures, shall also be ***taken into account*** .

Justification

The added words in the opening sentence indicate the context of applicability of the Accounting principle. The next element in the amendment indicates a further necessary condition, namely that a conviction has been handed down. The final part seeks to make intelligible the principle of taking account of prior time served or money paid as a fine in the

case of a second (exceptional) conviction for essentially the same offence. As written, the text of Article 5 is only dimly intelligible, at least in its English version.

Amendment 12
Article 7

The provisions of Articles 1 to 6 shall not preclude the application of broader national provisions on the **rule** of "ne bis in idem" when it is connected with judgments delivered abroad.

The provisions of Articles 1 to 6 shall not preclude the application of broader national provisions on the **principle** of "ne bis in idem" when it is connected with judgments delivered abroad.

Justification

'Ne bis in idem' is referred to throughout the Framework Decision as a 'principle', a change of terminology to 'rule' in Article 7 is misleading if no change in sense is intended; it appears that no such change is in fact intended, or would be sensible.