



JUSTICE note on the draft framework decision on ne bis in idem

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1. JUSTICE is a UK based human rights and law reform organisation working in the field of human rights, criminal justice, EU justice and home affairs, discrimination and asylum. JUSTICE has a long history of EU work, particularly relating to judicial cooperation in criminal matters.
2. This note follows an earlier JUSTICE paper on the implementation of the ne bis in idem principle¹ in the EU (May 2003). It highlights some of the most important changes that have been made to the text of the draft framework decision on ne bis in idem since then.

Article 1 - Definition of final decision

3. JUSTICE welcomes the establishment of a European Council Framework Decision on the ne bis in idem principle. A European principle of ne bis in idem should aim to increase legal certainty and to serve the Union's dual objectives of facilitating the pursuit of offenders across borders and guaranteeing citizens' rights in judicial proceedings across the European Union.
4. JUSTICE is, however, concerned that the new definition of 'final decision' in article 1(b) could narrow the scope of the ne bis in idem safeguard by restricting final decisions for this purpose to those that are (emphasis added):

final in accordance with the national law of the member state which made the decision and, if not made by a court, [have] the equivalent effect under that law with regard to preventing the reopening of the case, **and determine in substance the responsibility of a person for the facts on which the offence for which he was charged were based.**

Member states are divided as to the implications of this latter requirement. In order for it to add anything to the first criteria, it must necessarily exclude from the scope of the ne bis in idem principle certain decisions that are final under the national laws of the member state that has made the decision. In the UK, for instance, cases that were definitively closed as a result of statutory limitations could, following article 1 of the draft framework

¹ The term 'ne bis in idem' is used interchangeably with 'the prohibition on double jeopardy' throughout this paper.

decision, be subsequently reopened in another member state since in such cases the responsibility of the accused would not have been determined. It is also open to argument that where a juvenile is found not guilty merely because he is below the age of criminal responsibility, he could be tried in another jurisdiction that does not have similar provisions protecting him. This potential problem is exacerbated by the significant variations in the age of criminal responsibility across the EU². A further example might arise where a verdict of not guilty to murder is based on the defence of 'diminished responsibility'. Despite the fact that the judicial decision would be final in the UK, it may not prevent the defendant being tried for murder in a jurisdiction that does not recognise 'diminished responsibility' as a defence to murder but merely treats it as a factor that may reduce the sentence for the offence.

5. The uncertainty surrounding the potential implications of the article 1 definition of 'final decision' is unsatisfactory. In its present form, it will not effectively safeguard the right to be free from double jeopardy, nor will it implement the principle of mutual recognition, supposedly at the heart of European judicial co-operation in criminal matters³. Furthermore, it does not comply with the rationale of the ECJ's recent ruling in the joint cases of *Gozutok and Brugge*⁴, in which the court stated:

Article 54 of the CISA [ne bis in idem], the objective of which 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, cannot play a useful role in bringing about the full attainment of that objective unless it also applies to decisions definitively discontinuing prosecutions in a Member State, even where such decisions are adopted without the involvement of a court and do not take the form of a judicial decision⁵.

Moreover, the court emphasised that application of the ne bis in idem principle in this way was not dependent on member states having harmonised their criminal laws:

² The age of criminal responsibility is seven in Cyprus, Ireland, Switzerland and Liechtenstein; eight in Scotland; twelve in Greece and the Netherlands; thirteen in France; fourteen in Germany, Austria, Italy and many of the accession countries; fifteen in the Scandinavian countries; sixteen in Portugal and Spain; seventeen in Poland and eighteen in Belgium and Luxembourg.

³ Tampere European Council conclusions, para 33.

⁴ Cases C-187/01 *Gozutok* and C-385/01 *Brugge*, judgment of the ECJ, 11 February 2003.

⁵ These joint cases concerned the necessity of judicial involvement in final decisions but the court's argument can also be applied to restricting the application of the ne bis in idem principle to final decisions that substantially determine responsibility.

... nowhere in Title VI of the Treaty on European Union relating to police and judicial cooperation in criminal matters ... is the application of Article 54 of the CISA made conditional upon harmonisation, or at least the approximation, of the criminal laws of the Member States relating to procedures whereby further prosecution is barred ... 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.

Applying these arguments to the draft framework decision on ne bis in idem, it is clear that the proposed definition of 'final decisions' in article 1 would not recognise the finality of decisions under the national law of the member state in which such decisions were taken.

6. Where a decision is final under the national law of the member state that made the decision, in the sense of further prosecution being definitively barred, this must be sufficient to bring into play the prohibition on double jeopardy, which demands that the subject of such decision be free from subsequent prosecutions for the same facts in another member state. JUSTICE therefore urges the JHA Council to delete the text in bold above.

Article 3 – Lis Pendens

7. JUSTICE's concerns relating to the draft framework decision's treatment of lis pendens remain the same as those expressed in its earlier paper. In particular, the omission of time limits within which a final judgment should be delivered or be declared as not having been delivered will be detrimental to legal certainty and produce an unsatisfactory situation for an accused person awaiting the conclusion of proceedings in one state indefinitely, with the prospect of proceedings for the same acts being transferred to another member state for prosecution at any time.

Article 4 – Exceptions

8. The text of Article 4 of the draft framework decision has undergone important changes since the proposed exceptions to the ne bis in idem principle contained in the initial Greek proposal. The latest version represents a compromise between the position of those delegations that wished to delete article 4 altogether and those that insisted on retaining it. As a result, member states that are already bound by the Schengen provisions on ne bis in idem and that have not made a declaration under article 55 of that

convention may not make a declaration under article 4 of the draft framework decision either. On the other hand, member states that are bound by the Schengen provisions and have made a declaration under article 55, and member states (including future members) that are not yet bound by the Schengen provisions may make a declaration under article 4 of the draft framework decision.

9. JUSTICE believes that, contrary to the opinion of the JHA Council of 17 October 2003⁶, the proposed compromise will only represent a marginal improvement upon the existing Schengen provisions in relation to *ne bis in idem*. The draft framework decision will maintain the status quo in relation to those member states that are bound by the Schengen provisions on *ne bis in idem* and have not made a declaration under article 55. It will only reduce the possibility for all other present and future member states to declare exceptions to the *ne bis in idem* rule in one instance presently contained in article 55(1)(b) of the Schengen acquis, that is on the grounds of a member state's 'other essential interests'. While JUSTICE welcomes the removal of this overly broad exception, it regrets that an opt out of the *ne bis in idem* principle for some member states in relation to certain categories of offence has been retained (i) on the grounds of the undefined and political notion of 'national security'; (ii) in relation to officials of the member state in violation of the duties of his office; and (iii) where the acts in question took place in whole or in part on their own territory. Furthermore, the time lag between the drafting and entry into force of the draft framework decision will grant member states and accession countries ample time to make declarations under article 55 Schengen where they deem it desirable to do so, as has already occurred in the case of at least two member states so far⁷.
10. JUSTICE is also concerned that the wording of article 4(2) would permit *any* declaration made under article 55 of the Schengen acquis to entitle that member state to make *any* declaration under the new article 4, even if the substance of the article 4 declaration does not correspond to that of the declaration made under article 55. Similarly, if that member state had made a single declaration under article 55, it would seemingly have the possibility to expand its exceptions to the *ne bis in idem* rule under article 4 and declare up to three exceptions to the application of the *ne bis in idem* principle in accordance with that provision. If the compromise reached in article 4 remains, JUSTICE would therefore urge the JHA Council to redraft article 4(2) so that member states are restricted to making declarations of the same nature as those it has already made under article 55(1).

⁶ 13281/1/03 DROIPEN 57 COMIX 597, 17 October 2003, para II.4.

11. The compromise reached in article 4 of the draft framework decision does not adequately reflect the importance of a European principle of ne bis in idem in a Union that seeks to establish a genuine European judicial space. If the extension of such a principle across borders within the European Union is to be meaningful and assist in the establishment of legal certainty, the Framework Decision cannot contain the option for some member states to opt out of the principle by unilateral declaration in relation to certain types of offence or categories of defendant. JUSTICE believes that issues of national interest should be addressed in coming to a decision on a preferred forum for prosecution, not as an opportunity for opening new prosecution proceedings in a different member state indefinitely following a final judgment.

Article 8 - Reporting obligations

12. JUSTICE welcomes the new provisions of article 8(5) which impose: (i) an annual reporting obligation to the Council and Commission on member states that have had recourse to the exceptions in article 4 to refuse the application of the ne bis in idem principle; (ii) an obligation on the Commission to report within four years of the framework decision's implementation, accompanied by any initiatives it considers appropriate; and (iii) an obligation on the Council to review article 4, on the basis of the Commission's report, within five years of the framework decision's implementation 'with a view to considering whether article 4 shall be prolonged or not'.

13. These provisions reflect the divergent opinions of member states' delegations with regard to article 4 of the draft framework decision. If article 4 is retained, JUSTICE welcomes the annual monitoring obligation on member states. However, it considers that the application of article 4 should be restricted to five years in order to accelerate the removal of exceptions to double jeopardy that is appropriate in a genuine European judicial space based on respect for human rights and the principle of mutual recognition.

Conclusion

14. JUSTICE welcomes the development of a European principle of ne bis in idem as an opportunity to add real value to the Schengen provisions. In a genuine European judicial space where prosecutions can cross borders, so too must the protection of citizens' rights in judicial proceedings. In order to bolster legal certainty and facilitate the dual objectives of efficient prosecutions and rights protection in this evolving judicial space, exceptions to the principle of ne bis in idem must be minimised and the prohibition on double jeopardy

⁷ 14088/03 DROIPEN 78 COMIX 650, footnote 1.

must attach to *every* decision that has the status of res judicata in the member state where that decision was taken. Application of the ne bis in idem principle in this way will also implement the principle of mutual recognition and reflect the trust member states are presumed to have in eachothers' criminal justice systems.