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JURISDICTION COLLISIONS IN THE CRIMINAL PROCEEDINGS OF EUROPEAN UNION MEMBER STATES

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ABSTRACT

Employing systematic document analysis and other methods, this article analyses a long-standing and still relevant issue related to the interpretation and application of the law regulating relationships in the field of European Union criminal justice within the framework of the national criminal proceedings that are taking place in EU member states. The article places special emphasis on the explanation and application of the principle of mutual recognition within the framework of one of the newest instruments of international

cooperation in the European Union criminal proceedings meant to prevent conflicts of exercise of jurisdiction and to solve issues arising between two or more member states. The analysis of conflicts of exercise of jurisdiction provided in this paper is not limited to a mere explanation of the concept as such, but includes an essential analysis of other related issues, such as the principle of mutual recognition, its influence on the recognition of criminal proceedings as parallel proceedings, and including other aspects related to the matching of the form of national criminal proceedings with the criminal proceedings taking place in another member state. Finally, significant attention is given to one of the objectives in terms of prevention and solution of conflicts of exercise of jurisdiction, namely, the *ne bis in idem* principle and its application in case of parallel criminal proceedings taking place in two or more member states. One of the key conclusions offered here is that in order to eliminate conflicts of exercise of jurisdiction, positive law in the process of conflicts of jurisdiction must become an effective measure in criminal justice; however, only on the condition that at least a minimum likelihood in the form of criminal proceedings adopted by different EU members states is ensured as a precondition necessary to enable a smooth application of the principle of mutual recognition.

KEYWORDS

Criminal proceedings, parallel proceedings, jurisdiction, collision, the principle of *ne bis in idem*

INTRODUCTION

In the context of criminal justice, relationships between European Union member states are viewed as one element in the process of Europeanisation. How can this element be turned into an effective and productive tool aimed at strengthening the human rights protection mechanism. The dynamic Europeanisation of criminal justice has become an object of recent scientific discussions.¹ It is often highly criticized for efforts to harmonize and simplify the criminal proceedings of the European Union member states by choosing the quickest and most effective ways to achieve goals.

In the discussions the concept of Europeanisation in criminal justice is commonly viewed as something encompassing the process of interpretation, division, and institutionalization of formal and non-formal rules, including processes related to political paradigms. It also includes ways to incorporate the legal provisions that are born in the European Union public policy area into national legal systems. N. Hoppe provides further explanation of the concept within the legal context and claims that the essence of Europeanisation is the percolation of the legal provisions formed and developed on the European Union level into the national legal systems of member states. At the same time the author questions the uniformity of the outcomes of the percolation for the EU member states.² Hoppe reminds us of the views on Europeanisation that were prevalent in the early days of the phenomenon, i.e. the mid-1950s. As H.J.J. Leenen puts it, "with time the divided Europe will become more and more united. National states will not disappear, but become more and more dependent on each other."³ That is,

¹ Raimundas Jurka, "Europos teisės [taka Lietuvos baudžiamajam procesui]" [The Influence of European Law into Lithuanian Criminal Procedure]: 70; in: Raimundas Jurka, et al., *Baudžiamojo proceso tarptautiškumas: patirtis ir iššūkiai* [The Internationalization of Criminal Procedure: Experience and Challenges] (Vilnius: Mykolo Romerio universitetas, 2013); Rima Ažubalytė and Karolina Vozbutaitė, "Baudžiamojo proceso europeizacija: kai kurie konstituciniai ir procesiniai Europos arešto orderio reglamentavimo ir taikymo aspektai" [Europeization of Criminal Procedure: some Issues of Constitutional and Procedural Aspects of European Arrest Warrant Regulation and Application]; in: Raimundas Jurka, et al., *Baudžiamojo proceso tarptautiškumas: patirtis ir iššūkiai* [The Internationalization of Criminal Procedure: Experience and Challenges] (Vilnius: Mykolo Romerio universitetas, 2013); Birgit M. Sittermann, "Nachwuchsgruppe Europäische Zivilgesellschaft und Multi-Level Governance" [Europeanisation – A Step Forward in Understanding Europe?] (Münster, 2011) // http://nez.uni-muenster.de/download/Sittermann_Literature_Review_Europeanisation_FINAL2006.pdf; François Kristen, "Special Issue on Changing Approaches and Power in Criminal Justice," *Utrecht Law Review* 7 (3) (2012): 3; Piet Eeckhout, "The Growing Influence of European Union Law," *Fordham International Law Journal* 33(5) (2011); Ester Herlin-Karnell, "The Lisbon Treaty and the Area of Criminal Law and Justice," *European Policy Analysis* 3 (2008); Chris Hilson, "The Europeanization of English Administrative Law: Judicial Review and Convergence," *European Public Law* 9 (1) (2003): 128; Jan M. Smits, "The Europeanisation of National Legal Systems: Some Consequences for Legal Thinking in Civil Law Countries"; in: Mark Van Hoecke, ed., *Epistemology and Methodology of Comparative Law* (Hart Publishing, 2004).

² Nils Hoppe, "On the Europeanization of Health Law," *European Journal of Health Law* 17 (2010): 323, 324; Claudio M. Radaelli, *The Europeanization of Public Policy. The Politics of Europeanization* (Oxford university press, 2003), 27-56.

³ Nils Hoppe, *supra* note 2: 327.

dependent on each other in so far as it is necessary to reach common goals in crime prevention, effectively fight against the phenomenon, and wield common instruments to fight crime. The “dependence” is explained in the context of positive responsibility, which means that member states shall take all measures necessary to “harmonize” national judicial criminal proceedings. All of it is aimed at creating a common area of justice where national borders of the European Union member states start “fading” as far as the administration of justice is concerned, but without breaching the member states’ sovereignty.

Nonetheless, it is worth mentioning that a hasty matching of national legal systems of the European Union member states, especially in cases when member states are not ready to demonstrate mutual trust in each other, often results in problems related to theoretical and practical application of the law. It seems like this issue is unavoidable even when the European Union legal mechanisms meant to deal with conflicts of exercise of jurisdiction in criminal proceedings between two or more member states are in place. Certainly, this type of legal regulation is comparatively new and there is no solid legal practice in the area. Moreover, scientific discussions on various aspects of conflicts of exercise of jurisdiction in criminal proceedings are still ongoing. Concepts like parallel criminal proceedings and assessment of practical settlement of conflicts of jurisdiction are especially controversial. These questions are settled in Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings, but, as could be seen in the Report from the Commission to the European Parliament and the Council on the implementation by the Member States of Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings:

The non-implementation of the Framework Decisions by some Member States is problematic since those Member States who have properly implemented the Framework Decisions cannot benefit from their co-operation provisions in their relations with those Member States who did not implement them in time. Indeed, the principle of mutual recognition, which is the cornerstone of the European area of justice that this Framework Decision facilitates, cannot work if instruments are not implemented correctly in all Member States concerned. As a consequence, when cooperating with a Member State who did not implement in time, even those Member States who did so will have to rely on the random and often lengthy practice of traditional mutual legal assistance in criminal matters without a reliable guarantee of a timely detection of bis in idem cases, which

should already take place at early stages of criminal proceedings. Such a practice increases significantly a risk of double jeopardy.⁴

The aforementioned problems related to the implementation and application of the provisions of European Union law within national legal frameworks reinforce the concern that even if member states harmonize their criminal law with the Community's, *aquis* problems related to their practical application will remain unsolved. As for the provisions of the Council Framework Decision 2009/948/JHA, the unclear definitions contained therein, including the unjustified broad treatment and *flexible nature* thereof, which often results in practical side effects faced by law enforcement and judicial institutions, cause a lot of doubt. The analysis provided in this article shows that member states that are working on settling conflicts of exercise of jurisdiction have to agree on the uniformity of some legal instruments, which seem to be impeccable on the outside. However, the so-called seamy side of the tapestry⁵, i.e. what lies behind the legal instruments, makes us stop and think whether parallel criminal proceedings are something that can be avoided by way of proper application of the *ne bis in idem* principle and whether the proceedings are actually so similar in their form and minimum procedural guarantees that the member states willing to avoid conflicts of exercise of jurisdiction can boldly say that they have mutual trust in each other without any reservation, i.e. that they apply the principle of mutual recognition without any further claims involved.

1. THE PRINCIPLE OF *NE BIS IN IDEM* IN THE CONTEXT OF JURISDICTION CONFLICTS

The principle of *ne bis in idem*⁶ is often viewed as a prohibition to impose a repeated punishment for the same crime, and also as a prohibition to initiate repeated criminal prosecution for the same crime or all of the above prohibitions in their entirety.⁷ It is worth to noting that:

⁴ Report from the Commission to the European Parliament and the Council on the implementation by the Member States of Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings (COM(2014)313 final) (2014) // http://ec.europa.eu/justice/criminal/law/files/report_conflicts_jurisdiction_en.pdf.

⁵ As a philosopher A. Schopenhauer would say, "from the front side of the tapestry, but also from its seamy side, i.e. from the underneath side, on which all binds, raggedness and woven threads are seen" (Arthur Schopenhauer, *Gyvenimo išminties aforizmai [The Aphorisms of the Wisdom of Life]* (Vilnius: Tyto Alba, 2007), 236).

⁶ The Latin saying *ne bis in idem* or *non bis in idem* means "no two times for the same". For the purpose of this article the Latin phrase *ne bis in idem* is used.

⁷ Edita Gruodytė, "Teisingumas baudžiamajame procese Europos Teisingumo Teismo akimis: atskiri non bis in idem principo aspektai" [Justice in Criminal procedure in the Eyes of the European Court of Justice: Some Aspects of the Principle non bis in idem]: 20; in: *Baudžiamasis procesas: teisingumo garantas ar kliūtis?* [Criminal Procedure: the Guarantee of Justice or the Barrier?] (Vilnius: UAB "Vilniaus panda", 2014).

The rationale of the *ne bis in idem* principle is manifold. It is of course a principle of judicial protection for the citizen against the *ius puniendi* of the state and as such is part of the principles of due law and fair trial. On the other hand respect for the *res judicata* (*pro veritate habetur*) of final judgments is of importance for the legitimacy of the legal system and of the state.⁸

The *ne bis in idem* principle is found in *lex talionis*. It has never been forgotten within the framework of European Union criminal justice and is gradually gaining in importance.⁹

The principle of *ne bis in idem* was consolidated in domestic law on November 22, 1984, by the signing of Protocol No 7 of the Convention on Human Rights and Fundamental Freedoms.¹⁰ The application of the *ne bis in idem* principle in relations between member states has been provided for in the Convention Implementing the Schengen Agreement (hereinafter – the Schengen Convention)¹¹. Finally, the *ne bis in idem* principle has been consolidated into the European Union Charter of Fundamental Rights (hereinafter – the Charter)¹² as a tool to prevent repeated punishment imposed by a court of the same or any other member state in cases related to the European Union law.

Despite the fact that the aforementioned documents include slightly different descriptions of the *ne bis in idem* principle, they consolidate the principle as consisting of two parts: *bis* (the same acts) and *idem* (finally disposed of). This article is not aimed at an extensive analysis of the jurisprudence of the European Court of Justice (hereinafter – the ECJ) and that of the European Court of Human Rights (hereinafter – the ECHR) to identify the way these two courts interpret *bis* and *idem*.¹³ Nevertheless, in order to establish ways to solve the problems dealt with in this article, it is first of all necessary to review some key aspects in the interpretation of *bis* and *idem*. It is stated that:

The concept of *idem* relates to the elements which must be regarded as having already formed the subject-matter of a judgment. This may, understood in a manner which is advantageous to the individual, include identity solely of the material acts or, with a

⁸ John A.E. Vervaele, "The Transnational *ne bis in idem* Principle in the EU Mutual Recognition and Equivalent Protection of Human Rights," *Utrecht Law Review* 1 (2) (2005): 100.

⁹ *Opinion of Advocate General Bot delivered on 7 September 2010 in Case C-261/09, Gaetano Mantello* // <http://www.infolex.lt/estzv2/default.aspx?pg=31&crd=34047&lng=LT>.

¹⁰ *Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11, Article 4* // <http://conventions.coe.int/Treaty/en/Treaties/Html/117.htm>.

¹¹ *The Schengen acquis – Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders*, OJ L 239, 22.9.2000: 19–62.

¹² *Charter of Fundamental Rights of the European Union*, OJ C 326, 2012 10 26: 391–407, Article 50.

¹³ Edita Gruodytė, *supra* note 7.

stricter meaning, identity of the offences, that is to say those acts together with their legal classification.¹⁴

Regarding the interpretation of *idem*, the ECJ decided that the decisive criterion shall be the overlapping of material acts, which is perceived as the entirety of inseparable interrelated acts, irrespective of the legal classification of these acts or the legal interest that is to be protected.¹⁵ When speaking about drug-related crimes, the ECJ stated that there is no requirement for the material acts resulting from criminal offences committed in several member states or for the individuals who committed them to be identical. Therefore, it is possible to have a case where there is no identical coincidence in terms of acts or perpetrators, however, the case involves an entirety of acts that are interrelated in time, space and the subject matter. Moreover, the ECJ emphasized that the final assessment on the issue is to be given by a competent national court.¹⁶

The ECJ practice¹⁷ related to the interpretation of *idem* defines only the minimum scope of application of the *ne bis in idem* principle in relations between member states. Article 54 of the Schengen Convention does not preclude the application of broader national provisions of the *ne bis in idem* principle with regard to judicial decisions taken abroad (Article 58 of the Schengen Convention). The scientific analysis of the ECJ jurisprudence also confirms that *idem* is established by:

Assessing specific material acts by way of factual totality test applied to acts that are interrelated in time, space and subject matter, while the content of the test is to be determined by a competent national court. This gives a lot of freedom for interpretation and makes it evident that it is possible to have situations where essentially identical acts are viewed differently in different members states, which might result in absolutely different court rulings.¹⁸

In its interpretation of *idem* the ECHR followed the ECJ practice, which says that, as mentioned previously, only material acts shall be taken into consideration, irrespective of the legal classification of these acts or the legal interest that is to be protected.¹⁹

The concept of *bis* defines the decisions²⁰ to which the *ne bis in idem* principle may apply. The ECJ holds the opinion that the *ne bis in idem* principle shall apply in

¹⁴ *Opinion of Advocate General Bot*, *supra* note 9.

¹⁵ *Van Esbroeck*, Court of Justice Judgment of 9 March 2006, C-436/04.

¹⁶ *Van Straaten*, Court of Justice Judgment of 28 September 2006, C-150/05.

¹⁷ See *Gasparini and Others*, Court of Justice Judgment of 28 September 2006, C-467/04; *Jurgen Kretzinger*, Court of Justice Judgment of 18 July 2007, C-288/05; *Norma Kraaijebink and Others*, Court of Justice Judgment of 18 July 2007, C-367/05.

¹⁸ Edita Gruodytė, *supra* note 7: 26.

¹⁹ *Sergey Zolotukhin v. Russia [GC]*, Eur Court HR, no. 14939/03, § 83, ECHR 2009.

²⁰ Article 4 of Protocol No 7 of the Convention on Human Rights and Fundamental Freedoms, Article 54 of the Schengen Convention and Article 50 of the Charter include a mention of acquittal or conviction.

cases when a court acquits or sentences a plaintiff as a result of examining a case on its merits. This includes cases of conviction *in absentia*²¹ and cases when a plaintiff is acquitted on the basis of the absence of evidence resulting from examining a case on its merits.²² The *ne bis in idem* principle is also applied in cases when the proceedings are terminated in a particular member state because prosecution of a particular offence has become time-barred there, despite the fact that in another member state the same case has not become time-barred yet.²³ With regard to this particular case the ECJ stated that every member state shall accept the criminal law of the other member state the way it is applied in that particular member state, despite the fact that the application of its own criminal law would entail a rather different decision.²⁴

The ECJ stated that the *ne bis in idem* principle shall also apply to decisions that have not been passed by a court and that do not have a form of a court decision and yet finally dispose of the prosecution.²⁵ In the case of *Turansky*²⁶, the ECJ defined a criterion that helps determine whether the prosecution is finally disposed of:

First of all it must be verified [...] whether according to the national law of the Contracting State the officials of which passed the decision it is considered to be final and binding or not, and to make sure that in this particular state the *ne bis in idem* principle is safeguarded. [...] The protection comes into force only if at least one of the states passes a final decision that has the force of *res judicata*.²⁷

The ECHR holds the same position on the matter: a decision that has the force of *res judicata* has to be passed, i.e. “[...] in cases when there is no opportunity to make use of the usual remedies or in cases when states have exhausted all usual remedies or exceeded the time limit set for making use of the usual remedies.”²⁸

Currently national institutions may engage in parallel prosecution for the same crime without any limitations. The only legal barrier that could prevent this from happening is the *ne bis in idem* principle. However, this principle, which has been extensively analyzed in the jurisprudence of the ECJ:

However, Article 54 of the Schengen Convention further explains that a conviction shall be executed, be in the process of execution or is not possible to be executed any more in line with the laws of the state in which it has been passed.

²¹ *Bourquain*, Court of Justice Judgment of 11 December 2008, C-297/07.

²² *Van Straaten*, *supra* note 16.

²³ *Gasparini and Others*, *supra* note 17.

²⁴ *Ibid.*

²⁵ *Vladimir Turansky*, Court of Justice Judgment of 22 December 2008, C-491/07.

²⁶ *Ibid.*; see *M*, Court of Justice Judgment of 5 Juni 2014, C-398/12.

²⁷ *Edita Gruodytė*, *supra* note 7: 32.

²⁸ *Sergey Zolotukhin v. Russia*, *supra* note 19.

Does not prevent conflicts of exercise of jurisdiction in cases when criminal prosecution for the same crime is ongoing in two or more member states. It may help prevent the institution of repeated prosecution for the same crime if a decision barring repeated proceedings (*res judicata*) has been passed thus finally disposing of the judicial proceedings.²⁹

Additionally, it is emphasized that:

In the absence of a system enabling to hand cases over to an appropriate jurisdiction in situations when the proceedings are already ongoing, the application of the *ne bis in idem* principle may result in accidental and even arbitrary consequences, i.e. by giving preference to whichever jurisdiction can first take a final decision, its effects amount to a "first come first served" principle.³⁰

However, the principle of *ne bis in idem* does not constitute an obstacle to reopening a criminal case if new material facts or proof emerge.³¹ In that case the question of jurisdiction remains open again. The case must be reopened in the member state that passed the "final decision." It is so because, due to some peculiarities of national courts related to the assessment of particulars of the case, the courts of the member state that was not involved in passing the "final decision" cannot freely decide on the use of material received from the member state which passed the "final decision".³²

It is therefore obvious that in the aforementioned cases member states start "competing" for the right to criminal prosecution, i.e. conflicts of exercise of jurisdiction in criminal proceedings are feasible and the *ne bis in idem* principle "does not serve as an appropriate substitute of the agreed criteria that form the basis for solving conflicts of the kind".³³

²⁹ John A.E. Vervaele, "The Transnational *ne bis in idem* Principle in the EU Mutual Recognition and Equivalent Protection of Human Rights," *Common Market Law Review* 41 (2004): 804. As professor John A. E. Vervaele noted also:

The ECJ states explicitly that the area of Freedom, Security and Justice implies mutual trust in each other's criminal justice systems and that the validity of the *ne bis in idem* principle is not dependent upon further harmonization. The ECJ further considers that the intentions of the Contracting Schengen Parties are no longer of value, as they predate the integration of the Schengen *acquis* in the EU. It is the ECJ which, through interpretation of the principles of the Community legal order, has to define the legal principles and determine their scope and application. The ECJ's preliminary ruling in cases C-187/01 and C-385/01, Hüseyin Gözütok and Klaus Brügge, has made clear that the ECJ is prepared to play this role, just as it has played it in the process of the integration of the Community (*ibid.*: 808).

³⁰ *Ibid.*: 809.

³¹ *Opinion of Advocate General Sharpston delivered on 6 February 2014 in Case C-398/12, Procura della Repubblica v M.*, par. 59 // <http://www.infolex.lt/estzv2/default.aspx?pg=31&crd=16150&lng=LT>.

³² *Ibid.*

³³ *Ibid.*, par.51.

2. PARALLEL PROCEEDINGS: IMPORTANCE OF THE CONCEPT

The proper definition of any concept, be it an act, an event, or a phenomenon, determines proper understanding of the goals attached to an object chosen for research, which allows the formation of a systematic perception of its nature, features, relations with other objects, and how well they go together. Thus, when analyzing issues related to the conflicts of exercise of jurisdiction as part of the European Union criminal proceedings, it is essential to properly define parallel proceedings with the aim to get a better understanding of varied legal traditions characteristic of the multitude of legal systems that exist in European Union member states.

As stated in the Article 3 of Framework Decision 2009/948/JHA of November 30, 2009, on prevention and settlement of conflicts of the exercise of jurisdiction in criminal proceedings, parallel proceedings means criminal proceedings, including both the pre-trial and the trial phases, which are conducted in two or more Member States concerning the same facts and involving the same person. It seems like this piece of legislation gives a rather clear definition of the elements that constitute the concept of parallel criminal proceedings going on in several member states. The Green Paper, however, when speaking about the concept of exercise of jurisdiction and *ne bis in idem* in criminal proceedings states, among other things, that:

EU criminal justice is increasingly confronted with situations where several Member States have criminal jurisdiction to prosecute the same case. Moreover, multiple prosecutions on the same cases, or “positive” conflicts of jurisdiction, are currently more likely to occur as the scope of many national criminal jurisdictions has been extended considerably in the past years. Multiple prosecutions are detrimental to the rights and interests of individuals and can lead to duplication of activities. [...]. Currently, national authorities are free to institute their own parallel prosecutions on the same cases. The only legal barrier is the principle of *ne bis in idem*.³⁴

However, this principle, which is widely has been analyzed in the jurisprudence of European Court of Justice,

does not prevent conflicts of jurisdiction while multiple prosecutions are ongoing in two or more Member States; it can only come into play, by preventing a second prosecution on the same case, if a decision which bars a further prosecution (*res judicata*) has terminated the proceedings in a Member State.³⁵

Finally this paper emphasizes that:

³⁴ Green Paper on Conflicts of Jurisdiction and the Principle of *ne bis in idem* in Criminal Proceedings (COM/2005/0696 final), Bulletin/2005/12/1.4.18, JO C/2006/70/5.

³⁵ *Ibid.*

without a system for allocating cases to an appropriate jurisdiction while proceedings are ongoing, *ne bis in idem* can lead to accidental or even arbitrary results: by giving preference to whichever jurisdiction can first take a final decision, its effects amount to a "first come first served" principle. The choice of jurisdiction is currently left to chance, and this seems to be the reason why the principle of *ne bis in idem* is still subject to several exceptions.³⁶

However, when analyzing conflicts of exercise of jurisdiction in criminal proceedings, the concept of "parallel proceedings" does not seem to be self-explanatory. The area and context of application of the aforementioned Framework Decision 2009/948/JHA are even less self-explanatory. It is not enough merely to consider the entirety of circumstances in relation to the same individual or individuals that are considered to be plaintiffs in criminal proceedings taking place in two or more member states, which is supposed to help identify parallel proceedings *idem per idem*, because the discussion on the acceptability of the principle of mutual recognition on the European Union level has not been finalized yet.³⁷

Scientific sources show that parallel proceedings are only formally identical. Moreover, their similarity content-wise is meager. Authors analyzing conflicts of exercise of jurisdiction note that parallel proceedings result from the fact that two or more member states have jurisdiction over crimes that were committed in more than one member state, including crimes that result in negative consequences in at least two member states, and crimes that were committed by a citizen of another member state or which a citizen of another member state fell victim to.³⁸ Often parallel proceedings are perceived as simultaneous proceedings resulting from acts or events that have identical characteristics and are related with the same actors in criminal proceedings.³⁹ They are two different proceedings, be they different or identical in kind. They also encompass acts determined by the same events or

³⁶ *Ibid.*

³⁷ There are two different positions on the matter. One of them supports the principle as a cornerstone of International cooperation, yet another one, to the contrary, claims that the principle of mutual recognition in the EU law diminishes the authenticity, sovereignty and autonomy of national domestic law (Raimundas Jurka, "Tarptautinis bendradarbiavimas baudžiamajame procese: įrodymai ir jų priimtinumas Europos Sąjungoje" [International Cooperation in Criminal Procedure: Evidence and Its Acceptability]: 103; in: Vidmantas Egidijus Kurapka, et al., *Baudžiamasis procesas: nuo teorijos iki įrodinėjimo (prof. dr. Eugenijaus Palskio atminimui [Criminal Procedure: from Theory towards Evidence making procedure (in memoriam prof. Eugenijus Palskys)]* (Vilnius: Mykolo Romerio universitetas, 2011)).

³⁸ Polyvios Panayides, "Conflicts of Jurisdiction in Criminal Proceedings: Analysis and Possible Improvements to the EU Legal Framework," *Revue internationale de droit penal* 77 (1) (2006): 113.

³⁹ Mark D. Hunter, "SEC/DOJ Parallel Proceedings: Contemplating the Propriety of Recent Judicial Trends," *Missouri Law Review* 68 (2003): 149; Stephen P. Younger and Jenya Moshkovich, "Parallel Proceedings in Securities Enforcement Actions: The Growing Trend against Automatic Grants of Government Requests for Stays of Civil Cases," *Journal of Securities Law, Regulation & Compliance* 3 (4) (2010): 307; J. Brook Lathram and David S. Mitchell, Jr., "Permissible Parameters of Parallel Proceedings," *Tennessee Bar Journal* (2012): 22 // <http://www.tba.org/journal/permissible-parameters-of-parallel-proceedings>.

facts. In other words, parallel proceedings can be called *Double Trouble*⁴⁰ proceedings that usually cause some kind of negative consequences. Parallel proceedings are well characterized by the so-called *lis pendens* principle⁴¹ of civil jurisprudence according to which proceedings are considered to be overlapping if the participants of the proceedings (*persona*), the object of their dispute (*petitum*), and circumstances of the dispute (*causa petendi*) overlap and the merits of the cases are neighboring in nature.⁴² Here it is worth mentioning that some authors consider the proceedings to be negative in their nature and emphasize the “dark side” of the proceedings, such as the risk of two contradictory court decisions being passed, waste of resources, and potential damage. This makes it clear that even homogenous proceedings in analogous cases might result in undesirable consequences⁴³. Most of the sources indicate that all parallel proceedings have one common characteristic, namely, that there are no obstacles at the factual, legal, competence or sovereignty level to start, sustain, or end the proceedings.⁴⁴ Thus the proceedings subjected to analysis are autonomous, identical, or at least slightly similar. Only the proceedings that can be consolidated, irrespective of the stage they are in, are clearly parallel.⁴⁵

Previous deliberations make us doubt the appropriateness of the concept of parallel proceedings provided for in Framework Decision 2009/948/JHA as a precondition for effective prevention and settling of conflicts of exercise of jurisdiction. We should avoid concluding that the lack of exhaustive definition in the aforementioned document can be “compensated for” with the help of any legal interpretations, analogies, or systemic interpretation, etc. In order to avoid the “flexible” nature of key underlying concepts which would allow any interpretation thereof “depending on the situation,” it would be advisable to finalize the definition of the concept that is to help European Union member states to reach consensus. Once the authors dare to state the definition of parallel proceedings held in Framework Decision, it is not methodologically so clear. The analysis of the *ne bis in idem* principle, in the context of the conflicts of jurisdiction as well as the logical analysis of the concept of parallel proceedings as a whole, acts as a reason to deduce features of parallel proceedings.

⁴⁰ Walter P. Loughlin, “Fighting On Two Fronts: Parallel Proceedings and Challenges at the Intersection of Criminal and Civil Law,” *The Metropolitan Corporate Counsel* (October, 2006): 32.

⁴¹ In case of international proceedings *lis pendens* allows the court to refuse to hear the case if the same case is pending in a foreign court, which helps avoid parallel litigation in courts of different member states (Jugita Grigienė, “Forum Non Conveniens doktrina ir jos taikymas teismų praktikoje” [The Doctrine of Forum Non Conveniens and its Application in Court Practice], *Jurisprudencija* 51(43) (2004)).

⁴² Anait Sergejevna Smbatyan, “Parallel judicial proceedings problem in international law,” *Russian Juridical Journal* 81 (6) (2011): 25.

⁴³ Gabrielle Kaufmann-Kohler, “How to Handle Parallel Proceedings: a Practical Approach to Issues such as Competence and Anti-Suit Injunctions,” *Dispute Resolution International* 2 (1) (2008): 110.

⁴⁴ Tony Lewis, “Double trouble,” *The Lawyer* 17 (2008): 32.

⁴⁵ Campbell McLachlan, *Lis pendens in International Litigation* (Hague: Academy of International Law, 2009), 63.

The consolidated nature of the proceedings in question allows for the claim that proceedings can be considered parallel only if they have the following minimum features. First of all, they have to be homogenous (criminal). Second, they have to be ongoing in two or more member states. Third, the stage of the proceedings is of no importance. The important thing is that they are ongoing. Fourth, there is a link between the proceedings in terms of circumstances attributed to the same case. Fifth, the proceedings have been initiated against the same individual. Sixth, member states dealing with the conflict of exercise of jurisdiction shall reach a mutual agreement on the fact that the legal proceedings are identical judging from national substantive or procedural criminal law point of view. The latter feature suggests that, on the one hand, clearly not all proceedings that are similar from the procedural point of view are parallel if they are not qualified as identical in line with the national criminal law of respective member states. On the other hand, however, not all proceedings that are similar from the substantive point of view are parallel if they are not qualified as identical in line with the national criminal procedure law of respective member states. For example, it is possible to have a legal situation where proceedings that are ongoing in two member states may not have the features of parallel proceedings despite the fact that they involve the same circumstances and have been initiated against the same individuals, because of essential differences in the legal assessment of the same material facts despite the fact that in both member states certain acts are considered to be criminal. This is explained by differences in the nature of crime, the objects of crime may not be homogenous, different statutes of limitation for filing a criminal case might apply, etc. Moreover, criminal proceedings will not be perceived as parallel if it is established that even though the circumstances are the same and the plaintiffs are the same in both cases, in one of the member states involved there are also other plaintiffs full involvement of which in the proceedings serves as a precondition for a fair trial, etc. Finally, proceedings can only be perceived as parallel if are at least slightly similar in the form of evidence collection and documentation, including similarity of procedural form.

Whether at least one of the aforementioned features exists or not, the issue of conflict of exercise of jurisdiction remains unsolved, just like the risk of practical difficulties in harmonizing jurisdictions. Some authors claim that even if all features of parallel proceedings are there, theoretically "friction" between member states may still arise. It may be determined by certain practical difficulties that currently exist due to, first of all, still existing essential differences in national legal systems of member states. The second reason is that there are still numerous tries to initiate discussions about the demeaning of sovereignty (identity) of a member

state by being forced to abandon one's national jurisdiction and hand a particular case over to another jurisdiction.⁴⁶

Therefore, it is evident that previously described legal difficulties related to conflicts of exercise of jurisdiction in essence arise from the existing lack of mutual trust between European Union member states in the process of implementing the principle of mutual recognition that is already well-entrenched in the European Union criminal justice. In other words, the search for features of parallel proceedings may lead us to the precipice of application of the *ne bis in idem* principle if mutual recognition of non-identical national legal systems fails in practice in the area of law enforcement and judicial institutions.

3. MUTUAL RECOGNITION AS A WAY TO OVERCOME CONFLICTS OF JURISDICTIONS

Mutual recognition as a way to overcome conflicts of exercise of jurisdiction in criminal proceedings that are simultaneously ongoing in several member states is to be viewed as a way to affect the national law and as a feature characteristic of the European Community and recognized to be a cornerstone of judicial cooperation⁴⁷ that stipulates an important shift towards a more flexible legal regulation⁴⁸. The science of European criminal justice says that the principle of mutual recognition on the European Union level is characterized by the fact that it enables court decisions in criminal cases to be directly enforced throughout the Community. Mutual recognition enables to believe that there is no need to adapt the final decision of the national court of the member state that passed it to the national laws of the member state which will recognize and enforce it.⁴⁹ Scientific literature also says that the origins of mutual recognition stem from the development of the Community's internal market, especially with the decision of the European Union Court of Justice in the case of *Cassis de Dijon* dealing with the free movement of goods within the Community. The court said that mutual recognition is perceived as one of the key regulatory principles of the Community law ensuring that all fundamental rights are entrenched. Based on this precedent, K. Karsai developed the theory of free movement of court decisions in criminal

⁴⁶ Polyvios Panayides, *supra* note 38, 114.

⁴⁷ Raimundas Jurka, *supra* note 37, 96-104.

⁴⁸ Ramūnas Vilpišauskas, "Teisės integravimas į Europos integracijos tyrimus Lietuvoje: teisinio reguliavimo problematika stojant į ES" [Integration of Law into European Integration Researches in Lithuania: Problems of Legal Regulation while Accessing to EU], *Teisės problemos* 4(42) (2003): 53.

⁴⁹ Mar Jimeno-Bulnes, "European Judicial Cooperation in Criminal Matters," *European Law Journal* 9(5) (2003): 623. Mutual trust as the corner stone in European Union criminal justice is also widely analyzed in the researches of author V. Mitsilegas (Valsamis Mitsilegas, "The Symbiotic Relationship Between Mutual Trust and Fundamental Rights in Europe's Area of Criminal Justice," *Legal Studies Research Paper* 207 (2015) // http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2632892).

cases⁵⁰ and claimed that all decisions in criminal proceedings of international nature must be based on this theory to avoid cases when proceedings themselves become a burden to member states and the entire Community, because the theory helps make the best use of the proceedings as an economic, effective, and quick tool. Based on this idea it is possible to claim that the conflict of exercise of jurisdiction in criminal proceedings must also be based on free consultations, good will, and mutual trust.

The scientific sources that deliberate on the principle contain more than mere apologetic statements. Some scientists suggest discussing the monopolist nature of the principle of mutual recognition in the European Union legal area. It is claimed that the EU borrowed this principle from the EU single market domain and applied it in the area of rights, freedoms, and justice to solve cooperation issues between member states, especially with the aim of harmonizing criminal law in the broader sense (including the conflict of exercise of jurisdiction). It is perceived as a kind of isomorphism as from the structural point of view the elements of the principle subjected to analysis are identical both within the framework of single market and criminal justice.⁵¹ One may ask, what is the goal of mutual recognition, what is its object and what effect does it have on the mutual relations between member states, and how does it help to prevent and solve conflicts of exercise of jurisdiction in case of parallel criminal proceedings? Only when answers to the above questions are clear will it be possible to understand the fundamental differences in the application of the principle of mutual recognition in the areas of the single market and justice.

Speaking about the goals of mutual recognition, it becomes evident that international cooperation in criminal proceedings is meant to promote the free movement of court decisions and their recognition in the European Union member states by at the same time trying to avoid the infringement of the *ne bis in idem* principle. It is obvious that there is no reason to doubt the conclusions of the informal meeting of the ministers of justice and home affairs that took place on September 20-22, 2006, in Tampere during the Finnish presidency of the EU Council. The conclusions were aimed at speeding up the recognition of decisions passed by national courts and at ensuring their validity in other European Union member states.⁵² In defining the essence of this form of cooperation, s. Lavenex

⁵⁰ Krisztina Karsai, "The Principle of Mutual Recognition in the International Cooperation in Criminal Matters, *Zbornik radova Pravnog fakulteta u Novom Sadu* 1-2 (2008): 949.

⁵¹ Sandra Lavenex, "Mutual recognition and the monopoly of force: limits of the single market analogy," *Journal of European Policy* 14 (5) (2007): 762-763.

⁵² At the informal meeting of the EU ministers of justice and home affairs, which took place on 20-22 September 2006 in Tampere (Finland), Finland presented a new document on the improvement of the process of decision making in the area of justice and home affairs. The document maintained that the recent lack of efficiency in the decision making (and implementation) process in the area of justice and

claims that the effect of this instrument affecting the national law on the domestic market and in the area of justice is not the same. The process of integration of the single market is aimed at social cohesion, and mutual recognition allows strengthening the role of the private sector and individual consumer rights, while the influence of member states in the process is rather limited. In the area of justice, however, it does not provide impetus for the expansion of individual's rights *vis-à-vis* the state. This form of cooperation strengthens the international movement and recognition of sovereign acts adopted by executive or judicial institutions of member states which enables a pragmatic assessment of criminal proceedings with the aim to establish whether they are to be perceived as similar, i.e. parallel.

In answering the question of how to define the object of mutual recognition in the said two areas, it is considered that from the economic point of view mutual recognition allows for the recognition of rules of another member state applicable to products and methods of manufacture. In the case of *Cassis de Dijon* (1979), the ECJ formed a principle in line with which sale of any product that has been legally produced and placed on sale in any of the member states in a fair way and by following the rules and manufacturing processes of that particular member state must be allowed on the market of all member states. This constitutes the principle of mutual recognition of certain rules among member states in the absence of harmonization.⁵³ In the legal context, this form of recognition encompasses the decisions taken by both executive and judicial powers, including their handover to another member state and recognition. It even goes further than that and entails the recognition of the domestic (national) law of another member state as a result of which judicial decisions taken within the framework of another member states

home affairs became especially visible (especially in the IIIrd pillar, i.e. police and judicial cooperation). In order to solve the problem, a suggestion was made to make use of the possibilities provided for in the founding Treaty of the EU and to change the decision making process in the IIIrd pillar, i.e. to give up on the requirement to have all decisions passed unanimously and to adopt the Community decision-making model instead, where, following consultations with the European Parliament, decisions are adopted by qualified majority. For more information, please, see "Lietuvos Respublikos Vyriausybės veiklos Europos integracijos srityje 2006 m. apžvalga" [The Overview of Lithuanian Republic Government activity In European Integration 2006] (2007) // http://www.euro.lt/documents/es_dokumentai/apzvalga%2020070319.pdf.

⁵³ The explanation given by the ECJ in the case of *Cassis de Dijon* formed the court practice, i.e. entrenched the principle that the sale of any product that has been legally produced and placed on sale in any of the member states in a fair way and by following the rules and manufacturing processes of that particular member state must be allowed on the market of all member states. This was the main motive that encouraged discussions on the principle of mutual recognition, including cases where harmonisation is non-existent. Therefore, member states must allow the circulation and placing on the market of the goods that have been legally manufactured and placed on the market of any other member state even in the absence of European harmonisation tools (secondary EC law), except for the cases when compulsory requirements shall apply. In the latter case every applicable measure shall be analysed in great detail in line with the principles of necessity and proportionality. According to the Single Market Action Plan adopted in 1997, the principle of mutual recognition formed the basis for improving the efficiency of the internal market. For more information, please, see "Laisvas prekių judėjimas" [Free Movement of Goods] (2011) // http://circa.europa.eu/irc/opoce/fact_sheets/info/data/market/market/article_7191_lt.htm.

national law are interpreted as if they were adopted by the member state that is enforcing them.⁵⁴

S. Lavenex doubts whether mutual recognition in criminal proceedings on the European Union level is actually so reliable and efficient as it is presented. The author claims that it is not effective enough when it comes to the actual trust of member states in each other's national legal systems. The biggest doubts are caused by the fact that the mutual recognition and enforcement of decisions taken by national courts lacks sufficient description of material facts and additional information that is necessary to be able to recognize and enforce the decision of another member state's national court.⁵⁵ All of it recalls mutual relations that are based on mutual trust, without even getting to know the person in which the trust is invested. As a result one may ask if this is enough in the context of human rights protection.

It would be possible to justify the mutual recognition and trust of the kind if it were followed by a coherent functioning of other means by which the European Union law affects the national laws of member states, such as harmonization of the European Union and national law, etc.⁵⁶ Thus, mutual recognition could be reliable only if legal systems of different members states are at least similar in terms of procedural guarantees extended to individuals. As a result of discussions, there is a tendency to base legal cooperation on mutual recognition alone, which naturally makes further relations of law enforcement institutions easier and speeds up the recognition and enforcement of judicial decisions as well as makes it more efficient. In a way, mutual recognition gains advantage against legal harmonization as the latter is more complicated, because it is aimed at harmonizing minimum legal requirements (standards) applicable in criminal proceedings throughout the European Union member states. It is not an easy task, because it involves finding compromise in the context of the multitude of national legal systems, traditions and cultures. Nonetheless, it is necessary to do so, because the current form of mutual recognition where national courts are forced to trust and execute the judicial decisions taken by a judicial institution of another member state "without even questioning it"⁵⁷ results in a deadlock in cases when at least one of the parties to the proceedings starts doubting whether the mutual recognition of the kind is at all possible knowing that the provisions of criminal proceedings safeguarding the procedural guarantees for the suspects and the plaintiffs differ in every European Union member state in terms of procedural form and implementation.

⁵⁴ Sandra Lavenex, *supra* note 51: 765.

⁵⁵ *Ibid.*: 774.

⁵⁶ *Ibid.*

⁵⁷ John R. Spencer, "EU Fair Trial Rights – Progress at Last," *New Journal of European Criminal Law* 1 (4) (2000): 448.

It is important to understand that efficient application of the principle of mutual recognition and the resulting prevention of conflicts of exercise of jurisdiction in case of parallel proceedings is possible only in cases where criminal proceedings instituted against the same person on the basis of the same circumstances in two or more member states safeguard, at least to some extent, uniform procedural guarantees for the suspects (plaintiffs). In addition, safeguarding of minimum legal requirements (standards) applicable to criminal proceedings in all European Union member states results in effective and highly performing direct consultations between competent institutions of the member states that are solving conflicts of exercise of jurisdiction. Lack of mutual recognition that can be determined by differences in legal proceedings applicable in criminal cases prevent the application of the *ne bis in idem* principle. The Green Paper states about conflicts of jurisdiction and the principle of *ne bis in idem* in criminal proceedings that:

An adequate response to the problem of (positive) conflicts of jurisdiction would be to create a mechanism for allocating cases to an appropriate jurisdiction. Where prosecutions are concentrated in a single jurisdiction, an issue of *ne bis in idem* would no longer arise. Moreover, such a mechanism would complement the principle of mutual recognition, which provides that a judicial decision taken in one Member State is recognised and - where necessary - enforced by other Member States.⁵⁸

How could it be otherwise? Criminal proceedings that seem to be identical at first glance, but appear to have substantial differences in terms of their procedural form, serve as a simple example of the “lack of agreement” between the jurisdictions of the European Union member states.

We argue that merely formally parallel criminal proceedings will never actually become parallel if they are not mutually recognized as *idem per idem*. It will only be possible to overcome this obstacle when the idea of the European Investigation Order⁵⁹ is universally applied in practice. This will be the beginning of the end of breaches related to the *ne bis in idem* principle.

⁵⁸ *Green Paper on Conflicts of Jurisdiction and the Principle of ne bis in idem in Criminal Proceedings*, *supra* note 34.

⁵⁹ The authors emphasize, the gist of legal regulation of Directive 2014/41/EU is not the target to analyze in this article. Authors refrain to go into deep of analysis of this Directive, whereas this Directive needs attention for special comprehensive research. But for the purposes of this article, it should be mentioned, that scholars Emilio De Capitani and Steve Peers stated:

The adoption of Directive 2014/41/EU on the European Investigation Order (EIO) is a milestone for judicial cooperation in criminal matters in the European Union notably after the entry into force of the Lisbon Treaty and of the EU Charter of Fundamental Rights. This post focusses in turn on the broader legal context of the new Directive, its territorial scope in light of various opt-outs, and its important provisions on the relationship between human rights and mutual recognition. As from 22 May 2017, this Directive replaces most of the existing laws in a key area of judicial cooperation – the transfer of evidence between Member States in criminal cases – by a single new instrument which will make

Thus, parallel proceedings are those that are identical both “from the outside” and “from the inside”, i.e. the member states involved in parallel proceedings can trust, for example, the form of the procedural rules applied by another member state in collecting and documenting respective evidence that will be handed over to the court of another member state and will be assessed by it as if they were collected in line with the laws of the member state that institutes the proceedings.

It is absolutely necessary to try implementing the *ne bis in idem* requirements and avoid the unwanted consequences, such as the fiasco of criminal justice in cases when the litigation process is handed over from one member state to another where the national court will face the problem of admissibility of evidence collected in a foreign member state (which handed over the litigation). In addition it is critical to understand that this particular principle is focused both on the safeguarding of procedural guarantees applicable to the plaintiff and the unavoidability of liability.

CONCLUSIONS

The analysis of solutions meant to prevent conflict of exercise of jurisdiction in the criminal proceedings of the European Union member states shows that the key objective and purpose of the idea is to institute the functional effectiveness of the *ne bis in idem* principle. The values that form the basis for the application of this principle entail the risk that in case of parallel proceedings that are ongoing in several different member states the human rights and freedoms protected by various conventions and domestic law will be breached as a result of repeated criminal prosecution. Therefore, the fundamental interpretation of the *ne bis in idem* principle must be rather broad despite differences in qualification determined by national legal traditions; however, the sovereignty of the member state’s national legal systems, including the independence and impartiality of the judiciary, must not be ignored.

Only in their entirety do respective criteria allow for the conclusion that the proceedings that are ongoing in two or more European Union member states are to be perceived as parallel. To be more exact, these proceedings are identical in type, they are ongoing in two or more member states irrespective of their stage or phase, they are related in terms of the same merits of the case, instituted against the same person (suspect, plaintiff) and, finally, the states involved in the proceedings mutually agree that the legal proceedings are identical judging by certain features of the national substantial law or law of criminal procedure. In

cross-border investigations faster and more efficient (Emilio De Capitani and Steve Peers, “The European Investigation Order: A new approach to mutual recognition in criminal matters” (Friday, 23 May 2014) // <http://eulawanalysis.blogspot.com/2014/05/the-european-investigation-order-new.html>).

other words, in order to avoid breaching the *ne bis in idem* principle, the proceedings that are at least in some way similar in their form are considered to be parallel proceedings.

Mutual recognition by the member states of each other's legal systems based on total and entirely pragmatic mutual trust turns out to be the key indicator in preventing the conflict of exercise of jurisdiction in practice. This methodological legal instrument adopted to eliminate the conflict of exercise of jurisdiction gives rise to the cooperation of member states in criminal proceedings both formally and in terms of basic values.

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