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# Jurisdictional Conflicts in Criminal Matters and their Settlement within EU's Supranational Settings[**]

*Abstract*

This article discusses the fundamental issues surrounding the assignment of jurisdiction in criminal matters and the resolution of jurisdictional conflicts within the supranational setting of the EU. After delving into the interests that lie behind jurisdictional conflicts in criminal matters and their resolution in general, it highlights the settlement models for conflicts of jurisdiction in criminal matters at the national and the international level, and subsequently analyses, comparatively, the EU approach. With regard to the latter, it discusses the notion of the fundamental right based on the *ne bis in idem* principle enshrined in Article 50 of the CFR as well as the current state of affairs on the basis of the Framework Decision 2009/948/JHA, criticising the existing EU model and opting for a future one for preventing and resolving jurisdictional conflicts in the EU based on firm criteria and the territoriality principle with very slim exceptions.

## *1. A fundamental starting point*

The fundamental issues surrounding the assignment of jurisdiction in criminal matters and the resolution of jurisdictional conflicts within a *supranational* setting such as the EU are important for the unhampered enforcement of criminal law in an international milieu and presently the knottiestriddles in the field. To highlight them, it is useful to begin with a reminder: Criminal law is rigidly bound to the core of state sovereignty.[1] In every legal order, the state has the *ius-puniendi-monopol.* This explains why criminal law has been so resistant to internationalization and the last one affected by EU

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1 See *I. Manoledakis*, Reflections on a common European criminal law judicial area, in I. Manoledakis (ed.), Reflections on the future of criminal law, 2000, pp. 42, 45 et seq.(in Greek.).

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law.[2] State sovereignty, as expressed in terms of criminal jurisdiction, aims to protect fundamental legal interests of citizens and the state itself, and simultaneously achieve distinctive goals. Through criminal procedure and the enforcement of a penalty of proportionate magnitude to the committed offence and the offender's guilt, the State attempts to restore public peace and also serve special and general prevention for the future.[3] State sovereignty goes so far in this respect that it even claims the authority to adjudicate violations occurring outside its borders. Each State defines its relevant competence independently and rather inclusively, thus rendering conflicts of jurisdiction inevitable. How such conflicts are resolved over time – and especially in the EU context- can unveil not only the main features of the models utilised to defining jurisdiction and settle relevant conflicts, but also the underlying philosophy.

On the other hand, it should be stressed from the outset that the *nullum crimen nulla poena sine processu* ("n.c.n.p.s.p") principle is deep-seated within liberal criminal law systems and seeks to guarantee that a criminal conduct may only be punished by a competent court and with due process.[4] Of course, a criminal process is not carried out to protect the individual from the punishing state, but to urge the protection of society from criminal acts and fulfil the objectives of substantive criminal law as described above. However, limiting the state's criminal repression scope is of paramount significance in democratic societies to maintain the dual identity of criminal law as both an instrument of protecting basic legal interests and a yardstick of civil liberties.[5]

This said, the problems addressed in this paper will refer to criminal acts stretching over more jurisdictions, especially in the EU context which is presently the most sophisticated international milieu. According to its constitutional treaties, the EU comprises both sovereign states and the peoples of Europe, in what has been called "the European Sympoliteia"[6] Member States abide by this supranational organisation, in a gradual process of an evolving "federalization".[7] In jurisdictional issues, the layout is pyramid-like: EU interests hold the top and their State and citizen counterparts rest at its basis. In tandem, a gradual shift of sovereignty from the states to the supranational organisation becomes evident.

## 2. *Interests behind jurisdictional conflicts in criminal matters and their resolution*

Exercising the right to punish an offence is both reasonable and legitimate, as it aims to protect legal interests within a state's territory, or even beyond it under certain condi-

2 See e.g. *H. Satzger*, International and European Criminal Law, 2012, p. 44 et seq.
3 See e.g. *M. Kaiafa-Gbandi/N. Bitzilekis/E.Symeonidou-Kastanidou*, Criminal Sanctions, 2nd ed. (2016), p. 43 et seq. (in Greek.).
4 See e.g. *N. Androulakis*, Fundamentals of criminal procedure, 4th ed., p. 6 et seq. (in Greek).
5 See *I. Manoledakis*, Criminal Law, General Theory, 2004, p. 29 (in Greek).
6 See respectively in *D. Tsatsos*, The notion of democracy in the European Sympoliteia, 2007, pp. 55 et seq. and esp.103 et seq. (in Greek).
7 See in a comparative perspective with the federal criminal law system of the US *M. Kaiafa-Gbandi*, The EU and the US criminal law as two-tier models, 2016, pp. 55 et seq.

tions (extraterritorial jurisdiction). In the latter case, such interests belong to the state itself (state protective principle) or to a state's national (passive personality principle), or are infringed by a state's national abroad (active personality principle) or are universally protected according to relevant international conventions (universality principle)[8]. Expanding jurisdiction outside state territory is self-evidently a source of such conflicts, as at least the *locus delicti* legal order articulates a rightful claim to exercise its relevant competence.

This paper will not discuss the degree to which such an expansion is justifiable.[9] However, its demarcation under set thresholds and the settlement of jurisdictional conflicts are both governed by the same mindset. State extraterritorial criminal jurisdiction targets to eliminate – or at least reduce – punishability loopholes for offenders internationally and also voices the interests of a state's sovereignty. By linking itself to an offence under certain parameters, the state claims to intervene punitively even beyond its strict local confines, in an effort to fulfil the scopes of its criminal lawin general. Establishing a conflict-free structure for international cooperation seems to be low in the priorities list.[10] However, while criminal law remains the strictest social control mechanism by severely affecting the legal interests of those criminally accountable, fulfilling its mission as both a protection apparatus of basic legal interests and a benchmark of civil liberties requires its restriction within clearly defined margins. Consequently, while the extraterritorial expansion of criminal jurisdiction aspires to enforce criminal law in a rather wide perspective and aims to the enhanced protection of legal interests and to the self-actualisation of a state's sovereignty, drawing the above mentioned crucial limitations and promoting the respective international conflict-settlement regime should pay particular attention to suspects'/defendants' rights.[11] In short, and at least according to a perception of a global justice, the accused should never face dual prosecution and punishment for the same offence.[12]

Every institutional framework regulating criminal jurisdiction at an international level essentially expresses the established relationship between these conflicting aims.[13] The more the balance shifts towards the protection of legal interests and state sovereignty, the less citizen rights are taken into consideration.

8 For principles of extraterritorial jurisdiction see *H. Satzger*, International and European Criminal Law, 2012, 20 et seq. and with regard to the EU framework *M. Böse,* in M. Böse/F. Meyer/A. Schneider, Conflicts of Jurisdiction in Criminal Matters in the European Union, Vol. II, 2014, pp. 45 et seq. and *F. Zimmermann*, Strafgewaltkonflikte in der Europäischen Union, Ein Regelungsvorschlag zur Wahrung materieller und prozessualer strafrechtlicher Garantien sowie staatlicher Strafinteressen, 2014, pp. 70 et seq.

9 See rel. *Zimmermann*, Strafgewaltkonflikte in der Europäischen Union, pp. 70 et seq. and 135-136.

10 *Zimmermann*, Strafgewaltkonflikte in der Europäischen Union, 175.

11 See especially the analysis of*Böse,* in Böse, /Meyer/Schneider (ed), Conflicts of Jurisdiction in Criminal Matters in the European Union, Vol. II, pp. 44 et seq., cf. *Zimmermann*, Strafgewaltkonflikte in der Europäischen Union, pp. 175 et seq.

12 In this direction *I. Anagnostopoulos*, Ne bis in idem, European and International Perspectives, 2008, pp. 168 et seq. (in Greek).

13 *Zimmermann*, Strafgewaltkonflikte in der Europäischen Union, pp. 205-206.

Nevertheless, one should consider that such conflicts and their resolution do not only arise in an international context. Federal systems – and especially those envisaging distinct jurisdictions for the same act between local and federal levels and granting leeway for autonomous pursuit – also need to find ways to disentangle respective conflicts arising from their two-tiered criminal law template. In allowing prosecution and punishment for the same offence by both federal and local competent authorities, and consequently in acknowledging no institutional safeguard for *ne bis in idem* (practically but non-bindingly imposed by the so-called "Petite-policy" of the US Attorney General),[14] the USA is in fact the most characteristic example of sovereignty interests gaining the upper hand in regulating jurisdiction in criminal mattersin the context of a state itself.[15]

### *3. Settlement models for conflicts of jurisdictions in criminal matters at the national level*

Examining the various models employed for the settlement of jurisdictional conflicts at the national level, one discovers that a popular one recognises priority to a state's jurisdiction based on territorial, state-protective, or universally defined grounds.[16] The immediate impact of this hidden pecking order can be traced in a number of conflict-settlement procedures. While territoriality often entails the reservation of one's own jurisdiction or the final recognition of a foreign judgement, other principles are merely taken into account in off-set procedures.[17] Taking the Greek legal system as an example, this would imply that on such grounds (e.g. territoriality) prosecution and punishment for the same offence by a foreign legal order does not impede a subsequent equivalent by local authorities. In this case, however, the penalty already served will normally be deducted from the new sentence (Art. 10 GPC). On the contrary, in cases of a state's jurisdiction for offences committed abroad based on the principles of active or passive citizenship, if the perpetrator or victim are own nationals, prosecution not only must obey the double criminality principle but is also impossible if a final conviction has been issued for the same offence *and* the penalty has been served in whole, or by virtue of the statute of limitations (Art. 9 GPC).

Therefore, in the presence of a strong link between a criminal act and a specific legal order, state jurisdiction in criminal matters is not actually giving way to a foreign counterpart, thus also expressing its sovereignty through, e.g., territoriality or state protective principle. In such cases, citizens' rights are taken into consideration only minimally, e.g., to the extent that a served penalty deduction is acceptable (Art. 10 GPC). Citizens' rights are better off when regulating jurisdiction in the absence of a

14 See respectively *N. Abrahms/S. Sun Beale/R S. Klein,* Federal Criminal Law and its Enforcement, 6th ed., 2016, p. 96.
15 *Kaiafa-Gbandi*, The EU and US criminal law as two-tier models, pp. 110 et seq.
16 See respectively *F. Meyer*, in Böse/ Meyer/ Schneider (eds.), Conflicts of Jurisdiction in Criminal Matters in the European Union, Vol. I, 2013, p. 443.
17 Op. cit.

strong link between state sovereignty and committed offence, e.g. when an own national commits an offence abroad. In these cases, jurisdiction may be blocked not only by the double criminality prerequisite, but also by the previously imposed and served penalty by and within another state's jurisdiction, or by statute of limitations applicable to the same offence (Art. 9 GPC).

This analysis depicts that most states defend their own jurisdiction in criminal matters against their foreign counterparts, especially when the criminal act is strongly linked and directly relevant to their own sovereignty. The same applies to the corresponding conflict resolution: the *ne bis in idem* principle is dominant in such a settlement when the above mentioned link is weaker, proving that states yield and compromise only if the matter at hand does not challenge their punitive authority in areas under their sovereignty. Even in such cases, however, abstention from prosecution requires the irrevocable imposition of a penalty that is served in full, as well as the legal order's determination to acknowledge the *ne bis in idem* principle in transnational criminal matters.

### *4. Settlement models for conflicts of jurisdiction in criminal matters at the international level*

The above trend is manifest even at the international level.[18] The Convention Implementing the Schengen Agreement (CISA)[19], agreed between countries of the Schengen Area and not necessarily EU Member-States,[20] is one of the most progressive international instruments in the relevant field. According to its Article 54, CISA obliges its parties to abstain from prosecution for the same facts when the case has been finally and irrevocably tried by one of them, and – in case of a conviction – if the penalty imposed has been, is in the process of being, or can no longer be enforced under the laws of the imposing legal order. However, Article 55 of CISA grants its parties the right to

18 For the relevant international treaties see *Böse,* in Böse/Meyer/Schneider (eds.), Conflicts of Jurisdiction in Criminal Matters in the European Union, Vol. II, pp. 357 et seq.

19 Relevant provisions can also be found in two conventions of the Council of Europe (: the European Convention on the International Validity of the Criminal Judgments – Hague 28.5.1970, and The European Convention on the Transfer of Criminal Proceedings – Strasburg 15.5.1972) which include similar provisions to Articles 54-55 CISA as mentioned below. However, these conventions have not been widely accepted and their ratification pace is rather slow among signing parties, while major states have not yet sanctioned them. On the other hand, the International Convent on Civil and Political Rights, although arguably introducing the ne bis in idem principle transnationally and unrestrictedly (see *Anagnostopoulos,* Ne bis in idem. International and European Perspectives, pp. 160 et seq.), is -according to the prevailing view (see e.g. *Chr. Vanden Wyngaert/G. Stessens*, The international Non bis in idem Principle: Resolving some of the answered questions, ICLQ 1999, pp. 781 et seq., *S. Trechsel,* Human rights in criminal proceedings, 2005, pp. 385 et seq.) – not to be seen as a basis for the principle's international restricted validity.

20 See e.g. *S. Gless*, Internationales Strafrecht, Grundriss für Studium und Praxis, 2011, pp. 154 et seq.

express reservations for non-recognition of another State's judicial decision if the act to which the foreign judgment relates:

(i) took place in whole or in part in its own territory,[21]
(ii) constitutes an offence against national security or likewise critical interests of the Member State, or
(iii) was committed in violation of their formal duties by state officials of the reserving State.

Obviously, CISA parties have to exactly define the categories of offenses for which the above exceptions may apply.[22]

It has been argued that this reservation right was annulled upon enforcement of the Amsterdam Treaty.[23] Nonetheless, even if this were to be true, it would only affect EU Member States that are bound by the TEU/TFEU. At his point, however, the interest is focused on the settlement model for conflicts of jurisdictions in criminal matters at the *international level*.

This reference illustrates that although national parties to an international convention may agree to restrict themselvesas to the recognition of foreign judicial decisions in criminal matters, any involvement of their cardinal interests still tips the balance towards their sovereignty rights in settling such conflicts. Thus, citizens are not always shielded against a second prosecution for the same facts, even if they have stood trial for them and were acquitted or finally convicted and wholly served their sanctions. All the same, one has to acknowledge that CISA contributed to a relevant noteworthy progress. Albeit in a restricted area, in binding themselves via international convention its parties took a significant step to recognise a person's right against dual prosecution and trial for the same facts.

In other words, as far as each local *ius puniendi*, and thus criminal law enforcement, is concerned, the aims of safeguarding state sovereignty and acknowledging the *ne bis in idem* right to the citizen of the world are still conflicting. The prior is manifestly gaining the foothold, even in an international milieu where States express their fundamental reciprocal confidence by signing a restrictively binding international agreement and recognizing a corresponding right to citizens.

One might, of course, argue that an international recognition of the *ne bis in idem* principle favors some kind of international "forum shopping". Within its context, an

21 In the latter case, however, the exception does not apply if the acts materialised to some extent in the territory of the party that delivered the judgment.

22 An exception to the exception and thus an implementation of the rule applies when a concerned party has requested a co-signee to launch prosecution for the same acts or has extradited the defendant according to Art. 55 § 4 CISA.

23 See respectively *I. Anagnostopoulos*, Ne bis in idem in der Europäischen Union, Offene Fragen, in U. Neumann-F. Herzog (eds.), Festschrift für W. Hassemer, 2010, p. 1128, *B. Hecker*, Europäisches Strafrecht, 4th ed., 2012, p. 467, *O. Plöckinger/F. Leidenmühler*, Zum Verbot doppelter Strafverfolgung nach Art. 54 SDÜ1990, wistra, 2003, pp. 82-83.

offender could attempt to push fora final judgement by the legal order that applies the most lenient penal regime, and consequently be spared of other potential prosecutions with potentially harsher outcomes. However, this argument seems less convincing nowadays, given the wide range of judicial cooperation options available internationally, and especially for parties in even closer collaboration, as those to CISA.[24] Besides, it has aptly been stressed that a more lenient penal treatment should not be considered a "misfortune", and it is anyhow a minor loss in protecting citizens against double jeopardy.[25] Last but not least, it is also reminded that the "forum shopping"risk also applies to the opposite direction, i.e. when exercised by prosecuting authorities[26] that will often try to have the case indicted by either the strictest available legal order or the one allowing them a rather unrestricted leeway to act.

Thus, opting for an explicit safeguard of the *ne bis in idem* principle in criminal matters internationally should still be an international community objective, as this would signify a shift to more anthropocentric legal systems, which would prioritise citizen fortification against dual prosecution over state sovereignty rights and enforcement of sanctioning prowess.

However, the international community is still far from realising this goal, as evident in the ratifications of the Council of Europe's Conventions on transferring criminal proceedings and rendering international validity to decisions in criminal matters.[27]

### 5. *Resolving and preventing conflicts of jurisdiction in criminal matters at a supranational level – The EU approach: a baffling challenge*

The circumstances are quite different in the EU context. The Union – although at least not yet a federal state – can co-determine its Member-States' criminal law to a decisive extent, going forward to construct a common area of freedom, security and justice for the people living within its borders.[28] In order to achieve this, the EU tries to speed up criminal procedures with transnational characteristics and restricts its interventions to amendments in local procedural provisions to the least possible extent.[29] Hence, in the field of criminal procedure, it extensively applies the principle of mutual recognition of criminal decisions and judgments (Art. 82 TFEU). One could generally argue that this principle which aspires to pervade the whole criminal procedure (i.e. from thepretrial stage and up to the enforcement of decisions) promotes a some what automatic recog-

24 See respectively *Anagnostopoulos*, Ne bis in idem, European and International Perpsectives, pp. 168-169.
25 Op. cit., p. 169.
26 Op. cit, as well as *C. Nestler*, Europäisches Strafprozessrecht, ZStW 2004, pp. 341 et seq., 349 et seq., *J. Vogel,* Perspektiven des Internationalen Strafprozessrechts, 2004, pp. 40 et seq.
27 Cf. *Böse*, in Böse/Meyer/Schneider (eds.), Conflicts of Jurisdiction in Criminal Matters in the European Union, Vol. II, pp. 361 et seq.
28 See e.g. *Kaiafa-Gbandi*, The EU and US criminal law as two-tier models, pp. 38 et seq.
29 See e.g. *P. Asp*, The procedural criminal law cooperation in the EU, 2016, 13-14, pp. 20 et seq.

nition of judgments delivered by courts of another member state when observant of a minimum form and within the context of the limited power against denial of enforcement. This proves extremely beneficial for the implementation of measures ordered by individual decisions, and doubtlessly empowers the efficiency of crime control. However, mutual recognition can lead to an undermining of existing procedural principles that very much claim to be common between Member States, as palpable e.g. through the EAW provisions that extensively violate the presumption of innocence and the proportionality principle.[30] Evidently, mutual recognition is not destined to never to attain *positive* substance in shaping transnational crime control; nevertheless, such a development is only possible when mutual recognition comes to serve another acknowledged procedural principle, as noticeable in the EU perception of *ne bis in idem*.[31]

After the Lisbon Treaty, the double jeopardy principle was reformatted in Article 50 of the Union's Charter on Fundamental Rights (CFR), which reads as follows: "Nobody can be prosecuted or be punished with a criminal sanction for an offence for which he/she has been already acquitted of charges or convicted in the frame of the EU with a final decision of a criminal court according to the law". According to the thus far ECJ case-law on the content of the *ne bis in idem* principle, it is argued that:[32]

(i) although the provision refers to an offence, it is rather clear that it covers the same facts (idem factum), even under a different legal designation;
(ii) the term "final decision of a criminal court" implies not only criminal court judgements, but all decisions and rulings under judicial or alternate proceedings that bring final case closure, i.e. reviewable only under exceptional circumstances;
(iii) article 50 does not explicitly oblige the enforcement of the sentencing decision, as required by Article 54 CISA, and last but not least,
(iv) Article 50 allows for no Member-State reservations to the transnational enforcement of the principle, contrary to Article 55 CISA.

This contextual definition of *ne bis in idem* triggering a conclusive and unrestricted ban against any new prosecution for the same facts is not uncontested, although judicially upheld, e.g., in Greece by a decision of the Supreme Court Plenary (Olomeleia Areiou Pagou).[33] Several scholars[34] and also recently the ECJ itself[35] read the same re-

30 See respectively *M. Kaiafa-Gbandi*, Harmonization of criminal procedure on the basis of common principles: the EU's challenge for a Rule-of-Law transnational crime control, in C. Finjaut/Ouwerkerk (eds.), The future of police and judicial cooperation in the European Union 2010, 357 et seq.
31 *Asp*, The procedural criminal law cooperation in the EU, p. 112.
32 *Anagnostopoulos*, Ne bis in idem, European and international perspectives, pp. 173-174 (in Greek).
33 Areios Pagos (in Plenum) 1/2011.
34 See e.g. . *Böse,* in Böse/ Meyer/ Schneider (eds.), Conflicts of Jurisdiction in Criminal Matters in the European Union, Vol. II, pp.146 et seq.
35 ECJ C-129/27.5.2014, Spasic.

strictions of Articles 54 and 55 CISA in Article 50 CFR. However – and even in this mindset-although Art. 50 CFR did not repeal the Member States'reservations under 55 § 1 CISA, such exceptions cannot be held indisputable.[36] On the contrary, they always remain subject to legal scrutiny under Art. 52 § 1 CFR, that sets out the requirements for all fundamental rights limitations, such as that of Art. 50 CFR. In particular, such limitations must comply with the principle of proportionality. Hence, it is argued that some Member-State declarations articulated under Art. 55 § 1 lit b (:protection of essential state interests) and c (:violation of official duties) CISA, covering offences subjected to harmonization and consequently not restricted to own national interests (e.g. terrorism, piracy) or not safeguarding essential state interests (e.g. drug trafficking), breach the proportionality principle, and therefore a second investigation and prosecution in another Member State for such cases should be negated. The opposite would unsurprisingly be disproportional. Then again, the overwhelming majority of Member States have not expressed reservation under Art. 55 CISA, and this has not had a detrimental impact in a law enforcement. This is seen as proof that a functional coordination mechanism for criminal investigations and proceedings will render the exceptions under Art. 55 CISA[37] redundant.

Accounting for even these restrictive views, it is apparent that Article 50 CFR was another step towards prioritizing civil rights than state sanctioning prowess. Making double prosecution and trial for the same facts impossible for all crimes, leaving very slim reservation rights to the states, and necessitating their adherence to the proportionality principle by abstaining when the adjudicating Member State provides adequate protection of the relevant legal interest, is certainly significant progress. Besides, judicial cooperation in criminal matters is steadily and dynamically enhanced in the common area of freedom, security and justice[38], thus adequate protection of legal interests is actually not an issue. This also advocates for a rather unrestricted acceptance of the principle.

In spite of this, many unsolved problems still persist. Ne bis in idem itself does not obstruct more States to prosecute and adjudicate against a person's same act, with the development and conclusion of such cases depending on the procedurally faster Member State, which first finalises the decision ("first come-first served principle").[39] It is from that point on that *ne bis in idem*is applicable.

This is substandard for both the states and the persons involved. To date, the most of EU's legislative instruments invite Member States to criminalise certain behaviors, and to establish *extraterritorial* competence for such. Thus, the odds for jurisdictional

36 *Böse,* in Böse/ Meyer/ Schneider (eds.), Conflicts of Jurisdiction in Criminal Matters in the European Union, Vol. II, pp. 146-147.
37 Op. cit., p. 147.
38 See *European Criminal Policy Initiative (ECPI),* A Manifesto on European Criminal Procedure Law, ZIS 2013, pp. 430-431, 433 et seq., proposing requirements that safeguard individuals' rights to offset this development.
39 *Asp,* The procedural criminal law cooperation of the EU, pp. 91-93.

conflictsare raised.[40] On the other hand, common rules on jurisdiction do not exist on the EU level. Indeed, EU legal instruments exist which bind Member States to coordinate actions when deciding which member state is to prosecute where jurisdictional conflicts arise.[41] However, they provide neither tangible criteria for such coordination, nor a concrete relevant procedure. Eurojust – authorised under Art. 85 TFEU to aid in jurisdictional conflict resolution – has issued relevant guidelines.[42] Though not binding on Member States and lacking a set of fixed criteria, the guidelines propose no hierarchy pattern.[43] This makes foreseeability of competent forum in a transnational case impossible, and thus renders then c.n.p.s.l. principle (Art. 49 § 1 CFR) void, given that the latter also covers criminal act forum,[44]and consequently a person's natural judge in the EU common area of justice. This is intolerable, especially for suspectsas frankly jeopardising their rights, but also for the states themselves, which might be deprived from exercising their punitive power, although they have a stronger link to the case than the legal order that was the first to adjudicate. Framework Decision 2009/948/JHA on the prevention and settlement of conflicts of jurisdiction does not expel such effects either. Actually, in lacking firm criteria and a binding effect of the consultation proceedings outcome, it is likewise defective, envisaging no safeguards whatsoever for the rights of involved persons in the forum choice field.[45] Above all, suspects have to carry the burden of uncertainty until a final decision on their case is issued in one of the Member States, as well as an ambiguity on the exact forum that will adjudicate first; bear in mind that the latter might not even be the *locus delicti* one, or even one chosen by the prosecuting authoritiesas the most favorable for them. As a result, in lack of firm criteria for selecting adjudicating forum for transnational cases, forum shopping by offenders cannot be forestalled. Consequently, the questions persist: can we prevent conflicts and regulate jurisdiction of transnational cases in a way that shields the individual adequately versus the risk of defending against multiple jurisdictions for the same case and let *ne bis in idem* develop its transnational potency in time? Is that not the next appropriate step if priority lies with the rights of suspects and defendants, and even by con-

40 See, e.g., Art. 4 of the Convention on the protection of the European Communities' financial interests, Art. 9 § 1 c, d, e FD 2002/475/JHA, Art. 10 §§ 1 b, 2 Directive 2011/36/EU, Art. 12 §§ 1b, 2b Directive 201340/EU.

41 See respectively FD 2009/948/JHA, as well as e.g. Art. 4 the 1995 Convention on the Protection of the European Communities' Financial Interests, Art. 9 of the FD 2008/919/JHA on combating terrorism.

42 See http://www.eurojust.europa.eu/doclibrary/corporate/newsletter/eurojust%20news%20issue%2014%20(january%202016)%20on%20conflicts%20of%20jurisdiction/eurojustnews_issue14_2016-01.pdf andhttp://www.ecba.org/extdocserv/conferences/vilnius2016/eurojustguidelines.pdf.

43 See on the existing EU legal framework the criticism of *Böse*, in Böse/Meyer/Schneider (eds.), Conflicts of Jurisdiction in Criminal Matters in the European Union, Vol. II, 337 et seq, 346 et seq., and *Zimmermann,* Strafgewaltkonflikte in der Europäischen Union, 305 et seq.

44 *Böse*, in *Böse/Meyer/Schneider (eds.)*, Conflicts of Jurisdiction in Criminal Matters in the European Union, Vol. II, 124.

45 Op. cit., 357.

sidering state interests under the proportionality principle? Is this not so, especially in an area which gradually but steadily develops into a common area of prosecutorial powers without the required counter-balance towards a common area of freedom and justice for the individual as well?

These questions still wait for adequate answers in the EU. The existing model shows that the Union practically accepts a priority of its Member States' sovereignty when deciding on forum selection and on possible jurisdictional conflicts. The wider the discretion allowed to States to resolve jurisdictional matters in criminal cases in a non-binding manner, the stronger the threat against citizens' rights.

### 6. *Reflections on a future model for preventing and resolving jurisdictional conflicts in the EU*

A suitable future model for the prevention and/or settlement of jurisdictional conflicts within the EU requires a fundamental understanding that the Union is a *supranational* organization in the process of *a gradual "federalization"*,[46] as far as its status against its Member States goes. This means that the methodology of resolving existing jurisdictional issues in criminal matters has to be by all accounts integrated in the broader framework of this supranational structure, and thus attuned to its concrete principal characteristics. This a wareness apparently impacts the focal parameters of future decisions.

When deciding on jurisdiction and the settlement of relevant conflicts *in a national perspective*, a state does not account for interests other than its own. To essentially regulate the expansion of extraterritorial jurisdiction, international law promotes certain principles in this field, which are actually not institutionally binding on States. Furthermore, the latter are never bound in the process of preventing and solving such conflicts. Within *international surroundings*, things are a bit different. If an international treaty regulates jurisdiction and the settlement of relevant conflicts, the ratifying state is correspondingly bound. However, treaties ordinarily settle jurisdictional conflicts favorably for States' sovereignty; otherwise their ratification and enforcement are troublesome. This holds true even for the Convention Implementing the Schengen Agreement (CISA), the most progressive of them all. Besides, when a state signs an international treaty it restricts its own jurisdictional sovereignty only to the extent it wishes. Even if the party later fails to abide by the said provisions, only "soft" institutional enforcement via political pressure of the international community is available to compensate for lack of sanctioning mechanisms.

Things differ significantly within the supranational organization of the EU. Therein, Member States are bound by EU decisions as far as the Union has relevant competence and is aligned to its constitutional treaties (TEU and TFEU). The enforcement of such

46 See, albeit, the significant differences to a federal system in *Tsatsos*, The notion of democracy in the European Sympoliteia, pp. 55 et seq and esp. 103 et seq.

decisions is institutionally guaranteed.[47] On the other hand, one of the core Union traits in the post-Lisbon era when the Charter on Fundamental Rights became binding, is the placing of the individual at the heart of its activities (Preamble of the Charter, lit. c) and the construction of a common area of freedom, security and justice (Art. 3 TEU, Art. 67 TFEU) for people's benefit. In this approach, the EU acknowledges in a transnational perspective the *ne bis in idem* principle as a fundamental right in its Charter (Article 50), covering all its Member States, and providing it with a more substantial content compared to CISA. Thus, even if one believes the principle to be restricted by possible Member States' reservations in this case, it is only limited and proportional constraints that are acceptable in serving state interests. Given that, it is not tolerable for any regulatory system on the prevention and/or settlement of jurisdictional conflicts within the EU to devalue the priority acknowledged to individual rights over state sovereignty, as expressed in the Charter's preamble and the *ne bis in idem* principle. Therefore, the message is clear within the EU institutional framework: bringing states together in a common supranational organisation is not meant for the shake of law enforcement without loopholes to jeopardise its peoples' fundamental rights. Selecting to elevate the standard of protection by banning dual prosecution or adjudication for the same facts where intensive judicial cooperation allows for much easier criminal prosecution opens up a new perspective that ought to prevail, regardless of the additional characteristics of the forthcoming model for preventing and/or settling jurisdictional conflicts. For that reason, the model needs to clarify and uphold this fundamental selection in all its manifestations the best possible way.

As a matter of fact, different models could be suggested for the said approach.[48] The one presently incorporated in FD 2009/948/JHA introduces a horizontal design entailing direct interaction and mutual consultation between competent Member State authorities to decide on jurisdiction, supplemented by a vertical component in absence of

47 See Art. 258 and 260 TFEU granting leeway to sanction Member States for not abiding by EU rules.

48 See e.g. *K. Ambos,* Internationales Strafrecht, 3. Aufl., 2011, § 4, *A. Biehler/R. Kniebühler/J. Lelieur-Fischer/S. Stein* (Hrsg), Freiburg proposal on concurrent jurisdictions and the prohibition of multiple prosecutions in the European Union, 2003*, N. Bitzilekis/M. Kaiafa-Gbandi/E. Symeonidou-Kastanidou,* Alternative thoughts on the regulation of transnational criminal proceedings in the EU, in B. Schünemann (Ed.), A programme for European Criminal Justice, 2006, pp. 250 et seq, 493 et seq., *M. Böse/F. Meyer/A. Schneider (eds.)*, Conflicts of Jurisdiction in Criminal Matters in the European Union, Vol. II, pp. 381 et seq., *A. Eickert*, Transstaatliche Strafverfolgung: Ein Beitrag zur Europäisierung, Internationaölisierung und Fortentwicklung des Grundsatzes ne bis in idem, 2004, *H. Fuchs,* Zuständigkeitsordnung und materielles Strafrecht, in B. Schünemann, Ein Programm für die europäische Strafrechtspflege, 2006, pp. 112 et seq., *W. Gropp*, Kollision transnationaler Strafegewalten nulla prosecution transnationalis sine lege, in: A. Sinn (Hrsg.), Jurisdiktionskonflikte bei grenzüberschreitender Kriminalität, 2012, pp. 41 et seq., *L. Hein*, Zuständigkeitskonflikte im internationalen Strafrecht. Ein europäisches Lösungsmodell, 2002, *A. Klip,* Criminal Law in the European Union, 2005, pp. 79 et seq., *O. Lagodny,* Empfiehlt es sich eine europäische Gerichtskompetenz für Strafgewaltkonflikte vorzusehen?, Gutachten im Auftrag des Bundesministeriums der Justiz, 2001, http://www.uni-salzburg.at/strafrecht/lagodny, Vander, *J. Lelieur-Fischer*, Comments on the Green Paper on Conflicts of Jurisdiction and the principle

consensus (: cooperation with Eurojust, Art. 13 FD 2009/948/JHA). This method covers the *settlement* of jurisdictional conflicts, but not their prevention. An alternative model could also be vertically focused, by envisaging a more active role for Eurojust from the very beginning.[49] However, in the absence of definitive and binding jurisdictional rules on forum selection, procedure, and rights of concerned persons, neither model can properly serve the essence of theEU selection to safeguard *ne bis in idem* as a fundamental right. The core prerequisite, therefore, is for European rules to cover all relevant issues and hence set a minimum level of required protection and a clear procedural framework. It is of minor importance whether these imperatives will be implemented mostly horizontally (: through interaction between competent states' authorities) or vertically (: by acknowledging a substantial role to Eurojust and the ECJ)[50] However, other such models already proposed by scholars should also be considered, with an aim to *prevent* jurisdictional conflicts in the first place.[51] Such schemata better convey the essence of the selection made by the European constitutional legislator with the present system of safeguarding *ne bis in idem* in Article 50 CFR. However, even in the framework of such models one can distinguish between more and less flexible ones[52]. For example, the "territoriality principle" could become the rule for jurisdiction assignment and conflict resolution with no exception; when more Member States fulfill the *locus delicti* territoriality criterion, one of them should be selected to exercise jurisdiction by applying *additional* criteria. The latter could be prioritised according to their degree of relevance to the offence (:*locus delicti* in terms of majority/

of ne bis in idem in criminal proceedings, 2006, http://www.mpicc.de/ww/de/pub/organisation/wissenschafts /referat/sachreferate/europarecht.html, *B. Schünemann* (Hrsg/ed.), Ein Programm für die europäische Strafrechtspflege, 2006, *A. Sinn* (Hrsg.), Jurisdiktionkonflikte bei grenzüberschreitender Kriminalität, 2012, pp. 575 et seq., *H. Thomas*, Das Recht auf Einmaligkeit der Strafverfolgung. Vom nationalen zum internationalen ne bis in idem, 2002, *T. Vander Beken/ G. Vermeulen/S. Steverlynck/S. Thomaes*, Finding the best place to prosecute, 2002, *F. Zimmermann*, Strafgewaltkonflikte in der Europäischen Union, 2014, pp. 369 et seq. For a systematical presentation of the different models proposed to date for the prevention and/or settlement of jurisdictional conflicts in criminal matters and their critical evaluation, see esp. *Zimmermann*, Strafgewaltkonflikte in der Europäischen Union, pp. 320 et seq.

49 This is not the case under Art. 13 FD 2009/948/JHA.

50 To the latter, for example, through a judicial review of settlement decisions that may be filed by suspects or by the Member States themselves.

51 See e.g. *B. Schünemann (ed),* A programme for European Criminal Justice, 2006, pp. 257 et seq. as well as *N. Bitzilekis/M. Kaiafa-Gbandi/E. Symeonidou-Kastanidou,* Alternative thoughts on the regulation of trans-national criminal proceedings in the EU, in B. Schünemann (ed), A programme for European Criminal Justice, 2006, p. 493.

52 For rather flexible (and therefore not preferable) proposed models, see *M. Böse/F. Meyer/A. Schneider (eds.)* Conflicts of Jurisdiction in Criminal Matters in the European Union, Vol. II, pp. 381 et seq. and *Zimmermann*, Strafgewaltkonflikte in der Europäischen Union, pp. 369 et seq., 449-451, where the consultation process and the exceptions it entails cannot safeguard the foreseeability by the suspect/defendant of the criminal act and its punishment. *Zimmermann* accepts even a new adjudication of a case when special state interests apply (op. cit, pp. 450-451), while *Böse et al* propose numerous prospects for the transfer of proceedings (op. cit. pp. 443 et seq.).

center of criminal activities or of criminal outcome, defendant's domicile or habitual residence, location of most important pieces of evidence)[53]. Such benchmarks constitute a much more transparent – albeit less flexible – formula when more States fulfill the territoriality criterion.[54] By preventing jurisdictional conflicts before they even arise, such models defend the *ne bis in idem* principle much more effectively. However, conflicts might still occur when more Member States fulfil the set criteria or when they have foreseen exceptions (e.g. by circumventing the territoriality principle) considered essential to protect legitimate defendant interests[55] or to focus on the alleged acts, considering in particular the subsequent local prerequisites for obtaining evidence.[56]

Preserving the Charter's spirit to prevent and/or settle jurisdictional conflicts in the EU affects a vast array of crucial issues on criminal liability. For example, deciding which State is to be given jurisdictional priority or exclusivity within the EU is not irrelevant in safeguarding foreseeability for the suspect/defendant according to the *n.c.n.p.s.l. principle* (Art. 49 § 1 CFR). The fora least associated with the commission of the criminal act itself can hardly justify the required foreseeability of a criminal act as articulated by the n.c.n.p.s.l principle.[57] On the other hand, by turning the collection of evidence into a criterion (even linking it with objective elements such as the act itself),[58] the focus is bigotedly transferred to the prosecuting authority, i.e. to states' sovereignty. Through the Union's constitutional treaties – and especially the Charter on fundamental rights – the EU legislator has made a balanced yet clear choice to the citizens' benefit. Foreseeability is also momentous in upholding the *guilt principle* (Art. 48 § 2); it provides that an error of law is usually not an excuse for a defendant, unless a diligent citizen could not find out what the law is about.[59] A forum with the least possible association with the criminal act does not facilitate citizens to grasp the law, and thus assigning it with jurisdiction to adjudicate and enforce sanctions extensively undermines the functionality of the guilt principle.[60] Nevertheless, stretching the

53 *Bitzilekis/Kaiafa-Gbandi/Symeonidou-Kastanidou,* Alternative thoughts on the regulation of trans-national criminal proceedings in the EU, op. cit. p. 493. Additional criteria to territoriality (e.g. center of criminal activity, etc.) could also be decisive in deciding competent State when multiple associated offences are committed by the same person or when multiple offenders of associated crimes are subject to the jurisdiction of more Member States.

54 In this direction the model of *B. Schünemann (ed),* A programme for European Criminal Justice, 2006, pp. 257 et seq.

55 See in this direction *N. Bitzilekis/M. Kaiafa-Gbandi/E. Symeonidou-Kastanidou,* Alternative thoughts on the regulation of trans-national criminal proceedings in the EU, op. cit. p. 493.

56 See in this direction *B. Schünemann (ed),* A programme for European Criminal Justice, 2006, pp. 258-259.

57 See in this respect esp. *Zimmermann*, Strafgewaltkonflikte in der Europäischen Union, pp. 228 et seq, *D. Helenius*, Straffrättslig jurisdiktion 2014, pp. 163 et seq., cf. *Asp,* The procedural criminal law cooperation of the EU, 155-156, pp. 156 et seq.

58 In this direction *B. Schünemann (ed),* A programme for European Criminal Justice, 2006, pp. 258-259.

59 See *J. Blomsa*, Mens rea and defences in European Criminal Law, 2012, pp. 464 et seq.

60 See the interesting proposal of *M. Böse/F. Meyer/A. Schneider*, Conflicts of jurisdiction in Criminal Matters in the European Union, Vol. II, pp. 381-383, who formulate the following general rule: "Art. 1 para 2: Criminal liability under the law of a Member State is subject to

territoriality principle on the other hand beyond its notional confines (: *locus delicti* of violation and outcome) results in granting jurisdiction to States that possibly lack anygenuine link to a case. Such an adaptation of the territoriality principle is unfitting to serve both the criminal act foreseeability and the guilt principle.[61]

EU's choice to safeguard *ne bis in idem* as a fundamental right and integrate it within the framework of rights and principles enshrined in the Charter affects other critical questions. Should prevention of jurisdictional conflicts also cover the investigative phase by excluding parallel investigations? What should be the main characteristics of a procedure that prevents and/or settles jurisdictional conflicts? Should the right to intervene be recognised to the suspect or even to victim? Should settlement decisions be judicially reviewable? One could argue that parallel investigations are neither sensible nor necessary in a common area of freedom, security and justice under gradual yet unremitting enhancement.[62] The dynamics of the current regime of judicial cooperation in criminal matters render this choice understandable. Exclusive jurisdiction models (even including the investigative stage) naturally require a composed and comprehensive regulative framework and a provision for transferring proceedings to another Member State, if at a later point in time investigations push to such a direction.[63] However, such provisions need to safeguard suspects' rights, and should thus foresee that any such transfer does not occur after the conclusion of the investigation stage.[64] On the other hand, allowing suspects to safeguard their rights makes sense, especially where models leave room for a decision upon different or exceptional criteria.[65] The same cannot hold as far as the victim is concerned. Settling or preventing conflicts of jurisdiction is focusing on a criminal procedure whose subject is not the victim but the suspect. The victim's interests may be affected by the procedure, but the question of parallel or exclusive jurisdiction cannot be determined by them.[66] Otherwise, a lopsidedpriority is given to prosecuting authorities, given that the victim's interests are normally situated on the same side. To enable them to safeguard their effective participation in the proceedings, victims could be allowed to challenge such decisions when exceptional criteria that serve the interests of the suspect/defendant apply. Arguments re-

the condition that the person is aware (intent) or should be aware (negligence) of the circumstances that make that member State's criminal law applicable".

61 See the vague notion of "affecting" the territory of a state, used in certain legal orders.

62 See model in *B. Schünemann (ed),* A programme for European Criminal Justice, 2006, pp. 257 et seq.

63 See, however, the wide possibilities acknowledged for the transference of proceedings in the proposal of *Böse/Meyer/Schneider*, Conflicts of jurisdiction in Criminal Matters in the European Union, Vol. II, pp. 411 et seq. It should be stressed, though, that the wider the transference possibility, the flimsier the safeguarding of the criminal act foreseeability.

64 So *B. Schünemann (ed),* A programme for European Criminal Justice, 2006, pp. 258-259 et seq. Transference of proceedings should also be exceptionally possible upon request of the defendant for reasons serving his/her interests.

65 See esp.Art. 12, 13 *Böse*, in Böse/Meyer/A. Schneider (eds.), Conflicts of jurisdiction in Criminal Matters in the European Union, Vol. II, pp. 444-445.

66 See thorough argumentation in *Zimmermann*, Strafgewaltkonflikte in der Europäischen Union, pp. 206-208.

lated to the essence of the principal mindset to integrate *ne bis in idem* as a fundamental right in the Charter's framework are also helpful when deciding upon the issue of allowing the suspect to exercise a right to judicial review by the ECJ when the Member State argues for its right to prosecute.[67] Both sides should be heard during a procedure that attempts to weigh their conflicting interests and finalise a State's investigative and adjudicative competence.

## *7. Conclusion*

The preceding analysis should have clarified the following points:

- Multiple prosecutions for the same act, although supporting unhampered law enforcement, are no longer tolerable within a unified area of sovereign states that are members of a supranational organisation. The concept of a common area of freedom, security and justice inescapably leads to a single prosecution and actually to a single investigation for the same act. Thus, preventing and not simply settling jurisdictional conflicts in criminal matters should be a Union objective.
- In defining the proper jurisdiction to prosecute and adjudicate a criminal case within the EU, the Union legislator is bound by the principles and rights safeguarded in EU Treaties and the Charter of Fundamental Rights. These legal instruments endorse the territoriality principle as defined in EU law with very slim exceptions, and especially considering the suspects' interests within an unambiguous procedure, recognising them the right to be heard (i.e. pleading for an exception that shields their interests), and envisaging a judicial review for relevant decisions. Of course, such a model implies that the supranational organization's interests to facilitate judicial cooperation in criminal matters should not gain the upper hand by substituting states' sovereignty in defining jurisdiction and settling corresponding conflicts. The European Sympoliteia, as already mentioned, is a Union of sovereign states and their peoples, required by its constitutional treaties, even in the field of law enforcement, to express them both alike. Otherwise, the EU can no longer claim to place the individual at the heart of its activities – as it communicates in the Preamble of its Charter – nor safeguard the core of the fundamental right enshrined in the *nebis in idem* principle.

In other words, law enforcement in general and – to a significantly higher degree – criminal law enforcement in particular must always stand in equilibrium with the respect for fundamental rights' safeguards. For it is only by serving the citizen that law itself – and, therefore, also its enforcement – is truly linked to the genuine notion of justice.

67 See fn 66.