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Unity of Intent Effect on Sentencing: An EU Dimension to *ne bis in idem* and Proportionality?

Abstract

The European Union aims to develop a well-balanced, mature European criminal law, where free movement of persons as well as free movementof judgments is being pursued in order to install a European Area of Freedom, Security and Justice, and to obtain an effective cooperation in criminal matters to tackle cross-border crime. This goal can only be achieved when the Member States of the European Union have trust in each other's legal systems ('mutual trust'). One of the aspects of this mutual trust is reflected in the so-called mutual recognition principle, according to which the equivalence of foreign and national convictions when sentencing is being aspired by the Member States. This recognition of foreign final criminal judgments by a national criminal court can be, at least theoretically, both in advantage and disadvantage of a defendant (I). However, a closer look on the Belgian legal practice, by way of example, shows that it apparently is not necessary for Member States to trust each other in all situations thinkable, for example when several (cross-border) offences are committed with a premeditated intent (II). The question arises whether this distrust, even if it is legally allowed to completely undermine the freedom of movement and the mutual recognition principle, does not violate some of the fundamental human rights and freedoms of a defendant as provided for in several European legal instruments (III).

I. Freedom of movement when sentencing: a (dis)advantage for the defendant?

The freedom of movement of persons is, together with the other three freedoms of movement, one of the most fundamental principles of the EU internal market. Since the introduction of the mutual recognition principle as the fundamental basis of judicial cooperation in criminal matters, the free movement of people goes hand in hand with the free movement of criminal judicial decisions and judgments (A). Theoretical-

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ly, several situations can be thought of wherein the application of the mutual recognition principle is either in disadvantage (B) or in advantage (C) of the defendant when a sentence is being imposed.

A. The coming into being of a fifth freedom of movement: The free movement of judgments

The idea of the creation of the EU as an Area of Freedom, Security and Justice is *inter alia* based upon two very important pillars, more specifically the four freedoms of movement and the mutual recognition principle. One of the most fundamental freedoms of movement is the right of every European citizen to move freely between the EU Member States. This so-called freedom of movement of people has, together with the free movement of goods, capital and services, been installed by the 1957 Treaty of Rome (Treaty establishing the European Economic Community) to cover the free movement of workers and has since then changed in meaning.[1] Since the 1992 Treaty of Maastricht, the freedom of movement implies that every citizen of the EU has the right to move and reside freely within the European territory. This has been further elaborated by the 2004 Citizens' Rights Directive[2].

In addition to the free movement of persons, the EU has developed the mutual recognition principle. Mutual recognition was originally introduced as a principle within the internal market law, promoting the four freedoms of movement.[3] Since the Tampere European Council in 1999, the mutual recognition principle was launched as the fundamental base for judicial cooperation in criminal (and civil) matters and for the creation of a European Area of Freedom, Security and Justice.[4] Generally, it means that every Member State is required to treat decisions of another Member State equivalent to national decisions and thus to mutually recognize each other's decisions.[5]

1 For more information, see Fact Sheet on the European Union "Free movement of persons", http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_4.1.3.html.

2 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ 2004 L 158/77.

3 *C. Janssens*, Het beginsel van wederzijdse erkenning in de interne markt van de EU en de justitiële strafrechtelijke samenwerking in de EU. Een analyse vanuit een beleidsoverschrijdende benadering, RW, 2011-2012, p. 1830 et seq.; *W. De Bondt & G. Vermeulen*, First things first: characterising mutual recognition in criminal matters, in: M. Cools (Ed.), EU Criminal Justice, Financial & Economic Crime: New Perspectives, 2011, Maklu, p. 17 et seq.; *Team Bulgaria*, EU legislation & national legislative approach on taking account of convictions handed down in Member States in the course of new criminal proceedings, http://www.ejtn.eu/Documents/Team%20Bulgaria%20semi%20final%20A.pdf, p. 1 et seq.

4 *Janssens*, fn. 3, p. 1832; *De Bondt & Vermeulen*, fn. 3, p. 17 et seq.; *I. Armada & A. Weyembergh*, The mutual recognition principle and EU criminal law, in: M. Fletcher, E. Herlin-Karnell & C. Matera (Eds.), The European Union as an Area of Freedom, Security and Justice, 2017, Routledge, p. 111 et seq.

5 *Janssens*, fn. 3, p. 1830 et seq.

In the context of criminal cooperation, mutual recognition must be achieved in all phases of criminal procedure and, therefore, is applied on two different levels. First of all, final criminal judgments must be taken into account in a new criminal proceeding against the same defendant. This means that, *when sentencing*, a national judge has to take into account previous foreign judgments the same way he takes into account earlier national judgments.[6] Secondly, mutual recognition implies that the validity of foreign decisions must be fully accepted by a Member State of the European Union *when executing*.[7] Each Member State is thus obliged to execute foreign judicial decisions as if they were national judicial decisions. The several legal instruments focusing on this second level, have already widely been discussed.[8] This article will, therefore, only focus on the application of the mutual recognition principle when sentencing.

In sum, it can be said that the mutual recognition principle has led to a sort of fifth 'free movement of judicial decisions and judgments'. This free movement of judgments can be found in Framework Decision 2008/675/JHA. Its Recital (6) states that this Framework Decision aims to enable the attachment of consequences to a previous conviction handed down in one Member State in the course of new criminal proceedings in another Member State to the extent that such consequences are also attached to previous national convictions in that other Member State. Previous foreign convictions must, therefore, be treated equivalent to previous national convictions. In this context, Article 3(1) of the Framework Decision reads as follows:

> *Each Member State shall ensure that in the course of criminal proceedings against a person, previous convictions handed down against the same person for different facts in other Member States, in respect of which information has been obtained under applicable instruments on mutual legal assistance or on the exchange of information extracted from criminal records, are taken into account to the extent previous national convictions are taken into account, and that equivalent legal effects are attached to them as to previous national convictions, in accordance with national law.*

As a consequence of the combination of the principle of free movement of persons and the mutual recognition principle, each criminal final judgment handed down in a

6 Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings, which is applicable in the pre-trial stage, the trial stage and the executional stage, OJ 2008 L 220/32.

7 *E.g.*Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ 2002 L 190/1; Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties, OJ 2005 L 76/16 andCouncil Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, OJ 2008 L 327/27.

8 See for example*De Bondt & Vermeulen*, fn. 3; W. Van Ballegooij & P. Bard, Mutual recognition and individual rights. Did the Court get it right?, New Journal of European Criminal Law, 2016, p. 439 et seq.

Member State of the EU needs to be taken into account in a new criminal proceeding against the same defendant.

It is thinkable that this recognition of each other's convictions can have both negative (*e.g.* in case a previously sentenced person commits a *new* offence (See Chapter I, B) and positive (*e.g.*in case a previously sentenced person is being prosecuted in another Member State for the *same* offence (See Chapter I, C)) implications for European citizens. On the one hand, it must be guaranteed that the freedom of movement cannot be exploited by European citizens in order to escape the consequences of their criminal past (namely by trying to avoid the possible application of the aggravating circumstance of persistence).[9] On the other hand, in order to be able to move freely, persons need to be sure that final judicial decisions from one Member State are automatically recognised by other Member States, so they can trust they will not be prosecuted a second time by another Member State for the already punished criminal facts.[10]

B. Invoking a new criminal proceeding for a new offence – An incontestable negative consequence of mutual recognition

Persistence (also called 'recidivism') is in many Member States an aggravating circumstance, giving a judge under certain conditions the possibility or even the obligation to impose a penalty, that is more severe in comparison with the penalty that is legally provided, in case an already sentenced person (the 'repeat offender') commits a new offence. Whether or not persistence is considered to be an aggravating factor by a Member State is not the subject of European harmonisation and therefore depends on the view of that Member State on the punishment of persistence.[11]

Assuming that the approach of the Recidivist Premium School is being followed[12], persistence (meaning that the offender already has a criminal history and already has been convicted once or multiple times before) will fictitiously increase the seriousness

9 *E. Smith*, Running before we can walk? Mutual recognition at the expense of fair trials in Europe's area of freedom, justice and security, New Journal of European Criminal Law, 2013, p. 82 et seq.; *European Commission*, Report from the Commission to the European Parliament and the Council on the implementation of Council Framework Decision 2009/315/JHA of 26 February 2009 on the organisation and content of the exchange of information extracted from criminal record between Member States, https://ec.europa.eu/info/sites/info/files/ecris_implementation_report_jan2016_en.pdf, p. 2.

10 *M. Borgers*, Mutual Recognition and the European Court of Justice: The Meaning of Consistent Interpretation and Autonomous and Uniform Interpretation of Union Law for the Development of the Principle of Mutual Recognition in Criminal Matters, European Journal of Crime, Criminal Law and Criminal Justice, 2010, p. 99 et seq.; *Smith*, fn. 9, p. 83.

11 In legal literature, several approaches are being distincted. According to the Recidivist Premium School, repeat offenders must be punished more severely than first offenders. Other schools, such as the Exclusionary School and the First Offender School, do not agree with this vision and have another opinion concerning the impact recidivism should have on sentencing. For more information, see *A. Ashworth*, Sentencing and Criminal Justice, 2015, Cambridge University Press, p. 207 et seq.

12 *Supra* fn. 11.

of a newly committed act and, therefore, the severity of the sentence for this offence. The criminal court may thus extend the sentence beyond its normal length or heighth. Mostly, this possibility or obligation will be subject to a few conditions regarding the seriousness or relevance of the previous offences and the elapsed time since the last conviction(s).[13] The conditions to take into account a previous conviction have not been the subject of any harmonisation any more than the punishment of persistence itself and thus vary from Member State to Member State.

As a consequence of the free movement of persons and the mutual recognition principle and in accordance with Article 3(1) of the Framework Decision 2008/675/JHA, the few legal contributions concerning mutual recognition when sentencing agree that persistence does not only negatively affect the sentence in case of existence of previous national convictions.[14] It has been easily accepted that the aggravating factor of persistence also applies when a national criminal court is being confronted with a previous *foreign* conviction. This means that due to the mutual recognition principle and the correspondingly acception of foreign decisions, it is impossible for any European citizen to try to escape their criminal past by moving to another Member State of the EU, therefore, having an incontestable negative consequence for the defendant[15]. After all, when a defendant has been convicted repeatedly, it does not matter which Member State(s) of the EU has (have) imposed the sentence. When a criminal court has to punish a persistent offender, he has to take into account both national and foreign (European) previous sentences in order to assess whether the conditions of persistence have been met. Moving to another Member State in order to avoid being tried as a repeat offender will, thus, be without any result.

Of course, the taking into account of foreign decisions can also affect the defendant negatively in other situations than when deciding on an appropriate sentence. After all, according to Recital(7) of Framework Direction 2008/675/JHA, the principle of equivalence of foreign and national sentences must be applied at the pre-trial stage of criminal proceedings, at the trial stage and at the time of execution.[16] For example, some judicial favors, such as suspension of the sentence, will not always be possible for a repeat offender. Since this article only aims to focus on the effect of the free movement of persons and judgments when imposing a sanction, the author will not go any further into these consequences.

13 *Ashworth*, fn. 11, p. 205 et seq.; *E.g.* Articles 54 – 56 of the Belgian Criminal Code.
14 *De Bondt & Vermeulen*, fn. 3; *P. Tersago*, Het belang van gerechtelijke antecedenten in het straf(proces)recht, Nullum Crimen, 2011, p. 18 et seq.
15 In comparison with the situation wherein only previous national convictions would be taken into account.
16 *Supra* fn. 6.

C. Invoking a new criminal proceeding for the same offence – A theoretically positive consequence of mutual recognition?

However, the mutual recognition principle does not only seem to have negative consequences for criminals. After all, the Tampere European Council, which made the mutual recognition principle generally applicable, also stated that explicit attention must go to working towards an improvement of the legal position of a defendant, or at least towards avoiding a legal disadvantage for the defendant when cooperating in criminal matters. Although politically it is less appealing to treat a defendant in a positive manner, the mutual recognition principle and the freedom of movement of persons may, thus, not negatively impact the European citizens compared to national residents. It is undisputed that the basic human rights and the individual guarantees, under which the *ne bis in idem*-principle, must at all times be respected by every Member State.[17]

The *ne bis in idem*-principle, also called the prohibition of double jeopardy, basically implies that it is impossible to prosecute, judge or convict a defendant twice or multiple times for the same offence. If the *ne bis in idem*-principle would only apply at the national level and not at EU level, this would mean that a defendant, who already has been convicted in one Member State for an offence, would possibly face another prosecution for the same offence by another territorially competent Member State when exercising his right of free movement. Luckily though, the *ne bis in idem*-principle recently has been implemented in European legal instruments.[18] In combination with the *ne bis in idem*-principle, the mutual recognition of foreign criminal judgments seems to have as an effect, that prosecution for an already punished offence in another Member State becomes impossible, which is a positive consequence for the defendant who has exercised his right of free movement. After all, the right of free movement would be undermined if a European citizen would possibly face multipe prosecutions for the same offence.[19]

Contrary to the persistent offender, who is being faced with a new criminal proceeding due to committing a completely *new* offence while already having incurred a conviction for a previous offence, the mutual recognition principle will in this context be applied when a defendant is being faced with a new criminal proceeding for the *same* offence. However, there is an obvious lack of consensus regarding the interpretation of the *ne bis in idem*-principle, partially due to the fact that the principle is incorporated in various legal instruments.[20] A distinction can be made between the following situations:

- either the defendant is being prosecuted in a Member State for the exact *same fact* for which he already has been punished in another Member State (a);

17 *De Bondt & Vermeulen*, fn. 3, p. 27; *Armada & Weyemberg*, fn. 4, p. 116.
18 *Infra* nr. 34.
19 *M. Wasmeier*, The principle of ne bis in idem, Revue International de Droit Pénal, 2006, p. 124.
20 *Infra* nr. 34; *Armada& Weyemberg*, fn. 4, p. 114, p. 117.

- either the defendant is being prosecuted in a Member State for a fact that differs from other (similar or different) facts for which he already has been punished in another Member State, but that is committed with the same unity of intent, thus belonging to the *same series of facts* as the already previously sentenced facts (b).

However, a closer look at these situations will show that the positive consequences of the mutual recognition of criminal judgments for a defendant are potentially merely theoretical.

(a) Prohibition of prosecution for the same fact as a positive consequence of mutual recognition?

Possibly facing multiple prosecutions in several countries for the same offence would discourage European citizens to travel through Europe. However, as regards to the *exact same fact*, it is inevitable for a Member State and its criminal courts to strictly apply the *ne bis in idem*-principle in order for the freedom of movement to be effective since its implementation in the different European instruments.

It is undisputed that the *ne bis in idem*-principle applies to all situations wherein a criminal is being prosecuted by several countries for the same committed act. It is not even relevant how the criminal act is being qualified in the different countries. Multiple convictions for the same fact, even if that fact contributes to a different crime within the several countries (legal qualification), conflicts inherently with the prohibition of double jeopardy.[21] Criminal cooperation between Member States to tackle cross-border crime and the mutual recognition principle could never limit the application of this European *ne bis in idem*-principle.[22]

However, this positive consequence of not facing the risk of being prosecuted multiple times for the same offence by different Member States, is only a theoretical consequence of the mutual recognition principle. After all, according to Framework Decision 2008/675/JHA, the obligation to take into account previous foreign convictions is not unconditional.[23] For example, Article 3(1) expressly states that mutual recognition only applies on previous convictions *for different facts*, meaning that prosecution for *the exact same fact* is not a case of mutual recognition, but merely a consequence of the application of the *ne bis in idem*-principle.

(b) Prohibition of prosecution for the same series of facts as a positive consequence of mutual recognition?

Whereas the application of the *ne bis in idem*- (and theoretically also the mutual recognition) principle on prosecution for the exact same facts by multiple Member States is

21 *Infra* nrs. 36 – 37.
22 *De Bondt & Vermeulen*, fn. 3, p. 27.
23 *Team Bulgaria*, fn. 3, p. 3 et seq.

incontestable, less unanimity seems to exist on the application of both principles when a person, a so-called 'multiple offender', is being sentenced for a fact that has been committed with the same unity of intent as other facts for which he already has been convicted, thus together forming one series of facts.

The latter case can neither be considered as persistence nor as prosecution for the exact same fact.

The difference between a persistent offender and a multiple offender relates to the time frame wherein the different offences are committed. Persistence refers to the situation where the defendant has committed a new offence after already being definitively convicted for an earlier committed offence (of the same or of a different kind). On the contrary, a multiple offender commits several offences with a premeditated intent before a conviction is issued for one of them. These offences can either be tried in one criminal proceeding or multiple criminal proceedings. Only the latter hypothesis is relevant for this article, since in the first, the judge will not be confronted with a previous (foreign) conviction for one of the offences.

According to the strict interpretation of the *ne bis in idem*-principle, this principle only applies when a perpetrator is being prosecuted and convicted for the exact same fact (same act, same place, same time) for which he has been convicted before. Starting a new criminal proceeding for a different fact (of the same or different kind, but committed at another moment and possibly in another place), merely belonging to the same series of facts as the first offence, might possibly not be interpreted as '*idem*'.[24] The difference between the first and the latter case is that the first case concerns one and the same fact and the latter relates to multiple committed facts that are linked to each other since they are committed with the same unity of intent.

Since the application of the *ne bis in idem*-principle seems unsure and since no unanimity exists on this matter, the question arises how the previously incurred foreign convictions of a multiple offender have to be treated by a national court of a Member State. According to the Tampere European Council, the mutual recognition principle should also have positive consequences for a defendant. Assuming that this principle is carried out across the board, the previously foreign final judgments of a multiple offender should also be taken into account in a new criminal proceeding regarding other facts belonging to the same series of facts as the already punished ones. Whereas the application of the mutual recognition principle on persistence has been abundantly discussed in legal literature, the subject of mutual recognition of foreign convictions in case of unity of intent has not been researched yet.

Although a multiple offender is not the same as a persistent offender or as an offender who has only committed a single offence, politically it seems noticeably less appealing and less urgent to apply the mutual recognition principle in this situation, making the possible positive consequence thereof potentially theoretical. The further course of this article will, therefore, only focus on the mutual recognition of final

24 *Infra* nrs. 36 – 37.

criminal judgments of multiple offenders who committed several offences with a premeditated intent and the possible effect thereof on the sentence.

II. The fundamental gap in the system: mutual trust or mutual distrust?

As mentioned before, the mutual recognition principle must generally be respected on two different levels, namely (i) when sentencing and (ii) when executing foreign decisions, thus creating a free movement of judicial decisions and judgments.[25] In the context of sentencing, it must be highlighted that, although theoretically neutral, the mutual recognition principle seemingly only applies when in disadvantage of the defendant (A). Due to the acceptance of legal exceptions on the free movement of judgments, positive consequences of the mutual recognition principle for a defendant are merely theoretical, especiallyregarding the possible effect on the sentence of previous foreign convictions of a multiple offender for facts committed with unity of intent (B). A clear explanation or justification for this deviation, however, seems to be missing (C).

A. Council Framework Decision 2008/675/JHA -The gap in the application of the mutual recognition principle in new criminal proceedings

Since the Tampere European Council of 1999, the mutual recognition principle has been put forward as the cornerstone of judicial cooperation in criminal matters. However, it at least seems that the mutual recognition principle is only being applied partially and especially when implying negative consequences for a defendant. A closer look to the European provisions shows that some situations are rather being characterized by mutual distrust than by mutual trust. For example, with the adoption of the Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the EU in the course of new criminal proceedings, the Council of the EU has clearly opted for a rather restricted application of the mutual recognition principle. Whereas Article 3(1) stipulates that each Member State must take into account previous foreign convictions to the same extent as previous national convictions are taken into account, this obligation is immediately mitigated by Article 3(5), § 1 as follows:

> *If the offence for which the new proceedings being conducted was committed before the previous conviction had been handed down or fully executed, paragraphs 1 and 2 shall not have the effect of requiring Member States to apply their national rules on imposing sentences, where the application of those rules to foreign convictions would limit the judge in imposing a sentence in the new proceedings.*

25 *Supra* nrs. 5-6.

The combination of the first and fifth paragraph has as a result that the mutual recognition principle is only strictly applied when the recognition of the previous foreign conviction implies an undeniably legal disadvantage for the defendant, since (i) a judge is not obliged to take into account the criminal record of the defendant when this would limit the judge in imposing a sentence by leading to a more lenient penalty, thus (ii) only obliging national judges to take into account a criminal record when this would have an aggravating effect on the penalty. When the recognition of a foreign conviction would have positive consequences for the defendant, the taking into account of the conviction is optional for each Member State, except for when the *ne bis in idem*-principle[26] applies.

A specific example of this discrepancy can be found in the Belgian implementation of Article 3 of the Framework Decision 2008/675/JHA.

B. (The lack of) a unity of intent effect on sentencing in Belgium

Generally, Belgian judges are principally required to take into account the criminal history of a suspect, irrespective of whether this would be in his advantage or disadvantage. However, in compliance with Article 3(5) Framework Decision 2008/675/JHA, foreign previous convictions (b) are not always taken into account the same way national previous convictions (a) are taken into account. The question arises whether this doesn't contradict the very essence of the mutual recognition principle and to what extent the acceptance of legal exceptions to the principle completely undermines the idea behind it. A justification for the legally provided exceptions seems necessary.

(a) The existence of unity of intent in a merely national procedure

In Belgium, previous convictions are usually taken into account in a new criminal procedure. For example, in case of recidivism, the judge will impose a more severe penalty on the defendant than in case of the defendant who would not have had a criminal record yet.[27] Also some other judicial favors, such as suspension of the sentence, will not always be possible when the defendant already has a criminal history.[28] However, a defendant can also benefit from the principle that a previous conviction is taken into account.

When a suspect is being tried in the same criminal procedure for multiple committed facts (so-called concurring offences[29]), the imposed penalty will not always be the sum of the several penalties foreseen for these concurring offences. After all, when the several facts are connected through unity of intent, a 'discount' will be granted and they

26 *Supra* nrs. 14-15.
27 Articles 54 – 56 of the Belgian Criminal Code.
28 Article 590 of the Belgian Code of Criminal Procedure.
29 Concurring offences are offences that are committed by the defendant before a conviction is issued for any of them. See also *Team Bulgaria*, fn. 3, p. 12.

will be punished less severe than when the same facts would have been committed without premeditated intent.

When a defendant is being tried for multiple isolated facts, committed without any unity of intent, the judge can impose all penalties foreseen for these criminal facts, although he has to take into account a legally defined upper limit.[30]

On the contrary, if the different criminal acts are characterized by a unity of intent on the part of the defendant, only the most severe penalty can be imposed.[31] There is no possibility to add up the different penalties, thus resulting in a more lenient penalty than when the concurring offences are isolated facts. This does not only apply when the concurring offences are being prosecuted altogether in the same criminal procedure, but this also applies when the several offences are being tried in several criminal proceedings and thus when, in a new criminal proceeding, some of the offences have already been the subject of a final judgment. In the latter case, the judge in the new criminal procedure has to take into account the earlier imposed sanctions when sentencing, which gives him the opportunity to simply refer to these sanctions without having to impose an additional penalty. However, if the judge decides that the earlier punishment is inadequate to punish the whole series of facts, he may impose an additional penalty, with the only exception being that the whole of the imposed penalties may not exceed the maximum of the most severe penalty foreseen for the concurring offences. These rules are, of course, only applicable when the criminal acts judged in the new criminal proceeding are committed before the other acts were being punished by a final judgment, otherwise the rules of recidivism would apply.[32] After all, unity of intent between concurring offences can only exist when the offences have been committed before the defendant has already been convicted for one or more of the offences.[33]

It is accepted that this leniency is based on the *ne bis in idem*- and proportionality principle.

After all, as a consequence of article 65 of the Belgian Criminal Code, concurring offences are fictitiously treated as one offence, solely because the different criminal facts are connected through unity of intent on the part of the defendant. The *ne bis in idem*-principle thus prohibits judges to punish the defendant multiple times in case of concurring offences that are being tried in multipe criminal proceedings.[34]

The principle of proportionality also requires the judge to take into account earlier imposed sanctions. When several offences are committed with the same unity of intent

30 Articles 58 – 62 of the Belgian Criminal Code.
31 Article 65 of the Belgian Criminal Code.
32 *Supra* nr. 17.
33 *Supra* fn. 30.
34 *C. De Roy*, Drugs, ne bis in idem en art. 65, tweede lid Sw., noot onder HvC 17 september 2002, RW, 2002-2003, p. 181 et seq.; *T. Decaigny*, Het laattijdig vaststellen van een voortgezet misdrijf: feit of fictie?, T.Strafr., 2006, p. 338; *Tersago*, fn. 14, p. 11 et seq.; *C. Van Deuren*, Eén plus één is niet altijd twee. De regels van de samenloop besproken, vergeleken en empirisch onderzocht, Nullum Crimen, 2012, p. 366 et seq.

in mind, it would be disproportionate to not take into account this unity of intent and to automatically add up all the possible penalties for the different offences. The main goal of these rules, therefore, seems to be avoiding a disproportionate sentence.[35] Simply adding up the different penalties foreseen for each offence, would violate the proportionality principle, since less serious offences would be placed on the same level as much more serious offences.[36] Even article 65 of the Belgian Criminal Code itself expressly states that the judge may not impose a new penalty when the previous imposed penalties are already considered to be sufficient, thus referring explicitly to the proportionality principle in case the concurring offences are the subject of different criminal proceedings. On top of that, it would be disproportionate to punish a defendant more severely than in case the offences would all be judged in the same criminal procedure.

(b) The ignoring of the existence of unity of intent in case of cross-border concurring offences

However, the above-mentioned leniency ceases to exist when there are cross-border elements in the criminal procedure (*e.g.* when the judge is confronted with cross-border concurring offences or when several Member States are territorial competent to press charges), since Belgium has used the opportunity given to them by Article 3(5) FrameworkDecision 2008/675/JHA and has made reservations to the above mentioned granted leniency in case judges have to deal with cross-border concurring offences for which the defendant already has partially been convicted in another Member State.

For example, Article 99 of the Belgian Criminal Code generally determines that judgments rendered by the criminal courts of other Member States are taken into account in the same manner national judgments are taken into account and that these foreign judgments will have the same legal consequences as national judgments. Immediately, the second paragraph of this article makes a reservation to this rule by stating that this is not applicable when article 65, paragraph 2 (concurring offences connected through unity of intent of which some of them already have been the subject of a final judgment) applies. After all, when article 65, paragraph 2 of the Belgian Criminal Code is applicable, it is prohibited for the judge to impose an additional penalty that exceeds, together with the earlier imposed penalty, the maximum of the most severe penalty, thus "limiting the judge in imposing a sentence" (Article 3(5) Framework Direction 2008/675/JHA). In the latter case, the judge can ignore the existence of the previous foreign conviction and therefore autonomously decide on a proper punishment for the offences at issue.

35 *Van Deuren*, fn. 34, p. 376; *J.M. Ten Voorde*, Meerdaadse samenloop in het strafrecht. Een onderzoek naar doel, grondslag, karakter en functie van de wettelijke regeling van meerdaadse samenloop, 2013, https://www.wodc.nl/binaries/2260-volledige-tekst_tcm28-72729.pdf, p. 111, 131, 205.

36 *Ashworth*, fn. 11, p. 277.

This exception is not only in line with Article 3(5) Framework Decision 2008/675/JHA, but also with the once accepted general territoriality principle, according to which a judge can only take into account national previous convictions[37] and according to which there can be no unity of intent between cross-border concurring offences.[38] However, since 1999, the mutual recognition principle, which is contrary to and forms a clear break with the national territoriality principle, is generally applicable when Member States cooperate in criminal (and civil) matters.[39] The question, therefore, arises whether Article 3(5) Framework Decision 2008/675/JHA and Article 99(2) Belgian Criminal Code are a justifiable refusal ground for mutual recognition.

C. The search for a possible justification of the refusal ground of Article 3(5) Framework Decision 2008/675/JHA

According to the mutual recognition principle, every Member State needs to attach equivalent legal effects to foreign judicial decisions and judgments as to national judicial decisions and judgments as proof of the mutual trust in each other's legal systems.

In order to be effective, many authors emphasise that it is necessary to accept few or no limitations to this principle in order to not undermine its very essence.[40] After all, every exception would affect the efficiency, the meaning and the main targets of mutual recognition and, therefore, the effective exercise of the freedom of movement. With every legally provided exception, the challenge is to find the right balance between enhancing cooperation in criminal matters to tackle cross-border crime and not sacrificing and even enhancing the judicial protection of the basic human rights and freedoms of the defendant.[41] After all, the Tampere European Council specifically mentioned that legal disadvantages must be avoided for the defendant.[42]

Although the discounting of a previous foreign conviction in case of cross-border concurring offences is a legally provided exception on the mutual recognition principle, the question still arises whether this exception can be justified in the light of the *ne bis in idem*-principle, which can never be limited by the mutual recognition principle and its exceptions[43], and other fundamental human procedural rights and freedoms of the defendant. After all, exceptions on the mutual recognition principle in order to be

37 *Decaigny*, fn. 34, p. 228.
38 *De Roy*, fn. 34, p. 180; *P. Hoet*, Veroordelingen uit een andere EU-lidstaat in Belgische strafrechtelijke procedures – Het kaderbesluit 2008/675/JBZ van de Raad van de Europese Unie van 24 juli 2008, RW, 2010-2011, p. 1076 et seq.; *Van Deuren*, fn. 34, p. 367.
39 *Armada & Weyemberg*, fn. 4, p. 115.
40 *Janssens*, fn. 3, p. 1841; *Borgers*, fn. 10, p. 99;*De Bondt & Vermeulen*, fn. 3, p. 27;*Armada & Weyemberg*, fn. 4, p. 119.
41 *G. Vernimmen-Van Tiggelen & L. Surano*, Introduction, in: G. Vernimmen-Van Tiggelen, L. Surano & A. Weyembergh (Eds.), The future of mutual recognition in criminal matters in the European Union, 2009, Éditions de l'Université de Bruxelles, p. 12 et seq.; *Smith*, fn. 9, p. 98; *Armada & Weyemberg*, fn. 4, p. 116.
42 *Supra* nr. 11.
43 *Supra* nr. 14.

able to tackle cross-border crime in the most efficient manner can only be justified when compatible with the basic human rights.

However, neither the European preparatory legal documents nor the Belgian preparatory legal documents focus on the balance between the exceptions on the mutual recognition principle and the fundamental human rights and freedoms.

The original European preparatory documents never even mentioned the exception on the mutual recognition principle in case mutual recognition would be in the advantage of the defendant. This exception wasonly introduced later in the legislative procedure without any discussion regarding a possible violation of the human rights of the defendant. According to the preamble, Framework Decision 2008/675/JHA respects the fundamental rights of the Charter of Fundamental Rights of the European Union, but no link is made between this statement and the exception of Article 3(5). The reason that 'the taking into account of a foreign conviction would limit the judge in imposing in sentence' cannot justify the exception either. After all, in a merely national procedure, the judge would also be limited in imposing a sentence. Since one of the main goals of mutual recognition is to treat European citizens equally and their previous convictions, there seems to be no explanation available for why different treatment is justified in cases of cross-border concurring offences.

In Belgium, the explanatory memorandum merely refers to the practical difficulties that would exist when taking into account previous foreign convictions in case of cross-border concurring offences, such as the difficulty to decide which is the most severe sentence.[44] Nowhere does it refer to the ratio between article 99 bis and the fundamental rights and freedoms. According to the author, however, practical difficulties can possibly be settled at the European level and cannot justify any refusal ground, since limitations on the mutual recognition principle must not easily be accepted.[45] On top of that, Belgium considers itself territorially competent to prosecute a criminal for facts committed a) outside the Belgian territory but b) with the same unity of intent as facts committed within the Belgian territory, due to the localisation theory of indivisibility. The possible argument that prosecution is not possible for crimes committed in another Member State and convictions for these facts may thus not have an influence on the prosecution for the facts committed in Belgium, is therefore according to the author without subject.[46]

For now, the legally provided exception on the mutual recognition principle of not taking into account an earlier foreign conviction when the defendant would benefit from it, only seems to have been a political choice of the EU. Whether this practice of disregarding is justifiable in the light of thes basis (procedural) human rights and freedoms of the defendant must, therefore, still be the subject of legal research.

44 Preparatory works of the Belgian Parliament, *Parl. St.* Kamer, 2013/2014, 53-3149, p. 58 et seq.
45 *Supra* nr. 29.
46 *De Roy*, fn. 34, p. 182.

Thereby a distinction must be made between the situation wherein foreign convictions are not taken into account whilst national convictions are being taken into account and the situation wherein national convictions neither are being taken into account. After all, not every Member State provides for more lenient penaltieswhen concurring offences are being tried in multiple criminal proceedings. Some Member States, such as Austria, only foresee a more lenient penalty when the concurring offences are all being prosecuted in the same criminal proceeding. When a part of the concurring offences is being the subject of a new criminal proceeding, the leniency ceases to exist. For these Member States, it is not surprising and, at first sight, not problematic that foreign previous convictions are being ignored in case of concurring offences; after all, Framework Decision 2008/675/JHA only obliges Member States to attach the same legal effects to foreign convictions as to national convictions. Thus, in the situations wherein no legal effects are being attached to national convictions, no legal effects have to be attached to foreign convictions and no problems exist concerning the very essence of the mutual recognition principle. Whether the discounting of the previous convictions in general is problematic in the light of the fundamental rights of the defendant is another issue.

III. The European mutual distrust in violation with the European fundamental freedoms?

In order to be effective, exceptions on or limitations to the mutual recognition principle must be little in number and must be justifiable in the light of the basic human rights of a defendant. However, the legally provided exception on mutual recognition of foreign convictions when sentencing is not explicitly being justified in the preamble of Framework Decision 2008/675/JHA. This European exception must, therefore, still be examined on its compatibility with the *ne bis in idem*- (A), the proportionality (B) and the equality (C) principle. A closer look on the interpretation of these principles, however, is not as easy as it seems since no unanimity exists on their European scope whatsoever.

A. Violation of the multiple interpretations of ne bis in idem?

At the national level, imposing a lenient sentence in case of concurring offences is, according to legal literature, partially based on the national interpretation of the *ne bis in idem*-principle.[47] Since offences that are committed with the same unity of intent are fictitiously treated as one offence, a judge will have to take into account the penalty that already has been imposed for other offences which belong to the same series of facts as the current offence and will not be able to impose an additional penalty which would, together with the already imposed sentence(s), exceed the maximum of the

47 *Supra* nr. 26.

most severe penalty. The question arises whether this interpretation of "*idem*" also applies or must also apply at a transnational level. No unanimity seems to exist regarding the scope of the principle. European case law only contributes to the legal uncertainty that already exists.

The *ne bis in idem*-principle was first b introduced in the European legal order by the Convention implementing the Schengen Agreement (CISA). Since the Treaty of Lisbon, the principle has also been implemented in Article 50 of the Charter of Fundamental Rights of the European Union (CFR). Also Article 4 of Protocol 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms foresees in the prohibition of double jeopardy.

Whether or not the *ne bis in idem*-principle requires to take into account previous foreign convictions when prosecuting a defendant for an offence that belongs to the same series of facts as other offences for which he has already been convicted depends thus on the European interpretation given to the term "*idem*". As mentioned before, there is a lack of concensus regarding the uniform application of the *ne bis in idem*-principle.[48] This lack of concensus can be ascribed to the inclusion of the principle in various instruments, which all describe *ne bis in idem* in different ways. The case law of the European Court of Human Rights and the European Court of Justice will, therefore, be very relevant to decide on a uniform, European interpretation.

Article 4 of Protocol 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms implements the *ne bis in idem*-principle as follows:

> *RIGHT NOT TO BE TRIED OR PUNISHED TWICE*
> *1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.*
> *(…)*

Although Article 4 only comprises the situation wherein a defendant is being prosecuted twice by the same Member State, the case law of the European Court of Human Rights (ECtHR)is still relevant as to the interpretation of "*idem*". After all, a lot of European States are bound by both the European Convention for the Protection of Human Rights and Fundamental Freedoms and by the mutual recognition principle.

The ECtHR has already tried to clarify in the past what is meant by 'an offence'. Multiple shifts in interpretation were noticeable: from '*the same conduct*' to '*the same essential elements*' to '*the same acts*'.[49] The first approach contains the most strict interpretation, considering that 'the same offence' relates to 'the same conduct'.[50] Later, the

48 *Supra* nr. 13.
49 *N. Neagu*, The ne bis in idem principle in the interpretation of European courts: towards uniform interpretation, Leiden Journal of International Law, 2012, p. 969.
50 *Gradinger v. Austria*, Application no. 15963/90, Judgment 23 October 1995.

ECtHR confirmed in several cases[51] that it is possible that a single act can constitute more than one offence. In this situation, the judge will have to examine whether the several offences have the same essential elements.[52] If the offences are completely different, the *ne bis in idem*-principle does not apply. If the offences have the same essential elements and relate to the same set of facts, multiple prosecutions or convictions are prohibited. In a recent case, the ECtHR even went further by stating that there is the same offence when the committed offences arise from identical facts or facts which are substantially the same and which constitute a set of concrete factual circumstances involving the same defendant and are inextricably linked together in time and space.[53] With this latest judgment, it is clear that the ECtHR adopted a factual approach, wherein the legal qualification of the criminal act is not important anymore. However, the question whether several acts that are committed with unity of intent can fictitiously be considered as one offence, is not clearly answered by the Court. For example, in the *Zolothukin vs Russia* case, the facts were considered not to be the same, since there was no temporal or spatial unity between the facts. The question, therefore, arises whether the mere unity of intent between different facts would be sufficient to apply the *ne bis in idem*-principle.

A somewhat different description and application of the *ne bis in idem*-principle can be found in Article 54 CISA, which is binding throughout the entire EU and in Article 50 CFR, which is not legally binding, but still very important as to the interpretation given to this Article by the European Court of Justice (ECJ)[54]:

> *CISA – A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party.*
>
> *CFR – No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.*

Although both applicable within the EU, it is immediately noticeable that both legal instruments use a different terminology ('acts' versus 'offence'), which leaves room for interpretation by the ECJ.

51 *Oliveira v. Switzerland*, Application no. 25711/94, Judgment 30 July 1998; *Franz Fischer* v. Austria, Application no. 37950/97, Judgment 29 May 2001; *Sailer v. Austria*, Application no. 38237/97, Judgment 6 June 2002 and *Göktan v. France*, Application no. 33402/96, Judgment 2 July 2002.

52 *Wasmeier*, fn. 16, p. 128.

53 *Zolothukin v. Russia*, Application no. 1493/03, Judgment 10 February 2009.

54 *Wasmeier*, fn. 16, p. 123.

The ECJ also adopted a factual approach, according to which the identity of legal qualification is not a condition to apply the *ne bis in idem*-principle.[55] After all, mutual trust and mutual recognition require the Member States to have faith in each other's legal systems, even when facts are legally classified in a different manner.[56] It seems sufficient that there is "*an identity of the material acts understood as the existence of a set of facts which are inextricably linked together*".[57] Contrary to the case law of the ECtHR, spatial or temporal unity is not required in order to identify the facts as '*idem*'. This at least gives the impression that concurring offences, bound by unity of intent, might not be prosecuted in several criminal proceedings without taking into account the already imposed penalties for a few of these offences. However, in the *Norma Kraaijenbrinck* case, the ECJ stated that different facts can not be seen as state facts merely because the facts are linked by the same criminal intent.[58] The question arises why unity of intent does not mean that facts are inextricably linked together and what is necessary in order to be inextricably linked together. On top of that, in the *Van Esbroeck* judgment, the ECJ defined that "*the definitive assessment of what facts are to be considered identical should rest within the realm of the competent national courts*".[59] This ruling does not, of course, contribute to the legal certainty concerning the application of the *ne bis in idem*-principle on previous foreign convictions in case of concurring offences.

In the light of the above, it is evident that the implementation of the *ne bis in idem*-principle in various legal instruments, which all make use of a different terminology, gives rise to a lot of discussions regarding the interpretation of "*idem*" and, therefore, gives rise to legal uncertainty.[60] These discussions and uncertainties also reflect in the case law of the ECtHR and the ECJ. Their rulings must be thoroughly analysed further before being able to conclude whether the exception of Article 3(5) Framework Direction 2008/675/JHA violates the *ne bis in idem*-principle. For now, there are still several important questions left concerning the European interpretation of the *ne bis in idem*-principle and a more specific effort is required to fill in the existing gaps.

55 *Neagu*, fn. 49, p. 268 et seq.; *Court of Justice of the European Union* (CJEU), 11.2.2003, case 187/01 and 385/01 (Gözütork and Brugge) and *Court of Justice of the European Union* (CJEU), 10.3.2005, case 469/03 (Miraglia).

56 *Wasmeier*, fn. 16, p. 124.

57 *Neagu*, fn. 49, p. 268; *Court of Justice of the European Union* (CJEU), 9.3.2006, case 436/04 (Van Esbroeck); *Court of Justice of the European Union* (CJEU), 28.9.2006, case 150/05 (van Straaten) and *Court of Justice of the European Union* (CJEU), 18.7.2007, case 288/05 (Kretzinger).

58 *Neagu*, fn. 49, p. 269; *Court of Justice of the European Union* (CJEU), 18.7.2007, case 367/05 (Kraaijenbrink).

59 *Court of Justice of the European Union* (CJEU), 9.3.2006, case 436/04 (Van Esbroeck).

60 *J. Vervaele*, The transnational ne bis in idem principle in the EU: Mutual recognition and Equivalent protection of human rights, Utrecht Law Review, 2005;*Wasmeier*, fn. 16; *M. Fletcher*, The problem of multiple criminal prosecutings: Building an effective EU response, in: P. Eeckhout & T. Tridimas (Eds.), Yearbook of European Law, Oxford University Press, 2007;*B. Van Bockel*, The Ne Bis In Idem Principle in EU Law, Kluwer Law International, 2010.

B. The influence of the proportionality principle on sentencing must be further examined

Also the proportionality principle is being mentioned as one of the bases on which the Belgian treatment of concurring offences is founded. Even if the European *ne bis in idem*-principle is interpreted as only applicable on the same facts, and thus not on the same series of facts, there still might arise some problems regarding the application of the proportionality principle.

According to the proportionality principle, every offence has to be punished in proportion to its seriousness.[61] In case of concurring offences that are being tried in multipe criminal proceedings, simply adding up the different penalties foreseen for these offences would be disproportionate, since the total imposed penalty would be as severe (or even more severe) as sentences for graver, individually commited crimes.[62] No plausible explanation seems to exist as to why the proportionality principle would not apply to cross-border concurring offences.

Framework Decision 2008/675/JHA itself also pays attention to the application of the proportionality principle. Member States who choose not to take into account previous foreign convictions when this would limit the judge in imposing a sentence, are, according to Article 3(5), § 2, obliged "*to ensure that their courts can otherwise take into account previous convictions handed down in other Member States*". Recital 9 of the preamble clarifies in this context that "*Article 3(5) should be interpreted (…) in such a manner that if the national court in the new criminal proceeding (…) is of the opinion that imposing a certain level of sentence within the limits of national law would be disproportionately harsh on the offender (…), and if the purpose of the punishment can be achieved by a lower sentence, it may reduce the level of sentence accordingly, if doing so would have been possible in purely domestic cases*." Recital 9 thus explicitly refers to the proportionality principle and its obligatory application. Again, when there is no reason to apply the proportionality principle in a different manner on foreign as on national convictions, there seems to be no reason to not take into account previous foreign convictions in case of concurring offences, since in purely domestic cases, simply adding up the different penalties is considered to be disproportionately harsh on the defendant.

However, as mentioned before[63], not every Member State of the EU grants a "discount" to multiple offenders whose concurring offences are being judged in multiple criminal proceedings. Some of them only foresee in a more lenient penalty when the concurring offences are all being tried in the same criminal procedure. However, this different treatment of multiple offenders depending on the number of criminal proceedings raises some questions as to the compatibility with the privilege of self-incrimination. After all, in order to profit from the granted leniency, a defendant is almost

61 *Ashworth*, fn. 11, p. 112 et seq.
62 *Ashworth*, fn. 11, p. 277 et seq.
63 *Supra* nr. 31.

obliged to confess other offences in order to have them immediately taken into account, which enables crimes to be cleared up.[64]

The same applies for Member States who only take into account previous national convictions in case of concurring offences. A defendant who fears to be tried in multiple criminal proceedings across the borders, can only confess all the facts in order to benefit from the rules regarding concurring offences.

The privilege against self-incrimination is implemented in the Presumption of Innocence Directive of 9 March 2016[65] and is, according to case law of the ECtHR, also comprised within the scope of Article 6 of the European Convention on the Protection of Human Rights and Fundamental Freedoms.[66]Although the privilege against self-incrimination is thus legally introduced within the European legal order, no unanimity seems to exist regarding the scope and the restrictions of this fundamental right.[67] For example, whereas the ECtHR uses *free will* as a criterion to decide whether or not the privilege against self-incrimination has been violated, questions can arise concerning the situation wherein a defendant has almost no other choice than confess to a crime in order to be granted a more lenient penalty.[68] A clear European interpretation and application of the privilege against self-incrimination to fill in the gaps and legal uncertainties is thus necessary.[69]

Considering all of the above, further research is required as to how proportionality as a sentencing principle and the interpretation of the privilege against self-incrimination can or must have an influence on the taking into account of previous (foreign and national) final criminal judgments in case of (cross-border) concurring offences committed with a premeditated intent.

C. The European equality principle as overarching principle: how equal is equal?

As previously argued, there is no agreement on a European interpretation of the *ne bis in idem*- and proportionality principle and further efforts are necessary to work towards such an interpretation. An examination of the application of both principles in the European practice should, on top of that, also give a central role to the overarching equality principle, since this principle might too be compromised by the current Bel-

64 *Ashworth*, fn. 11, p. 278.
65 Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, OJ 2016 L 65/1.
66 *J. Meese*, The sound of silence. Het zwijgrecht en het nemo tenetur-beginsel in strafzaken. Een historisch en rechtsvergelijkend overzicht, in: J. Rozie, S. Rutten & A. Van Oevelen (Eds.), Zwijgrecht versus spreekplicht, Intersentia, 2013, p. 37 et seq.; *S. Lamberigts*, The privilege against self-incrimination. A chameleon of Criminal Procedure, New Journal of European Criminal Law, 2016, p. 418 et seq.
67 *Lamberigts*, fn. 66, p. 419.
68 *Meese*, fn. 66, p. 39 et seq.
69 *Lamberigts*, fn. 66, p. 437 et seq.

gian treatment of cross-border multiple offenders. However, even this basic, ancient principle is subject of discussion.

Framework Decision 2008/675/JHA enables European citizens with a criminal history to exercise their right of free movement, since Member States are obliged to take into account previous foreign final criminal judgments to the same extent as to which previous national final criminal judgments are taken into account. The Framework Decision does not seek to harmonise the legal effects attached to a previous conviction by each Member State, but only aims (i) to ensure that every Member State treats a defendant, who already has been convicted in another Member State, in the same manner as when the previous conviction would have been a national conviction or at least (ii) to avoid that such a defendant is treated less favourably (recital 8).

This means that it is, at least according to the equality principle and the Framework Decision[70], not problematic to disregard previous foreign conviction in situations where a previous national conviction would also not have been taken into account. A violation of the equality principle and the Framework Decision only exists when previous national convictions are more frequently taken into account as previous foreign convictions. However, Framework Decision 2008/675/JHA provides a legal exception when the existence of a foreign criminal history would limit the national courts in imposing a sentence. Member States that do not take into account a previous foreign judgment in the latter case, even though previous national convictions are taken into account in a given situation, therefore, do not violate the Framework Decision.

The question emerges whether in the latter case Member States also do not violate the equality principle. After all, according to the equality principle (and the related prohibition of arbitrary punishment), equivalent criminal facts must be punished in an equivalent manner. The application of this principle might be in danger when the same criminal concurring offences are punished differently depending on the number of European 'crime scenes' (and therefore on the number of prosecuting Member States). After all, as demonstrated above[71], a multiple offender who is being prosecuted in multiple Member States will be punished more severely than when the committed concurring offences are being tried in only one Member State.

In the past, some authors have argued that unity of intent cannot exist when there is a cross-border element.[72] This would mean that domestic concurring offences are not equivalent to cross-border concurring offences, since the latter cannot be committed with the same unity of intent. Therefore, it would not be necessary to punish both situations in an equivalent manner. On the other hand, other authors, including the author of this article, state that the existence of unity of intent can be transboundary.[73]

70 As argued earlier, problems might arise as to the application of the *ne bis in idem*- and proportionality principle.

71 *Supra* nrs. 24 – 28.

72 *J. De Codt*, Le nouvel article 65 de Code pénal ou la légalisation du délit collectif, JT, 1995, p. 291 et seq. and *Van Deuren*, fn. 35, p. 367.

73 See for the same reasoning *De Roy*, fn. 34, p. 181.

Given the uncertainty concerning the existence of unity of intent in case of cross-border concurring offences and the related treatment, it is, therefore, also necessary to research whether the cross-border character of the crimes is a sufficient element to decide that these crimes are not relatively comparable to crimes committed within the borders of only one Member State. The scope of the equality principle is thus also subject of discussion, especially concerning the question whether a cross-border element can take the 'equal' away in equality.

IV. The necessity of a European dimension to basic human rights in order to exercise the freedom of movement without any borders

The freedom of movement of persons and the mutual recognition of judicial decisions are two fundamental pillars of the European Area of Freedom, Security and Justice. Both principles are further developed in several European legal instruments, such as Directives and Framework Decisions.

One of these Framework Decisions is Framework Decision 2008/675/JHA, according to which (foreign) final criminal judgments previously incurred by a defendant, have to be taken into account in every new criminal proceeding against this defendant. However, the legally provided exceptionon this obligation (Article 3(5)) allows Member States to discount a previous foreign conviction if this would have positive consequences for the defendant.

One of the Member States which eagerly took advantage of this exception is Belgium. Concurring offences that are all being prosecuted within Belgium are punished less severely on the basis of the *ne bis in idem*- and proportionality principle. However, according to the Belgian Criminal Code, multiple offenders of cross-border concurring offences who already have been punished in another Member State for one or a few of the concurring offences will not be granted the discount that is granted in a purely domestic sphere. The *ne bis in idem*- and proportionality principle, therefore, apparently do not have to be applied when the multiple criminal proceedings are being instituted for (cross-border) concurring offences in more than one Member State.

Legal questions can be formulated as to the extent to which this legally provided exception does not eradicate the very essense of the mutual recognition principle and the European pursuit of mutual trust between Member States. After all, in order to be effective, limitations to the mutual recognition principle must be rather exceptional and must always be justifiable in the light of the basic human rights and freedoms of a defendant. Otherwise, there will be a risk of European citizens not being able to exercise their freedom of movement entirely free without any (literal and figurative) borders.

However, no explanation seems to be available as to why this exception has been accepted and applied. Further research is, therefore, required to examine to what extent this seemingly political choice is compatible with the fundamental basic human rights and freedoms at the European level, starting with the *ne bis in idem*-, the proportionality and the equality principle. All three of these principles are already implemented in

the European legal order and steps have already been taken both by the European Court of Justice and the European Court of Human Rights to provide guidelines on how to interpret these principles, but so far, a clear European view has not been expressed yet. A more effective, complete, certain and thorough European dimension of these principles is necessary in order to reinforce the application of the mutual recognition principle and in order to get rid of the legal uncertainties regarding the free movement of judicial decisions. The time has come to fill in the multiple gaps that exist for multiple offenders.