



Implementing the ne bis in idem principle in the EU

May 2003

Implementing the ne bis in idem principle in the EU

Initiative of the Hellenic republic with a view to adopting a Council Framework Decision concerning the application of the “ne bis in idem” principle.

1. JUSTICE is a UK based human rights and law reform organisation working in the field of human rights, criminal justice, EU justice and home affairs, discrimination and asylum. JUSTICE has a long history of EU work, particularly relating to judicial cooperation in criminal matters.
2. This paper outlines some preliminary issues arising from the text of the draft Framework Decision on ne bis in idem put forward by the Greek Presidency.

Article 3 – Lis Pendens

3. Article 3 addresses the issue of selecting a forum Member State where a number of Member States would have jurisdiction to prosecute certain acts. Article 3(c) states that where a forum of one Member State is preferred, proceedings in other Member States shall be suspended until a final judgment is delivered in the Member State whose forum is preferred. It then goes on to deal with the possibility that a final judgment may not be delivered in the preferred Member State and obliges the competent authorities of that state to inform those in the first other Member States to have suspended proceedings of this failure to hand down a final judgment.
4. The result of the Article, as currently drafted, would provide no legal certainty. It does not set down any time limits within which a final judgment should be delivered or be declared as not having been delivered. It is extremely difficult to establish a negative proposition – that is, failure to issue final judgment – where there are no time limits to establish at what point a view is to be taken on the absence of a final judgment. JUSTICE would welcome the inclusion of time limits on the forum Member State for reaching a final judgment to establish legal certainty and avoid the situation of an accused person awaiting the conclusion of proceedings in one country indefinitely with the knowledge that at any given time proceedings for the same acts could be transferred to another Member State for prosecution.
5. The proposal does not address the possibility of the second Member State deciding not to reinstate proceedings. Again, time limits should be established within which

Member States must take a decision as to whether or not to reinstate proceedings which had been suspended under Article 3(c). Some Member States, but not all, have a system whereby prosecution can be barred by time lapse. The differences in national legislations on this point would create a variable geometry of application of the principles in the Article across the EU. Such uncertainty on this issue is intolerable in a true European area of freedom, security and justice and would leave a defendant unsure, indefinitely, as to whether or not he might be obliged to face proceedings in another Member State where those proceedings had been suspended. The decision on time barring in cases of *lis pendens* in multiple jurisdictions in the EU should be governed by EU legislation and not left up to the national legislation applicable in each Member State.

Article 4 - Exceptions

6. JUSTICE believes that the possibility of opting out of the Framework Decision in matters relating to “offences against the security or other equally essential interests of that Member State” undermines the basic value of the draft Framework Decision. The breadth of this possible exception means that a declaration on this point could, in effect, amount to an opt out from the European principle of *ne bis in idem*. The notion of offences against national security is not a clearly defined one. It can be used to apply to demonstrators (as seen in a recent Spanish legislative proposal which classified anti-war protestors as committing offences against national security which would be tried in military tribunals) and can have highly political connotations. Offences against “other equally essential interests” could be construed in any way and, in particular, could apply to private business interests which are important in some way to the Member State concerned.
7. The exception applying to civil servants where they were in breach of their official duties is equally unjustifiable. This is a factor that should be considered in establishing a preferred forum under Article 3 relating to *lis pendens*. Civil servants should not be deprived of the protection of the principle of *ne bis in idem*.
8. If a European wide definition of *ne bis in idem* is to be implemented, there is no justification for allowing exceptions to the application of that principle based on the nature of particular offences or the status of the defendant. Issues of national interest should be addressed in coming to a decision on a preferred forum, not as an

opportunity for opening new prosecution proceedings in a different Member State indefinitely following a final judgment.

Article 5 – Accounting Principle

9. This Article should be deleted. A new prosecution should not be capable of being brought in a Member State where the person has been definitively convicted for the same offences in another Member State, therefore there is no need for the accounting principle. This Article is incongruous with the purpose of the Framework Decision.

Conclusion

10. JUSTICE welcomes the establishment of a European Council Framework Decision on the principle of *ne bis in idem*. This development reflects the trend towards recognising the European Union as a genuine judicial space that serves the two purposes of facilitating the pursuit of offenders across borders and guaranteeing citizen's rights in judicial proceedings across the European Union¹. If the extension of such a principle across borders within the European Union is to be meaningful and assist in the establishment of legal certainty, the Framework Decision cannot contain the possibility for States to opt out of the principle in relation to selected types of offence or categories of defendant. The principle of legal certainty in a European judicial space needs to be bolstered by clear guidelines as to time limits on Member States' decisions as to whether or not to take proceedings in a given case. Such time limits could apply from the time when a Member State takes action and considers proceedings rather than from the time of the alleged commission of the offence as the notion of such time barring is not common to Member States' legal cultures and would be unacceptable in some Member States. There must, however, be a definable end to the threat of proceedings in one or other Member States of the European Union. It is intolerable for a person to under a constant and real threat of continued proceedings indefinitely.

JUSTICE, May 2003

¹ See Cases C-187/01 Gozutok and C-385/01 Brugge, Judgment of the ECJ, 11th February 2003