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## The construction of a European standard of *ne bis in idem* and the concept of final judicial decision in the EAW

Araceli Turmo

The existence of *ne bis in idem* as a fundamental right is not contested in European Union law or any of the legal orders of the Member States. This broad recognition of the importance of the principle is nevertheless only the first step towards its implementation in the context of the European arrest warrant (EAW)<sup>1</sup> or other instruments of European criminal law. Scholars have long drawn attention to the complexity of this principle and of the specific procedural mechanisms which allow its enforcement, in particular in the context of a multilevel legal order like the EU. The EAW is a comparatively recent area of development of the European Court of Justice' case law on *ne bis in idem*, as a result of the evolving competences of the EU as a whole, and of the Court more specifically, in the field of criminal law. The Court had initially constructed separate strands<sup>2</sup> of case law on the principle, the first being applicable in the fields of competition law and the second, with regard to criminal law, to Article 54 of the Convention Implementing the Schengen Agreement (CISA).<sup>3</sup> The development of the case law following legislative interventions in the field of EU criminal law did not help to resolve these inconsistencies.

The coexistence of these different strands, to which one must add not only Article 50 of the European Charter of Fundamental Rights but also the further complicating factor of the case law of the European Court of Human Rights on Article 4 of Protocol 7, has long been criticised as unjustifiable inconsistency<sup>4</sup> and a source of uncertainty as to the EU standard for *ne bis in idem*.<sup>5</sup> Recent years have added even more complexity to this, perhaps most notably with the introduction of exceptions for certain cases of double prosecution, intended to mitigate the (unintended?) consequences of the characterisation of certain types of administrative enforcement as criminal in nature.<sup>6</sup> As Advocate General Bobek wrote in *bpost* in 2021, '[the principle as it has been

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<sup>1</sup> Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision, OJ L 190, 18.7.2002, p. 1.

<sup>2</sup> For a detailed overview of these strands of case law, see most notably Bas van Bockel, *The Ne Bis in Idem Principle in EU Law* (Kluwer 2010), esp. pp.53-118; Jonathan Tomkin, 'Article 50, in Steve Peers e.a. (eds), *The EU Charter of Fundamental Rights. A Commentary* (Hart 2014), pp. 1373-1412.

<sup>3</sup> Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, signed in Schengen on 19 June 1990 and which entered into force on 26 March 1995, OJ L 239, 22.9.2000, p. 19.

<sup>4</sup> See, *inter alia*, the Opinion of Advocate General Kokott, Case C-17/10, *Toshiba Corporation* [2011], EU:C:2011:552, para. 117.

<sup>5</sup> Although convincing arguments have been made in favour of maintaining a degree of plurality of standards for *ne bis in idem* across European legal systems, see Xavier Groussot and Angelica Ericsson, '*Ne Bis in Idem* in the EU and ECHR Legal Orders. A Matter of Uniform Interpretation?', in Bas van Bockel (ed.), *Ne Bis in Idem in EU Law*, Cambridge University Press, 2016, pp. 53-102.

<sup>6</sup> See the ECtHR judgments in Cases *A and B v Norway* [2016] n<sup>o</sup>s 24130/11 and 29758/11; and *Jóhannesson and Others v Iceland* [2017] n<sup>o</sup> 22007/11; and the response by the ECJ in Cases C-524/15, *Menci* [2018] EU:C:2018:197; C-537/16, *Garlsson Real Estate and Others* [2018] EU:C:2018:193; and Joined Cases C-596 and C-597/16, *Di Puma and Zecca* [2018] EU:C:2018:192. Both series of judgments, and the inconsistency between the approaches of the two European Courts, led to significant debates and some criticism from scholars, see *inter alia*: Laure Milano, 'Le principe non bis in idem devant la Cour de Luxembourg, vers un abaissement de la protection accordée au principe', [2019] *Revue trimestrielle des droits de l'homme* p161; Araceli Turmo, 'L'art du compromis : la Cour de justice opte pour une résistance modérée à l'arrêt *A et B / Norvège*' [2018] *Revue des affaires européennes* 149; MaxVetzo, 'The Past, Present

developed in the case law of the ECJ] can hardly be characterised as (*ne*) *bis in idem*, but rather by now a *quater* or *quinquies in idem*, while uncertainty continues to plague *bis* as well.<sup>7</sup> Although recent judgments<sup>8</sup> have attempted to establish a more uniform understanding of *ne bis in idem* in EU law and to integrate within this a solution to the case of double proceedings, the results are not entirely satisfactory<sup>9</sup> and do not go as far as Advocate General Bobek had proposed.<sup>10</sup>

Indeed, as with any fundamental right and, more generally, any principle of law, the content of the norm is even more significant than its existence and may vary significantly according to the implementation choices made by legislative and judicial institutions. In the case of *ne bis in idem*, the extent of the protection granted varies significantly depending on the interpretation of a wide range of concepts which may be considered its component parts and is influenced by the choices made in other aspects of criminal and procedural law. This interpretation is the expression of a balance between competing interests present in any criminal justice system. On the one hand, the system must be capable of effectively prosecuting, judging and sentencing criminals. On the other, defendants (and the judicial system and legal order themselves) must be protected from endless or successive prosecution. A number of practical arrangements may also mitigate the impact of double prosecutions or convictions and be taken into account while applying the fundamental right, as demonstrated by the recent case law of the European Court of Justice which allows Member States to combine proceedings and sanctions both considered criminal in nature.

The interpretation of the principle by judicial authorities must always take into account its different facets. As the ECJ has consistently ruled, *ne bis in idem*, as recognised under the AFSJ, is intended not only to prevent the impunity of persons definitively convicted and sentenced; but also to ensure legal certainty through the cross-border recognition of the final decisions of public bodies, in the absence of harmonisation or approximation of the criminal laws of the Member States.<sup>11</sup> In a recent judgment on the application of *ne bis in idem* in the context of the grounds for optional non-execution of a EAW, the ECJ explained: ‘the executing judicial authority must strike a balance between, on the one hand, preventing impunity and combating crime and, on the other, ensuring legal certainty for the person concerned, in order to attain the European Union’s objective of becoming an area of freedom, security and justice, in accordance with Article 67(1) and (3) TFEU.’<sup>12</sup>

The power exercised by judges when striking this balance between conflicting interests is particularly visible in the ways in which they interpret the building blocks of *ne bis in idem* in the context of different instruments of EU criminal law and, increasingly, the EAW. One crucial choice is how to define the ‘*idem*’: when should one consider the new proceedings to be for ‘the same criminal offence’ as the one for which the accused has already been acquitted or convicted? A broad

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and Future of the *Ne Bis In Idem* Dialogue between the Court of Justice of the European Union and the European Court of Human Rights: The Cases of *Menci*, *Garlsson* and *Di Puma*’ [2018] *Review of European Administrative Law* 55. For a less critical view, see Gianni Lo Schiavo, ‘The principle of *ne bis in idem* and the application of criminal sanctions: of scope and restrictions’, [2018] *EuConst* 644.

<sup>7</sup> Opinion of Advocate General Bobek in Case C-117/20, *bpost* [2021], EU:C:2021:680, para. 3.

<sup>8</sup> Case C-117/20, *bpost* [2022] EU:C:2022:202, Case C-151/20 *Nordzucker e.a.* [2022] EU:C:2022:203.

<sup>9</sup> See, *inter alia*, the critical comments by : Tom Boeckestein, ‘The Grand Chamber’s Judgment in Case C-117/20 *bpost*: Disimproving the Essence of *ne bis in idem*’ (*European Law Blog*, 14 April 2022), <https://europeanlawblog.eu/2022/04/14/the-grand-chambers-judgment-in-case-c-117-20-bpost-disimproving-the-essence-of-ne-bis-in-idem/#more-8254>, Accessed 15 May 2022; Patrizia De Pasquale, ‘Finale di partita per il principio del *ne bis in idem*? Breve nota alle sentenze *bpost* e *Nordzucker e.a.* (*BlogDUE*, 22 April 2022) <https://www.aisdue.eu/patrizia-de-pasquale-finale-di-partita-per-il-principio-del-ne-bis-in-idem-breve-nota-alle-sentenze-bpost-e-nordzucker-e-a/>, Accessed 15 May 2022; Miguel Sousa Ferro, ‘Bpost and *Nordzucker*: More Ashes on the Fire of *Ne Bis in Idem* in EU Antitrust Law’, *EU Law Live*, 31 March 2022.

<sup>10</sup> Opinions of Advocate General Bobek in Cases C-117/20, *bpost*, and C-151/20, *Nordzucker e.a.*, [2021] EU:C:2021:681.

<sup>11</sup> Case C-129/14 PPU, *Spasic* [2014] EU:C:2014:586, para. 77; quoted in the Judgment in Case C-665/20 PPU, *X (European arrest warrant – Ne bis in idem)* [2021] EU:C:2021:339, para. 99.

<sup>12</sup> Case C-665/20 PPU, *X (European arrest warrant – Ne bis in idem)*, para. 103.

understanding of the ‘idem’, including all possible legal characterisations of a set of behaviours, will lead to a generous application of *ne bis in idem* granting more protection to the accused, whereas an interpretation which restricts it to specific offences may allow successive trials and convictions regarding different legal characterisations of a single set of behaviours.

This chapter focuses on another major component of *ne bis in idem*: the requirement of finality. This is the requirement that a final judicial decision<sup>13</sup> has already been made concerning the same person and the same facts, which means that the new proceedings constitute a ‘bis’. In European Union law, this fundamental right is understood as applicable only insofar as the accused has already been convicted or acquitted in a final decision. This approach can also be found in the Framework Decision on the EAW, in which the grounds for non-execution of a warrant related to the existence of a previous judgment in a Member State or a third State both require this judgment to have been final.<sup>14</sup> The definition of a final judicial decision is, however, not specified by these instruments. A number of issues arise in relation to this concept when applying *ne bis in idem* in EU law, which are visible in a growing number of preliminary rulings by the ECJ. This paper will analyse the Court’s recent case law on the finality requirement in the Framework Decision on the EAW in the light of the broader context of the pertinent provisions and precedents.

The significant number of preliminary references on *ne bis in idem* in the context of the EAW illustrate not only the importance of the principle but also the need for European case law in order to set common standards for its implementation (1). The definition of what constitutes a ‘final’ decision capable of triggering *ne bis in idem* is one of the elements that requires judicial intervention. Its importance in the application of the fundamental right has led to the construction of an elaborate case law in other areas of EU criminal law (2). As the ECJ develops its case law on the concept in the context of the EAW, issues of consistency have started to appear as it becomes apparent that simple reliance on the existing precedents is not the Court’s preferred approach (3).

## 1. *Ne bis in idem*: an essential guarantee for the European arrest warrant

In recent years, an increasing number of references have been made to the European Court of Justice on the issue of the scope and contents of *ne bis in idem* in the context of the application of the Framework Decision on the European Arrest Warrant. This case law demonstrates the importance of the principle with regard to this instrument - as in other aspects of police and judicial cooperation in criminal matters. It also confirms that it is not possible to rely on domestic law to define the contents of the principle or its scope, and European standards are necessary. The extended competence that the ECJ gained with the Treaty of Lisbon to assist Member States courts in the implementation of acts in the area of police and judicial cooperation has predictably led to a significant number of references on the provisions of the Framework Decision, and among them many on the appropriate standard for *ne bis in idem* and its effects in such proceedings.

The case law of the ECJ on this fundamental right was, for a long time, mostly related to matters that are not formally considered part of criminal law (most notably, competition law) or to the implementation of Article 54 of the CISA which, as part of title III on ‘police and security cooperation’ between the Contracting States, was the main source of the development of *ne bis in idem* in EU criminal law.<sup>15</sup> Once preliminary references started to be made on the specific issue of the interpretation and application of this fundamental right with regard to the EAW, the Court of

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<sup>13</sup> Final acquittal or conviction in the language of Article 50 of the Charter.

<sup>14</sup> Article 3(2) and Article 4(5) of the Framework Decision: ‘the requested person has been finally judged’.

<sup>15</sup> According to Article 54: ‘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.’

Justice had to contend with the complex issues arising out of this cooperation mechanism with regard to *ne bis in idem*. At the same time, it had to decide which of the standards set in its previous case law to follow, whether to create a new one - or whether to try to establish a common standard for EU law. If one follows the wording of the instruments, even within the field of police and judicial cooperation in criminal matters, the scope of the protection granted under the principle varies significantly.<sup>16</sup> The number and diversity of the references made specifically on the issue of *ne bis in idem* illustrate its importance but also the difficulties arising out of its application in such a context of transnational cooperation.

The importance of this principle in the implementation of the Framework Decision on the EAW is apparent from the wording of the instrument itself. Indeed, *ne bis in idem* is, although not explicitly mentioned, included as one of the mandatory grounds for non-execution in Article 3(2)<sup>17</sup> as well as two of the grounds for optional non-execution: Article 4(3)<sup>18</sup> and, with respect to third countries, Article 4(5).<sup>19</sup> This fundamental right is of course an expected ground for the non-execution of a judicial decision emanating from a different State, since it would operate as a defence in the context of a single national legal system. However, the absence of any disagreement as to the legitimacy of *ne bis in idem* as a bar to the execution of European arrest warrants does not prevent disagreements from arising as to the precise scope of the bar and the circumstances in which it may be relied on.

Although the universal acceptance of *ne bis in idem* as a fundamental right and essential component of the criminal justice system may make it appear straightforward, recent case law demonstrates the range of issues which arise out of its application. In the context of EU criminal law, a further complicating factor is that the principle is applicable across the borders of domestic legal systems. This is not the case under the ECHR where, as is well-known, the principle as set out in Article 4 of Protocol 7 only applies within the confines of one legal system.<sup>20</sup> This specificity of EU standard of *ne bis in idem*, which protects individuals from repeated trials or punishment ‘within the Union’ under Article 50 of the Charter, creates an increased number of challenges for judicial authorities interpreting and enforcing the principle in the context of EU instruments. The ECJ is not merely trying to construct a minimum standard for *ne bis in idem* which could be acceptable and applicable in the different Member States, it also has to look for way to allow for the application of *ne bis in idem* in the context of cooperation mechanisms which have to operate across legal systems.

The cross-jurisdictional nature of the guarantee in the AFSJ transforms the nature and function of the principle<sup>21</sup>. It also makes it especially necessary to establish common understandings and definitions for the components of *ne bis in idem*. Although, in the absence of harmonisation, EU instruments must to a large extent rely on domestic law to define, for example, what constitutes a final judgment or a criminal penalty triggering the application of the principle or what must be considered a repeated procedure on the ‘same facts’, it is impossible to ensure cooperation between the judicial authorities of different Member States if there is no common standard. Reliance on

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<sup>16</sup> Daniel Flore, *Droit pénal européen*, 2e éd. (Larcier 2014), 599-602.

<sup>17</sup> ‘If the executing judicial authority is informed that the requested person has been finally judged by a Member State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State’.

<sup>18</sup> ‘Where the judicial authorities of the executing Member State have decided either not to prosecute for the offence on which the European arrest warrant is based or to halt proceedings, or where a final judgment has been passed upon the requested person in a Member State, in respect of the same acts, which prevents further proceedings’.

<sup>19</sup> ‘If the executing judicial authority is informed that the requested person has been finally judged by a third State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing country’.

<sup>20</sup> Article 4, para. 1: ‘No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State [...]’.

<sup>21</sup> Bas van Bockel, ‘The Interpretation and Application of the *Ne Bis In Idem* Principle in the EU Area of Freedom, Security and Justice’, in Sara Iglesias Sánchez and Maribel González Pascual (eds), *Fundamental Rights in the EU Area of Freedom, Security and Justice* (Cambridge University Press 2021), pp. 354-370, p. 357.

mutual trust is not sufficient, although it is indispensable. This explains the characterisation of *ne bis in idem* as an autonomous concept of EU law by the ECJ.<sup>22</sup>

The provisions guaranteeing *ne bis in idem* in EU instruments need to be interpreted in the same way across the EU if they are to provide effective protection and contribute to the objective of offering citizens a borderless area of freedom, security and justice. This requires the ECJ to construct common definitions for the constitutive elements of *ne bis in idem*.<sup>23</sup> The EAW is a perfect illustration of the type of police and judicial cooperation in which common standards for the notions required to apply *ne bis in idem* are necessary. The executing authorities must determine whether the person has indeed been 'finally judged' for 'the same facts' in any Member State, which requires being able to understand the scope of these conditions and the way in which they might apply in any of the legal orders of the European Union - or even beyond, under Article 4(5) of the Framework Decision.

## 2. The essential but elusive notion of final judicial decision in *ne bis in idem*

The criterion of the finality of the decision made on the conviction or the acquittal of the person is one of the essential conditions for the application of *ne bis in idem* in EU law. As such, it is a constitutive element for which the European Court of Justice has had to provide clarifications towards a common understanding applicable in the context of police and judicial cooperation.<sup>24</sup> The existence of a previous set of proceedings which have resulted in a final outcome is the condition for the possibility of the '*bis*' which this principle precludes.<sup>25</sup> The ECJ has frequently referred to finality as an essential condition for the application of *ne bis in idem*. Indeed, the ability of the judicial system to produce final decisions which settle disputes is an essential characteristic of any functioning legal system, and this fundamental right is only applicable when one such final resolution has been reached - although the nature of this final outcome and the way in which the system reaches it may be subject to varying interpretations. Of course the final decision must have been made in proceedings brought against the same person - someone who was merely interviewed as a witness in earlier proceedings may not rely on *ne bis in idem*.<sup>26</sup>

This requirement is not specific to this legal system, and is generally presented as a common feature of *ne bis in idem* across national and international legal systems. It establishes a clear distinction between the rules related to *ne bis in idem*, which operates *a posteriori*, after a final judgment has been made in one legal system,<sup>27</sup> and rules which have a more preventative nature, such as *lis pendens*. Although both share similar objectives in that they aim to prevent the adoption of two distinct judicial decisions on the same issue, the rules related to *lis pendens* do so by regulating the relationship between simultaneous, parallel proceedings. Although the problem posed by positive jurisdiction conflicts which can lead to incompatible decisions is just as important, it is solved by instruments regulating conflicts of law and jurisdiction rather than *ne bis in idem* in EU law.<sup>28</sup>

*Ne bis in idem* is meant to regulate the relationship between ongoing proceedings and preexisting final decisions, much like *res judicata*. In fact, *ne bis in idem* and *res judicata* share very similar functions and goals, although the former is perceived as more focused on protecting the rights of the

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<sup>22</sup> Case C-261/09, *Gaetano Mantello* [2010] EU:C:2010:683, para. 38.

<sup>23</sup> Norel Neagu, 'The *Ne Bis in Idem* Principle in the Interpretation of European Courts: Towards Uniform Interpretation' [2012] *Leiden Journal of International Law* 955, p. 956.

<sup>24</sup> The notion of a 'final judicial decision' was in fact one of the points which the Greek proposal for a Framework Decision on *ne bis in idem* aimed to clarify (Initiative of the Hellenic Republic with a view to adopting a Council Framework Decision on the "*ne bis in idem*" principle, OJ C 100, 26.4.2003, 24).

<sup>25</sup> Bas van Bockel, 'The Interpretation and Application...' *op. cit.*, p. 357.

<sup>26</sup> Case C- 268/17, *AY* [2018] EU:C:2018:602.

<sup>27</sup> Daniel Flore, *op. cit.*, p. 666.

<sup>28</sup> Bas van Bockel, *The Ne Bis in Idem Principle in EU Law* (Kluwer 2010), p. 230.

individual (hence its recognition as a fundamental right) while the other, which applies beyond the scope of criminal law, is perceived as predominantly procedural in nature. The finality requirement in the context of *ne bis in idem* has sometimes been presented as a manifestation of *res judicata*.<sup>29</sup> This is not strictly true because they are distinct, albeit interrelated, principles, and the criteria as to what constitutes *res judicata* and what is a ‘final’ judgment or decision in the context of *ne bis in idem* does not always overlap. Most significantly, the fundamental right may be triggered by a decision which puts an end to the proceedings even if it is not a judicial act, such as an out-of-court settlement.<sup>30</sup> However, the reference is certainly useful and has in fact been used by the EU Courts. The obvious connection between the two principles means that the ECJ will sometimes rely on its case law related to *res judicata* in order to rule on a claim based on *ne bis in idem*, for example in order to rule that an order was not capable of triggering *ne bis in idem* because it did not rule on the substance of the case and, therefore, did not constitute *res judicata*.<sup>31</sup> This is in fact true with regard to other aspects of the criteria for the application of the principle, and not just with regard to the concept of ‘finality’ itself: the ECJ’s early case law on the ‘idem’ clearly referred to criteria of similarity between two sets of proceedings which had been established in the context of the case law on *res judicata* as a bar to admissibility.<sup>32</sup>

In the context of EU law, *ne bis in idem* is applied in relation to a variety of judgments and decisions, ranging from decisions of the European Commission which impose fines on undertakings to the judgments of national courts. The issue of what constitutes finality, in such a way as to make *ne bis in idem* applicable, therefore requires clarifications through case law. The concept cannot simply rely on national understandings of *res judicata*, even in the context of instruments such as the Framework Decision on the EAW, precisely because cooperation across the boundaries of domestic legal systems requires a common standard for the application of *ne bis in idem*. Police and judicial authorities in one Member State must be able to identify which judicial decisions made in a different Member State give rise to the application of *ne bis in idem*.

One cannot rely on the precise wording of the applicable provisions either. Article 50 of the Charter only refers to acquittals and convictions, but is clearly applicable many other cases, including to decisions of the European Commission.<sup>33</sup> Article 54 of the CISA refers to a trial having been ‘finally disposed of’ while the EAW Framework Decision refers to persons who have been ‘finally judged’: one might argue that these should be interpreted as referring to a single, common autonomous concept of a ‘final’ decision for the purposes of *ne bis in idem*, which also matches that of the corresponding provision of the Charter. This was certainly what the ECJ stated in *Mantello*.<sup>34</sup> However, the lack of consistency inherent to the construction of different strands of case law related to specific instruments seems to prevent such a push towards uniformity. In any case, clarifications are required if these provisions are to be applicable with regard to the diverse range of judgments and decisions adopted at the national level and to which *ne bis in idem* might apply.

The case law does establish some rules which generally allow for a simple application of the criteria for *ne bis in idem*. The first criterion relates to the status of the judgment or decision within the judicial system itself: it must no longer be susceptible to an appeal (to the exception of extraordinary remedies). In this regard, the criteria developed in order to define *res judicata* as a

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<sup>29</sup> *Ibid.*, p. 224.

<sup>30</sup> Joined Cases C-187/01 and 385/01, *Gözütok and Brügge* [2003] EU:C:2003:87, para. 31.

<sup>31</sup> Order of the General Court in Case T-413/06 P-DEP, *Gualtieri v European Commission* [2012], EU:T:2012:624, paras 12-14.

<sup>32</sup> See, for example, the use of the phrase according to which ‘the application of [ne bis in idem] is subject to the threefold condition of identity of the facts, unity of offender and unity of the legal interest protected’, a clear reference to the criteria of similarity between two sets of proceedings required for the objection of inadmissibility based on *res judicata*: Joined Cases C-204/00 etc., *Aalborg Portland and Others v European Commission* [2004], EU:C:2004:6, para. 338. The same criteria appear in many cases, especially in competition law, for example in T-217/06, *Arkema France and Others v European Commission* [2011], EU:T:2011:251, para. 292.

<sup>33</sup> Bas van Bockel, *The Ne Bis in Idem Principle in EU Law*, *op. cit.*, p. 225.

<sup>34</sup> Case C-261/09, *Mantello*, para. 38.

principle of EU law are helpful guides and entirely pertinent in order to apply *ne bis in idem*, insofar as they may apply both to judgments produced by EU Courts but also by national courts. The identification of a judicial pronouncement as final once the ordinary remedies are no longer open, either because they are time-barred or because the parties have made use of them, is not controversial and it constitutes a useful first step. The European Court of Human Rights refers to the decisions acquiring ‘force of *res judicata*’ (from the French *force de chose jugée*) as the criterion for finality under *ne bis in idem*, a characteristic acquired by judicial decisions once they are irrevocable due to the unavailability of ordinary remedies.<sup>35</sup>

The ECJ has also always maintained that, in particular in the context of Article 54 of the CISA, it is not necessary that the decision be a judgment or the act of a judicial body. This was confirmed in the recent case *WS v Bundesrepublik Deutschland (Notice rouge d’Interpol)*,<sup>36</sup> in which a German national brought an action against the Federal Republic of Germany seeking an order requiring that the Member State take the measures necessary to arrange for an Interpol red notice issued regarding him be withdrawn. The red notice had been issued at the request of the United States after proceedings regarding the same acts had been concluded in Germany by a settlement procedure under which he had paid a sum of money. The questions were whether *ne bis in idem* applies in such situations and whether, when the applicability of the principle is not yet established, the provisional arrest of a person who is the subject of a red notice is possible under Article 54 of the CISA, Article 50 of the Charter and Article 21(1) TFEU. In a decision reminiscent of the famous precedent in *Gözütok and Brügge*, (check si cited) the ECJ held that a decision made by a body other than a criminal court, such as the settlement in this case, may trigger *ne bis in idem* if it bars further prosecutions and is based on a determination as to the merits of the case.<sup>37</sup> The finality of the decision, its ability to bar further proceedings at the national level, was therefore the essential condition for the application of *ne bis in idem* under the CISA.

Another, more difficult set of criteria has to do with the contents of the judgment or decision. Indeed, the fact that a decision may not (or no longer) be appealed is not necessarily sufficient for it to trigger *ne bis in idem*. Here, too, one might refer to the case law on *res judicata* where similar questions have been raised. The case law of the ECJ, both with respect to *res judicata* and to *ne bis in idem*, clearly states that not all decisions made by judicial authorities can produce such effects. However, the identification of the appropriate criteria to determine which types of decisions may do so, based on their contents, is not an easy task, especially considering the diversity of national legal systems in which EU criminal law may apply. With respect to *res judicata*, the case law regarding the orders and judgments made by the EU Courts themselves establishes as a core criterion whether the decision actually settles the dispute or part of it. This is also expressed in the phrase according to which *res judicata* ‘extends to all matters of fact and law settled by a judicial decision’.<sup>38</sup> For example, the orders by which the President of the Court of Justice puts an end to a dispute following a request for a discontinuance do not contain any judicial ruling on an issue of fact or law.<sup>39</sup>

The case law of the ECJ does not completely transpose this approach to *ne bis in idem*. Several cases on Article 54 of the CISA indicate that the matter is more complex. In *Gasparini*,<sup>40</sup> the Court did not follow Advocate General Sharpston’s Opinion which proposed that a national court should be bound by an acquittal adopted in another Member State due to the offence becoming time-barred

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<sup>35</sup> Explanatory Report to the Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Explanatory Report, paras 22 and 29, 22 November 1984, available online at: <https://rm.coe.int/16800c96fd>. . See, e.g., ECtHR judgments *Nikitin v. Russia*, of 20 July 2004, [2005] ECHR, para. 37; and *Horciag v. Romania*, of 15 March 2005, [2006] ECHR.

<sup>36</sup> Case C- 505/19, *WS v Bundesrepublik Deutschland (Notice rouge d’Interpol)* [2021] EU:C:2021:376.

<sup>37</sup> Paras 73-74 of the judgment in *WS*.

<sup>38</sup> See, e.g., Case C-281/89, *Italian Republic v Commission* [1991] EU:C:1991:59, para. 14.

<sup>39</sup> Case T-270/15, *ANKO AE Antiprosopion, Emporion kai Viomichanias v European Research Executive Agency* [2016] EU:T:2016:681, para. 48.

<sup>40</sup> Case C-467/04, *Criminal proceedings against Gasparini and Others* [2006] EU:C:2006:610.



only if that decision was not merely final, but had involved consideration on the merits of the case.<sup>41</sup> This ‘substance-based approach’ to the principle, as she termed it, was justified by the idea that the rationale behind *ne bis in idem* presupposes that society has already had one chance to settle its accounts with the individual and that a society’s self-imposed time-limits, which in effect lead it to surrender this chance, cannot as such be imposed upon other States in the context of the CISA.<sup>42</sup> All of the Member States which submitted observations also agreed that an assessment of the merits was necessary for Article 54 to apply.<sup>43</sup> Such an approach is consistent with the approach to *res judicata* under which a decision which does not actually settle the dispute is not truly a ‘final decision’ capable of producing the effects which attach to the concept - although once again the scope of the criteria is not entirely similar. An acquittal based on the statute of limitations would settle the dispute and become final for the purposes of *res judicata*. However, from the point of view of a more substantive principle such as *ne bis in idem*, the approach according to which such decisions do not ‘settle’ the dispute and may not therefore be considered sufficient cause to bar further action in another State seems justified.

The Court, however, ruled that an acquittal must trigger *ne bis in idem* under Article 54 of the CISA even in the absence of any determination on the merits of the case. This was based on the objective of the provision, which is to ensure that persons can enjoy their freedom of movement in the Schengen Area once their cases are finally disposed of.<sup>44</sup> The aim of ensuring that individuals can rely on the fact that there has already been a final decision concerning a behaviour prevails over the idea that States should be able to justify a prosecution if the criminal liability of a person has not yet been assessed. Whether this formalistic approach should be understood to apply more generally was contested, however, considering the importance which the ECJ seemed to have given to the examination of the merits of the case in other precedents.<sup>45</sup>

By contrast, the ECJ has ruled on the same provision that a decision which is made after examining the merits of the case, but which is not final, does not trigger *ne bis in idem*. The case at hand involved an order made before the charging of the suspected person, which suspended the proceedings but did not definitively bar further prosecution.<sup>46</sup> Once again, although this time more predictably, the formal status of the decision in the domestic judicial system prevailed over its contents in its ability to produce this effect. In *Miraglia*,<sup>47</sup> the ECJ held that *ne bis in idem* did not apply to a decision declaring a case to be closed after the public prosecutor had decided not to pursue the prosecution, without any determination as to the merits of the case, on the sole ground that criminal proceedings have been started in another Member State against the same defendant and for the same facts. In *Kossowski*,<sup>48</sup> the decision of the public prosecutor closing the investigation procedure was similarly not considered a final judicial decision for the purposes of *ne bis in idem* because the statement of reasons for the decision showed that no detailed investigation had been carried out. *Gasparini* does seem to stand out, however it does not appear unjustified with regard to the effects of acquittals based on time bars within domestic legal systems.

All of this case law regarding the CISA illustrates the importance of the finality criterion as one of the essential constitutive elements of *ne bis in idem*. The criterion is often decisive, a factor which partly explains the number of references on this very issue. Another explaining factor for this case law is, however, that this criterion can be one of the most difficult to define, especially in a multinational and multilevel system in which there can be no consensus as to what constitutes a final judicial decision. A common definition, applicable at least within the scope of specific EU law

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<sup>41</sup> Opinion of Advocate General Sharpston delivered on 15 June 2006, C-467/04, EU:C:2006:406, para. 90.

<sup>42</sup> Ibid., paras 92-104.

<sup>43</sup> Ibid., para. 88.

<sup>44</sup> Judgment in Case C-467/04, *Gasparini*, para. 27.

<sup>45</sup> See the critical analysis of the judgment in the context of the rest of the case law by André Klip, *European Criminal Law*, 2nd ed. (Intersentia 2012), pp. 254-257.

<sup>46</sup> Case C-491/07, *Vladimir Turanský* [2008] EU:C:2008:768.

<sup>47</sup> Case C-469/03, *Miraglia* [2005], EU:C:2005:156, para. 30.

<sup>48</sup> Case C- 486/14, *Kossowski* [2016], EU:C:2016:483, para. 42.

instruments, is therefore a necessary contribution of the case law to the standard that must be enforced in the EU. However, as is apparent in particular with regard to the importance given to the contents of the decision which triggers the protection of *ne bis in idem*, the ECJ has fluctuated even in the context of the interpretation of a single instrument. The different wording the corresponding provisions and different aims of the instruments lead to further temptations to adjust the interpretation of the ‘bis’ according to the context.

### 3. Defining the ‘bis’ in the context of the European arrest warrant

Considering the importance of the condition that the ‘bis’ can only exist if there is a final judicial decision, the Framework Decision on the European arrest warrant was also expected to give rise to a significant amount of disputes on its precise definition. If the person has already been the subject of criminal proceedings and, as the case may be, a conviction in one State, this must be taken into consideration when deciding whether a warrant may be executed since it may constitute a violation of the principle. Articles 3(2), 4(3) and 4(5) of the Framework Decision establish different exceptions which may all be considered expressions of *ne bis in idem*. Articles 3(2) and 4(5) require that the previous judicial decision on which it is based has become final and has been enforced (or is no longer capable of being so). Article 4(3) allows the executing State to refuse to execute a warrant when its own judicial authorities have decided not to prosecute or to halt proceedings against the person for the same offence, or where a final judgment has passed in a Member State, in respect of the same acts, prevents further proceedings.

A number of judgments provide valuable clarifications regarding the interpretation of the criterion of finality, as well as the related enforcement requirement, in the context of the *ne bis in idem* exceptions to the execution of EAW. If the executing authority has enough evidence that the principle is being violated, it must (or may, under Article 4) refuse to execute the warrant. In the absence of harmonisation, the default with regard to procedural matters is always to refer to the domestic legal systems which are called upon to cooperate. However, as with other instruments of EU law, the implementation of these provisions of the Framework Decision at the national level requires some common interpretation of the conditions under which *ne bis in idem* might be triggered. This approach extends to the notion of a final judicial decision, which can therefore not entirely depend on the decision’s status in the legal system where it originated.

Of course, finality must be understood in relation with the other criteria - a decision is only ‘final’ for the purposes of *ne bis in idem* if it covers the same person and the same facts as the newly issued warrant. A request for further information from the issuing Member State might serve to determine whether there is in fact an ‘idem’.<sup>49</sup> As Advocate General Bobek wrote in a more recent case, for the principle *ne bis in idem* to be validly triggered, there must be a final statement from a Member State that authoritatively defines the extent of the *idem* that may then start precluding the *ne bis*.<sup>50</sup>

The Court of Justice has also ruled that the question whether a person has been ‘finally’ judged, for the purposes of Article 3(2) of the Framework Decision, is determined by the law of the Member State in which the judgment was delivered.<sup>51</sup> This means that the decisive factor is whether the judicial decision has the effect, under domestic law, of barring any further prosecution for the same acts. The finality of a judicial decision relied upon in a defence based on *ne bis in idem* must therefore, first and foremost, be determined on the basis of the status and effects of that decision under the law of the State where it was issued. In the same judgment, the ECJ invited executing authorities to make use of the cooperation arrangements provided for in Article 15(2) of the

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<sup>49</sup> Ibid., para. 49.

<sup>50</sup> Opinion of AG Bobek in Case C-505/19, WS [2020], EU:C:2020:939, para. 49.

<sup>51</sup> Case C-261/09, *Gaetano Mantello*, para. 46.

Framework Decision in order to ask the authority of the State where the judgment was delivered the precise nature of that judgment.<sup>52</sup>

In an effort to establish a common standard across EU criminal law and to facilitate the interpretation of the Framework Decision on the EAW, the ECJ had also indicated that; in view of their shared objective, the interpretations of *ne bis in idem* it has given in the context of Article 54 of the CISA must be equally valid in the context of Article 3(2) of the Framework Decision.<sup>53</sup>

However, recent case law seems to call this into question with respect to the issue of finality, in particular the judgment of the Court in *AB*.<sup>54</sup> The proceedings in Slovakia regarded the possible issuance of a EAW in respect of one of the accused persons in a case which had previously led to a final judgment. This judgment, which had the effects of an acquittal, was based on an amnesty which was decided before a determination was made on the substance of the case, and was later revoked. However the judgment had become final by the time the amnesty was revoked. Under Slovak law, the revocation of the amnesty entailed the annulment of decisions adopted on that basis and thus removed the legal obstacles to prosecutions, without the need for specific decisions or proceedings.

The ECJ chose<sup>55</sup> a definition of the concept of final judicial decision for the purposes of *ne bis in idem* as requiring a determination on the merits of the case, meaning that *ne bis in idem* was not triggered by the final judgment in such a situation. It justified this, first, by analogy to Article 54 CISA and the judgments in cases *Miraglia*<sup>56</sup> and *Kossowski*.<sup>57</sup> Advocate General Kokott had also cited ECtHR judgment *Mihalache v Romania* in this regard.<sup>58</sup> The ECJ followed Advocate General Kokott in stating<sup>59</sup> that this interpretation was confirmed by Article 50 of the Charter which refers to the person being ‘convicted’ or ‘acquitted’, both of which imply an examination of the substance of the case and a determination of the accused’s criminal liability. The ECJ also justified this interpretation by reference to the objective established in Article 3(2) TFEU which includes the ‘legitimate objective of preventing impunity for persons who have committed an offence’.<sup>60</sup> A decision to discontinue prosecution not on the basis of an examination of the substance of the case but on account of an amnesty could not, therefore, constitute a final decision giving rise to *ne bis in idem*. Although with some uncertainty as to the exact nature of the decision made following the amnesty in this case, the ECJ therefore found that the decision to discontinue prosecution on account of an amnesty generally does not involve a determination as to the merits of the case and that, therefore, the issuance of a EAW for the same facts is not precluded by *ne bis in idem*.<sup>61</sup>

Beyond the procedural peculiarities of the Slovak case at issue, what must be noted here is the firm choice of a substantive interpretation of the notion of a final decision giving rise to the protection of *ne bis in idem* for the purposes of the EAW Framework Decision. Although the referring court informed the ECJ that the decision which initially brought the prosecutions to an end had the same effects as an acquittal under Slovak law and was tantamount to a decision on the ‘substance’ of the case, what mattered the most to the ECJ was that it appeared that the decision based on the amnesty had been made before any court could rule on the accused’s criminal liability. Thus, before they were acquitted or convicted.

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<sup>52</sup> Opinion of AG Bobek .in Case C-505/19, *WS*, para. 48.

<sup>53</sup> Case C-261/09, *Gaetano Mantello*, para. 40.

<sup>54</sup> Case C-203/20, *Criminal proceedings against AB and Others* [2021] EU:C:2021:1016.

<sup>55</sup> *Ibid.*, para. 56.

<sup>56</sup> Case C-469/03, *Miraglia*, para. 30.

<sup>57</sup> Case C- 486/14, *Kossowski*, para. 42.

<sup>58</sup> Judgment of the European Court of Human Rights (‘the ECtHR’) of 8 July 2019, *Mihalache v. Romania* (54012/10, CE:ECHR:2019:0708JUD005401210, §§ 97 and 98).

<sup>59</sup> Para. 57 of the judgment in *AB*, referring to para. 51 of the Opinion of Advocate General Kokott delivered on 17 June 2021, EU:C:2021:498.

<sup>60</sup> Para. 58 of the judgment, which cites the ECJ judgments in: Case C-182/15, *Petruhhin* [2016] EU:C:2016:630, paras 36 and 37; C- 897/19 PPU, *Ruska Federacija* [2020] EU:C:2020:262, para. 60; and C- 505/19, *WS*, para. 86).

<sup>61</sup> *Ibid.*, paras 59-61.

The two precedents cited by the ECJ on this issue were given in the context of Article 54 CISA on decisions made by public prosecutors to terminate criminal proceedings without any detailed investigation or determination as to the merits of the case.<sup>62</sup> These were therefore not truly comparable to what was presented as an acquittal in *AB*, except insofar as the ECJ was satisfied that the national decision was not based on a determination as to the substance of the case. The ECtHR judgment cited by the Advocate General, *Mihalache*, provided an interesting counterpoint in which the European Court found that *ne bis in idem* was applicable following a public prosecutor's order discontinuing criminal proceedings while imposing a fine on the applicant. This decision could be considered a 'final acquittal or conviction' triggering the application of the principle. That case raised issues somewhat similar to *WS*, which restated the importance of the fact that the final decision triggering *ne bis in idem* be based on a determination as to the merits of the case, in relation to a settlement which put an end to the proceedings following the payment of a sum of money determined by a public prosecutor.

Yet, considering the ECJ's references to judgments made in the context of Article 54 of the CISA, one precedent which is conspicuously absent from the judgment is *Gasparini*.<sup>63</sup> The justification for distinguishing conditions for the triggering of *ne bis in idem* in that case from the circumstances in *AB* is not clear. In both cases, the acquittal is decided without any examination of the criminal liability of the accused. A consensus interpretation of *Gasparini* was previously that it established the lack of any requirement of a 'substantive determination' for an acquittal to benefit from *ne bis in idem*<sup>64</sup> and some authors drew from this and other judgements a conclusion that, according to the ECJ, the substantive contents of the decision were not a decisive factor in the triggering of this guarantee.<sup>65</sup>

An alternative interpretation, under which an acquittal which was not based on a substantive determination could not bar further prosecution in another Member State, certainly seemed equally defensible.<sup>66</sup> However, once the choice had been made so explicitly in the case law, any judgment which seems incompatible should require further justification. The fact that *AB* applies a different instrument of EU criminal law is not sufficient since the Court cites precedents related to the CISA in the grounds for the decision. One possible explanation<sup>67</sup> is that the judgment in *Gasparini* was explicitly based on the objective of Article 54 of the CISA, which is to ensure that persons who have their cases finally disposed of are able to enjoy their right to freedom of movement and are not prosecuted for the same acts in several Contracting States. This objective might justify a broad interpretation of the types of final decisions which might be covered under *ne bis in idem*, which would not be required in the case of the EAW, especially where the warrant is to be issued by authorities of the same Member State as the one where the initial prosecution had been carried out. However, this is not made explicit by the ECJ and would certainly merit clarification. The Court's approach is clearly different and some explanation ought to have been given as to the need to distinguish *Gasparini* or the specific requirements at play when the EAW is issued in the same Member State as the one where the earlier decision was made.

It is difficult to tell whether *AB* should be read as an overruling of *Gasparini* or whether more case law will establish a clearer distinction, either between the scopes of application of *ne bis in idem* for

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<sup>62</sup> In *Miraglia*, the ECJ held that *ne bis in idem* did not apply to a decision declaring a case to be closed after the public prosecutor had decided not to pursue the prosecution, without any determination as to the merits of the case, on the sole ground that criminal proceedings have been started in another Member State against the same defendant and for the same facts. In *Kossowski*, the decision of the public prosecutor closing the investigation procedure was similarly not considered a final judicial decision for the purposes of *ne bis in idem* because the statement of reasons for the decision showed that no detailed investigation had been carried out.

<sup>63</sup> Case C-467/04.

<sup>64</sup> Bas van Bockel, *The Ne Bis in Idem Principle in EU Law*, *op. cit.*, p. 227.

<sup>65</sup> Daniel Flore, *op. cit.*, p. 686. *Contra*, see André Klip, *op. cit.*, arguing that *Gasparini* was incorrectly decided.

<sup>66</sup> Bas van Bockel, *ibid.*

<sup>67</sup> Lorenzo Cecchetti, 'Between Autonomy and Respect for National Prerogatives: Another Brick in the Case Law on the *Ne Bis in Idem* Principle in EU Law', *EU Law Live*, 17 January 2022.

different instruments, or between different aspects of the two cases which justified these seemingly incompatible solutions. From the point of view of material justice, so long as no determination has been made as to the substance of the case and therefore the guilt or innocence of the accused, the matter cannot be considered to have been settled. One generally accepted exception to this, also justified by general requirements within the legal order and, in particular, the rights of the person accused, was the one set out in *Gasparini*: a time bar will lead the criminal justice system to consider the case ‘closed’ even in the absence of a decision on the substance of the case. In this regard, perhaps *AB* must be considered an expression of the usual rule, to which the exception made for the statute of limitations does not apply. As is often the case, it would have been preferable for the ECJ to explain this - or the other justifications for its decision not to follow (or cite) *Gasparini* - in its judgment.

Similar questions related to the ‘transfer’ of interpretations established in the context of the CISA to the EAW were raised in *X (European arrest warrant - Ne bis in idem)*,<sup>68</sup> on the enforcement requirement set out in Article 4(5) of the Framework Decision. As is apparent from the drafting of the provisions and the case law, this condition, which is also set out in Article 54 of the CISA, is closely related to finality: cases where there are questions as to the fulfilment of the enforcement requirement are often also cases in which questions may be raised as to the existence of a final question. The condition that there be a final decision is therefore often linked to a requirement that this decision has been executed or is no longer capable of being enforced, as in the Framework Decision on the EAW.

In an earlier judgment in *Bourquain*,<sup>69</sup> the ECJ had to rule on a preliminary reference made in a very peculiar case on a conviction *in absentia* by the French Permanent Military Court while the accused had fled to the German Democratic Republic. When new proceedings were launched in Germany in 2002, Mr Bourquain sought to rely on this previous conviction which had indeed become final but had never been capable of being executed, first because if he had reappeared before the end of the limitation period, a new trial would have had to take place, second, because he had later benefited from an amnesty, third, because the limitation period for the execution of the sentence had passed. The ECJ held that such a conviction is ‘final’ even if, as was the case here, there was never a point when it could have been enforced. The fact that by the time proceedings started in Germany, the French penalty was no longer capable of being enforced due to the limitation period, was enough to rule that the first conviction barred the German authorities from instituting new criminal proceedings for the same acts. The specific procedural mechanisms at play in the French system in this case show how the finality of a judicial conviction may be inherently linked to its execution: the judgment is not entirely clear as to what the solution would be with regard to a conviction *in absentia* which can still be executed and for which the obligation to institute new proceedings if the person is arrested still applies.

In *X*, the reference requested guidance on the interpretation of the ground for non-execution when the requested person has been finally judged and the sentence may no longer be executed under the law of the third country, under Article 4(5). The person against whom the EAW had been issued claimed that he had been prosecuted and finally judged for the same acts in Iran. The Iranian decision had acquitted him in respect of some of those acts and sentenced him in respect of others to a term of imprisonment, which he had partially served, until he benefited from a general leniency measure granted by the Supreme Leader of Iran to mark the 40th anniversary of the Islamic Revolution. The reference to the ECJ raised the question of the margin of discretion granted to the executing judicial authority when applying the provision transposing Article 4(5), and asked whether the requirement that the sentence has been served or may no longer be executed could be fulfilled in a situation such as that at issue in the main proceedings. The Court held that the executing authority must have a margin of discretion to determine whether it is appropriate to refuse

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<sup>68</sup> Case C-665/20 PPU, *X (European arrest warrant – Ne bis in idem)* [2021] EU:C:2021:339.

<sup>69</sup> Case C-297/07, *Klaus Bourquain* [2008] EU:C:2008:708.

to execute a EAW on that ground. It recalled that, while exercising this power, it must strike a balance between the two aims of preventing impunity and combating crime, on the one hand, and ensuring legal certainty for the person concerned, on the other.<sup>70</sup> As such, therefore, the fact that a leniency measure which prevents the execution of the sentence was granted by a non-judicial authority and was not based on objective criminal policy considerations does not prevent it from meeting the requirements for the triggering of *ne bis in idem* under Article 4(5).<sup>71</sup>

This judgment shows how crucial, but also how complex, the interpretation of the provisions which set out the finality requirement is for the implementation of the Framework Decision on the EAW is. The recognition of a final judicial decision as such, for the purposes of *ne bis in idem*, depends on the degree of trust which the executing judicial authority can place in the system in which it originated - a condition which depends on compliance with the standards of a fair trial<sup>72</sup> and which cannot be presumed beyond the Member States of the European Union.<sup>73</sup> Therefore, the executing authority cannot be required to recognise the final decision or its execution in the third State as producing the effects of *ne bis in idem* in its own legal system. However, the ECJ takes the view that such effects are, *a priori*, possible, even if the decision was not made by a judicial authority and not based on the implementation of a specific criminal policy or the merits of the case.

This approach may be difficult to reconcile with the one in *AB* which seems to go in a different direction. If a decision can only be final for the purposes of the *ne bis in idem* exceptions to the EAW if it was made after some examination of the substance of the case, it seems at least questionable to rule that a leniency measure that bears no relation to the substance of the case can produce these effects with respect to the enforcement requirement. Interestingly, Advocate General Hogan had proposed a different ruling on the issue of the recognition of the remission of the sentence following the general leniency measure, because the logic of mutual trust could not operate outside the sphere of the judicial application of the law and therefore could not apply to a measure adopted by a political authority outside any criminal policy considerations.<sup>74</sup> The *X* case on the EAW, like *AB*, shows that the transfer of interpretations and precedents from cases on Article 54 of the CISA to the relevant provisions of the Framework Decision on the EAW is not straightforward.

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The case law on the notion of a final judicial decision in the context of the *ne bis in idem* exceptions to the execution of a European arrest warrant is not yet sufficiently developed to draw definitive conclusions. What is clear is that, in part due to the inconsistencies present in the preexisting case law, the European Court of Justice has not yet established a clear and uniform standard for the concept in EU criminal law. Yet, the case law also confirms the importance of the criterion for the application of *ne bis in idem* in the context of the EAW, as in other instruments adopted in this field. The existence of a final judicial decision, or of a decision which can have the similar effect of barring further proceedings within a legal system, is an essential condition for the triggering of this fundamental right in EU law. References to domestic procedural law in order to determine which decisions should benefit from these effects are not sufficient, although they are a necessary starting point in an area which relies on mutual trust and cooperation between the judicial authorities of different States. However, for an autonomous concept to truly exist, the ECJ should make further efforts towards clarifying and unifying the constitutive elements of *ne bis in idem* across EU law, including those which are necessary to identify a '*bis*'. With *ne bis in idem* remaining one of the

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<sup>70</sup> Ibid., para. 103.

<sup>71</sup> Ibid., para. 88.

<sup>72</sup> Opinion of Advocate General Hogan delivered on 15 April 2021, *X (European Arrest Warrant - Ne bis in idem)*, C-665/20 PPU, EU:C:2021:303, para. 61.

<sup>73</sup> Judgment in *X*, para. 55.

<sup>74</sup> Opinion of AG Hogan, paras 76-78.

major sources of preliminary references to the ECJ in this field, and the finality criterion one of the aspects which produces the largest amount of case law, we can expect further clarification - and complexity - to be introduced in the near future. The implementation of the right in the context of the EAW certainly remains an ongoing source of references.<sup>75</sup>

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<sup>75</sup> See the request for a preliminary ruling introduced by the Spanish Audiencia Nacional in Case C-164/22, which actually combines questions on Article 54 of the CISA and the Framework Decision on the EAW.