ARTICLES

THE POST-LISBON PRINCIPLE OF TRANSNATIONAL NE BIS IN IDEM: ON THE RELATIONSHIP BETWEEN ARTICLE 50 CHARTER OF FUNDAMENTAL RIGHTS AND ARTICLE 54 CONVENTION IMPLEMENTING THE SCHENGEN AGREEMENT

Case note on District Court Aachen, Germany, (52 Ks 9/08 – “Boere”), Decision of 8 December 2010

CHRISTOPH BURCHARD and DOMINIK BRODOWSKI*

ABSTRACT

The ne bis in idem provision in Article 50 CFR – which gained the status of primary law when the Lisbon Treaty entered into force – differs in some important details from the long known Article 54 CISA. For example, only the latter contains an explicit “enforcement clause” – that only executed sentences prohibit a second proceeding. We discuss a recent case decided by the District Court Aachen where this difference was relevant, and consider Article 54 CISA to be a (secondary) operational embodiment of the (primary) Article 50 CFR. Despite the “angst clause” in Article 51(1) CFR, the judicial rights specified in the CFR are at least applicable whenever national courts interpret Union laws. At this point in time, the official Explanations to the CFR guide the interpretation of the CFR, albeit not precluding future dynamic extensions of the scope of protection offered by the CFR.

Keywords: Charter of Fundamental Rights; double jeopardy; implementing Union law; interpretative methodology; ne bis in idem

* Dr. Christoph Burchard, LL.M. (NYU) and Dominik Brodowski, LL.M. (UPenn) are senior researchers at the Chair for European Criminal Law and Criminal Procedure, Professor Dr. Joachim Vogel, Tübingen, Germany. This contribution is a revised version of our article originally published in German in Strafverteidiger Forum (Strafo) 2010, pp. 177–186.
The New Journal of European Criminal Law is the leading international journal on European criminal law. It analyses, discusses, defines, develops and improves criminal law in Europe and in particular criminal law as it is drawn up by the European Union and the Council of Europe.

European criminal law is an established and recognised legal discipline. It is not confined to the European Union, but it extends to all forty-seven States of the Council of Europe. Institutionally speaking European criminal law is driven by both the EU and the Council of Europe under the supervision and influence of the Court of Justice of the European Communities as far as the EU is concerned and by the European Court of Human Rights as regards the Council of Europe.

Although European criminal law is a recognised body of law, it constitutes by no means a perfect system and it requires analysis and discussion, so that it may develop and improve. Analysis and discussion cannot be the exclusive preserve of the legislative and judicial bodies; others must contribute to ensure balanced solutions.

Nor is European criminal law confined to what is traditionally considered as criminal law. It extends to and complements environmental law and competition law. As regards competition law the New Journal of European Criminal Law is running a section dedicated to the criminalisation of competition law and of hard-core cartels in particular. It is the first ever legal journal to treat criminal and competition law disciplines related at their interface.

To ensure originality, the New Journal of European Criminal Law has a peer-review system which is applied to long in-depth articles. This is necessary to maintain the position of the New Journal of European Criminal Law as the pre-eminent journal in its field and to guarantee the continued quality of its contents. For the same reason an Advisory Committee, composed of several authorities on the subject of European criminal law, supervises the Journal and its future development.

Thus, each issue comprises i.a. an editorial, in-depth articles submitted to a peer review, cutting-edge and to-the-point analysis & opinions, case law notes and legislative updates.
New Journal of European Criminal law

General Editors
Scott Crosby, M.A., LL.B., LL.M., Advocate, Brussels (Editor in chief) – Professor RA Holger Matt, Johann Wolfgang Goethe University, Frankfurt/Main (Deputy editor) – Professor Paul de Hert, Vrije Universiteit Brussel, University of Tilburg (Deputy editor)

Advisory Board
Professor Sir Francis Jacobs QC, London, Honorary Chairman – Professor John Vervaele, University of Utrecht – Professor John Spencer QC, University of Cambridge – Professor Ulrich Sieber, Max-Plack-Institut, Feiburg im Breisgau – Professor Robert Roth, University of Geneva

Editorial Board

Assistant Editors
Karen Weis and Silvia Santoro, Brussels

Order form

I would like to order ............... subscription(s) to New Journal of European Criminal law (NJECL) at 145 euro per subscription.

Please charge my credit card:

☑ Visa
☐ MasterCard

Name of cardholder:

Card number:

Expire date:

Signature

Fax this form to Intersentia +32 3 658 71 21

Mr | Ms | Prof | Dr

Name: First name:

Company: Job description:

Street: No.:

Postal code: City:

Country:

Telephone: Fax:

E-mail: VAT no.:

Signature Date

Groenstraat 31
BE-2640 Mortsel
Belgium

T +32 3 680 15 50
F +32 3 658 71 21

www.intersentia.com
mail@intersentia.be

www.intersentia.com