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# **CCBE RESPONSE TO THE GREEN PAPER ON CONFLICTS OF JURISDICTION AND THE PRINCIPLE OF *NE BIS IN IDEM***

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**APRIL 2006**

**Conseil des barreaux européens – Council of Bars and Law Societies of Europe**

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# CCBE RESPONSE TO THE GREEN PAPER ON CONFLICTS OF JURISDICTION AND THE PRINCIPLE OF *NE BIS IN IDEM*

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## I. Presentation

The Council of Bars and Law Societies of Europe (CCBE) represents more than 700,000 lawyers through its member bars and law societies. The CCBE is pleased to have the opportunity to respond to the green paper of the European Commission.

## II. Background

1. The rule against double jeopardy (*ne bis in idem*) is regarded as a fundamental principle of criminal justice.

Legal doctrine and jurisprudence justify the conclusiveness of *ne bis in idem*, which is a basic value in criminal litigation. The smooth functioning of criminal justice and the need finally to terminate the social disorder arising from the commission of a criminal offence within reasonable time, require that a criminal prosecution against an individual once terminated shall not commence again for the same act.

*Ne bis in idem* is also regarded as a principle protecting the individual from an abuse of State power. Uncertainty as to the likelihood of a new prosecution for the same act would expose (acquitted or convicted) accused persons to an unfair and unacceptable permanent risk.

2. For a long time, *ne bis in idem* was considered as an internal rule governing criminal proceedings within the same jurisdiction.

In recent years, however, the fast developing police and judicial cooperation in criminal matters within the European Union and growing sensitivity to fairness in criminal justice - as well as pragmatic considerations - have created a clear trend towards recognising the protection against double jeopardy in respect to all criminal judicial decisions taken within the common European area of justice.

Indeed, the importance of the *ne bis in idem* principle as a fundamental guarantee of individual justice for citizens of the European Union cannot be overestimated. As stated in the Opinion of the Advocate General of the *European Court of Justice* in *Gözütok and Brügge* (Judgment of 11 February 2003):

*"It would be inherently unfair and contrary to the principles on which the construction of a United Europe rests if ... a person could be punished in several Member States for committing the same acts. It is contrary to the very concept of justice to deny the effectiveness of foreign criminal judgments. That approach would both undermine the fight against criminality and the rights of the convicted person"* (at 58-59).

In the above cases, the European Court of Justice opted for an autonomous and broad interpretation of the term "final disposal of criminal proceedings" within the European (Schengen) area, including the termination of criminal proceedings without a court's judgment.

More recently, the European Court of Justice in *Esbroeck* (Judgment of 9 March 2006) reinforced the protection against double jeopardy, ruling that exporting and importing of the same consignment of drugs between Member States should be regarded as the "same act" within the meaning of Article 54 of the Schengen Convention.

### III. The Green Paper's Approach

While until now initiatives to establish *ne bis in idem* as a cross-border principle binding Member States of the European Union were mainly aimed at promoting the right not to be prosecuted and punished twice for the same act as a fundamental individual right, the Commission's Green Paper on Conflicts of Jurisdiction and the Principle of *ne bis in idem* in Criminal Proceedings takes a new approach to this matter.

As its title indicates, priority is given to the avoidance and resolution of positive conflicts of jurisdiction between Member States. The Green Paper promotes the idea of a single "appropriate" European forum on a case by case basis for each criminal act. It is argued in the Green Paper that a mechanism for allocating criminal cases to the appropriate jurisdiction at an early stage of concurrent national criminal proceedings would be much preferable to the current situation, where choice of jurisdiction is left to chance and priority is given to the "faster" amongst them.

### IV. Discussion

1. The approach of the Green Paper has some merits as compared to the current situation, which is not satisfactory for both individuals and States. On the other hand, the Green Paper fails to address properly substantial issues which are of paramount importance for the protection of individual rights.

Generally speaking, the Green Paper transforms the right not to be prosecuted and punished twice for the same act – which is primarily a right of the accused person - into an intergovernmental affair, where the individual has no standing until the choice of the appropriate forum is made by the states which have concurrent jurisdiction.

The role of the concerned individuals at the so-called pre-trial stage of the suggested mechanism is extremely limited, while his/her right to challenge the selected jurisdiction after indictment and only on exceptional grounds (due process and/or abuse of power) offers no reasonable measure of protection.

2. There are at least five areas in which the proposed mechanism to select the appropriate jurisdiction is fundamentally flawed:

- a. The decision on the appropriate forum is left entirely to the interested Member States, which are under a duty to enter into discussions.

An independent body within the European Union would be a much preferable alternative.

- b. The discussions are to be held between the competent authorities of the interested States, i.e. primarily between prosecuting authorities, which, as a rule, are influenced by the Executive.

In cases where vital State interests are involved (e.g. financial crimes, terrorism etc.), more powerful States would be motivated to put pressure on less powerful States within the European Union to accept jurisdiction of the former.

Forum shopping on the basis of other considerations (e.g. avoidance of time limits for prosecution or other bars to prosecution, expected length of sentence etc.) could expose the whole forum selection procedure as being unfair or abusive and would undermine the moral authority of the selected jurisdiction.

- c. The Green Paper includes a non-exhaustive list of criteria, according to which the appropriate jurisdiction shall be selected. There is no hierarchy of these criteria.

Although it is reasonable to keep the mechanism flexible and not to prioritise in an absolute manner one or more of the criteria mentioned, territoriality and residence of the

accused should be given priority. Lack of hierarchy jeopardises transparency and integrity of the forum selection procedure.

- d. There is no mechanism for the concerned individuals to challenge the selected jurisdiction before domestic courts in cases where the selected forum is not that of the person's permanent residence. His/her right in this respect can be exercised only before the selected jurisdiction. This restriction, combined with the very limited grounds on which the selected jurisdiction may be challenged, leaves the individual practically unprotected.
- e. *Ne bis in idem* is proclaimed in the title of the Green Paper as being one area of the proposed legislation. However, the text of the Green Paper contains no proposals in respect of this principle. There is only a vague reference that the establishment of the proposed mechanism to select the appropriate jurisdiction would allow the discussion on *ne bis in idem* to be relaunched.

This approach is strange. It is apparent that no initiative on conflicts of jurisdiction can expect wide acceptance if it does not address in detail the issues to be resolved in respect of protection against double jeopardy.

## V. Conclusion

The Green Paper fails to provide an acceptable basis to discuss positive conflicts of jurisdiction and *ne bis in idem* within the European Union. Importance and complexity of the issues involved demand a substantially longer consultation period.