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The Italian Supreme Court and the European *ne bis in idem* Principle: A Correct Decision Worthy of Some Criticism

Note to: Corte di Cassazione (Sez. Feriale penale), 19 August 2022, No. 31267

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Abstract

The judgment gives the opportunity to focus on the *ne bis in idem* principle as established at the European Union level. Accordingly, after an analysis of the facts of the case and of the judgment of the Italian Supreme Court, some inquiries on the nature of the principle will pave the way for a critical assessment of the decision's legal reasoning, notwithstanding the correctness of the final outcome.

Keywords

European Union – European arrest warrant – *ne bis in idem* – *idem factum*

1 Abstract of the Decision

The *Corte di Cassazione* has affirmed that the principle of *ne bis in idem*, enshrined in Article 50 of the Charter of Fundamental Rights of the European Union, cannot be invoked for convictions issued by a third State. Accordingly, international *ne bis in idem* cannot be characterized as a general principle of law and is not part of the Italian legal system under Article 10 of the *Costituzione*. Moreover, according

to the Court under the facts of the case there was no *idem factum* and it was not possible to qualify the situation within *ne bis in idem* principle.

2 Key Passages from the Ruling

(Paragraph 9) “The Court of Appeal in Genoa correctly noted that the *ne bis in idem* principle enshrined in Article 50 of the Charter of Fundamental Rights of the European Union cannot be invoked for convictions issued by a third State, such as the Helvetic Confederation, and that the *bis in idem* prohibition does not constitute a general principle of international law under Article 10 Cost. (*ex plurimis*: Sez. 3, 18 May 2021, No. 34576, C., Rv. 282796). In the case at hand, however, the conviction issued by the Bern Court concerns violations of Article 96(1)(a) of the Swiss Value Added Tax Act, which were put in place due to having obtained a tax deduction without having the reason for it, and not of German taxes, in relation to which the European arrest warrant was issued. Therefore, there is no *idem factum* suitable to ground, in hypothesis, the application of the guarantee of *ne bis in idem*”¹

3 Comment

3.1 *Brief History of the Court Case*

The *Corte di Appello di Genova* ordered the surrender of a German citizen to Germany’s judicial authority in execution of an European Arrest Warrant issued on 21 August 2015 by the Regensburg Public Prosecutor’s Office in relation to a criminal proceeding on tax and contribution evasion charges. The crimes had been allegedly committed in Switzerland and Germany between 2008 and 2014 and had consisted in omitted or unfaithful declarations regarding a tax on commercial activities (corresponding to “Irap” in the Italian system).

In addition, the execution of the European Arrest Warrant was subject to the condition that, after the trial in the requesting country, the defendant had to be returned to Italy to serve there any conviction emanated by the issuing Member State, given that the German (and European) citizen had been permanently residing in the Italian territory for more than five years.

The defendant appealed to the *Corte di Cassazione* against the judgment of the *Corte di Appello* relying on five grounds, among which the violation of the principle of international *ne bis in idem* and, in particular, of Article 3, para. 2,

¹ Key passages from the ruling are translated by the author.

of the Framework Decision 2002/584/JHA. The ground of appeal was based on the argument that, since the person requested to be surrendered had been judged for the same facts by the Court of Bern in Switzerland with a judgment dated 21 December 2020, it would not have been admissible for another judicial authority to hold a second trial.

3.2 *The Judgment*

The *Corte di Cassazione* dismissed the case on all the grounds. Of particular interest, for the purposes of this comment, the fact that it found the prohibition of *bis in idem* enshrined in Article 50 of the Charter of Fundamental Rights not to be applied to convictions issued by a State, as Switzerland, that is not part of the European Union. This outcome relies on the fact that the *bis in idem* principle is not protected under Article 10 of the *Costituzione*² since it is not part of the general principles of international law. In any case, according to the Court under the circumstances of the case there was no *idem factum* and, as a consequence, the *ne bis in idem* principle could not have applied anyway.

3.3 *The bis in idem Principle in European Law*

If in the European Convention on Human Rights (“ECHR”) system the right not to be prosecuted twice for the same offence finds its scope of application in the internal territorial dimension of each national legal order,³ meaning that another State – part of the Convention or not – may prosecute the person for the same facts for which there has already been a final judgment in another signatory State or third Party, under Articles 54–58 of the Convention Implementing the Schengen Agreement (“CISA”)⁴ and Article 50 of the EU

2 *Costituzione*, Article 10, para. 1: “The Italian legal system conforms to the generally recognized principles of international law” (author’s translation).

3 ECHR, Article 4, Protocol No. 7: “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”. In international law also Article 14, para. 7, of the International Covenant on Civil and Political Rights establishes the domestic scope of the *ne bis in idem* principle: “No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country”. More in general, the prohibition of *ne bis in idem* can be found in most criminal justice systems all over the world and in various international and supranational legal instruments. See, among many, DE LACUESTA, “Concurrent national and international criminal jurisdiction and the principle ‘ne bis in idem’. General report”, *Revue internationale de droit penal*, 2002, p. 707 ff.

4 CISA, 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”.

Charter of Fundamental Rights⁵ the principle's scope is broadened taking on both a national and transnational value.⁶ Indeed, at the European Union level, in addition to the need to balance the protection of individuals from the unfair exercise of the *jus puniendi* by the State with the value of the rule of law,⁷ there is also the need to guarantee the freedom of movement of citizens who shall not have to fear to be judged again when crossing national borders.⁸

5 EU Charter of Fundamental Rights, Article 50: "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".

6 With specific reference to the relationship between ECHR and European Union law with regard to the prohibition of *ne bis in idem* in its national scope of application, Article 52, para. 3, of the EU Charter of Fundamental Rights states that where it "contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention", without prejudice, in any case, to more extensive protection afforded under European Union law. See also the Explanations to the Charter under Article 50, where it is emphasized that "With regard to the situations covered by Article 4 of Protocol 7, namely the application of the principle within a Member State, the right guaranteed has the same meaning and scope as the corresponding right enshrined in the ECHR". On the several implications, including critical stances, see the Conclusions of Attorney General Cruz Villalón in C-617/10, *Åkerberg Fransson*, 2012, paras. 81–87; AMALFITANO and D'AMBROSIO, "Art. 50", in MASTROIANNI et al. (eds.), *Carta dei diritti fondamentali dell'Unione europea*, Milano, 2017, p. 1015 ff., pp. 1029–1031. With particular regard to the principle in the European Union see, among the others, GALGANI, "*Ne bis in idem* e spazio giudiziario europeo", in MANGIARACINA (ed.), *Il ne bis in idem*, Torino, 2021, p. 233 ff.; GALANTINI, "Diritti e conflitti di giurisdizione", in RUGGIERI (ed.), *Processo penale e regole europee: atti, diritti, soggetti e decisioni*, Torino, 2017, p. 113 ff.; see also CASSIBBA, "Disorientamenti giurisprudenziali in tema di *ne bis in idem* e 'doppio binario' sanzionatorio", *Processo penale e giustizia*, 2017, p. 1098 ff.

7 On the double rule of law and human right function of the principle see MITSILEGAS, *EU Criminal Law after Lisbon. Rights, Trust and the Transformation of Justice in Europe*, Oxford and London, 2016, p. 84.

8 Among many, MITSILEGAS and GIUFFRIDA, "Ne bis in idem", in SICURELLA et al. (eds.), *General Principles for a Common Criminal Law Framework in the EU*, Milano, 2017, p. 209 ff., p. 210; see, on this, Case C-467/04, *Gasparini*, 2006, paras. 27–28. In this regard, in its case law the European Court of Justice has consistently attempted to balance the need not to undermine the "useful effect" of the principle in the area of freedom, security and justice with the concern that an overly broad interpretation of the *ne bis in idem* could engender situations of impunity. See AMALFITANO and D'AMBROSIO, *cit. supra* note 6, p. 1021. It is important to observe that according to the Court of Luxembourg, harmonization is not a pre-requisite for recognition of foreign decisions: mutual recognition requires the existence of differences and it is based on the recognition of other Member States' criminal law "even when the outcome would be different if its own law were applied" (Cases C-187/01 and C-385/01, *Hüseyin Gözütok and Klaus Brügge*, 2003, paras 31–33). Consequently, the legal classification of the offence in each Member State is not relevant (Case C-288/05, *Kretzinger*, 2007, para. 29).

Accordingly, the principle applies among all EU Member States and, under Article 54 CISA, also in four non-EU countries which are part to the Schengen *acquis*: Iceland, Liechtenstein, Norway and Switzerland. Also, in EU law the *ne bis in idem* principle represents a ground for refusal in all the mutual recognition instruments established, among which the Framework Decision on the European Arrest Warrant pursuant to Article 3, para. 2.⁹

In this context, the requirements able to trigger the principle are common to the ECHR and EU legal systems: given a prior decision (of conviction or acquittal) that has become final and that concerns the merits, the prohibition (*ne*) requires that the same person (so-called subjective *idem*), for the same fact (so-called objective *idem*), is subject to another criminal proceeding (*bis*).¹⁰

With specific reference to the *idem* element, the European Court of Justice' case law, that has been endorsed by the Court of Strasbourg, requires the same "set of facts which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected".¹¹ In the leading case *Van Esbroeck*, indeed, the same historical fact (*idem factum*) criterion established was the only basis that could allow Article 54 CISA to come into

9 Framework Decision 2002/584/JHA, Article 3, para. 2: "The judicial authority of the Member State of execution [...] shall refuse to execute the European arrest warrant [...] 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 [...]". In literature on this provision, *ex multis*, CHIAVARIO, *Manuale dell'estradizione e del mandato d'arresto europeo*, Torino, 2013, p. 205 ff.; KLIMEK, "Mutual Recognition of Judicial Decisions in European Criminal Law", Cham, 2017, p. 200 ff.

10 Among many, LONATI, "L'incostituzionalità del sistema di 'doppio binario' in materia di diritto d'autore riapre il dibattito sulla legittimità strutturale dei cumuli punitivi: verso una nuova stagione del *ne bis in idem*?", *MediaLaws*, 2022, p. 1 ff., p. 6.

11 Case C-436/04, *Van Esbroeck*, 2006, para. 42. Similarly, the Grand Chamber of the European Court of Human Rights has established that the second proceeding needs to concern the "same set of concrete factual circumstances involving the same defendant and inextricably linked together in time and space". *Zolotukhin v. Russia*, Application No. 14939/03, Judgment of 10 February 2009, para. 84. Before this judgment, the Court of Strasbourg' case law adopted a different criterion, based on a mere comparison between abstract types of offences. See, with different nuances, *Ponsetti and Chesnel v. France*, Application Nos. 36855/97 and 41731/98, 14 September 1999; *Rosenqvist v. Sweden*, Application No. 60619/00, 14 September 2004; *Oliveira c. Switzerland*, Application No. 25711/94, 30 July 1998; *Franz Fisher v. Austria*, Application No. 37950/97, 29 May 2001. For an analysis of the case law of the two Courts see BIN, "Anatomia del *ne bis in idem*: da principio unitario a trasformatore neutro di principi in regole", *Diritto penale contemporaneo, Rivista Trimestrale*, 2020, p. 98 ff.; GAITO, "Ne bis in idem (profili europei)", *Digesto Discipline Penalistiche*, Torino, 2021, p. 461 ff.; SEMINARA, "Il divieto di bis in idem: un istituto inquieto", *Diritto penale e processo*, 2022, p. 1381 ff.

play under the circumstances of fact.¹² Quite interestingly to our purpose, the interpretation established with regard to Article 54 CISA in this judgment, and constantly affirmed in further decisions,¹³ was extended to the EAW Framework Decision in the case *Mantello*¹⁴ and finally adopted also by the Italian *Corte Costituzionale*.¹⁵

3.4 *Brief Remarks on the Decision*

The decision of the *Corte di Cassazione* on the non-application of the *ne bis in idem* principle is agreeable in its outcome but not in its entire argumentation.

On the one hand, the Supreme Court has correctly applied the notion of *idem* established at the supranational level in the European case law. In particular, the Italian judges have underlined how the two criminal proceedings, one pending in Germany and the other one concluded with a decision of conviction in Switzerland, concern different sets of facts, one regarding German taxes violations (in relation to which the European Arrest Warrant had been issued) and the other one on Swiss taxes violations. In this sense, the requirement seems to have been correctly applied, even if the reference made by the Court,

12 Neither the legal classification of the conducts nor the legal interest protected by the law could trigger the legal prohibition of *bis in idem*. Indeed, the facts concerned the illegal trafficking of drugs from one State to another and the issue at hand regarded whether the exportation and the importation could be considered as “same acts” under Article 54 CISA. Accordingly, neither the legal classification (exportation and importation of drugs constitute two different offences) nor the legal interests guaranteed could trigger the principle. On the other hand, according to the European Court, the importing and exporting activities represent two sides of the same coin since they concern the same time and location and are related to the same quantity. Therefore, there is the same historical fact able to get the principle applied. See MITSILEGAS and GIUFFRIDA, *cit. supra* note 8, p. 218.

13 *Kretzinger* case, *cit. supra* note 8, where the issue was around the transportation of contraband cigarettes involving the crossing of internal Schengen area borders; Case C-367/05, *Kraaijenbrink*, Judgment of 18 July 2007. In both cases the Court confirmed its practical approach and affirmed that the only relevant criterion was the identity of the material acts, meaning the existence of concrete circumstances inextricably linked together. It is for the competent national courts to assess the notion of “same acts” under Article 54 CISA. See KLIP, *European Criminal Law*, 4th Edition, 2021, p. 366.

14 Case C-261/09, *Mantello*, 2010, para. 38, where the Court emphasizes the need to give to the notion of *idem* “an autonomous and uniform interpretation throughout the European Union”.

15 *Corte Costituzionale*, 21 July 2016, Judgement No. 200. See, in critical terms, PULITANÒ, “Ne bis in idem. Novità dalla Corte Costituzionale e problemi aperti”, *Diritto Penale e Processo*, 2016, p. 1588 ff.; VICOLI, “Il ne bis in idem tra approccio naturalistico e dimensione tripartita del fatto: la Corte costituzionale delinea i nuovi equilibri”, *Giurisprudenza costituzionale*, 2016, p. 2466 ff.

in distinguishing the two sets of facts, to the violation of a specific provision of Swiss law risks to be misleading.¹⁶ Accordingly, even assuming the judgment of the Bern Court to be definitive (circumstance that is not clarified by the Supreme Court's decision) the *Corte di Cassazione* has reached the proper conclusion regarding the non-application of the *ne bis in idem* principle to the facts of the case in the light of the absence of the *idem factum* requirement.

On the other hand, while not questioning its outcome, the reasoning around the non-application of the *bis in idem* prohibition to Switzerland needs to be criticized. In particular, the *Corte di Cassazione* has affirmed the decision of the *Corte di Appello di Genova* that had found the principle, as established in Article 50 of the EU Charter of Fundamental Rights, not to be applied to the Helvetic Confederation as a State not part of the European Union. In addition, the Supreme Court has – correctly – underlined how the prohibition of *bis in idem* does not constitute a general principle of international law under Article 10 *Costituzione*, recalling to this purpose its case law on the matter.¹⁷ Nevertheless, in doing so the judgment has not taken into account the fact that Switzerland is part of the Schengen *acquis*. Accordingly, even if it is undisputed that the international *ne bis in idem* is not part of the general principles of international law and that, as a consequence, it can find application with respect to foreign judgments only under the existence of a Convention between the States,¹⁸ the Helvetic Confederation and the European Union have entered into an agreement – effective 12 December 2008 – for the purpose of implementing and developing the Schengen *acquis*. As a consequence, in such circumstances

16 It is important to observe, once again, that pursuant to the Court of Luxembourg' case law above mentioned the legal classification under national law is not relevant for the *ne bis in idem* application.

17 In particular, *Corte di Cassazione (Sezione Terza)*, C., 18 May 2021, No. 34576. The fact that it does not represent a general principle of international law has always been justified on the basis of the differences of substantial and procedural law in the national legal systems. See, *inter alia*, *Corte Costituzionale*, 8 April 1976, Judgment No. 69. Among the Supreme Court case law see also *Corte di Cassazione (Sezione Prima)*, *Spalevic Slobodan*, 12 June 2014, No. 29664; *Corte di Cassazione (Sezione Seconda)*, *Tropeano*, 21 May 2013, No. 40553.

18 See, among the others, GALANTINI, "Bis in idem per il cittadino già giudicato dalla giurisdizione ecclesiastica per un fatto contemplato dal codice canonico e sottoposto a giudizio in Italia per lo stesso fatto previsto dal codice penale", *Sistema penale*, 2 November 2021, available at: <[https://www.sistemapenale.it/it/scheda/cassazione-2021-34576-bis-in-idem-giurisdizione-ecclesiastica-giurisdizione-italiana#:~:text=Bis%20in%20idem%20per%20il,fatto%20previsto%20dal%20codice%20penale](https://www.sistemapenale.it/it/scheda/cassazione-2021-34576-bis-in-idem-giurisdizione-ecclesiastica-giurisdizione-italiana#:~:text=Bis%20in%20idem%20per%20il,fatto%20previsto%20dal%20codice%20penale;)>; LA ROCCA, "La 'minorata' concezione del ne bis in idem internazionale nel sistema integrato di tutela dei diritti della persona", *Processo penale e giustizia*, 2020, p. 1186 ff. In case law, *inter alia*, *Corte di Cassazione (Sezione Quarta)*, *Shabani*, 6 December 2016, No. 3315.

the European Union principle of *ne bis in idem* finds application, under Article 54 CISA, even with regard to Switzerland. Quite interestingly, indeed, the same *Corte di Cassazione* had affirmed in the past the application to the Helvetic Confederation of the provisions of the Convention Implementing the Schengen Agreement and, in particular, of Article 54 CISA.¹⁹

In the light of the above, by recalling that the international *ne bis in idem* principle is not covered by Article 10 *Costituzione* and that Article 50 of the EU Charter of Fundamental Rights does not apply to Switzerland, the *Corte di Cassazione* seems to have missed the target.²⁰ Indeed, the Supreme Court should have focused on the application (or non-application) of the European *ne bis in idem* as established in Article 54 CISA to the facts of the case. Or, even more properly, considering that the ground of appeal to the Supreme Court was neither based on Article 50 of the EU Charter of Fundamental Rights nor on Article 54 CISA, the Court should have dealt with Article 3, para. 2, of the EAW Framework Decision,²¹ a provision that has not even been cited by the Supreme Court in its reasoning.

In this sense, the *Corte di Cassazione* seems to have missed the opportunity to address the further issue of the (non) application of the *bis in idem* principle in the case of a European Arrest Warrant issued towards a person that has been (finally) judged in a State, as Switzerland, that is not a member of the

19 *Corte di Cassazione (Sezione Quarta)*, Rosignoli, 4 December 2009, No. 49706. See also *Corte di Cassazione (Sezione Quinta)*, Tagietti, 20 February 2009, No. 7687 (under the circumstances of the case the Supreme Court excluded *ratione temporis* the applicability of the agreement subsequently concluded between the Swiss Confederation and the European Union and concerning Switzerland's accession to the implementation, application and development of the Schengen Agreement); *Corte di Cassazione (Sezione V)*, PG v. *Cuomo Gerardo*, 26 May 2020, No. 15818 (establishing that, since Article 54 CISA operates in domestic law only in the presence of a definitive judgment, the "abandonment" decree issued by the Swiss judicial authority does not trigger the *bis in idem* prohibition since it lacks a definitive preclusive effect on the prosecution). For further references see GALANTINI, "Ne bis in idem internazionale", in MANGIARACINA (ed.), *Il ne bis in idem*, Torino, 2021, p. 263 ff., pp. 274–275.

20 In this way the Italian Supreme Court seems to adhere to its case law concerning the application of the European principle to States that are not part neither of the European Union nor of the Schengen Agreement. See GALANTINI, *cit. supra* note 18. In particular, see *Cassazione (Sezione Terza)*, I., 18 May 2018, No. 21997. Among the European Court of Justice case law see Case C-505/19, *WS v. Bundesrepublik Deutschland*, 2021. On the preliminary ruling see CANESTRINI, "Interpol red notices incompatibili con il diritto dell'Unione europea? Libertà di circolazione e *ne bis in idem* europeo", *Cassazione penale*, 2019, p. 4103 ff.

21 See page 2 of the *Corte di Cassazione* Judgment.

European Union but that is part of the Schengen *acquis*.²² This, of course, notwithstanding the fact that, regardless of what the decision on the issue would have been, the absence of the *idem factum* requirement would have not modified the final outcome of the judgment.

22 Under the Framework Decision 2002/584/JHA there is a distinction between the case, where the definitive judgment was issued in another European Union Member State or alternatively, in a third State. In the former case, refusal is mandatory (Article 3, para. 2) while in the latter case it is optional (Article 4, para. 5), meaning that it is left to the implementing laws whether to allow refusal or not. With specific reference to Italy, Article 18 Law 69 of 2005 has established only a mandatory reason for not executing the EAW where a final judgment was issued by another European Union Member State.