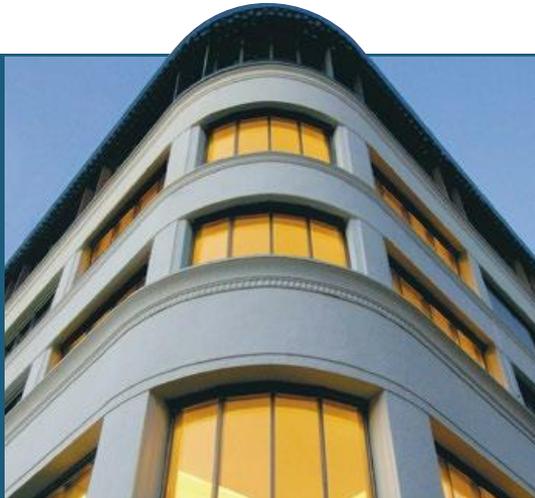


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# Double Jeopardy in Investigations and Prosecutions: Risks and Best Practices for companies and individuals

*A sketch of the legal framework*

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# I. Challenges

- ❖ Increasing transnational dimension of domestic criminal justice activities, in particular when it comes to cross-border corruption investigations.
- ❖ Lack of coordination among global anticorruption enforcement authorities.
- ❖ Results in unfair treatment of companies under investigation in multiple jurisdictions which may discourage companies from voluntarily disclosing potential corruption offenses.
- ❖ Such overlapping investigations may violate the *ne bis in idem* principle.
- ❖ Can this principle be invoked by companies?

## II. International legal framework

- ❖ No general rule of international law that imposes an international obligation to comply with *ne bis in idem*.
- ❖ Individual right to *ne bis in idem* under IHRL treaties, but no cross-border application as the binding effect is limited to every single jurisdiction.
  - ❖ Art. 17(4) of the International Covenant on Civil and Political Rights (ICCPR)
  - ❖ Art. 4 of the of the 7th Protocol to the European Convention on Human Rights (ECHR)
- ❖ No individual right to *ne bis in idem* under multilateral treaties but a ground of refusal (mutual legal assistance) or a ground for non-execution (mutual recognition) between states or between judicial authorities.

### III. The EU legal framework

#### ❖ Art. 54 Schengen Convention (CISA)

- ❖ *“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 (...)”*

#### ❖ Art. 50 Charter of Fundamental Rights of the EU (CFREU)

- ❖ *“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”*
- ❖ Cross border *ne bis in idem* principle, but only becomes operative when a defendant has been acquitted, convicted (CFREU) or when the matter has otherwise been resolved or settled (CISA).
- ❖ Does not prevent multiple states from conducting parallel investigations<sub>4</sub> of the same conduct.

## IV. Recent case law

### - Execution condition of art. 54 CISA

- ❖ *Spasic* (C-129/14 PPU), Court of Justice of the EU, 2014
  - ❖ Fraud offence and coincidental parallel investigations in the EU.
  - ❖ Where the penalty consists of a term of imprisonment and a fine, both imposed as principal penalties, the payment of the fine alone is not sufficient to consider that the penalty has been enforced.
  - ❖ The additional enforcement condition laid down in Art. 54 CISA is therefore compatible with the CFREU.
  - ❖ Strong focus on the duty to prevent the impunity of criminals within the Schengen Area.

## IV. Recent case law

### - Final decision according to art. 54 CISA

- ❖ *M.* (C-398/12), Court of Justice of the EU, 2013
  - ❖ Allegations of child abuse and coincidental parallel investigations in the EU.
  - ❖ Even a decision of “non lieu” is a final decision on the merits of the case that bars further prosecution in another Member State.
  - ❖ Only the Court that issued the “non lieu” is in a position to assess what is “new” evidence that may brought new proceedings against the same person for the same facts.

## IV. Recent case law

### - Interaction between DPAs and double jeopardy

- ❖ *Oil for Food* case, Tribunal correctionnel de Paris, 2015
  - ❖ Allegation of bribery in the context of the Oil For Food (OFF) program.
  - ❖ A French company had entered into a Deferred Prosecution Agreement with the US Department of Justice (DoJ). The French enforcement authorities were also investigating – and proposing to prosecute – the same company in relation to the same conduct.
  - ❖ The principle of double jeopardy guarantee prohibits a second prosecution for the same fact where a DPA had already been reached with a competent authority (and resulted in a conviction entered by a US court).

## IV. Recent case law

### - Balance of interests and double jeopardy

- ❖ *Siemens case*, Cámara Federal de Casación Penal de la República de Argentina, 2015
  - ❖ Allegation of corrupt payments to high Argentinean officials for the national ID and migration control project.
  - ❖ A company officer entered into a plea bargain with the Munich Public Prosecutor's Office in settlement over foreign corruption. The Argentinian pursued subsequent prosecutions in relation to the same conduct.
  - ❖ The Argentinian Court distinguished between private interests served by the German prosecution (damage suffered by the company due to the payment to third parties without a clear consideration) and public interests served by the Argentinian prosecution (potential harm caused by public-sector bribery), found no match between these interests and the facts investigated and allowed the case to proceed.

## V. Perspectives

- ❖ Enhance cross-border cooperation in order to prevent or to settle issues relating to concurrent proceedings.
  - ❖ Coordination role of OLAF for states, institutions and organizations under a joint ongoing investigation. Competent national authorities decide whether or not to initiate criminal proceedings based on OLAF's findings. However, no competence to conduct criminal investigations or to prosecute fraud cases.
  - ❖ Revised Eurojust Council Decision 2009/426/JHA : art. 13 requires Member States to exchange with Eurojust “*any information necessary for the performance of its tasks*”, e.g. cases involving (potential) conflicts of jurisdiction
  - ❖ Creation of joint investigation teams as a mean to conduct specific cross-border criminal investigations for a limited period.
  - ❖ Draft EPPO Regulation as a role model of decentralised prosecution office of the European Union with exclusive competence for investigating, prosecuting and bringing to judgment crimes against the EU budget.

## VI. Conclusion

- ❖ There is no universal acceptance of a *ne bis in idem* principle.
- ❖ Absent a treaty, as with EU states, each country is entitled to decide whether it can or will prosecute conduct which has already been prosecuted elsewhere.
- ❖ A company's risk of multiple convictions is therefore affected by the jurisdictions involved.
- ❖ A company should not focus only on which jurisdiction(s) may be more likely to consider favourable settlements, but should also take into account the global perspective, including which jurisdiction(s) are likely to consider themselves bound by the rule of international double jeopardy

## VII. Questions?

