Criminal justice: ne bis in idem principle or prohibition of double jeopardy

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PURPOSE : to present a Greek initiative with a view to adopting a Council Framework Decision concerning the application of the "ne bis in idem" principle. CONTENT : the principle "ne bis in idem", or the prohibition of double jeopardy, i.e. that no-one should be prosecuted or tried twice for the same acts and for the same criminal behaviour assumes a special significance at a time when transborder crime is on the increase and problems of jurisdiction in connection with criminal prosecutions are becoming more complicated. The importance of this principle is furthermore apparent in the areas of asylum, immigration and extradition and within the framework of the European Union and in agreements between the Union or certain Member States and third countries To recall, in the programme of measures to implement the principle of mutual recognition of decisions in criminal matters established by the Council and the Commission the "ne bis in idem" principle is included among the immediate priorities of the Union, in particular as regards the taking into account of final criminal judgments delivered by a court in another Member State. The programme recommended a reconsideration of Articles 54 to 57 of the Convention implementing the Schengen Agreement, which reiterate the corresponding articles of the Convention between the Member States of the European Communities on Double Jeopardy, signed in Brussels on 25 May 1987, with a view to the full application of the principle of mutual recognition, which has, however, not been ratified by the Member States. It should also be highlighted that in the legal systems of a number of States the principle of "ne bis in idem" is recognised only at national level, i.e. vertically, observing the criminal procedure followed in the State in question. The application of the "ne bis in idem" principle has thus far raised many serious questions as to the interpretation or acceptance of certain substantive provisions or more general rules (e.g. the concept of "idem") because of the different provisions governing this principle in the various international legal instruments and the difference in practices in national law. The aim of this proposed Framework Decision is to provide the Member States with common legal rules relating to the "ne bis in idem" principle in order to ensure uniformity in both the interpretation of those rules and their practical implementation. Since the above objectives of the Framework Decision cannot be sufficiently achieved by the Member States and can therefore be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity. In accordance with the principle of proportionality, this Framework Decision does not go beyond what is necessary in order to achieve those objectives. This draft Framework Decision sets out a number of definitions of specific terms such as "criminal offences" which shall mean: - acts which constitute crimes under the law of each Member State; - acts which constitute administrative offences or breaches of order that are punished by an administrative authority by a fine, in accordance with the national law of each Member State, provided that they fall within the jurisdiction of the administrative authority and the person concerned is able tobring the matter before a criminal court; - "judgment" shall mean any final judgment delivered by a criminal court in a Member State as the outcome of criminal proceedings, convicting or acquitting the defendant or definitively terminating the prosecution, in accordance with the national law of each Member State, and also any extrajudicial mediated settlement in a criminal matter; any decision which has the status of res judicata under national law shall be considered a final judgment; - "Member State of the proceedings" shall mean a Member State in which the proceedings took place; - "Lis pendens" shall mean a case where, in respect of a criminal offence, a criminal prosecution has already been brought against a person, without a judgment having been delivered and where the case is already pending before a court; - "idem" shall mean a second criminal offence arising solely from the same, or substantially the same, facts, irrespective of its legal character. As regards the right of any person not to be prosecuted or convicted twice for the same criminal offence, the draft framework decision stipulates that whoever, as a result of committing a criminal offence, has been prosecuted and finally judged in a Member State in accordance with the criminal law and the criminal procedure of that State cannot be prosecuted for the same acts in another Member State if he has already been acquitted or, if convicted, the sentence has been served or is being

served or can no longer be enforced, in accordance with the law of the Member State of the proceedings. The procedure may be repeated if there is proof of new facts or circumstancess which emerged after the judgment or if there was a fundamental error in the previous procedure which could have affected the outcome of the proceedings, in accordance with the criminal law and the criminal procedure of the Member State of the proceedings. Exceptions are also provided in the application of the principle. A Member State may make a declaration specifying the categories of offence to which the exception may apply. The draft framework decision also provides for an accounting principles. It stipulates that if a new prosecution is brought in a Member State against a person who has been definitively convicted for the same offences in another Member State the period of deprivation of freedom or fine handed down by that State in respect of those offences shall be deducted from the sentence which he would probably receive. As far as allowed by national law, any penalties other than deprivation of freedom which have been imposed, or penalties imposed in the framework of administrative procedures, shall also be included. Lastly, the draft framework decision provides for the exchange of information between competent authorities. If a prosecution has been brought against a person in a Member State and the competent authorities of the latter have reasons to believe that the charge concerns the same acts for which he has been definitively convicted in another Member State, those authorities shall request the relevant information from the competent authorities of the Member State of the proceedings. The requested information shall be provided as soon as possible using all available technical means and shall be taken into account in order to determine whether the procedure is to becontinued.