Prosecuting and Punishing Offenders for Several Offences in Belgium

Nele Audenaert

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I. Introduction

An offender is often brought to court for multiple different offences at once. In Belgium, no specific legal concept exists for such an offender. Yet, such an offender can be referred to as a 'multi-offender'. This term refers to an involvement in a multitude of offences. A legal concept for the offences, on the other hand, does exist in Belgium. After all, the Belgian legislator labelled these offences as 'concurring offences' ('*samenlopende misdrijven*') and a set of concurring offences as a 'concurrence' ('*samenloop*'). These terms refer to the fact that the offences concur on the track record of a multi-offender.

Offenders who have committed a multitude of offences give way for several unique challenges that warrant a unique treatment. These challenges occur on multiple levels of the criminal justice chain. More specifically, the unique position of a multi-offender requires specific attention from both a procedural and a substantive point of view and from both a national and transnational perspective.[1] Surprisingly, the Belgian legal system only has eye for the substantive characteristics of dealing with a multi-offender. A well-considered approach governing the prosecution of multi-offenders or the execution of penalties is completely missing. The Belgian rules on concurring offences only tackle the penalty or penalties that can (or cannot) be imposed for a multitude of offences. However, transnational cases have been explicitly excluded from the scope of these specific rules.

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1. See Nele Audenaert and Wendy De Bondt, 'Setting the Scene: Why Study Multi-Offenders' in this volume.

This ignorance of the unique position of a multi-offender causes many problems. Therefore, this chapter will question (a few of) the decisions the Belgian legislator made with regard to the prosecution and punishment of multi-offenders. To maintain a clear structure, the chapter will follow the criminal justice chain. First, the scope of the specific rules on multi-offenders will be examined (II). After that, the prosecution phase (III), the sentencing phase (IV) and the execution phase (V) will be addressed. Overarching in all four sections, the potential upcoming revision of the Belgian Criminal Code (hereafter: BCC) will also be briefly referred to.[2]

II. Qualifying offences as 'concurring offences'

The Belgian legislator introduced different rules for the prosecution and/or punishment for offences. These different rules are not only based upon the seriousness of the committed offence(s) but also, amongst others, upon their number and the criminal record of the offender. Although not explicitly labelled as such, rules for several types of offenders can thus be distinguished within Belgian substantive criminal law (A). Before elaborating on the (lack of) specific rules for prosecuting and punishing multi-offenders, it is thus crucial to define when offences can be qualified as 'concurring offences'. Furthermore, it is also necessary to discuss the three different categories of concurring offences (B). After all, each of these categories will have a different impact on the applicable penalty range.

A. Introducing two times two different types of offenders

The BCC implicitly makes a double distinction between two different types of offenders. Firstly, an offender can be qualified as a 'single-crime offender' or as a

2. For more information about this potential revision, see Joëlle Rozie and Damien Vandermeersch, *Commissie voor de Hervorming van het Strafrecht. Voorstel van Voorontwerp van Boek I van het Strafwetboek* (Brugge, die Keure, 2016) 216p and Joëlle Rozie, Damien Vandermeersch, Jeroen De Herdt, Marie Debauche and Margot Taeymans, 'Het voorstel van voorontwerp van nieuw Boek I Strafwetboek. Na 150 jaar eindelijk tijd om 'de sprong' te wagen' (2017) *Nullum Crimen* 1-9. Up until now, it is still unclear to what extent this proposal for a new Belgian Criminal Code will be adopted by the Belgian Parliament (Legislative Proposal of 13 March 2019 for the Introduction of a new Criminal Code <https://www.dekamer.be/FLWB/PDF/54/3651/54K3651001.pdf> accessed 25 February 2021).

'multi-offender'. Secondly, both types of offenders can either be 'first-time offenders' or 'repeat offenders'. The difference between these type of offenders is of paramount importance. After all, the severity of the penalty will largely depend on the number of offences committed (single-crime versus multi-offender) and the criminal record of the offender (first-time versus repeat offender).

The difference between a 'single-crime' and a 'multi-offender' is, in most cases,[3] easy to make. Whereas single-crime offenders committed only one act which constituted only one offence, multi-offenders committed a multitude of offences, either or not following from multiple acts.

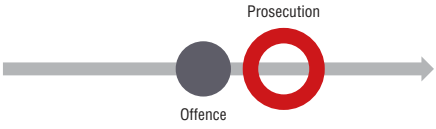

FIGURE 1. A single-crime offender

FIGURE 2. A multi-offender

The difference between a 'first-time' and a 'repeat offender' is more difficult to make. The main difference between both types of offenders lies in either or not already having received an official warning before. If an offender committed one or more offences *after* already having been finally convicted for another offence, the rules for repeat offenders apply. Vice versa, if an offender committed multiple offences *before* having been finally convicted for an offence, the rules for first-time offenders apply. Thus, the decisive criterion to qualify an offender as a first-time offender is, perhaps somewhat counterintuitive, the moment a previous conviction for other

3. Of course, there are always some exceptions. For example, there are some offences (so-called aggravated offences) that necessarily imply the commission of another offence (so-called predicate offence). Reference can be made to the offences of homicide (which necessarily implies intentional assault) and breaking and entering (which necessarily implies theft). Homicide and breaking and entering are considered to be the aggravated versions of respectively intentional assault and theft. In the Belgian legal system, it is not possible to convict the offender for both the aggravated and the predicate offence. Therefore, these offences will never be qualified as a concurrence, even though theoretically two (or more) offences have been committed. See R. Vasseur, 'Over feit en kwalificatie: wanneer het basismisdrijf niet bewezen wordt geacht, maar de autonoom strafbaar gestelde verzwarende omstandigheid wel…' (2018) *Tijdschrift voor Strafrecht* 245, 246.

offences becomes final. Irrelevant are the moment (1) an indictment is issued or (2) a conviction is handed down.[4]

FIGURE 3. A first-time multi-offender

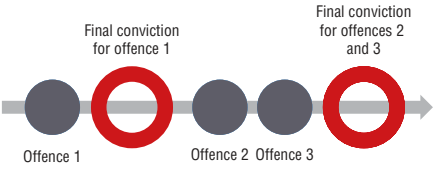

FIGURE 4. A repeat multi-offender

It follows from the above that two times two types of offenders can be distinguished, as showcased by the following table. One differentiation depends on the number of committed offences. The other differentiation depends on the (non-)existence of a prior criminal record.

TABLE 1. Four types of offenders

	One committed offence	A multitude of offences
No prior criminal record	A first-time single-crime offender	A first-time multi-offender
Prior criminal record	A single-crime repeat offender	A repeat multi-offender

For the purposes of this chapter, only three different types of offenders will be referred to. The term 'single-crime offender' will refer to a first-time single-crime offender. The term 'multi-offender' will refer to a first-time multi-offender. Lastly, the term 'repeat offender' will refer to a single-crime repeat offender. The situation of a repeat multi-offender will not be addressed in this chapter for reasons of simplicity.

As previously mentioned, the difference between these types of offenders affects the applicable sentencing range. For single-crime offenders, no specific rules apply. The judge will impose a sentence within the margins set out by the legislator for a certain type of offence. On the other hand, specific rules apply to multi- and repeat offenders. Multi-offenders are traditionally punished more leniently compared to single-crime offenders. After all, in most cases, the total penalty for a multitude of offences will not equal the sum of the different penalties prescribed for the different

4. Thus, the Belgian legal system did not provide in specific rules for so-called multiple-conviction offenders. See Nele Audenaert and Wendy De Bondt, 'Setting the Scene: Why Study Multi-Offenders?' in this volume.

offences. In contrast, repeat offenders are mostly punished more severely compared to single-crime offenders. The existence of a prior conviction is considered to warrant a more severe sentence compared to the sentence that would have been imposed on a first-offender for the same offence(s).

B. Introducing three different types of concurrence

The scope of the rules on multi-offenders is relatively broad. The only requirements for the (lenient sentencing) rules to be applicable are that the offender (a) must have committed a multitude of offences (b) before a final conviction has been handed down for at least one of these offences. All the offences committed before the final conviction are then labelled as a concurrence. The number of criminal proceedings in which they are tried is irrelevant.

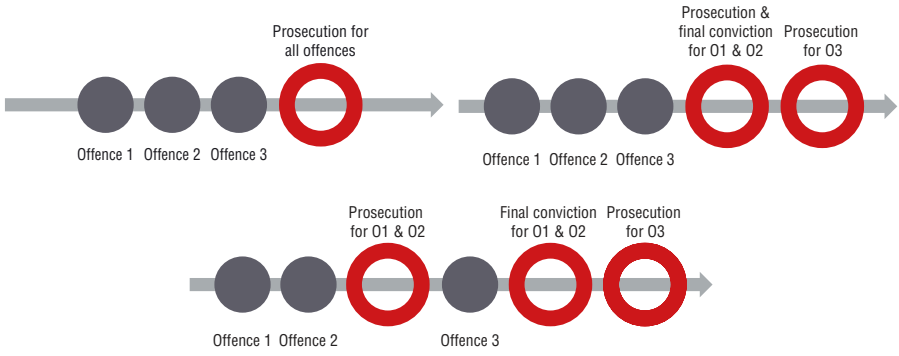

FIGURE 5. Possible "concurrence" scenarios

However, the sentencing level does not only vary according to the type of offender that is brought to court. Also the type of concurrence at issue is important to determine the appropriate sentence. Three different types of concurrence exist.

First, the BCC distinguishes cases of *concursus idealis* ('*eendaadse samenloop*') and cases of *concursus realis* ('*meerdaadse samenloop*'). The rules for *concursus idealis* apply whenever one single act constitutes more than one offence. A person who rapes a woman in a public park, for example, can be held criminally responsible for both rape (Article 375 BCC) and public indecency (Article 385 BCC). To the contrary, when the different offences follow from different acts (*e.g.* stealing a car and battering a man), the rules for *concursus realis* will apply.

Secondly, within the category of *concursus realis*, a distinction can be made between "disconnected concurring offences" ('*zuivere meerdaadse samenloop*') and "connected concurring offences" ('*collectieve*' or '*voortgezette misdrijven*').[5] If the concurring offences are the consecutive and continuous expression of the same criminal intent, the rules for connected concurring offences apply.[6] If not, the rules for disconnected concurring offences apply.[7]

The distinction between the above-mentioned types of concurrence seems relatively straightforward. Yet, the number of discussions in the Belgian case-law on how to qualify a given concurrence prove otherwise. For example, according to the Belgian *Court de cassation*, offences are linked by the same criminal intent whenever these are linked by "*one overall aim*". It is not required that the aim itself is criminal,[8] nor is it required that this aim already existed when committing the first offence.[9] Even when the plan changes throughout the course of committing the offences, they can still be qualified as connected. Especially the period of time between the concurring offences is fundamental in this regard: the larger the time period, the less likely that the judge will qualify the offences as connected concurring offences.[10] In practice, a time frame of six months has already been regarded as too large.[11] Another criterion relates to the question of whether some sort of "warning" judicial action has already been taken against the offender. This could, for instance, be the case when the offender has already been prosecuted for a part of the offences, even though the prosecution did not yet lead to a final conviction.[12] Also the location

5. On the basis of the structure of the BCC and on the basis of their potential influence on the penalty that can be imposed, it could be argued that the category of disconnected concurring offences belongs to the category of *concursus idealis*. However, since an offender of disconnected concurring offences also committed more than one single act and since the revisers of the BCC suggest to no longer make a distinction between disconnected and connected concurring offences, it seems more accurate to regard disconnected concurring offences as belonging to the category of *concursus realis*.

6. For example, someone illegally buys a firearm, robs a bank and steals a car to flee from the police authorities.

7. For example, an offender steals a car in January 2019. In April 2019, the same offender starts a bar fight, thereby causing serious bodily harm to someone else. In July 2019, the offender decides to set the house of his deceased grandmother on fire, because she did not include him/her in her final will.

8. Cass. 12 December 1978, *Arr.Cass.* 1978-79, 419 and Cass. 1 March 1994, 6354.

9. Cass. 1 March 1994, 6354; Cass. 29 September 1992, 7060 and Cass. 27 June 1990, 8302.

10. See for example Cass. 19 May 2015, P.15.0095.N.

11. Cass. 23 June 2010, P.10.0794.F.

12. Cass. 8 February 2012, P.11.1918.F.

of the crime scene(s) could play a role. These very broad and vague criteria make it difficult to predict the outcome in a specific case. It is up to the judge to sovereignly classify the concurring offences as connected or disconnected. This can possibly lead to a very broad application of the (most generous[13]) rules on connected concurring offences[14] or, to the contrary, to a very narrow application of these rules.[15] This raises a lot of questions concerning the requirement of legal certainty. Luckily though, as soon as the proposal for the revision of the BCC will be accepted, the distinction between connected and disconnected concurring offences will probably disappear. From then on, only the more clear and less debatable categories of *concursus idealis* and *concursus realis* will exist.[16]

III. The Belgian approach on prosecuting multi-offenders: Worry-free in one, two, three criminal proceedings?

No specific rules governing the prosecution of multi-offenders exist in the Belgian legal system. Nor the BCC, nor the Belgian Code of Criminal Procedure (hereafter: BCCP) make a distinction between prosecuting a single-crime and prosecuting a multi-offender. General rules apply to both types of offenders. However, overall, these general rules are not very efficient for prosecuting an offender for a multitude of offences. Three different situations can occur.

13. *Infra* IV.A.

14. Even if several different legal interests or several different persons have been affected, the offences can still be qualified as connected concurring offences. See for example Cass. 23 november 2016, P.16.0982.F.

15. Very recently, the Belgian *Court de cassation*, for instance, stated that identical offences are not necessarily linked through a premeditated intent. Although this statement in itself is not worrisome, it was quite surprising that repeatedly deciding to drive your car without a car insurance was not considered to be the continuous expression of the same criminal intent (Cass. 5 januari 2021, P. 20.1206.N).

16. Articles 62 and 63 of the Draft Criminal Code. See Legislative Proposal of 13 March 2019 for the Introduction of a new Criminal Code <https://www.dekamer.be/FLWB/PDF/54/3651/54K3651001.pdf> accessed 25 February 2021.

A. All concurring offences are brought to court at the same time

FIGURE 6. All concurring offences are brought to court at the same time

In an ideal scenario, all concurring offences would be prosecuted at the same time. Several good reasons exist for bringing a multi-offender to court only once. Reasons of procedural (use of resources) and court efficiency are probably the main reasons to initiate only one criminal procedure. Furthermore, also reasons of legal certainty should encourage to settle a criminal case as soon as possible: the more criminal proceedings are initiated, the longer the multi-offender will have to wait to know the final outcome. Correspondingly, splitting criminal proceedings increases the risk that the offender would be acquitted because the reasonable period of time has been exceeded. Last but not least, it can be argued that each additional criminal procedure would cause extra distress on behalf of the multi-offender and could consequentially be experienced as an additional punishment.[17] The situation in which all concurring offences are prosecuted at the same time is thus the most desirable and efficient situation.

However, it is not always possible to target the whole concurrence at once. For example, one or more of the offences could have been committed after the multi-offender was already prosecuted for a series of other offences.[18] Furthermore, some offences are not always immediately discovered or it may not always be easy to find evidence for the whole concurrence. In the latter case, the prosecuting authorities could decide to already bring the offender to court for a part of the concurrence, to prevent this part from becoming time-barred.

Unfortunately, the lack of specific rules also allows to prosecute a multi-offender for each offence separately, even if there are no good reasons to do so. There is no

17. Nele Audenaert and Wendy De Bondt, 'Multi-offenders In (Double) Jeopardy: Towards cross-border prosecution and sentencing rules for offenders who have committed multiple offences' (2019) *European Criminal Law Review,* 256, 271.
18. *Supra* II.A.

obligation whatsoever to prosecute the offences all at once.[19] Especially considering that each public prosecutor's office has its own (substantive and territorial) competence, it is not unlikely that this lack of rules will often result in several simultaneous or consecutive proceedings.

B. The offences are brought to court simultaneously in different criminal proceedings: What about *lis pendens*?

It follows from the above that a multi-offender may be subjected to multiple ongoing criminal proceedings. These simultaneous proceedings can either have been initiated in Belgium only (a) or in Belgium and other EU Member States (b) and can either relate to the same (1) or a different part (2) of the concurrence.

a. Simultaneous proceedings in Belgium

1) Simultaneous proceedings for the same offences

FIGURE 7. Simultaneous proceedings for the same offences

No explicit *lis pendens*-rules exist in the BCC(P). According to Belgian law, it is thus not prohibited to initiate multiple criminal proceedings against the same multi-offender for the same (part of a) concurrence. Nonetheless, such a situation is mainly hypothetical. Ultimately, there are still some general rules on the territorial and material competence of the prosecuting authorities. Furthermore, it is rather unlikely that the same prosecutor will prosecute the multi-offender more than once for the same offences. Therefore, this situation does not need any further attention.

19. The potential upcoming revision of the Criminal Code, however, implicitly requires that the facts at issue in the second procedure were not yet known during the first criminal procedure. See Article 63, paragraph 4 of the Draft Criminal Code in Legislative Proposal of 13 March 2019 for the Introduction of a new Criminal Code <https://www.dekamer.be/FLWB/PDF/54/3651/54K3651001.pdf> accessed 25 February 2021.

2) Simultaneous proceedings for different offences

More likely to occur is the situation in which a multi-offender is prosecuted multiple times, each time for different parts of the concurrence. Due to the lack of specific rules, it may even occur that a multi-offender is prosecuted for each committed offence separately.

FIGURE 8. Simultaneous proceedings for different offences

It has already been stressed that (deliberate) multiple criminal proceedings may be experienced as an additional punishment and may hinder legal certainty. Additionally, the question arises whether separate proceedings could also result in a different (more severe) punishment compared to when all offences would have been dealt with at the same time. This question has so far not been addressed very often. After all, the rules governing the sentencing of multi-offenders are designed to assure that multi-offenders will not be punished more severely when prosecuted for different parts of the concurrence separately.[20] But does this argument not ignore the differences between theory and practice? Especially when a judge is already aware that the defendant also committed other offences, it is perhaps not too far-fetched to assume that he would implicitly take this additional criminal behaviour into consideration when deciding on the appropriate penalty. Besides the above-mentioned reasons to start only one criminal procedure, also some concerns with regard to the fair outcome of several criminal proceedings can thus be expressed.

Luckily, it is possible to merge criminal cases if the offences that are the subject of the different criminal proceedings are "related" ("*samenhangend*")[21] or "indivisible" ("*ondeelbaar*"). The meaning of these legal terms is not completely clear. Nonetheless, it is assumed that disconnected concurring offences can be qualified as related[22] and connected concurring offences and *concursus idealis*-cases can probably

20. *Infra* IV.A.b.
21. Article 227 of the Belgian Code of Criminal Procedure (hereafter: BCCP).
22. Chris Van den Wyngaert, *Strafrecht en strafprocesrecht in hoofdlijnen: boek* 1 (Antwerpen, Maklu, 2017) 1159.

be qualified as indivisible.[23] Unfortunately, merging criminal cases is only possible when all criminal proceedings have already been initiated.[24] Even worse, an offender cannot demand the merging of the criminal cases. If the judge is not willing to merge the cases, the multi-offender can only hope that the reasonable period of time in which a criminal case should be dealt with will be exceeded more easily.[25]

A striking example is a recent homicide case. In this case, a couple was accused of murdering someone. After they were prosecuted, some of the evidence was destroyed (presumably by the couple and their former lawyers). Additionally, the couple was thus also accused of destroying evidence. The judge who was asked to rule upon the murder, however, refused to merge both proceedings. He did not take into consideration that this could very well have some negative consequences for the defendants.[26]

b. Simultaneous proceedings in Belgium and in another EU Member State

Even more likely is the situation in which Belgium prosecutes a multi-offender who has also been prosecuted by another EU Member State, for the same or for different offences. In this regard, also the lack of binding European rules concerning simultaneous criminal proceedings is striking. The above-mentioned adverse consequences of such a lack of rules thus similarly occur in transnational cases.

1) Simultaneous proceedings for the same offences

The only EU instrument tackling possible positive jurisdiction conflicts between EU Member States is the Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings[27] (hereafter: FD Jurisdiction Conflicts). This instrument encourages the

23. Chris Van den Wyngaert, *Strafrecht en strafprocesrecht in hoofdlijnen: boek* 1 (Antwerpen, Maklu, 2017) 1159.

24. Raf Verstraeten, *Handboek strafvordering* (Antwerpen, Maklu, 2012) 824.

25. See Article 21ter of the Preliminary Title BCCP, although this will not lead to the inadmissibility of the criminal procedure. For connected concurring offences, this reasonable period of time starts running as soon as the perpetrator is a suspect for at least one of the committed offences (Cass. 13 February 2018, P.17.0610.N).

26. See Nele Audenaert, 'Rechter negeert onterecht samenlopende feiten in proces Van Eyken' (2019) *Juristenkrant* 12.

27. Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings [2009] OJ 328/42.

EU Member States to communicate in case of simultaneous proceedings for the same facts. However, the Framework Decision does not enforce the EU Member States to concentrate the criminal procedures in only one Member State.[28] Also the *ne bis in idem*-principle will not apply, considering that this principle only comes into play once one of the proceedings has been finally disposed of.

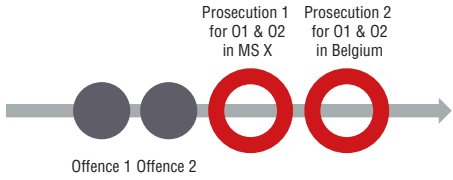

FIGURE 9. Simultaneous proceedings for the same offences in different EU Member States

Belgium implemented this Framework Decision solely by summarising it in a circular.[29] Apparently, the Belgian legislator did not consider avoiding simultaneous cross-border proceedings sufficiently important to introduce some clear rules or guidelines on the matter.

2) Simultaneous proceedings for different offences

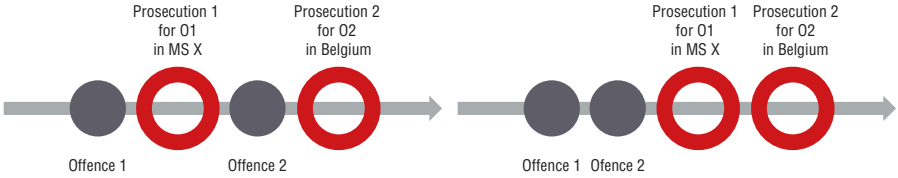

FIGURE 10. Simultaneous proceedings for different offences in different EU Member States

As previously indicated, the FD Jurisdiction Conflicts is only applicable whenever the simultaneous criminal proceedings cover the same facts. No EU instrument covers the situation in which the different EU Member States prosecuted the same multi-offender for different parts of a concurrence.

28. Francisca De Graaf, 'Samenloop van strafbare feiten binnen de Europese Unie. Naar een transnationale samenloopregeling als sluitstuk bij de (gelijktijdige) vervolging van meerdere strafbare feiten in verschillende EU-lidstaten?' (2013) *Delikt en Delinkwent* 658, 660.

29. College van procureurs-generaal, Omzendbrief nr. 10/2013 of 27 March 2013 <http://www.ejtn.eu/PageFiles/6533/COL%202013-10%20Conflicts%20of%20jurisdiction.pdf> accessed 25 February 2021.

Luckily, the Council of Europe (hereafter: CoE) adopted the European Convention on the Transfer of Proceedings in Criminal Matters.[30] As opposed to the FD Jurisdiction Conflicts, this Convention does apply to criminal procedures covering different facts. Unfortunately, no obligation to effectively cooperate and concentrate criminal proceedings has been introduced in this instrument. Furthermore, the Belgian legislator did not even ratify this Convention.

3) Evaluation of the European and Belgian rules preventing simultaneous cross-border proceedings

The lack of clear and binding rules that may help decide which country is best placed to conduct criminal proceedings, is very problematic. After all, relatively easy, Belgium (and also other countries) consider themselves competent to prosecute facts that have been committed on the territory of another EU Member State.[31] This means that it is not unlikely that Belgian criminal proceedings can cover the same facts as foreign criminal proceedings, let alone the even higher probability that there are simultaneous proceedings that cover different facts. The lack of anticipation of the possible problems that could result from parallel criminal proceedings cultivates legal uncertainty and could even result in a severer penalty for the multi-offender.[32]

C. The offences are brought to court consecutively: What about *ne bis in idem*?

Lastly, it is also possible that a multi-offender is prosecuted multiple times, the one procedure being initiated after the other one has already been concluded. Luckily, such a situation does not appear to be as worrisome as the one described in B. After all, the (national or European) principle of *ne bis in idem*, according to which no one can be prosecuted and/or punished repeatedly for the same,[33] could bring some

30. European Convention of 15 May 1972 on the Transfer of Proceedings in Criminal Matters, ETS no. 073.

31. Chris De Roy, 'Drugs, ne bis in idem en art. 65, tweede lid Sw.' (2002-03) *Rechtskundig Weekblad* 181, 182.

32. *Infra* IV.B.

33. Nele Audenaert and Wendy De Bondt, 'Multi-offenders In (Double) Jeopardy: Towards cross-border prosecution and sentencing rules for offenders who have committed multiple offences' (2019) *European Criminal Law Revies,* 256, 262-269.

relief in this regard. This situation can occur in both *concursus idealis*- (a) and *concursus realis*-cases (b) and, again, in both national (1) and transnational (2) contexts.

a. *Concursus idealis*-cases: Always *ne bis in idem*

For *concursus idealis*-cases, it is clear that both the national and the European *ne bis in idem*-principle will bar a second prosecution for the same fact. This is self-evident if multiple criminal proceedings target the same offence of the concurrence (*e.g.* O1). However, this will also be the case if the separate criminal proceedings target *different* offences (in the legal sense of the word) belonging to the same *concursus idealis*.

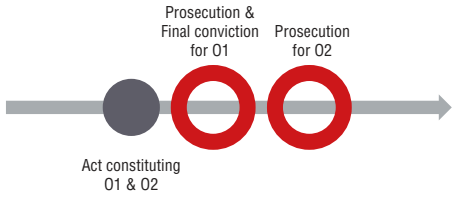

FIGURE 11. Multiple criminal proceedings for different parts of a *concursus idealis*-case

1) Consecutive criminal proceedings in Belgium

If the prior conviction has been handed down in Belgium, Article 339 BCCP applies. According to this Article, it is impossible to prosecute an offender more than once for the same facts. The legal description of these facts is thereby irrelevant.[34] Thus, if the concurrence qualifies as *concursus idealis*, the multi-offender cannot be prosecuted for one of the committed offences after already having received a final conviction for another one of the committed offences. After all, all the different offences can be traced back to the same fact.[35]

34. The *Court de cassation* repeatedly stated in this context that the national principle of *ne bis in idem* has the same scope as the European principles of *ne bis in idem*. See, for example, Cass. 22 March 2016, P.15.0929.F and Cass. 4 June 2019, P.18.0407.N.

35. For instance, if someone has been raped in a public park, it will not be possible to initiate a consecutive criminal procedure for rape after the offender has already been finally convicted for public indecency.

2) Consecutive criminal proceedings in Belgium and in another EU Member State

On the other hand, if the prior conviction has been handed down in another EU Member State, at first instance, Article 13 of the Preliminary Title BCCP seems applicable. According to this Article, a prior foreign conviction will only bar a second procedure if the prior conviction dealt with the same *offence* as the second procedure ánd on condition that the offender already served the possibly imposed sentence. Thus, Belgium seems to be able to prosecute the multi-offender for an offence that was not yet covered by the foreign procedure, even if both the offence in the foreign and the offence in the national procedure can be traced back to the same fact.

Fortunately, also the more general[36] and the European *ne bis in idem*-principle comes into play in a transnational context. After all, the national and European case-law with regard to this principle hinder the Belgian authorities to initiate a second criminal proceeding against the same offender for the same facts, even if the legal description of the offence differs from the offence for which the offender has already been convicted in another EU Member State. The only additional condition compared to a mere domestic context is that the sentence must already be executed or must at least be in the process of being executed.[37] If the latter is not the case, a second prosecution for the same fact will still not be barred.

For cases of *concursus idealis*, the prosecuting authorities will thus not have the possibility to initiate as many criminal proceedings as the number of committed offences. There is no doubt that the *ne bis in idem*-principle is applicable, both in national and in transnational cases.

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36. See, for example, Cass. 19 March 2002, P.00.1603.N and Cass. 2 March 2016, P.15.0929.F.

37. See also Patrick Waeterinckx and Tim Van Hoogenbemt, 'Het Hof van Cassatie en het arrest C-367/05 van het Hof van Justitie: dekt het Belgische begrip 'eenheid van opzet' het begrip 'dezelfde feiten' onder het *ne bis in idem*-beginsel van artikel 54 SUO?' (2009) *Nullum Crimen* 112, 114; Peter Hoet, *Het ne-bis-in-idembeginsel in het grensoverschrijdend strafrechtsverkeer: het gezag van gewijsde van Belgische en vreemde strafvonnissen* (Gent, Larcier, 2004) 21; Guy Stessens and Tom Ongena, 'Extra-territorialiteit en het *ne bis in idem*-beginsel' in Serge Brammertz, Christian De Valkeneer, Adrien Masset, Tom Ongena, Bart Spriet, Guy Stessens. Philip Traest, Damien Vandermeersch and Gert Vermeulen (eds.), *Strafprocesrecht en extraterritorialiteit* (2002) 91, 98-99 and Tom Vander Beken, Gert Vermeulen and Tom Ongena, 'Belgium, concurrent national and international criminal jurisdiction and the principle '*ne bis in idem*' (2002) *Revue Internationale de Droit Pénal* 811, 812 and 818.

b. *Concursus realis*-cases: Never, yet sometimes *ne bis in idem*

For *concursus realis*-cases, different offences of the same concurrence cannot be traced back to the same fact. Does this then imply that the prosecuting authorities are free to initiate as many criminal proceedings as the number of committed offences? Or does the *ne bis in idem*-principle potentially also bar a second prosecution for *different*[38] parts of *the same concurrence*?

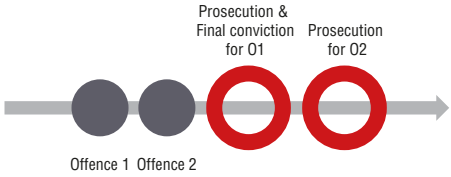

FIGURE 12. Multiple criminal proceedings for different parts of a *concursus realis*-case

1) Consecutive criminal proceedings in Belgium

Before 1994, the sentencing levels for multi-offenders varied according to the number of criminal proceedings. The more criminal proceedings were initiated, the severer the total penalty would be.[39] Therefore, in absence of a legal basis, a jurisprudential initiative tried to limit the possible number of consecutive criminal proceedings against a multi-offender. On more than one occasion, the Belgian *Court de cassation* stated that consecutively prosecuting a multi-offender was only possible when the concurring offences did not belong to "one and the *same* ("*idem*") *series* of offences". Thus, in the event a first criminal procedure only covered a part of the concurrence, a second procedure for the remaining part could very well be barred on the basis of the *ne bis in idem*-principle. In this regard, judges had to determine for each specific case whether the different offences belonged to the same series of offences.

However, connected concurring offences were almost always automatically qualified as '*idem*'.[40] Also the Belgian *Court de cassation* supported this view by stating

38. It is, again, self-evident that the *ne bis in idem*-principle would apply if the consecutive criminal proceedings would target the same offence of the *concursus realis* (*e.g.* O1).

39. Paul Ducheyne, 'De samenloop van verschillende misdrijven en hun bestraffing door afzonderlijke vonnissen en arresten' (1951) *Rechtskundig Weekblad* 342-345.

40. Joachim Meese, 'Ne bis in idem en erkenning van buitenlandse vonnissen in strafzaken' in Gert Straetmans (ed.), *Doorwerking van het Europese recht in de nationale rechterlijke praktijk* (2012) 139, 144; Caroline Van Deuren, 'Eén plus één is niet altijd twee. De regels van samenloop

that "*different facts that can be regarded as the consecutive and continuous expression of the same criminal intent, must be considered one single fact in the legal sense of the word*".[41] Ten airbag thefts would, for example, always have been considered to belong to "the *same* series of airbag thefts". But also the illegal possession of a firearm, a bank robbery with that firearm and the theft of a car to flee from the police authorities would have been considered as offences that all belong to the same "*idem*", since it was not required that the different facts had the same legal qualification.

According to the Belgian legislator, this approach had some unacceptable consequences. Given that connected concurring offences were automatically regarded as one single fact in the legal sense of the word, these offences could give rise to one prosecution and one punishment only. After all, both the *ne bis in idem*-principle and the principle of *res iudicata* would prevent another judge from imposing a new or complementary sentence on the offender for the same. This even applied when a part of the concurrence was not yet discovered at the time of the first criminal procedure. A judge who was asked to rule upon (newly discovered) facts that were connected to other facts for which the offender already had been convicted, was always obliged to revoke the criminal procedure.[42] If a multi-offender was originally only prosecuted and convicted for one airbag theft, it was no longer possible to prosecute, convict and punish the multi-offender for the other nine airbag thefts.

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besproken, vergeleken en empirisch onderzocht' (2012) *Nullum Crimen* 358, 358 and 365; Peter Hoet, *Het ne-bis-in-idembeginsel in het grensoverschrijdend strafrechtsverkeer: het gezag van gewijsde van Belgische en vreemde strafvonnissen* (Gent, Larcier, 2004) 10; Bart Spriet, 'Het voortgezet of collectief misdrijf—omschrijving en gevolgen' (1994-95) *Rechtskundig Weekblad* 468, 469 and Ad Braas, *Précis de droit pénal* (Brussel, Emile Bruylant, 1946) 277.

41. Cass. 15 September 1992, *RW* 1992-93, 849; Cass. 21 November 1948, *Pas.* 1985, I, 365; Cass. 28 September 1982, *Pas.* 1983, I, 136; Cass. 16 December 1981, *Rev.dr.pén.* 1982, 549.

42. Charlotte Conings, '*Ne bis in idem*: tijd voor hetzelfde '*idem*' (2012) *NJW* 274, 280; Tom Decaigny and Karen Weis, 'Laattijdige vaststelling eenheid van opzet ook mogelijk bij veroordeling in een andere EU-lidstaat' (2012) *Tijdschrift voor Strafrecht* 226, 227; Caroline Van Deuren, 'Eén plus één is niet altijd twee. De regels van samenloop besproken, vergeleken en empirisch onderzocht' (2012) *Nullum Crimen* 358, 365; Peter Hoet, 'Eenheid van opzet en het 'idem' van het ne bis in idem-beginsel van artikel 54 van het SUO' (2010) *Rechtspraak Antwerpen Brussel Gent* 458, 460; Sarah Coisne, 'Over het laattijdig vastgestelde collectief misdrijf, werking van de strafwet in de tijd en bijzondere verbeurdverklaring' (2007) *Tijdschrift voor Strafrrecht* 187, 188 and Peter Hoet, *Het ne-bis-in-idembeginsel in het grensoverschrijdend strafrechtsverkeer: het gezag van gewijsde van Belgische en vreemde strafvonnissen* (Gent, Larcier, 2004) 15. See for example Cass. 24 November 1992, *Pas.* 1992, I, 1301; Cass. 6 February 1985, *Pas*. 1985, I, 703; Cass. 8 June 1983, *Pas*. 1983, I, 1133; Cass. 28 June 1977, *Pas.* 1977, I, 1103.

The same applied for the bank robber: if originally only the illegal possession of the firearm was criminally targeted, the offender could no longer be prosecuted, convicted and punished for the actual bank robbery and the car theft.

The legislator especially stumbled upon the very broad interpretation of "the same criminal intent". For example, concurring offences are also connected when the committed offences are not all planned in advance.[43] To prevent judges from constantly revoking criminal procedures for offences that were technically not yet ruled upon, the legislator implicitly put an end to these practices **in 1994** by introducing Article 65, limb 2 BCC. According to this Article, judges now have to take into consideration a prior conviction at the sentencing level instead of at the prosecuting level. After all, *dixit* the legislator, *different* concurring offences, even if connected, can never be qualified as the *same* in light of the *ne bis in idem*-principle.[44]

Article 65, limb 2 BCC did not miss its goal. It made the well-established case-law of the Belgian criminal courts concerning the applicability of the *ne bis in idem*-principle disappear into thin air. Since 1994, it has been widely accepted that both connected and disconnected concurring offences can never be regarded as "one and the same" fact.[45] Even the Belgian *Court de cassation* disassociated itself from its original case-law.[46]

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43. *Supra* II.B.

44. Preparatory works of the Belgian Parliament, *Parl. St.* Kamer, 1993-1994, 1480-003, 20-21.

45. Charlotte Conings, '*Ne bis in idem*: tijd voor hetzelfde '*idem*' (2012) *Nieuw Juridisch Weekblad* 274, 280 and Peter Hoet, 'Het begrip feiten in het ne bis in idem-beginsel van artikel 54 van de Schengenovereenkomst' (2007) *Tijdschrift voor Strafrecht* 32, 32.

46. See amongst others Cass. 23 November 2016, P.2016.0982.F and Cass. 8 February 2012, P.11.1918.F, in which the Belgian *Court de cassation* explicitly stated that unity of intent does not necessarily mean unity of facts. See also Cass. 22 June 2014, P.04.0310.N, in which the same Court ruled that Article 65, limb 2 BCC does not breach the *ne bis in idem*-principle, since no judge is obliged to rule a second time upon the same facts and Cass. 22 November 2006, P.06.0925.F, in which the Court no longer applies the rule of *res judicata* on concurring offences. See also Cass. 16 November 1994, P.94.1206.F. For more information, see also Sylwia Gawronska, Laurens Claes and Kristof Van Assche, 'Double Prosecution of Illicit Organ Removal as Organ Trafficking and Human Traffiking, with the Example of Belgium' (2020) *European Journal on Criminal Policy and Research*. This even applies if the facts at issue in the second criminal procedure were already known when initiating the first criminal procedure (Cass. 16 January 2018, P.2017.0387.N). The upcoming revision of the Criminal Code, however, implicitly requires that the facts at issue in the second procedure were not yet known during the first criminal procedure. See article 63, paragraph 4 of the Draft Criminal Code in Legislative Proposal of 13 March 2019 for the Introduction of a new Criminal Code <https://www.dekamer.be/FLWB/PDF/54/3651/54K3651001.pdf> accessed 25 February 2021.

2) Consecutive criminal proceedings in Belgium and in another EU Member State

Even before 1994, a prior foreign conviction of a multi-offender could never bar a second prosecution for at least the remaining part of the concurrence in Belgium. After all, offences that are committed in more than one country were rarely regarded as connected by the same criminal intent. Since in most situations, although not all, a prior foreign conviction relates to a foreign offence, a second prosecution for the other connected concurring offences that were committed in Belgium was almost always still possible. Furthermore, according to the (then applicable, but now abandoned) Belgian approach, the *ne bis in idem*-principle in a transnational context only barred a second prosecution if *the offences* (not the facts) were the same.[47] In any case, nor before, nor after 1994, the Belgian legislator considered transnational *concursus realis*-cases to activate the *ne bis in idem*-principle.

3) Evaluation of the Belgian approach on *concursus realis* and *ne bis in idem*

Since 1994, similar approaches have been adopted towards domestic and transnational situations. In both situations, the *ne bis in idem*-principle will not apply in cases of *concursus realis*. Since 1994, judges have to qualify connected concurring offences not only as different *offences*, but also as different *facts*. It has been stated multiple times that this approach is not a violation of the *ne bis in idem*-principle.

Unfortunately, the intervention of the legislator only gave rise to more legal uncertainty. Some authors still express doubts with regard to the automatic exclusion of concurring offences from the scope of the *ne bis in idem*-principle.[48] Also the Belgian *Court de cassation* contradicted itself in some cases by revoking a second criminal procedure[49] or by describing connected concurring offences as "one fact" that can only give rise to "one punishment".[50] The *Court de cassation* even asked the

47. See Article 13 of the Preliminary Title BCCP.

48. Patrick Waeterinckx and Tim Van Hoogenbemt, 'Het Hof van Cassatie en het arrest C-367/05 van het Hof van Justitie: dekt het Belgische begrip 'eenheid van opzet' het begrip 'dezelfde feiten' onder het *ne bis in idem*-beginsel van artikel 54 SUO?' (2009) *Nullum Crimen* 112, 118.

49. Cass. 16 September 1998, M.81.0005.F.

50. See for example Cass. 14 March 2017, P.2015.1380.N.; Cass. 10 October 2006, P.06.0403.F. and Cass. 8 September 2004, P.04.0427.F. See also Tom Decaigny and Karen Weis, 'Laattijdige vaststelling eenheid van opzet ook mogelijk bij veroordeling in een andere EU-lidstaat' (2012) *Tijdschrift voor Strafrecht* 226, 227.

Court of Justice of the European Union (hereafter: CJEU) whether connected concurring offences (can) fall within the scope of '*idem*'.[51] Last but not least, also some parliamentarians expressed concerns on the compliance of Article 65, limb 2 BCC with *ne bis in idem*.[52] The reasoning of the legislator about the "new" interpretation of *ne bis in idem* was clearly not very convincing.

Indeed, it may very well be that the Belgian approach on prosecuting multi-offenders will in some cases violate the *ne bis in idem*-principle. After all, both European Courts interpret the term '*idem*' broadly. The European Court of Human Rights (hereafter: ECtHR), for example, stated in 2009 that facts do not have to be identical: also facts that are merely *substantially* the same meet the '*idem*'-requirement.[53] However, the implications of this ECtHR-finding on (connected) concurring offences are still unclear. In some cases, the ECtHR ruled that concurring offences that are inextricably linked together by the same criminal intent could not be qualified as the same.[54] In at least one case, on the other hand, the ECtHR did apply the *ne bis in idem*-principle on concurring offences connected through a unity of intent.[55] Also the CJEU interprets '*idem*' as "*the identity of material facts, understood in the existence of a set of concrete circumstances which are inextricably linked together in time, in space and by their subject-matter*".[56] Although the CJEU already explicitly stated that unity of intent itself is not sufficient to meet this requirement,[57] it cannot be ruled out that connected concurring offences are sometimes indeed *also* inextricably linked together in time, in space and by their subject-matter.[58] In the *Kretzinger* case, for example, the CJEU ruled that two facts that were linked by the same criminal intent, namely the possession of smuggled tobacco and the illegal transport of this tobacco, were also linked in time and

51. Unfortunately, the CJEU never answered this question. See Cass. 6 September 2005, P.05.0583.N.

52. Preparatory works of the Belgian Parliament, *Parl. St.* Kamer, 1993-1994, 1480-003, 20-21.

53. *Zolotukhin vs Russia* App no 14939/03 (ECtHR 10 February 2009).

54. *Zolotukhin vs Russia* App no 14939/03 (ECtHR 10 February 2009) and *Dungveckis vs Lithuania* App no 32106/05 (ECtHR 12 April 2016).

55. *Igor Tarasov vs Ukraine* App no 44396/05 (ECtHR 16 June 2016).

56. Case C-436/04 *Van Esbroeck* (CJEU 9 March 2006).

57. Case C-367/05 *Kraaijenbrink* (CJEU 18 July 2007).

58. Nele Audenaert, 'Het ne-bis-in-idembeginsel en eenheid van opzet: een goed huwelijk?' (2018) *Tijdschrift voor Strafrecht* 262, 275.

space.[59] On the basis of this European case-law, it seems that a Belgian judge will still have to assess to what extent the facts at issue can be marked as '*idem*' on a case-by-case basis. If necessary, the judge will have to ignore Article 65, limb 2 BCC in order to not breach the European *ne bis in idem*-principle.

It is clear that the Belgian legislator did not realise the importance of providing specific rules for prosecuting multi-offenders. As regards consecutive criminal proceedings for cases of *concursus realis*, both approaches—the one before 1994 and the one after—are incredibly problematic. Although it is true that never allowing the initiation of a second criminal procedure is not desirable nor necessary, it is also true that always allowing the initiation of a second criminal procedure is neither desirable nor even technically allowed. However, this is generally not considered problematic. After all, it is argued that the initiation of more than one criminal procedure will be compensated when deciding on the appropriate sentence for the multi-offender. But is this indeed the case?

IV. The Belgian approach on sentencing multi-offenders: Eeny, Meeny, Miny, Moe!

Luckily, the Belgian legislator did provide specific rules for sentencing multi-offenders. These rules have been designed to guarantee a proportionate penalty for multi-offenders. Yet, they only apply to multi-offenders who are brought to court in Belgium. Multi-offenders who have also been brought to court in another EU Member State, on the other hand, fall within the scope of the general sentencing rules. This distinction implies that (deliberately) splitting criminal proceedings could, at least in a transnational context, very well affect the proportionate character of the sentence.

A. Sentencing multi-offenders in a domestic context: A proportionality discount

In most cases, multi-offenders will receive a more lenient penalty when compared to single-crime offenders. A judge will rarely pronounce a penalty as high as the sum of

59. Case C-288/05 Kretzinger (CJEU 18 July 2007); For a similar case, see Case C-467/04 *Gasparini* (CJEU 28 September 2006).

the individual sentences prescribed for the several committed offences. It is thereby, at least theoretically, irrelevant how many criminal proceedings have been initiated against the multi-offender. However, the latter does not apply to the hypothesis in which the criminal proceedings are simultaneously conducted.

a. Sentencing multi-offenders for all concurring offences in one criminal procedure

The easiest situation is the one in which a judge pronounces a sentence for the whole concurrence at once. The severity of this sentence will mainly depend on the category of concurring offences at issue. Offenders of *concursus idealis*-offences and of connected concurring offences are always granted a (theoretical) penalty discount. Oddly, offenders of disconnected concurring offences can only in some cases enjoy a (more limited) discount. These distinctions make the rules on concurrence unnecessary complex and perhaps even obsolete. *Genius is making complex ideas simple, not making simple ideas complex*.[60]

1) *Concursus idealis* and connected concurring offences

The legislator adopted the same approach on *concursus idealis*-cases and connected concurring offences. For these categories, a judge can never cumulate the different penalties that each offence would merit in a separate case. The judge will only be able to pronounce one sentence for the whole concurrence that does not exceed the most severe penalty prescribed for the most serious offence.[61] This rule applies a 'mechanism of absorption': the most serious offence absorbs all the other offences. This mechanism gives a distinct advance to a multi-offender: if a judge would already punish the most serious offence by imposing the legally defined maximum sentence, all the other offences would have been committed for free. Of course, the legally granted penalty discount could be of a mere theoretical nature. After all, the rules on concurrence do not influence the statutory minima of the applicable penalty ranges. They only define some upper limits. This means that it is always possible that the one sentence pronounced by the judge does not exceed the sum of

60. Quote by Albert Einstein.
61. Article 65, limb 1 BCC.

the penalties the judge would have imposed for the different offences if there were no specific sentencing rules to take into account.

2) Disconnected concurring offences

The rules are more complicated for disconnected concurring offences. For these offences, the multi-offender will either enjoy the same discount as if he had committed connected concurring offences, either a more limited discount or no discount at all. The height of the discount depends on the seriousness of the committed offences. The BCC distinguishes three categories of offences in this regard: infringements, (the more serious) misdemeanours and (the most serious) crimes.

When the offender committed mere infringements, a mechanism of unlimited cumulation applies. The judge will be able to simply cumulate all the penalties for all the different infringements.[62] Disconnected infringements thus give rise to the same penalty as if each infringement would have been committed by a single-crime offender.

A limited discount, on the other hand, can be granted when the offender committed either (i) multiple misdemeanours or (ii) a combination of misdemeanours and infringements. For these cases, the judge will also be able to cumulate the different penalties. However, the total sum of these penalties may not exceed twice the most severe penalty prescribed for the most serious misdemeanour (mechanism of limited cumulation).[63] Two remarks should be made in this regard. First, it is not clear how this rule should be applied if the judge wants to impose different kinds of penalties (for example a prison sentence and a community service) for the different offences.[64] Secondly, this approach will not in all circumstances result in a penalty discount. After all, if the sum of the penalties does not exceed the predetermined maximum, the penalty will be as severe as the penalties single-crime offenders would have received for each of the offences separately.

62. Article 58 BCC.
63. Articles 59 and 60 BCC.
64. See also Joëlle Rozie, 'Artikel 60 Sw. m.b.t. de meerdaadse samenloop van wanbedrijven: strijdig met het gelijkheids- en het proportionaliteitsprincipe?' (2019) *Nullum Crimen* 93, 97-98.

Only when the offender has been found guilty of at least one crime[65] (in combination with other crimes[66] or with infringements[67]), the rules for connected concurring offences are applicable. The judge will then only impose one penalty that cannot exceed the highest maximum penalty prescribed for the most serious crime.[68]

To conclude, the difference between connected and disconnected concurring offences is clearly of undeniable importance. However, the yet to be adopted Draft Criminal Code punishes all *concursus realis*-offences similarly, regardless of whether they are connected. The judge will always be obliged to only impose one penalty and to grant the multi-offender a (theoretical) penalty discount. Only the height of this discount will still differ from case to case.[69]

3) Relevance of the specific sentencing rules for multi-offenders

Both legal scholars and practitioners agree that lenient sentencing rules are necessary to not violate the proportionality principle,[70] according to which each offence

65. Or a crime reduced to a misdemeanour. In case a crime reduced to a misdemeanour is involved, a judge will have the choice to apply either the mechanism of absorption or the mechanism of limited cumulation (Article 82 BCC).

66. Or crimes reduced to misdemeanours.

67. Up until recently, the judge also had to apply the absorption mechanism in case an offender committed a combination of crimes and misdemeanours. However, for unconvincing reasons, the legislator decided in 2019 to delete this rule from the BCC. If this situation occurs, it is currently unclear for the judge which approach should be adopted. It can be assumed that a judge will have no other option than to apply the mechanism of unlimited cumulation and thus to treat the multi-offender as if he were a single-crime offender. This amendment raises several questions. First, some offences are *in abstracto* crimes, but can nonetheless in a criminal procedure, *in concreto*, be qualified as misdemeanours due to the existence of mitigating circumstances. Oddly, this change in assumed seriousness could have as an adverse consequence that the multi-offender would be punished more severely than if no mitigating circumstances would have been accepted. Secondly, two persons who committed two identical *in abstracto* crimes can be punished completely differently according to the decision of the prosecuting authorities or the judge to re-qualify one of the offences as an *in concreto* misdemeanour. This could very well infringe the principle of equality before the law.

68. Article 62 BCC.

69. Article 63, paragraph 3 of the Draft Criminal Code. See Legislative Proposal of 13 March 2019 for the Introduction of a new Criminal Code <https://www.dekamer.be/FLWB/PDF/54/3651/54K3651001.pdf> accessed 25 February 2021.

70. See for example also Jeroen Ten Voorde, 'Meerdaadse samenloop in het strafrecht. Een onderzoek naar doel, grondslag, karakter en functie van de wettelijke regeling van meerdaadse samenloop' (2013) 111, 131 and 205 <https://www.wodc.nl/binaries/2260-volledige-tekst_tcm28

must be punished in proportion to its seriousness.[71] After all, if the multi-offender would have been warned immediately after the first offence, probably not that many offences would have been committed. Furthermore, simply doing the arithmetics could result in an overall penalty that is disproportionate to the harms inflicted by the offences. The overall penalty may even equal or exceed the normal sentence that could be pronounced for a much more serious offence. For example, twenty car thefts could possibly lead to a prison sentence of maximum 100 years (Article 463 BCC), whereas homicide can only be punished with a prison sentence of maximum 30 years (Article 393 BCC). Although the number of offences is higher, twenty car thefts are still not as serious as homicide.

However, the current rules of the BCC do not refer to the proportionality principle as their underlying rationale. The preparatory documents of the potential upcoming revision, on the other hand, do externalise this rationale.[72]

b. Sentencing multi-offenders in multiple criminal proceedings

It follows from the above that in most cases a multi-offender will receive a penalty that is more lenient compared to the sum of the individual penalties. This is at least the case when all the offences are brought to court at the same time. However, as explained above, a multi-offender can also be subject to multiple criminal proceedings.[73] Especially cases of *concursus realis* risk to become the subject of multiple simultaneous or consecutive criminal proceedings.

1) Simultaneous criminal proceedings

The BCC does not anticipate the situation in which simultaneous criminal proceedings are initiated against the multi-offender for different parts of the concurrence. Neither procedural nor substantive rules exist to meet the concerns that can be

-72729.pdf> accessed 25 February 2021 and Caroline Van Deuren, 'Eén plus één is niet altijd twee. De regels van samenloop besproken, vergeleken en empirisch onderzocht' (2012) *Nullum Crimen* 358, 376.

71. Nele Audenaert, 'Mind the proportionality gap!', in review and Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, Cambridge, 2015) 112.

72. See Joëlle Rozie and Damien Vandermeersch, *Commissie voor de Hervorming van het Strafrecht. Voorstel van Voorontwerp van Boek I van het Strafwetboek* (Brugge, die Keure, 2016) 162.

73. *Supra* III.B. and III.C.

expressed in this regard. It is obvious that the risk of a cumulative sentence increases in cases of multiple simultaneous criminal proceedings. If in each criminal procedure, the judge only pronounces a sentence for the offence at issue, the total sum of the penalties will equal the sum of the different penalties prescribed for the different offences. It appears that the only remaining possibility for the multi-offender will then be to lodge an appeal. Or would it be easier to remediate this disadvantage at the executing stage of the criminal procedure?[74]

2) Consecutive criminal proceedings

Fortunately, the BCC does anticipate the situation in which consecutive criminal proceedings are initiated against a multi-offender for different parts of the concurrence. At least in terms of punishment,[75] a multi-offender will not suffer a disadvantage if the committed offences are split into different consecutive criminal proceedings. After all, the total sentence must still reflect the seriousness of the whole concurrence and not the seriousness of each offence individually. For this reason, the sum of the penalties imposed in the different procedures may never exceed the maximum that would have been applicable if all offences were brought to court at the same time. To this end, a judge in a subsequent criminal procedure will take the penalty imposed in the prior conviction into consideration. Two situations can occur. Firstly, it is possible that the judge in the first criminal procedure already pronounced the highest maximum penalty prescribed for the most serious offence. In this case, the judge(s) in the subsequent criminal procedure(s) will have no other choice than merely declaring the multi-offender guilty for the remaining part of the concurrence, without being able to impose an additional penalty.[76] Secondly, it is also possible that the highest maximum penalty was not yet pronounced in the first criminal procedure. In this situation, the judge in the subsequent criminal procedure has a choice. If the judge is of the opinion that the already imposed penalties are sufficient to punish the offender for the whole concurrence, (s)he is allowed to simply refer to these penalties without imposing an additional punishment. The judge may, however, also consider the already imposed penalties inadequate to punish the whole concurrence. This requires

74. *Infra* V.
75. *Supra* III.
76. Except for a possible confiscation.

an extra judgment on those facts that were previously brought to court.[77] The judge will then be allowed to impose an additional penalty, which may not, together with the previously imposed penalty or penalties, exceed the maximum of the most severe penalty prescribed for the most serious offence. Therefore, (s)he will have to deduct the previously imposed penalty from the maximum that would have applied if all offences were tried in the same criminal procedure. For connected concurring offences, the Belgian legislator explicitly introduced these rules.[78] For disconnected concurring offences, on the other hand, no such rules have been implemented.[79] However, the Belgian *Court de cassation* already repeatedly stated that the benefit granted by the Article(s 58 to) 60 BCC should also be granted in consecutive proceedings.[80] Also the new Draft Criminal Code explicitly acknowledges that trying concurring offences (either or not connected) in multiple criminal proceedings may never disadvantage a multi-offender.[81]

Although these rules originally aimed to get rid of the undesirable jurisprudence with regard to the *ne bis in idem*-principle,[82] they also serve to comply with the proportionality principle. Article 65, limb 2 BCC even implicitly refers to the proportionality principle by prescribing that the judge may not impose an additional penalty if the already imposed penalties are *sufficient* to punish the whole concurrence. Also the preparatory documents for the potential upcoming revision recognise that the total penalty imposed in the multiple criminal proceedings may not exceed the otherwise applicable maximum penalty for reasons of proportionality.[83]

77. Cass. 5 June 2018, P.2017.1240.N.
78. Article 65, limb 2 BCC.
79. This is probably due to the fact that the second limb of Article 65 BCC aimed to put an end to the negative consequences of the broad interpretation of the *ne bis in idem*-principle for connected concurring offences. The legislator probably forgot to broaden the scope of these rules to disconnected concurring offences.
80. See, for instance, Cass. 9 March 2005, P. 04.1591.F and Cass. 25 April 2012, P.12.0178.F.
81. See Joëlle Rozie and Damien Vandermeersch, *Commissie voor de Hervorming van het Strafrecht. Voorstel van Voorontwerp van Boek I van het Strafwetboek* (Brugge, die Keure, 2016) 164.
82. *Supra* III.C.
83. See Joëlle Rozie and Damien Vandermeersch, *Commissie voor de Hervorming van het Strafrecht. Voorstel van Voorontwerp van Boek I van het Strafwetboek* (Brugge, die Keure, 2016) 164.

B. Sentencing multi-offenders in a transnational context: No proportionality discount?

The importance attributed to the proportionality principle provokes some expectations. It is fair to expect that the same or similar rules will continue to apply if the multiple criminal proceedings are conducted in different EU Member States. After all, the philosophy underlying the proportionality principle will stand and the mutual recognition principle requires Member States to disregard the foreign nature of a prior decision. After all, Member States are required to treat foreign judicial decisions as if it were national judicial decisions and to attach equivalent legal effects as to national judicial decisions (the so-called equivalence principle).[84] Unfortunately, nothing could be further from the truth.

a. Simultaneous proceedings in multiple EU Member States

Again, in case the multi-offender is subject to multiple simultaneous criminal proceedings in Belgium and at least one other EU Member State, no specific rules are applicable. Thus multi-offenders are not protected against the possible negative consequences of simultaneous transnational criminal proceedings in terms of punishment. This is similar to what applies to multi-offenders who are subject to simultaneous national criminal proceedings.

b. Consecutive proceedings in multiple EU Member States

Even more problematic is the situation in which a multi-offender has already been convicted in another EU Member State and is consecutively prosecuted in Belgium for the remaining part of the concurrence.[85]

Yet, Article 99*bis* BCC states that final convictions rendered by the criminal courts of other EU Member States must have the same legal effects as prior national convictions. Immediately, however, the second limb of Article 99*bis* clarifies that this does not apply to multi-offenders. This reservation implements Article 3,

84. Nele Audenaert, 'Unity of Intent Effect on Sentencing: An EU Dimension to *ne bis in idem* and Proportionality?' (2018) *EuCLR* 39, 40-42.

85. If the second prosecution would target the exact same offences as the ones of which the offender was convicted abroad, of course, the *ne bis in idem*-principle would apply. *Supra* III.C.

paragraph 5 of the Framework Decision on Prior Convictions[86] (hereafter: FD Prior Convictions). The latter Article allows EU Member States to make an exception on the equivalence principle if recognising a foreign decision "*would limit the judge in imposing a sentence*". If it were not for the exception, a judge would indeed be limited in imposing a sentence. After all, the judge would have to keep in mind the previously pronounced sentence when safeguarding the legally defined upper limit.[87]

Nevertheless, this exception rather came as a surprise.[88] On the basis of the legislative approach in mere national cases, it could have been expected that the legislator would make the same reasoning for punishing "transnational" multi-offenders. Two practical arguments have been put forward to explain why prior foreign convictions cannot be taken into consideration in Belgian criminal law.[89] First, according to the Belgian legislator, it is impossible to determine (i) which offence is the most serious and (ii) which penalty is the most severe when also (i) offences ruled upon abroad and (ii) foreign penalties are at play. However, this is not very convincing, considering that there are several possibilities to solve such practical difficulties.[90] A second problem is situated at the executing level. Apparently, the Belgian legislator fears the possibility that an extreme severe foreign penalty could render a Belgian judge unable to impose an additional penalty, even when the offender would be due for parole very soon in the other EU Member State. It can be questioned to what extent arguments related to the executive stage can justify imposing a more severe sentence.[91] Also, the risk that such a situation will occur seems rather small and is inherently linked to cooperating with other EU Member States in criminal matters without being willing to harmonise the existing differences.[92] Should such a situation nevertheless occur, other solutions may be offered to meet the expressed

86. Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings [2008] OJ 220/32.

87. *Supra* IV.A.b.

88. See for example Pieter Tersago, 'Het belang van gerechtelijke antecedenten in het straf(process)recht' (2011) *Nullum Crimen* 8-38.

89. Preparatory documents of the Belgian Parliament, *Parl. St.* Kamer, 2013-14, 53-3149, 58.

90. In the context of repeat offenders and in the context of executing a foreign judicial decision, for example, foreign penalties also have to be translated into national terms.

91. See also Jente De Smedt and Frank Verbruggen, 'Grondwettelijk Hof keurt Europese owngoal van wetgever ten onrechte goed' (2020) *Nieuw juridisch Weekblad* 350-352.

92. See also Pieter Tersago, 'Het belang van gerechtelijke antecedenten in het straf(proces)recht' (2011) *Nullum Crimen* 8, 31.

concerns. For example, the judge could very well only take into consideration the penalty that could have been imposed in a previous national procedure or that actually has been served or will be served. Furthermore, it could be an option to run the sentences concurringly.[93] Last but not least, these (at first sight rebuttable) feasibility arguments do not seem to be able to counterbalance some more fundamental concerns. Both the proportionality and the equality principle are relevant in this regard.

Firstly, it is striking that the interpretation of the proportionality principle would differ in national and transnational situations. If the proportionality principle requires or warrants a penalty discount in national situations, why would it not require or warrant a similar discount in transnational situations? Especially the lack of arguments referring to the proportionality principle is remarkable. For example, it is unclear how the small risk on an early conditional release could ever warrant an additional (harsh) penalty for an offender who possibly has no chance on conditional release at all. The failure of the Belgian legislator to address such concerns is worrisome and does not contribute to legal certainty.

Secondly, it is not the first time that conformity of the distinction between prior national and prior transnational convictions with the equality principle is questioned.[94] The equality principle is relevant from at least two perspectives. Not only are multi-offenders treated in a different manner according to the nationality of the conviction or according to the number of prosecuting EU Member States, but also are transnational multi-offenders treated differently than transnational repeat offenders. Also the Belgian Supreme Court recently took a (too careless) look at the conformity of the second limb of Artice 99bis BCC with the equality principle.[95] Surprisingly, the Supreme Court decided, without wasting too many words on the matter, that Article 99bis BCC does not infringe the equality principle. As long as a judge is allowed (not obliged!) to take the existence of a prior foreign conviction into consideration "*in another manner*", no problem is claimed to exist. However, the other manners to take into consideration a prior foreign conviction, such as

93. See also Francisca De Graaf, 'Samenloop van strafbare feiten binnen de Europese Unie. Naar een transnationale samenloopregeling als sluitstuk bij de (gelijktijdige) vervolging van meerdere strafbare feiten in verschillende EU-lidstaten?' (2013) *Delikt en Delinkwent* 658, 667.

94. Nele Audenaert, 'Unity of Intent Effect on Sentencing: An EU Dimension to *ne bis in idem* and Proportionality?' (2018) *European Criminal Law Review* 39, 40-42; Peter Hoet, 'Eenheid van opzet en het 'idem' van het ne bis in idem-beginsel van artikel 54 van het SUO' (2010) *Rechtspraak Antwerpen Brussel Gent* 458, 464 and Chris De Roy, 'Drugs, ne bis in idem en art. 65, tweede lid Sw.' (2002-03) *Rechtskundig Weekblad* 181, 181.

95. Belgian Supreme Court 16 January 2020, 6/2020.

through the acceptance of mitigating circumstances, could never result in a penalty as lenient as the one that could have been imposed in a mere national situation. Therefore, this argument is not convincing. Furthermore, irrespective of whether the Supreme Court has got it right, it is astonishing that such an important difference in terms of punishment can be made without a clear, theoretically or pragmatically sound basis.[96]

It is regrettable that the same choices have, for now, been made in the Draft Criminal Code.[97]

v. Executing penalties for multi-offenders: Out of sight? Out of mind!

At first sight, there seems to be no dire need to develop specific rules governing the execution of the sentence(s) imposed on a multi-offender. After all, it is not clear why having committed a multitude of offences could or should influence the different manners to execute a sentence. Yet, the Belgian legislator could have paid some attention to a few elements in the post-trial stage of a criminal procedure.

For instance, it is not unlikely that different parts of the concurrence are ruled upon by different judges without the one judge having knowledge of the other procedure. This could possibly (although not necessarily[98]) result in a penalty that is more severe than the legally defined upper limit. After all, the judge in the most recent procedure did not have the opportunity to take into consideration the previous conviction. In such a case, it appears that the only option for the offender would be to lodge an appeal against the most recent conviction. Nonetheless, such a drastic and time-consuming appeal could be easily avoided by developing some rules focusing on the execution phase of the criminal procedure. However, the legislator

96. Nele Audenaert, 'Prior Foreign Convictions in the EU: Equivalence is the New Equality' (2021) in preparation.

97. Article 74, paragraph 2 of the Draft Criminal Code. See Legislative Proposal of 13 March 2019 for the Introduction of a new Criminal Code <https://www.dekamer.be/FLWB/PDF/54/3651/54K3651001.pdf> accessed 25 February 2021.

98. The *Court de cassation* already explicitly ruled that the judge in a subsequent criminal procedure is allowed to pronounce for the offences at issue a sentence that is not more lenient compared to the sentence that would have been pronounced for a single-crime offender, on condition that this does not result in exceeding the legally defined upper limit. See Cass. 16 January 2018, P.17.0387.N.

completely ignored this issue.[99] Luckily, the suggested Article 62, paragraph 4 of the Draft Criminal Code provides that the "Sentence Implementation Court" will, in case of consecutive criminal proceedings, have to reduce the total penalty according to the rules governing the sentencing stage.[100] However, the problem still remains (i) if the too severe penalty is the result of simultaneously conducted criminal proceedings or (ii) if the sentences are not executed in Belgium, but in another country.

Another problem could arise when the judge has to apply the mechanism of limited cumulation. In this scenario, the judge will pronounce not one penalty, but as many penalties as the number of committed offences.[101] Afterwards, the judge will reduce the sum of these penalties to the legally defined upper limit.[102] In Belgium, only the "topped-off" penalty will then be executed. However, not the "topped-off" penalty, but each individual penalty, will appear on the criminal record of the defendant. Thus, in subsequent criminal procedures on newly committed offences, the individually imposed penalties will be taken into consideration to apply, for example, the rules on recidivism.[103] Although the latter would be beneficial to the multi-offender,[104] this could very well cause some problems when the penalties are executed abroad. After all, it is not clear whether all countries will focus on the judgment itself, rather than on the track record of the defendant. The latter would, at least in terms of execution, be in clear disadvantage of the offender.

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99. The legislator introduced one article in which the "Sentence Implementation Court" is explicitly allowed to reduce a too severe penalty if the judge in the second procedure was not aware of the concurrence of offences, but this article has never been put into practice. See for more information, Joëlle Rozie, 'Artikel 60 Sw. m.b.t. de meerdaadse samenloop van wanbedrijven: strijdig met het gelijkheids- en het proportionaliteitsprincipe?' (2019) *Nullum Crimen* 93, 97-98 and 101.

100. Article 63, paragraph 4 of the Draft Criminal Code. See Legislative Proposal of 13 March 2019 for the Introduction of a new Criminal Code <https://www.dekamer.be/FLWB/PDF/54/3651/54K3651001.pdf> accessed 25 February 2021.

101. Cass. 9 February 1925, *Pas.* 1925, I, 129; Cass. 27 January 1930, *Pas.* 1930, I, 82 and Cass. 10 October 1932, *Pas.*, I, 266.

102. Cass. 5 February 2019, P.18.1072.N.

103. Joëlle Rozie, 'Artikel 60 Sw. m.b.t. de meerdaadse samenloop van wanbedrijven: strijdig met het gelijkheids- en het proportionaliteitsprincipe?' (2019) *Nullum Crimen* 93, 97-98 and 101 and Chris Van den Wyngaert, *Strafrecht en strafprocesrecht in hoofdlijnen: boek* 1 (Antwerpen, Maklu, 2017) 516.

104. After all, although applying the mechanism of limited cumulation will often result in a harsher sentence compared to the application of the absorption mechanism, the imposition of—smaller—individual penalties will more easily hinder the application of disadvantageous rules, such as the rules on recidivism.

VI. Conclusion

Although the Belgian legislator introduced specific rules to punish multi-offenders, not enough thought has been given to all the aspects of their unique position. It is, for example, clear that the Belgian legislator completely lost track of the importance to create some procedural safeguards for offenders who have committed a multitude of offences. This chapter pointed out some possible important loopholes in this regard. On top of that, also some inconsistent choices have been made on the sentencing level. There is no doubt that the Belgian legislator did not thoroughly dwell on the possible adverse consequences thereof. Last but not least, also some issues with regard to the executive phase have been identified.

Besides the question whether developing some additional rules is necessary in light of some procedural and fundamental safeguards (such as *ne bis in idem*, proportionality and equality), it is clear that the introduction of such additional rules is at least desirable.