

# Setting the Scene: Why Study Multi-Offenders?

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## 1. The unique position of multi-offenders in a domestic context

Throughout the whole of this book, reference will be made to ‘MULTI-OFFENDERS’. These are offenders who have committed a series of offences before being officially warned by a criminal court for at least one of these offences.

These multi-offenders pose several challenges for criminal justice systems. These challenges can be situated at the pre-trial, the trial and the post-trial stage of a criminal procedure. As already slightly elaborated on in the preface, multi-offenders should not be confused with REPEAT OFFENDERS and the more recently identified category of MULTIPLE-CONVICTION OFFENDERS.<sup>1</sup> The latter categories of offenders differ from the first because they have already—to a small or large extent—experienced censure, respectively by already having served a final sentence or by already having received a (final or non-final) sentence before committing new offences. Although for those latter categories also some specific choices have to be made, the position of a multi-offender is somewhat more unique.

At the pre-trial stage, if the offender has already been convicted for some of the offences element to the series of offences, prosecutors can be confronted with

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1. Jakub Drápal, ‘Sentencing multiple conviction offenders’ (2021) *European Journal of Criminology* 1-19.

questions regarding the possibility to initiate a criminal proceeding for the remaining offences. It is unclear whether a multi-offender can or should be prosecuted only once for the committed offences (despite of the prosecution not covering the entirety of the series of offences), or whether a subsequent prosecution for the remaining offences is possible. For offenders who have only committed one offence (hereafter referred to as ‘SINGLE-CRIME OFFENDERS’), it is self-evident that they can only be prosecuted once in order not to infringe the *ne bis in idem*-principle. For multi-offenders however, several possible options exist, which is testimony of their unique position. Firstly, the legislator could limit the possibility to prosecute the offences committed by a multi-offender to a single prosecution. This means that all offences have to be prosecuted in one go. A simultaneous or consecutive prosecution of another part of the series of offences is not possible. Secondly, to the contrary, the legislator could allow the initiation of as many criminal proceedings as the number of committed offences; one criminal proceeding for each individual offence. Thirdly and lastly, a legislator could also combine both approaches by allowing to split criminal proceedings as it is deemed suited, necessary and desirable, giving the competent authorities a range from initiating only one criminal procedure to initiating as many procedures as committed offences—and everything in-between. The choice for one of these three approaches could have an important impact on the multi-offender. After all, additional criminal procedures cause extra distress on behalf of a multi-offender and could result in an accumulation of several sanctions.

At the trial stage of the criminal procedure, the unique position of a multi-offender stems from the multiple approaches that a judge can adopt when pronouncing a sentence. Pronouncing a sentence for a single-crime offender is relatively ‘easy’: a judge can only choose a penalty that is situated in-between the applicable penalty scales (ranging from no penalty/the minimum penalty to the maximum penalty). In contrast thereto, pronouncing a sentence for a multi-offender is much more complex. Should a judge calculate the sum of the penalties prescribed for the committed offences? Or should a judge assess the entire series of offences? For multi-offender cases, several possible mechanisms to determine the most appropriate penalty have already been developed in legal doctrine.<sup>2</sup> So far, however, no specific approach has been indicated as the only (or most) right(eous) approach. This implies that a legislator or a judge could choose to simply cumulate the different individual

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2. Jan de Keijser, Julian Roberts and Jesper Ryberg (eds.), *Sentencing Multiple Crimes* (Oxford, Oxford University Press, 2017) 267p.

penalties that each individual offence merits or to only impose one sentence for the complete series of committed offences—or anything in-between. Things get even more complicated when bearing in mind that it is perfectly possible that the series of offences committed by a multi-offender is brought to court in different criminal procedures, either or not in front of different judges. In such a situation, it is clear that the combined outcomes of the different criminal procedures should not land the offender with a more severe penalty compared to when all offences would have been brought to court together.

This immediately explains why also the post-trial stage asks some specific attention in multi-offender cases. In the end, if being brought to court in one procedure or in different procedures could affect the penalty that requires execution, legislators could consider remediating this situation during the execution phase of the criminal procedure.

Thus, the unique position of a multi-offender in a domestic context confronts legislators and practitioners with questions that do not appear in relation to single-crime offenders.

## II. The unique position of multi-offenders in an EU context

In an EU context, these questions become even more complex. After all, from an EU perspective, the unique position of multi-offenders poses some additional challenges. Especially the lack of a solid legal framework governing the way to operate and take account of foreign decisions in multi-offender cases seems to underpin this complexity.

Over the past decades, the EU gradually developed and enhanced the idea of a single European judicial area in which state borders would gradually become irrelevant. Originally, the EU especially emphasised that the introduction of the principle of free movement of people needed to be complemented with flanking measures in the context of police and judicial cooperation and the development of legal principles reflecting the shared sense of justice. It is in this context that the *ne bis in idem*-principle was elaborated on and soon gained a transnational, cross-border dimension. After that, in 1999, especially the introduction of the mutual recognition principle and the corresponding loyal execution of foreign judicial decisions became a ‘hot topic’. Since then, several legal instruments established an EU-wide cross-border effect for several types of judicial decisions, particularly in

the pre- and post-trial stages of a criminal procedure, the Framework Decision on the European Arrest Warrant (2002)<sup>3</sup> being the first one and the Directive on the European Investigation Order (2014)<sup>4</sup> being the most recent one of these instruments.<sup>5</sup> For a somewhat longer period of time, the EU remained silent on how to deal with a prior foreign conviction during trial. However, with the adoption of the Framework Decision on prior foreign convictions in 2008<sup>6</sup> (hereafter: FD Prior Convictions), it was expected that the EU would express a clear view on the cross-border effects a prior conviction must have on the outcome of a subsequent foreign criminal procedure. Unfortunately, this has not been the case, at least not for multi-offenders.

Although not typically considered to be one of the mutual recognition measures,<sup>7</sup> the FD Prior Convictions does explicitly state in its Recital (2) that the mutual recognition principle implies that a judge in an EU Member State must be able to take account of a final criminal judgment rendered by a court in another EU Member State to, amongst others, determine the applicable sentence. Article 3 of the FD implements this idea in its first and second limb for all stages of criminal procedure, thus, including the trial stage. According to this Article, each Member State must ensure that prior convictions are taken into account to the extent prior national convictions are taken into account, and that equivalent legal effects are attached to them as to prior national convictions, in accordance with national law. With this provision, the EU introduced the equivalence principle. Whenever the national law of a Member State decides that a national prior conviction should have an impact on the outcome of a subsequent criminal procedure against the same person, but with regard to different facts,<sup>8</sup> an equal, similar or equivalent effect should be attached to a foreign prior conviction. However, it is important to highlight that

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3. Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2002] OJ 190/1.

4. Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters [2014] OJ 130/1.

5. Libor Klimek, *Mutual Recognition of Judicial Decisions in European Criminal Law* (Cham, Springer, 2017) 742p.

6. 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.

7. Libor Klimek, *Mutual Recognition of Judicial Decisions in European Criminal Law* (Cham, Springer, 2017) 742p.

8. Otherwise, the *ne bis in idem*-principle should apply.

the FD Prior Convictions does not at all aim to harmonise the consequences that could be attached to a prior conviction or to determine the appropriate sentence for certain types of offenders.

This provision is particularly relevant for transnational repeat, multiple-conviction and multi-offenders, whose different convictions are handed down in different EU Member States. On the basis of Article 3 FD, it could be expected that the choices that have been made in a domestic context with regard to those types of offenders, must also be made in a transnational context. For a large part, these expectations indeed have to be met. Unfortunately, for one specific situation, Article 3(5) FD Prior Convictions rephrases the equivalence principle in a more open-ended fashion. According to this fifth limb, Member States are not obliged to apply their national rules to a prior foreign conviction (i) if the offence at issue in the new criminal procedure was committed before that prior conviction was handed down (multi-offenders) or before that prior conviction was fully executed (multiple-conviction offenders) AND (ii) if the application of these national rules would limit the judge in the subsequent criminal procedure in imposing a sentence. For such situations, it is sufficient to take into consideration a prior foreign conviction “in another manner”. Both criteria have to be fulfilled in order to be able to deviate from the equivalence principle. Whereas theoretically both multi-offenders and multiple-conviction offenders could be negatively affected by this opt-out clause (first criterion), in practice, especially multi-offenders are targeted (second criterion). After all, multi-offenders are in most EU Member States granted a penalty discount. Multiple-conviction offenders, on the other hand, are generally treated as repeat offenders, implying that the judge in a subsequent criminal procedure would never be limited in imposing a sentence.<sup>9</sup>

Thus again, multi-offenders are in a unique position. Not only are national legislators confronted with the questions on how to deal with a multi-offender in a domestic context, but also do national legislators have to consider whether they want to make different choices in a transnational context. For other types of offenders, these “transnational” choices have been limited in a considerably more thorough manner.

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9. Although some exceptions exist, considering that a few countries also treat multiple-conviction offenders as multi-offenders or as a completely separate category of offenders. See Jakub Drápal, ‘Sentencing multiple conviction offenders’ (2021) *European Journal of Criminology* 1-19.

### iii. The unique position of multi-offenders in comparative legal research

To sum up, within the entire European Union, the prosecution and punishment of multi-offenders could be governed by different rules in both domestic and transnational contexts. Hence, still a lot of differences exist between the Member States: (i) not all EU Member States foresee in specific rules for the prosecution and punishment of multiple offenders and (ii) in the EU Member States that do apply specific rules when prosecuting and sentencing multi-offenders, the rules often vary according to the committed offences at issue, the number of criminal proceedings and the number of prosecuting EU Member States.

So far, too little attention, not to say none, has been paid to the interaction between the unique position of a multi-offender in a domestic context and the unique position of a multi-offender in an EU context. Nevertheless, the different choices that national legislators can make both in domestic and in transnational contexts have important and interesting consequences. For instance, not granting a more lenient penalty to a multi-offender merely because more than one EU Member State is involved, seems to undermine the single European judicial area and the almost generally accepted mutual recognition principle. Next, the different approaches of the different EU Member States could also negatively affect the principle of free movement of persons. After all, if the risk exists that a penalty discount will not be granted when perpetrators move from one EU Member State to another, this could discourage the exercise of their freedom of movement. On the other hand, different approaches could also encourage perpetrators of offences to specifically seek justice in those EU Member States that leniently deal with multi-offenders in both domestic and transnational situations. Last but not least, also the *lex certa*-principle seems to be at stake.<sup>10</sup>

These possible differences and their interesting consequences are what sparked this comparative EU-project, for which the national legislation of ten different EU Member States has been mapped and analysed. More precisely, the national laws of Belgium, the Netherlands, Sweden, Finland, Germany, Poland, Portugal, Spain, Italy and Greece have been evaluated. Of course, in an ideal world, it would have been possible to include all 27 EU Member States in this comparative project.

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10. See also Nele Audenaert, 'Unity of Intent Effect on Sentencing: an EU dimension to *ne bis in idem* and proportionality?' (2018) *European Criminal Law Review* 39-61.

However, in order to enable a detailed and in-depth study of the examined legislations in the final chapter, a more specific selection had to be made. For this selection, a diverse sample of the different EU Member States was chosen to ensure that most of the different existing approaches towards punishing multi-offenders in a national and transnational context would be covered. In doing so, the overall conclusions of the project could probably be generalised for the majority of the EU Member States.