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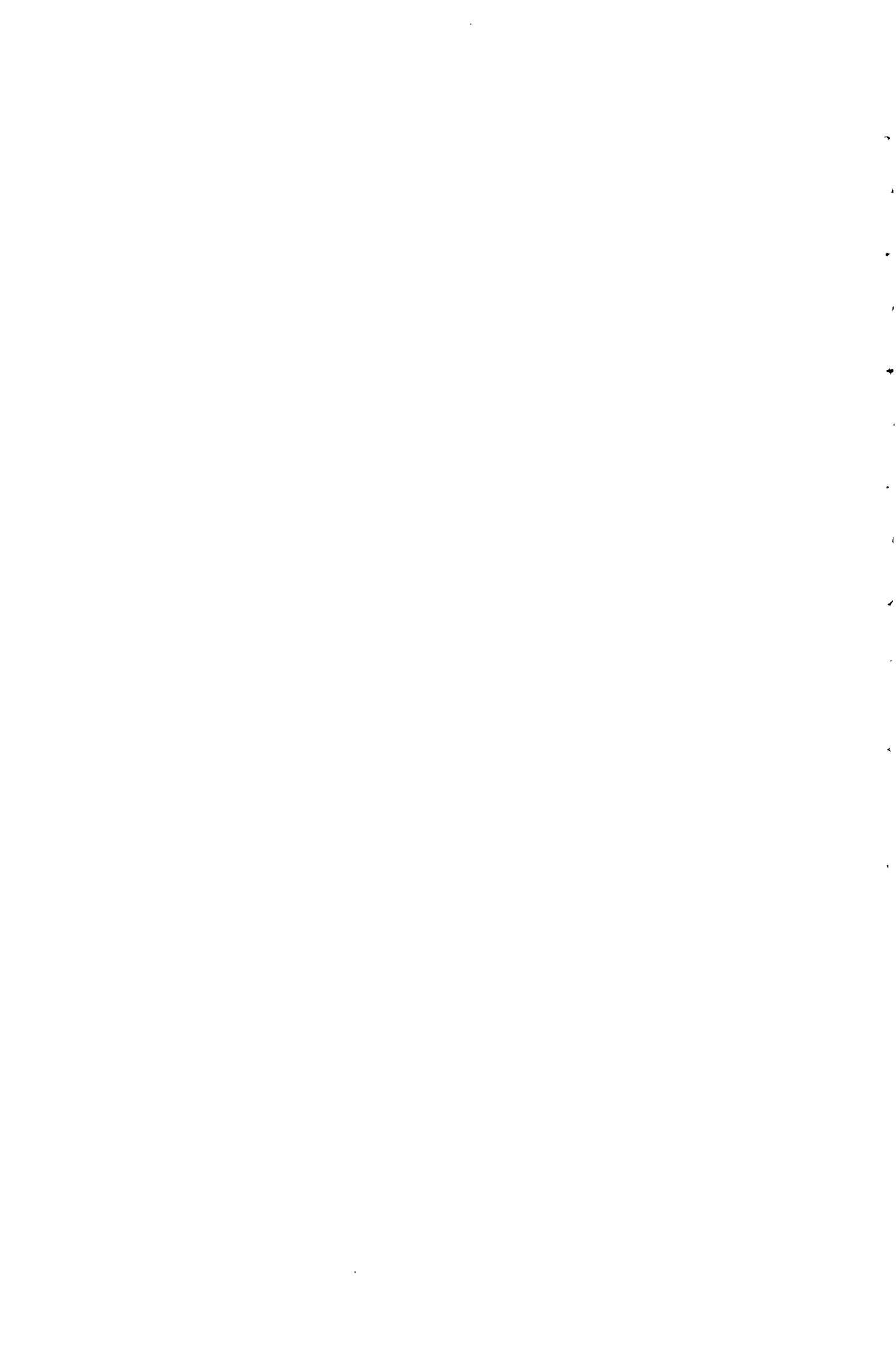
Report

drawn up by the Legal Affairs Committee

on the application of the 'non bis in idem' principle
in criminal law in the European Community

Rapporteur: Mr K. de GUCHT

PE 80.269/fin.



At its sitting of 17 November 1981 the European Parliament referred the motion for a resolution (Doc. 1-749/81) tabled by Mr Glinne and Mrs Vayssade pursuant to Rule 47 of the Rules of Procedure on the application of the 'non bis in idem' principle within the European Community to the Legal Affairs Committee.

At its meeting of 28 January 1982 the Legal Affairs Committee appointed Mr De Gucht rapporteur.

It considered the draft report drawn up by Mr De Gucht at its meetings of 20/21 June 1983 and 1/2 February 1984 and adopted it unanimously at the latter meeting.

The following took part in the vote: Mrs VEIL, chairman; Mr LUSTER, vice-chairman; Mr DE GUCHT, rapporteur; Mr ARNDT (deputizing for Mrs Macciocchi), Mr EPHREMIDIS, Mr GEURTSSEN, Mr GONTIKAS, Mr MEGAHY, Mr PRICE, Mr PROUT, Mr SIEGLERSCHMIDT, Mrs VAYSSADE, Mr VETTER and Mr VIE.

This report was tabled on 7 February 1984.

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The Legal Affairs Committee hereby submits to the European Parliament the following motion for a resolution together with explanatory statement:

MOTION FOR A RESOLUTION

on the application of the 'non bis in idem' principle in criminal law in the European Community

The European Parliament,

- having regard to the motion for a resolution by Mr GLINNE and Mrs VAYSSADE on the application of the 'non bis in idem' principle within the European Community (Doc. 1-749/81),
 - having regard to the 'International Covenant on civil and political rights' and to Article 14(7) thereof, under which 'No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country,
 - having regard to the report of the legal Affairs Committee (Doc. 1-1397/83);
1. Notes that provisions which do not conform with the application of the 'non bis in idem' principle still exist in the criminal law of a number of Member States, empowering them to prosecute, try and sentence a person who has already been sentenced in another country;
 2. Affirms that the 'non bis in idem' principle derives from the fact that, in order to ensure respect for legal verdicts and the protection of the individual, it is in the interests both of the community and of the individual that the authority of 'res judicata' should be fully recognized;
 3. Notes that the 'non bis in idem' rule is based on two complementary principles, that of individual freedom and that of the authority of 'res judicata' as an element of social peace;

4. Emphasizes that in view of the various freedoms provided for by the EEC Treaty, in particular in the field of the freedom of movement of persons, the maintenance of provisions which do not correspond to the 'non bis in idem' principle would appear to be in conflict with the realization of a uniform economic area;
5. Points out that although the European Convention for the protection of human rights omits to guarantee application of this principle as a recognized and protected right, this lacuna could be removed by means of a protocol which is at present being drawn up, and expresses its full support for this;
6. Notes that various conventions of the Council of Europe are based on this principle, including the European Convention on extradition of 1957 (Article 9), the European Convention on the international validity of criminal judgments of 28 May 1970 (Article 53) and the European Convention on the transfer of proceedings in criminal matters (Articles 35-37);
7. Points out that these conventions have, however, so far only been ratified by a small number of Member States;
8. Therefore requests the Member States to ratify these conventions as soon as possible;
9. Points out that, according to the jurisprudence of the Court of Justice in the sphere of protection of basic rights, Community law recognizes this principle as an integral part of the system of general legal principles and that therefore no exceptions may in future be made to the application of the 'non bis in idem' principle;
10. Notes that a number of Member States have written the 'non bis in idem' principle into their constitution or their criminal code, or apply this principle, thereby complying with the principles laid down in Community law, the conventions of the Council of Europe and general principles of law;

11. Believes that Member States whose legislation permits infringement of the 'non bis in idem' principle must take appropriate legal measures to abolish such provisions;
12. Requests the Council of Ministers of Justice to state their position on the 'non bis in idem' principle and to urge Member State to abolish provisions deemed to be incompatible with this principle;
13. Instructs its President to forward this resolution to the Council, the Commission and the Member States.

EXPLANATORY STATEMENT

I. INTRODUCTION

1. The 'non bis in idem' rule derives from the principle that, to protect the interests of the community and of those subject to jurisdiction and to ensure respect for the verdicts of the courts, a sentence in criminal law which has the power of a final judgment 'res judicata' can no longer be questioned.

Once the verdict admits of no further appeal, the person concerned cannot be prosecuted for the same act again by a criminal court since this would represent violation of the 'res judicata', there being an identical subject, an identical case and identical parties.

2. The 'non bis in idem' rule therefore rests on two complementary principles: one is the protection of individual freedom and the other is the importance for social peace of the validity in criminal law of 'res judicata'

This rule therefore follows on directly from legal views recognized by those states which are based on a respect for basic rights.

It initially applied only in the case of crimes committed on the territory of a state but has since been extended to crimes committed in other countries.

Criminal offences committed by an individual outside his country of origin therefore involve two national authorities: those of the state on whose territory the offence was committed and his state of origin.

3. In various Member States criminal law provisions still apply which allow the authorities to prosecute, try and sentence a person who has already been sentenced in another country.

In the light of the EEC Treaty and the freedoms it enshrines, and particularly the freedom of movement of persons, such provisions clearly present serious problems.

II. THE PROVISIONS AT ISSUE

4. The tablers of the motion for a resolution give the example of provisions from the Italian penal code, viz. Articles 9, 11, 575 and 576.

Under Article 9 any Italian citizen who has committed an offence in another country in respect of which Italian criminal law provides for imprisonment of more than three years may be tried again in as far as he is on Italian territory.

In the case of offences subject to imprisonment of less than three years the accused may be sentenced at the request of the Minister of Justice after the victim has lodged a charge.

Under Article 11 of the Italian penal code an Italian subject and even a foreigner may be tried for offences committed on Italian territory even if they have been already tried in another state.

For certain categories of offence which are punishable under Articles 7, 8, 9 and 10 of the penal code this requires a personal request from the Minister of Justice.

5. Articles 575 and 576 of the Italian penal code refer to offences against the person.

Under Article 575 manslaughter is punishable by imprisonment for more than 21 years.

Article 576 describes the aggravating circumstances under which manslaughter may be punishable by imprisonment for life.

An Italian citizen who has already been sentenced in a Member State of the EEC may thus on his return to Italy be sentenced for a second time for the same acts for which he has already served a sentence.

6. The penal codes of some other Member States may also contain similar exceptions to the 'non bis in idem' principle. However, the general trend is for the legislator to admit fewer such exceptions.

The 'non bis in idem' principle is incorporated in the Basic Law of the Federal Republic of Germany: Article 103(3) provides that under general penal legislation nobody may be punished more than once for the same act.

In accordance with this principle, paragraph 51, subsection 3(1) of the Penal Code states in the version of 2 January 1975:

'If the sentenced person has been punished in a foreign country for the same act, the new sentence shall be offset by the foreign sentence, provided that this has been enforced'.

7. In Belgium the Penal Code provided, before the entry into force of the law of 26 February 1981, that a person who was legally acquitted could not be tried again on the same facts and on the same charge (Article 360).

This infringement of the 'non bis in idem' principle was removed by the introduction of the abovementioned law which now constitutes the new Article 360 of the Penal Code. Henceforth anyone who is acquitted by a court can no longer be prosecuted on the same facts, irrespective of the charges brought against them.

8. In France the non-validity of an absolute judgment by a foreign court is governed by Articles 6 and 368 of the Penal Code. This is a norm under public law which the accused cannot escape from and which may be waived ex officio by the judge.

With regard to crimes committed in other countries by French citizens or foreigners the Code of Criminal Procedure excludes any prosecution if the accused can show that he has received a definitive trial in the other country and if he was convicted that he has served his sentence or that the right to carry out punishment falls under the statute of limitations or that pardon has been granted (Article 692).

In order to ensure application of the 'non bis in idem' principle the final preliminary draft of the Penal Code includes a provision in Article 28 recognizing the exonerating effect of a sentence delivered in another country. In this way the principle should be reaffirmed at international level thus removing any possible remaining violations of it.

9. In the Netherlands Article 68 of the Penal Code prohibits the reopening of a case against a person on the same facts, except when a judgment is still open to appeal.

10. In the United Kingdom a person who has already been tried, sentenced or acquitted in another country by a qualified court may not be tried again for the same offence¹.

III. POSSIBLE SOLUTIONS

11. There are various systems of law in Europe and the Community containing provisions based on the 'non bis in idem' principle.

Strangely enough this principle is not one of those recognized and protected by the European Convention for the protection of human rights, although it is explicitly enshrined in Article 14(7) of the 'International Covenant on civil and political rights'¹.

This lacuna is now to be removed by a protocol being drawn up at the present time, and this is a most welcome development.

At the same time this principle is inherent to various conventions of the Council of Europe.

In Community law, however, the application of this principle raises some problems especially with regard to competition law.

A. The conventions of the Council of Europe

1. The European Convention on extradition

12. Article 9 of this Convention which dates from 1957 states that extradition shall not be granted if final judgment has been passed by the competent authorities of the requested Party upon the person claimed in respect of the offence or offences for which extradition is requested.

¹ (For the text, see the second recital of the motion for a resolution). This International Covenant came into force on 23 March 1976. The following Community Member States have ratified it: Belgium, Denmark, the Federal Republic of Germany, France, Italy, Luxembourg, the Netherlands and the United Kingdom (as at 1 September 1983).

Extradition may be refused if the competent authorities of the requested Party have decided either not to institute or to terminate proceedings in respect of the same offence or offences.

This Convention has been ratified by seven of the Member States of the EEC, Belgium, France and the United Kingdom being those which have not ratified it. It came into force on 18 April 1960.

2. The European Convention on the international validity of criminal judgments

13. The 'non bis in idem' principle is naturally an important factor in the international effect of criminal sentences. Article 53 of this Convention, which was signed on 28 May 1970 in The Hague, provides that a person on whom a criminal sentence has been passed, may, for the same act, neither be prosecuted nor sentenced nor subjected to enforcement of a sanction in another contracting state if he was acquitted or if the sanction imposed has been completely enforced or is being enforced or he has been granted a pardon or an amnesty or the sanction can no longer be enforced because of lapse of time. The same applies if the court has convicted the offender without imposing a sanction.

14. There are, however, two exceptions to the application of this principle. A contracting state is not obliged, unless it has itself requested the proceedings, to recognize the effect of 'non bis in idem' if the act which gave rise to the judgment was directed against either a person or an institution or anything having public status, or if the subject of the judgment had himself a public status in that state.

Moreover, the contracting state where the act was committed is not obliged to recognize the 'non bis in idem' principle unless it has itself requested the proceedings.

These are the two exceptions stipulated in this Convention. It is, however, left to the individual states to apply wider domestic provisions relating to the 'non bis in idem' principle attached to foreign criminal judgments.

This Convention has been signed by four Member States of the EEC, Denmark, Greece, Italy and Luxembourg and it has been ratified by one Member State, Denmark. It came into force on 26 July 1974.

3. The European convention on the transfer of proceedings in criminal matters

15. This Convention, which came into force on 30 March 1978, has so far only been signed by two Member States of the EEC: Denmark and Greece, and ratified by Denmark. It contains 'non bis in idem' rules in Articles 35 to 37 which are identical to those contained in the Convention on the international validity of criminal judgments.

B. Community law

16. According to the case law of the Court of Justice in respect of the protection of basic rights, there are no exceptions to the application of the 'non bis in idem' principle in Community law.

In the Nold case the Court confirmed that fundamental rights constitute an integral part of the general legal principles which it is its job to ensure. It stated that it had been guided, in the protection of these rights, by the constitutional traditions common to the Member States and could thus not admit any measures which ran counter to fundamental rights which were recognized and enshrined in the constitutions of the states.

In this the Court is applying an important principle, namely that of the maximum protection of basic rights².

As a consequence no exception whatsoever can be made to the 'non bis in idem' principle in Community law.

17. The theory of an accumulation of penalties in connection with competition law arose in the Wilhelm/Bundeskartellamt case³.

This case was concerned with the possibility that, pending a Community regulation, double administrative sanctions would be imposed on undertakings which had applied restrictions on the field of competition.

The Court believed that the two procedures, viz a Community and a national procedure, served different purposes and derived from the special provisional system of distribution of powers under Article 88 of the EEC Treaty.

The Court believed that if, however, the possibility of two different procedures led to an accumulation of penalties it seemed for reasons of fairness more appropriate that foreign punitive sanctions imposed earlier should be taken into account when determining the punishment.

Even in this special case concerning a typical transitional situation, the Court had no hesitation, generally speaking, in forbidding breaches of this principle.

In the Boehringer/Commission case⁴ the Court rejected the appeal by this undertaking against a heavy fine imposed by the Commission of the European Communities for infringement of Article 85 of the EEC Treaty when it had already been sentenced by a New York District Court for infringing federal US legislation.

The Court was of the opinion that the application against the defendant which aimed to show the imposition of accumulated sanctions, was in fact based on activities of a different kind and in a different place.

18. In connection with an appeal by an EEC official who had been reprimanded and against whom consequently a new disciplinary procedure was instituted on the same charges the Court decided that the 'non bis in idem' rule had been violated. It accordingly annulled the decision of the Commission ordering continuation of the enquiry 'at the disciplinary level'⁵.

REFERENCES

- (1) R. v. Hutchinson (1677) 3 Keb 785.
R. v. Roche (1775) 1 Leach 134.
R. v. Aught (1918) 118 L.T. 658 C.C.A.
 - (2) Judgment of 14.5.1974, case 4-73: Nold/Commission (reports 1974-4, page 491).
 - (3) Judgment of 13.2.1969, case 14-68: Wilhelm/Bundeskartellamt (reports 1969, page 1).
 - (4) Judgment of 14.12.1972, case 7/72, reports 1972-II, page 1281.
 - (5) Judgment of 15.3.1967, Gutmann/Commission of the EAEC, joined cases 18 and 35/65, reports 1967, page 61.
- n.b. ANNEX: Motion for a resolution Doc. 1-749/81, with the following
PE No. PE 80.269/fin./Ann.

