Ne bis in idem

Old principles in new clothes

From obstacle to extradition to fundamental right not to be prosecuted twice within the EU

European Jurisdictional Conflicts
Transfer of Proceedings
The Sources of Law

**national**: The domestic acts/laws on cooperation in criminal matters
Links to be found on the EJN-Atlas:  

**bilateral**: Bilateral Treaties
Links to be found on the EJN-Atlas:  

**EU**: The law of the European Union

**Schengen**: The applicable law between member states of the Schengen area

**CoE**: The Conventions of the Council of Europe
[http://www.conventions.coe.int](http://www.conventions.coe.int)

**UN**: The Conventions of the United Nations
International *ne bis in idem* – *(obstacle to extradition)*

A) **International**

*Article 9 European Convention on Extradition of 13 December 1957*

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.

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.

B) **Bilateral** e.g.

*Article 4 Treaty between Australia and the Federal Republic of Germany Concerning Extradition of 14 April 1987*

1. Extradition **shall not be** granted if:
   a) the person claimed has already been tried and acquitted or convicted by the competent authorities of the Requested State for the offence in respect of which his extradition is requested; or
   b) criminal proceedings initiated against the person claimed for the offence in respect of which extradition is requested have been discontinued finally by the competent authorities of the Requested State, the person claimed having complied with the conditions imposed on him.

2. Extradition **may be refused** if the person claimed has already been tried and acquitted or convicted by the competent authorities of a third State for the offence in respect of which his extradition is requested.

3. Extradition may be refused if the person claimed is under examination or trial in the Requested State for the offence in respect of which his extradition is requested.

4. Subject to paragraph (1) (b), a decision by the competent authorities of the Requested State not to initiate or to stop proceedings against the person claimed in respect of an offence shall not be a reason to refuse extradition in respect of the same offence.
**Ne bis in idem – obstacle to extradition: §§ 9,9a IRG**

**Section 9**

- If the offence is also subject to German jurisdiction extradition shall not be granted if
- (1) a court or other authority in Germany has because of the offence and with respect to the prosecuted person issued a judgment or a decision with corresponding legal effect or has declined to admit the case for trial (s. 204 CCP – Strafprozessordnung) or has denied a motion to admit a case for trial (s. 174 CCP – Strafprozessordnung) or has suspended the proceedings after the satisfaction of conditions or directions (s. 153a CCP - Strafprozessordnung) or has under juvenile criminal law declined prosecution or has closed the proceedings (ss. 45, 47 Law on Juvenile Delinquency - Jugendgerichtsgesetz), or
- (2) the statute of limitations for prosecution or enforcement has lapsed under German law or if prosecution or enforcement are barred by a German amnesty law.

**Section 9a Extradition and Proceedings before International Criminal Courts**

(omitted)
National *ne bis in idem* (double jeopardy)

1. **Art. 14 (7) ICCPR (19 December 1966):**
   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.

2. **Example: Germany: Art. 103 (3) GG (23. Mai 1949)** (Constitution - Basic Law)
   
   No person may be punished for the same act more than once under the general criminal laws.

   - Prohibition of multiple criminal prosecution
   - Principle of singularity of criminal prosecution
   - Consequently settled jurisprudence *inter alia* articulates:
     
     „Where **two parallel criminal proceedings** are conducted in respect of one and the same acts it is all the more forbidden to order such measures which would affect the defendant in a particularly sustained manner, i.e. **an arrest warrant**.“
     
     [BGHSt 38, 54, 57 f.]
     
     „In the case of a conviction abroad no ban exists prohibiting renewed prosecution for the same criminal act in **Germany**.“ [BVerfGE 75, 1]
Article 4 Protocol No. 7 to the ECHR of 22 November 1984

1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

3. No derogation from this Article shall be made under Article 15 of the Convention.

Not ratified by inter alia Germany

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41. The Court reiterates that Article 4 of Protocol No. 7 prohibits the repetition of criminal proceedings that have been concluded by a “final” decision. Article 4 of Protocol No. 7 is not only confined to the right not to be punished twice but extends also to the right not to be prosecuted or tried twice (see Franz Fischer v. Austria, cited above, § 29). Were this not the case, it would not have been necessary to add the word “punished” to the word “tried” since this would be mere duplication. Article 4 of Protocol No. 7 applies even where the individual has merely been prosecuted in proceedings that have not resulted in a conviction. The Court reiterates that Article 4 of Protocol No. 7 contains three distinct guarantees and provides that no one shall be (i) liable to be tried, (ii) tried or (iii) punished for the same offence (see Nikitin v. Russia, cited above, § 36).

43. As concerns parallel proceedings, Article 4 of Protocol No. 7 does not prohibit several concurrent sets of proceedings. In such a situation it cannot be said that an applicant is prosecuted several times “for an offence for which he has already been finally acquitted or convicted” (see Garaudy v. France (dec.), no. 65831/01, ECHR 2003-IX (extracts)). There is no problem from the Convention point of view either when, in a situation of two parallel sets of proceedings, the second set of proceedings is discontinued after the first set of proceedings has become final (see Zigarella v. Italy (dec.), no. 48154/99, ECHR 2002-IX (extracts)). However, when no such discontinuation occurs, the Court has found a violation (see Tomasović v. Croatia, cited above, § 31; Muslija v. Bosnia and Herzegovina, no. 32042/11, § 37, 14 January 2014; Nykänen v. Finland, no. 11828/11, § 52, 20 May 2014; and Glantz v. Finland, no. 37394/11, § 62, 20 May 2014).

44. However, the Court has also found in its previous case-law (see R.T. v. Switzerland (dec.), no. 31982/96, 30 May 2000; and Nilsson v. Sweden (dec.), no. 73661/01, 13 December 2005) that although different sanctions (suspended prison sentences and withdrawal of driving licences) concerning the same matter (drunken driving) have been imposed by different authorities in different proceedings, there has been a sufficiently close connection between them, in substance and in time. In those cases the Court found that the applicants were not tried or punished again for an offence for which they had already been finally convicted in breach of Article 4 § 1 of Protocol No. 7 to the Convention and that there was thus no repetition of the proceedings.
ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

60. The applicants complained under Article 2 of the Convention, read in conjunction with the State’s general duty under its Article 1 to “secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention”, that Germany did not provide for an adequate or effective official investigation into their father’s death. They further complained that the German authorities had refused to allow U.’s extradition to face trial in the United Kingdom. They relied in this respect on the procedural obligations inherent in Article 2 § 1 which provides in its first sentence: “1. Everyone’s right to life shall be protected by law. ...”

93. The Court observes that, in reality, the applicants complained about the fact that U. was convicted in Germany and not in the United Kingdom where he may have faced a heavier penalty. It notes in this context that the German authorities were obliged to institute criminal proceedings against U. by operation of domestic law once they had learned of his involvement in the events surrounding Mr Gray’s death and consequently had a basis for their decision not to extradite U. to the United Kingdom in accordance with the relevant domestic and international law. The Court would point out in this respect that the procedural guarantees enshrined in Article 2 do not entail a right or an obligation that a particular sentence be imposed on a prosecuted third party under the domestic law of a specific State........

95. The Court concludes that in the present case the German authorities have provided for effective remedies with a view to determining the cause of the applicants’ father’s death as well as U.’s related responsibility. There is further nothing to establish that the criminal investigations and proceedings instituted on the initiative of the German authorities in relation to Mr Gray’s death fell short of the procedural guarantees inherent in Article 2 § 1 of the Convention.

96. There has accordingly been no violation of Article 2 of the Convention.
Vertical transnational *ne bis in idem*

**Article 20 ICC (Rome-) Statute (18 November 1998)**

1. Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.

2. No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court.

3. No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:
   a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or
   b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.
Horizontal International *ne bis in idem* – first examples

**a) Article VII (8) NATO-Status of Forces Treaty of 19 June 1951 (SOFA)**
Where an accused has been tried in accordance with the provisions of this Article by the authorities of one Contracting Party and has been acquitted, or has been convicted and is serving, or has served, his sentence or has been pardoned, he may not be tried again for the same offence within the same territory by the authorities of another Contracting Party. However, nothing in this paragraph shall prevent the military authorities of the sending State from trying a member of its force for any violation of rules of discipline arising from an act or omission which constituted an offence for which he was tried by the authorities of another Contracting Party.

**b) Article 1 Convention between the Member States of the EC on Double Jeopardy of 25 May 1987**
A person whose trial has finally been disposed of in a Member State may not be prosecuted in another Member State in respect of the same facts, provided that if a sanction is imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing state.

**c) Article 54 Convention of 19 June 1990 Implementing the Schengen Agreement of 14 June 1985 (CISA)**
A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party.
Transnational *ne bis in idem* – Schengen/EU

**Article 50 Charter of Fundamental Rights of the EU (CFREU)**
(12 December 2007)

No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.

**Article 3 Council FD of 13 June 2002 on the EAW and the surrender procedures between Member States**

The judicial authority of the Member State of execution [...] shall refuse to execute the European arrest warrant in the following cases:

1. if the offence on which the arrest warrant is based is covered by amnesty in the executing Member State, where that State had jurisdiction to prosecute the offence under its own criminal law;
2. if the executing judicial authority is informed that the requested person has been finally judged by a Member State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State;
3. if the person who is the subject of the European arrest warrant may not, owing to his age, be held criminally responsible for the acts on which the arrest warrant is based under the law of the executing State.

**Article 4**

The executing judicial authority may refuse to execute the European arrest warrant:…

2. where the person who is the subject of the European arrest warrant is being prosecuted in the executing Member State for the same act as that on which the European arrest warrant is based;
3. where the judicial authorities of the executing Member State have decided either not to prosecute for the offence on which the European arrest warrant is based or to halt proceedings, or where a final judgment has been passed upon the requested person in a Member State, in respect of the same acts, which prevents further proceedings;
4. where the criminal prosecution or punishment of the requested person is statute-barred according to the law of the executing Member State and the acts fall within the jurisdiction of that Member State under its own criminal law;
5. if the executing judicial authority is informed that the requested person has been finally judged by a third State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing country;

...
The ne bis in idem principle, laid down in Article 54 of the Convention implementing the Schengen Agreement of 14 June 1985... also applies to procedures whereby further prosecution is barred, such as the procedures at issue in the main actions, by which the Public Prosecutor of a Member State discontinues criminal proceedings brought in that State, without the involvement of a court, once the accused has fulfilled certain obligations and, in particular, has paid a certain sum of money determined by the Public Prosecutor.

Contrary to Article 14(7) of the International Covenant on Civil and Political Rights and Article 4 of Protocol No 7 to the European Convention of Human Rights, which enshrine the ne bis in idem principle by using the term ‘offence’, Article 54 of the Convention implementing the Schengen Agreement (CISA) must be interpreted as meaning that the relevant criterion for the purposes of the application of that article is identity of the material acts, understood as the existence of a set of facts which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected.
Selected jurisprudence of the CtEU (Luxemburg) 2

C-150/05 Van Straaten and others (Judgment of 28 September 2006)

In the case of offences relating to narcotic drugs, first, the quantities of the drug that are at issue in the two Contracting States concerned or the persons alleged to have been party to the acts in the two States are not required to be identical. It is therefore possible that a situation in which such identity is lacking involves a set of facts which, by their very nature, are inextricably linked. Second, punishable acts consisting of exporting and of importing the same narcotic drugs and which are prosecuted in different Contracting States party to the Convention are, in principle, to be regarded as ‘the same acts’ for the purposes of Article 54 of the Convention, the definitive assessment in that respect being the task of the competent national courts.

... The ne bis in idem principle... A provision which has the objective of ensuring that no one is prosecuted for the same acts in several Contracting States on account of the fact that he exercises his right to freedom of movement, falls to be applied in respect of a decision of the judicial authorities of a Contracting State by which the accused is acquitted finally for lack of evidence.

Furthermore, not to apply Article 54 of the Convention to a final decision acquitting the accused for lack of evidence would have the effect of jeopardising exercise of the right to freedom of movement.

Finally, in the case of a final acquittal for lack of evidence, the bringing of criminal proceedings in another Contracting State for the same acts would undermine the principles of legal certainty and of the protection of legitimate expectations. The accused would have to fear a fresh prosecution in another Contracting State although a case in respect of the same acts has been finally disposed of.
The **ne bis in idem** principle... applies in respect of a decision of a court of a Contracting State, made after criminal proceedings have been brought, by which the accused is **acquitted** finally because prosecution of the **offence is time-barred**.

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- **C-491/07 Turansky** (Judgment of 22 December 2008)
  - The **ne bis in idem** principle.... on account of his having exercised his right to freedom of movement, does **not** fall to be applied to a decision by which an authority of a Contracting State, after examining the merits of the case brought before it, makes an **order**, at a stage before the charging of a person suspected of a crime, suspending the criminal proceedings, where the suspension decision does **not**, under the national law of that State, **definitively bar further prosecution** and therefore does not preclude new criminal proceedings, in respect of the same acts, in that State.

- **C-261/09 Mantello** (Judgment 16 of November 2010)
  - For the purposes of the issuance and execution of a European arrest warrant, the concept of 'same acts’ in Article 3(2) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the EAW... constitutes an **autonomous concept of European Union law**.
Judgment of the Court (Fourth Chamber) of 5 June 2014
In Case C-398/12
in the criminal proceedings against M
(finding of “non lieu”)

- Article 54 of the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, signed in Schengen (Luxembourg) on 19 June 1990, must be interpreted as meaning that an order making a finding that there is no ground to refer a case to a trial court which precludes, in the Contracting State in which that order was made, the bringing of new criminal proceedings in respect of the same acts against the person to whom that finding applies, unless new facts and/or evidence against that person come to light, must be considered to be a final judgment, for the purposes of that article, precluding new proceedings against the same person in respect of the same acts in another Contracting State.
Comparison: ICCPR / CFREU

Article 50 Charter of Fundamental Rights of the EU (CFREU)

No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.

Art. 14 (7) ICCPR :

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.
1. **Article 54 of the Convention Implementing the Schengen Agreement** of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, signed on 19 June 1990 and entered into force on 26 March 1995, which makes the application of the *ne bis in idem* principle subject to the condition that, upon conviction and sentencing, the penalty imposed ‘has been enforced’ or is ‘actually in the process of being enforced’, is compatible with Article 50 of the Charter of Fundamental Rights of the European Union, in which that principle is enshrined.

2. **Article 54 of that convention** must be interpreted as meaning that the mere payment of a fine by a person sentenced by the self-same decision of a court of another Member State to a custodial sentence that has not been served is not sufficient to consider that the penalty ‘has been enforced’ or is ‘actually in the process of being enforced’ within the meaning of that provision.
• 21 Recital 3 in the preamble to Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings (OJ 2009 L 328, p. 42) states:

‘The measures provided for in this Framework Decision should aim to prevent situations where the same person is subject to parallel criminal proceedings in different Member States in respect of the same facts, which might lead to the final disposal of those proceedings in two or more Member States. The Framework Decision therefore seeks to prevent an infringement of the principle of ‘ne bis in idem’, as set out in Article 54 [CISA] …’

• 22 Under Article 5(1) of that framework decision, when a competent authority of a Member State has reasonable grounds to believe that parallel proceedings are being conducted in another Member State, it is to contact the competent authority of that other Member State to confirm the existence of such parallel proceedings, with a view to initiating direct consultations. (tbc)
• 69 While it is true that those mechanisms are capable of facilitating the execution of decisions within the European Union, their use is nevertheless subject to various conditions and depends, in the end, on a decision of the Member State in which the court that delivered a decision on a definitive sentence is located, since that Member State is not obliged under EU law to ensure the effective execution of the penalties arising from that sentence. The options made available to that Member State by those Framework decisions cannot ensure that, in the area of freedom, security and justice, persons definitively convicted and sentenced in the European Union will not enjoy impunity if the State which imposed the first sentence does not execute the penalties imposed.

• 70 Moreover, although Framework Decision 2008/909 envisages the execution of a custodial sentence in a Member State other than that in which the court which imposed the sentence is located, it must be pointed out that, under Article 4 thereof, that option arises only where the sentenced person has consented and the sentencing State has satisfied itself that the execution of the sentence by the executing State will serve the purpose of facilitating the social rehabilitation of the sentenced person. It follows that the main aim of the system established by that framework decision is not to prevent the impunity of persons definitively convicted and sentenced in the European Union and it is not capable of ensuring the full realisation of that aim.
Solutions?

Ne!

bis?

\(+\text{execution of sanction}\)?

idem!

in
Coordination: Treaty of Lisbon (1)

Article 67 Treaty on the Functioning of the European Union (TFEU)

1. The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States.

2. It shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals. For the purpose of this Title, stateless persons shall be treated as third-country nationals.

3. The Union shall endeavour to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia, and through measures for coordination and cooperation between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws.

4. The Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters.
Interpretation: Treaty of Lisbon (2)

Article 267 TFEU

The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:
(a) the interpretation of the Treaties;
(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.
Conflicts of jurisdiction: Treaty of Lisbon (3)

Article 82 TFEU

1. Judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States in the areas referred to in paragraph 2 and in Article 83. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures to:
   (a) lay down rules and procedures for ensuring recognition throughout the Union of all forms of judgments and judicial decisions;
   (b) prevent and settle conflicts of jurisdiction between Member States;
   (c) support the training of the judiciary and judicial staff;
   (d) facilitate cooperation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions.

...
Eurojust: Treaty of Lisbon (4)

Article 85 TFEU

1. Eurojust’s mission shall be to support and strengthen coordination and cooperation between national investigating and prosecuting authorities in relation to serious crime affecting two or more Member States or requiring a prosecution on common bases, on the basis of operations conducted and information supplied by the Member States’ authorities and by Europol.

In this context, the European Parliament and the Council, by means of regulations adopted in accordance with the ordinary legislative procedure, shall determine Eurojust’s structure, operation, field of action and tasks. These tasks may include:

(a) the initiation of criminal investigations, as well as proposing the initiation of prosecutions conducted by competent national authorities, particularly those relating to offences against the financial interests of the Union;

(b) the coordination of investigations and prosecutions referred to in point (a);

(c) the strengthening of judicial cooperation, including by resolution of conflicts of jurisdiction and by close cooperation with the European Judicial Network.

These regulations shall also determine arrangements for involving the European Parliament and national Parliaments in the evaluation of Eurojust’s activities.
Transfer of Proceedings (I)


Article 3
Any Contracting State having competence under its own law to prosecute an offence may, for the purposes of applying this Convention, waive or desist from proceedings against a suspected person who is being or will be prosecuted for the same offence by another Contracting State. Having regard to Article 21, paragraph 2, any such decision to waive or to desist from proceedings shall be provisional pending a final decision in the other Contracting State.

Article 4
The requested State shall discontinue proceedings exclusively grounded on Article 2 when to its knowledge the right of punishment is extinguished under the law of the requesting State for a reason other than time-limitation, to which Articles 10.c, 11.f and g, 22, 23 and 26 in particular apply.

Article 6
1. When a person is suspected of having committed an offence under the law of a Contracting State, that State may request another Contracting State to take proceedings in the cases and under the conditions provided for in this Convention.
2. If under the provisions of this Convention a Contracting State may request another Contracting State to take proceedings, the competent authorities of the first State shall take that possibility into consideration.

(But: Small number of ratifications only!

(Article 21 CoE MLA Convention of 1957 (Laying of Information) is besides the point
Article 6 EU MLA Convention 2000 (Transmission of requests for mutual assistance) as well)
Transfer of Proceedings (II)

Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings

Too vague to be efficient
Recommendation of means without any obligation!
Why not establish trigger mechanisms, e.g. SIS alert in case of conflicting (E)AWs?
Why not establish in all member states the possibility of transfer of proceedings?
Why no obligation to bring a case before Eurojust to establish the jurisdiction best placed to hear the EUROPEAN case as such?
Why no stronger role of Eurojust, at least by way of effective recommendation?
Why not going the Queens Way to mandatorily provide for a binding decision rendered by EUCJ or EUCC?
Lost in EU-Acts?

• Follow a real European spirit –
• Take action!
• Avoid ne bis in idem situations by
• negotiations:

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