(Non) Ne bis in idem

European Jurisdictional Conflicts
Transfer of Proceedings
National ne bis in idem

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.
National ne bis in idem

Example: Article 103 (3) German Constitution ("Basic Law" [Grundgesetz])

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 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]
International ne bis in idem

a) Article 9 European Convention on Extradition of 13 December 1957 (obstacle to extradition)
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) 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 Germany
International ne bis in idem – further examples 1

a) 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.

b) 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.

c) 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.
d) Article 10 ICTY Statute

1. No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal.

2. A person who has been tried by a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal only if:
   a) the act for which he or she was tried was characterized as an ordinary crime; or
   b) the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.

   ...

e) Article 20 ICC Statute

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.
International ne bis in idem

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.

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.
Gaetano Mantello  
Case C-261/09 of 16 November 2010

For the purposes of the issue and execution of a European arrest warrant, the concept of ‘same acts’ in Article 3(2) of Council Framework Decision 2002/584/JHA [...] constitutes an autonomous concept of European Union law.

In circumstances such as those at issue in the main proceedings where, in response to a request for information within the meaning of Article 15(2) of that Framework Decision made by the executing judicial authority, the issuing judicial authority, applying its national law and in compliance with the requirements deriving from the concept of ‘same acts’ as enshrined in Article 3(2) of the Framework Decision, expressly stated that the earlier judgment delivered under its legal system did not constitute a final judgment covering the acts referred to in the arrest warrant issued by it and therefore did not preclude the criminal proceedings referred to in that arrest warrant, the executing judicial authority has no reason to apply, in connection with such a judgment, the ground for mandatory non-execution provided for in Article 3(2) of the Framework Decision.
The ne bis in idem principle enshrined in Article 54 of the Convention implementing the Schengen Agreement, which aims to ensure that a person is not prosecuted for the same acts in the territory of several Contracting States 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.
The prohibition of double jeopardy in Art. 50 CFREU is, as opposed to the corresponding prohibition in Art. 54 CISA, not expressly modified by an execution clause. Pursuant to Art. 52(1) CFREU, however, the rights enshrined in the Charter can be restricted by laws that respect the essence of the Charter. Art. 54 CISA represents such a restriction.

Therefore Art. 50 CFREU beyond doubt only applies in accordance with Art. 54 CISA.
Treaty of Lisbon 1

Article 19 Treaty on the European Union (TEU)

1. The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed. Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.

…

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.
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.
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.

…
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.

...
Concurrent Jurisdiction 1

Articles 7-10 European Convention on Extradition of 13 December 1957

Article 7 – Place of commission
1. The requested Party may refuse to extradite a person claimed for an offence which is regarded by its law as having been committed in whole or in part in its territory or in a place treated as its territory ist.
2. When the offence for which extradition is requested has been committed outside the territory of the requesting Party, extradition may only be refused if the law of the requested Party does not allow prosecution for the same category of offence when committed outside the latter Party's territory or does not allow extradition for the offence concerned.

Article 8 – Pending proceedings for the same offences
The requested Party may refuse to extradite the person claimed if the competent authorities of such Party are proceeding against him in respect of the offence or offences for which extradition is requested.

Article 9 – Non bis in idem
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.

Article 10 – Lapse of time
Extradition shall not be granted when the person claimed has, according to the law of either the requesting or the requested Party, become immune by reason of lapse of time from prosecution or punishment.
Concurrent Jurisdiction 2

Article 9 Act on International Cooperation in Criminal Matters (AICCM, Germany)

If the act is also subject to German jurisdiction, extradition shall not be granted, provided

1. a court or other authority in Germany has rendered a judgement or a decision with corresponding legal force or has declined to open the main trial (Section 204 of the Code of Criminal Procedure [Strafprozessordnung - StPO]) or has denied a motion to issue a formal indictment (Section 174 of the Code of Criminal Procedure) or has suspended the proceedings after the satisfaction of conditions and instructions (Section 153(a) Code of Criminal Procedure) or has, under juvenile criminal law, rescinded prosecution or has suspended the case (Sections 45 and 47 of the Juvenile Court Act [Jugendgerichtsgesetz - JGG]) or

2. the statute of limitations for the prosecution or the enforcement has elapsed under German law or the prosecution or enforcement is barred by a German amnesty law.


If a State Party exercising its jurisdiction under paragraph 1 or 2 of this article has been notified, or has otherwise learned, that one or more other States Parties are conducting an investigation, prosecution or judicial proceeding in respect of the same conduct, the competent authorities of those States Parties shall, as appropriate, consult one another with a view to coordinating their actions.
Transfer of Proceedings


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.

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 ???
Lost in EU-Acts?

Follow the European spirit – take action!