(Non) Ne bis in idem

European Jurisdictional Conflicts
Transfer of Proceedings
Overview

Evolution of this principle *ne bis in idem*:
From obstacle to extradition to individual fundamental right

- Natural law (deriving from various religions to Don Quichote - *cf.* Advocate General *Colomber*, to be seen as part of or *lex specialis* to the principle of proportionality – now enshrined *inter alia* in Art. 49 CFREU

- Obstacle to extradition in the interest of sovereignty

- Domestic individual (at times even fundamental) right

- Art. 14 (7) ICCPR (binding member states internally) - however, subject to interpretation (scope and limits of *res judicata*)

- Art. 54 CISA emanating from the right to freedom of movement in the Schengen area, an area of freedom, security and justice

- Art. 50 CFREU (Fundamental right within the European Union)
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.]
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 inter alia Germany*
Excursus: ECPR and CFREU

- OPINION OF ADVOCATE GENERAL Sharpston delivered on 18 October 2012 C-396/11 (Radu)
- 1) The provisions of the Charter of Fundamental Rights of the European Union, including Articles 6, 48 and 52 thereof, form part of the primary law of the Union. Fundamental rights, as guaranteed by the European Convention for the Protection of Fundamental Rights and Freedoms, including the rights set out in Articles 5(1), (3) and (4) and 6(2) and (3) of the Convention, constitute general principles of Union law. […]
- 3) The competent judicial authority of the Member State executing a European arrest warrant can refuse the request for surrender without being in breach of the obligations authorised by the founding Treaties and the other provisions of European Union law, where it is shown that the human rights of the person whose surrender is requested have been infringed, or will be infringed, as part of or following the surrender process. However, such a refusal will be competent only in exceptional circumstances. In cases involving Articles 5 and 6 of the Convention and/or Articles 6, 47 and 48 of the Charter, the infringement in question must be such as fundamentally to destroy the fairness of the process. …
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.
… [A]t present there is no identifiable general rule of international law in the meaning of Art. 25 §1 German Constitution ([Grundgesetz]), according to which no person shall be prosecuted or punished again for the same facts (=acts) [identischer Sachverhalt] for which he has already been finally acquitted or convicted by another State.

See already: [BVerfGE 75, 1 <18 ff.>] and [BVerfGK 13, 7 <17 ff.>]
International ne bis in idem

Article 54 Convention of 19 June 1990
Implementing the Schengen Agreement (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.
Applicability of Art. 54 – 58 CISA?

- The **Accession Treaty** with Croatia, signed in Brussels on 9 December 2011, reads *inter alia*:

- List of provisions of the Schengen *acquis* as integrated into the framework of the European Union and the acts building upon it or otherwise related to it, to be binding on, and applicable in, the Republic of Croatia as of accession (referred to in Article 4(1) of the Act of Accession)

- 1. The Agreement 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 dated 14 June 1985

- 2. The following provisions of the Convention signed in Schengen on 19 June 1990 implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at their common borders, its related Final Act and Joint Declarations, as amended by certain of the acts listed in paragraph 8 of this Annex: Article 1 to the extent that it relates to the provisions of this paragraph; Article 26; Article 39; Articles 44 to 49 (with the exception of Article 47(4) and Article 49(a)), Article 51, **Articles 54 to 58**; Article 62(3); Articles 67 to 69; Articles 71 and 72; Articles 75 and 76; Article 82; Article 91;……..
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 [...].
Further:

This interpretation of the [German] Federal Court of Justice appears to be justifiable [...].

It is also justifiable to understand the explanations [*] relating to article 50 CFR as interpreted by the [German] Federal Court of Justice, according to which the enforcement element of article 54 CISA presents a permissible limitation to article 50 CFR.

* Explanations relating to the Charter of Fundamental Rights (2007/C 303/02)
Other approaches in Greece (Supreme Court) and elsewhere (e.g. District Court Milano (Tribunale di Milano, 6 July 2011,D+S 1795/11)

- **AREIOS PAGOS (HELLENIC SUPREME COURT)**
- **Decision No 1/2011 *(in pleno)*
- Non official Summary:
  - Article 54 of the Schengen Convention (CISA) establishes a trans-border ne bis in idem rule. As a State-Party to CISA Greece has filed a declaration according to Article 55 CISA including reservations which exempt drug trafficking crimes from the application of the ne bis in idem rule.
  - Article 50 of the Charter of Fundamental Rights of the European Union establishes the right not to be prosecuted or convicted twice for the same act as a fundamental right according to Article 6(1) of the Treaty of the European Union.
  - This right is linked to the principle of mutual recognition of court judgments and orders enshrined in Article 69A(1) of the Treaty of the European Union.
  - Article 50 of the Charter is a directly applicable provision according to Article 51(1) and is clear in its wording. The requirements for the application of Article 50 of the Charter shall be defined on the basis of its autonomous interpretation.
  - The declaration filed by Greece under Article 55 CISA excluding drug trafficking crimes from the application of the ne bis in idem rule has been abolished by the Treaty of Lisbon and the Charter given that Article 50 of the Charter does not provide for exceptions from this rule.
ECJ on Art. 54 CISA

• ECJ, Judgment of 11. 2. 2003, C-187 + 385/01 Gözütök und Brügge
• ECJ Judgment of 10. 3. 2005, C-469/03 – Miraglia
• ECJ Judgment of 9. 3. 2006, C-436/04 – Van Esbroeck
• ECJ Judgment of 28. 9. 2006, C-150/05 – Van Straaten
• ECJ Judgment of 28. 9. 2006, C-467/04 – Gasparini
• ECJ Judgment of 18. 7. 2007, C-288/05 – Kretzinger
• ECJ Judgment of 18. 7. 2007, C-367/05 – Kraaijenbrink
• ECJ Judgment of 22. 12. 2008, C-491/07 – Turansky
• ECJ Judgment of 16. 11. 2010, C-261/09 – Mantello
Still pending: M C-389

- Reference for a preliminary ruling from the Tribunale di Fermo (Case C-398/12)
- Language of the case: Italian
- Question referred
- Does a final judgment of no case to answer given by a Member State of the European Union party to the Convention implementing the Schengen Agreement (CISA), [1] following an extensive preliminary investigation as part of investigations in connection with proceedings which could be re-activated in the event of fresh evidence, preclude the initiation or conduct of proceedings in respect of the same facts and the same person in another Contracting State.
Toshiba JUDGMENT OF THE ECJ (Grand Chamber) of 14 February 2012 - Case C-17/10

• (Competition – Cartel which commenced before the accession of a State to the European Union – Ne bis in idem principle)

• Recital 37 of Regulation No 1/2003 provides: ‘This Regulation respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union (“the Charter”).

• In interpreting a provision of EU law, it is necessary to consider not only its wording, but also the context in which it occurs and the objectives pursued by the rules of which it is part.

• It is of little importance that the decision whereby the said authority imposed fines relates to a period prior to the accession of the Czech Republic to the Union.

• The ne bis in idem principle does not preclude penalties which the national competition authority of the Member State concerned imposes on undertakings participating in a cartel on account of the anti-competitive effects to which the cartel gave rise in the territory of that Member State prior to its accession to the European Union, where the fines imposed on the same cartel members by a Commission decision taken before the decision of the said national competition authority was adopted were not designed to penalise the said effects.
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.
Excursus: Multiple surrender

- JUDGMENT OF THE COURT (Second Chamber) of 28 June 2012 In Case C-192/12 (PPU),
- Article 28(2) of Council Framework Decision 2002/584/JHA of 13 June 200[...] must be interpreted as meaning that, where a person has been subject to more than one surrender between Member States pursuant to successive European arrest warrants, the subsequent surrender of that person to a Member State other than the Member State having last surrendered him is subject to the consent only of the Member State which carried out that last surrender.
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.
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.

...
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.
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


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.

Article 3 Council Framework Decision of 13 June 2002 on the European arrest warrant 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.
Concurrent Jurisdiction 3

Article 4 Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States

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;

…
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 the European spirit – take action!