"ne bis in idem"

(Excerpts from Schomburg *et.al.*, Internationale Rechtshilfe in Strafsachen/International Cooperation in Criminal Matters, 5th ed., Munich 2012)

I

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
of 19 June 1990
(CISA)

(OJ 2000 L 239, 19)

Chapter 3. Application of the "ne bis in idem" Principle

Art. 54

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.

[Editor's note: It has to be observed that also the following translation has been used:
*"A person who has been finally judged by a Contracting Party may not be prosecuted by another Contracting Party for the **same offences** provided that, where he is sentenced, the sentence has been served or is currently being served or can no longer be carried out under the sentencing laws of the Contracting Party"*
Interestingly enough Art. 1 of the Convention between the Member States of the European Communities on Double Jeopardy of 25 May 1987 reads as follows:*
*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 was 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.]*

II

Charter of Fundamental Rights of the European Union
of 7 December 2000
(CFREU)

As adapted on 12 December 2007

(OJ C 83/02 of 30. 3. 2010)

Art. 50 Right Not to Be Tried or Punished Twice in Criminal Proceedings for the Same Criminal Offence

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.

III

Leading Decisions of ECJ/EUGH

http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=de

ECJ/EUGH, Urteil vom/ Judgment of 11. 2. 2003, C-187 + 385/01 (NJW 2003, 1172) – ***Gözutök und Brügge***
ECJ/EUGH, Urteil vom/ Judgment of / 10. 3. 2005, C-469/03 (NJW 2005, 1337) – ***Miraglia***
ECJ/EUGH, Urteil vom/ Judgment of 9. 3. 2006, C-436/04 (EuGRZ 2006, 140) – ***Van Esbroeck***
ECJ/EUGH, Urteil vom/ Judgment of 28. 9. 2006, C-150/05 (EuGRZ 2006, 572) **– *Van Straaten***
ECJ/EUGH, Urteil vom/ Judgment of 28. 9. 2006, C-467/04 (NStZ 2007, 407) – ***Gasparini***
ECJ/EUGH, Urteil vom/ Judgment of 18. 7. 2007, C-288/05 (NJW 2007, 3412) – ***Kretzinger***
ECJ/EUGH, Urteil vom/ Judgment of 18. 7. 2007, C-367/05 (NStZ 2008, 164) – ***Kraaijenbrink***
ECJ/EUGH, Urteil vom/ Judgment of 11. 12. 2008, C-297/07 (NStZ 2009, 454) – ***Bourquain***
ECJ/EUGH, Urteil vom/ Judgment of 22. 12. 2008, C-491/07 (NStZ-RR 2009, 109) – ***Turansky***
ECJ/EUGH – GCh/GK, Urteil vom/ Judgment of 16. 11. 2010, C-261/09 (NJW 2011, 285) – ***Mantello***

IV English summaries of the decisions on interpretation of *ne bis in idem* in relation to Art. 54 CISA

(Source: European Commission, Commission Staff Working Document, SEC(2011) 430 final of 11 April 2011)

C187/01 & C385/01 (joined cases) Gözütok and Brügge (Judgment 11 February 2003)

The ne bis in idem principle, laid down in 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 at Schengen, 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.

71 **C-469/03 Miraglia (Judgment 10 March 2005)**

The principle *ne bis in idem*, enshrined in Article 54 of the Convention implementing the Schengen Agreement, the purpose of which is to ensure that no one is prosecuted on the same facts in several Member States on account of his having exercised his right to freedom of movement, does not fall to be applied to a decision of the judicial authorities of one Member State declaring a case to be closed, after the Public Prosecutor has decided not to pursue the prosecution on the sole ground that criminal proceedings have been started in another Member State against the same defendant and for the same acts, without any determination whatsoever as to the merits of the case. Such a decision cannot in fact constitute a decision finally disposing of the case against that person within the meaning of Article 54.

The consequence of applying that principle to such a decision to close criminal proceedings would be to make it more difficult, indeed impossible, actually to penalise in the Member States concerned the unlawful conduct with which the defendant is charged. Such a consequence would clearly run counter to the very purpose of the provisions of Title VI of the Treaty on European Union, as set out in the fourth indent of the first subparagraph of Article 2 EU.

72 **C-436/04 Van Esbroeck (Judgment 9 March 2006)**

1. The *ne bis in idem* principle, enshrined in Article 54 of the Convention implementing the Schengen Agreement, must be applied to criminal proceedings brought in a Contracting State for acts for which a person has already been convicted in another Contracting State even though the Convention was not yet in force in the latter State at the time at which that person was convicted, in so far as the Convention was in force in the Contracting States in question at the time of the assessment, by the court before which the second proceedings were brought, of the conditions of applicability of the *ne bis in idem* principle.

2. 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. Nowhere in Title VI of the Treaty on European Union relating to police and judicial cooperation in criminal matters, or in the Schengen Agreement or the CISA itself, is the application of Article 54 of the CISA made conditional upon harmonisation, or at the least approximation, of the criminal laws of the Member States. The *ne bis in idem* principle thus necessarily implies that the Contracting States have mutual trust in their criminal justice systems and that, since there is no harmonisation of national criminal laws, each of them recognises the criminal law in force in the other Contracting States even when the outcome would be different if its own national law were applied. The definitive assessment of the identity of the material acts belongs to the competent national courts which are charged with the task of determining whether the material acts at issue constitute a set of facts which are inextricably linked together in time, in space and by their subject-matter.

It follows that punishable acts consisting of exporting and importing the same narcotic drugs and which are prosecuted in different Contracting States to the CISA are, in principle, to be regarded as 'the same acts' for the purposes of Article 54, the definitive assessment in that respect being the task of the competent national courts.

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

1. In the context of the cooperation between the Court of Justice and national courts that is provided for by Article 234 EC, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of Community law, the Court is, in principle, bound to give a ruling. The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it.

2. Although the Court has no jurisdiction under Article 234 EC to apply a rule of Community law to a particular case and thus to judge a provision of national law by reference to such a rule, it may, in the framework of the judicial cooperation provided for by that article and on the basis of the material presented to it, provide the national court with an interpretation of Community law which may be useful to it in assessing the effects of the provision in question.

3. Article 54 of the Convention implementing the Schengen Agreement 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. 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.

4. The *ne bis in idem* principle, enshrined in Article 54 of the Convention implementing the Schengen Agreement, 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.

The main clause of the single sentence comprising Article 54 of the Convention makes no reference to the content of the judgment that has become final. It is only in the subordinate clause that Article 54 refers to the case of a conviction by stating that, in that situation, the prohibition of a prosecution is subject to a specific condition. If the general rule laid down in the main clause were applicable only to judgments convicting the accused, it would be superfluous to provide that the special rule is applicable in the event of conviction. 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.

C-467/04 Gasparini and others (Judgment 28 September 2006) **74**

1. The *ne bis in idem* principle, enshrined in Article 54 of the Convention implementing the Schengen Agreement, 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.

The main clause of the single sentence comprising Article 54 of the Convention makes no reference to the content of the judgment that has become final. It is not applicable solely to judgments convicting the accused.

Furthermore, not to apply Article 54 where the accused is finally acquitted because prosecution for the offence is time-barred would undermine the implementation of the objective of that provision which is to ensure 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. Such a person must therefore be regarded as having had his trial finally disposed of for the purposes of that provision.

It is true that the laws of the Contracting States on limitation periods have not been harmonised. However, nowhere in Title VI of the EU Treaty, relating to police and judicial cooperation in criminal matters, or in the Schengen Agreement or the Convention implementing the latter is the application of Article 54 made conditional upon harmonisation, or at the least approximation, of the criminal laws of the Member States relating to procedures whereby further prosecution is barred or, more generally, upon harmonisation or approximation of their criminal laws. There is a necessary implication in the *ne bis in idem* principle that the Contracting States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Contracting States even when the outcome would be different if its own national law were applied. Finally, Framework Decision 2002/584 on the European arrest warrant and the surrender procedures between Member States does not preclude the *ne bis in idem* principle from applying in the case of a final acquittal because prosecution of the offence is time-barred. Exercise of the power, provided for in Article 4(4) of the framework decision, to refuse to execute a European arrest warrant inter alia where the criminal prosecution of the requested person is time-barred according to the law of the executing Member State and the acts fall within the jurisdiction of that State under its own criminal law is not conditional on the existence of a judgment whose basis is that a prosecution is time-barred. The situation where the requested person has been finally judged by a Member State in respect of the same acts is governed by Article 3(2) of the framework decision, a provision which lays down a mandatory ground for non-execution of a European arrest warrant.

2. The *ne bis in idem* principle, enshrined in Article 54 of the Convention implementing the Schengen Agreement, does not apply to persons other than those whose trial has been finally disposed of in a Contracting State. This interpretation, based on the wording of Article 54 of the Convention, is borne out by the purpose of the provisions of Title VI of the Treaty on European Union, as set out in the fourth indent of the first paragraph of Article 2 EU.

3. A criminal court of a Contracting State cannot hold goods to be in free circulation in national territory solely because a criminal court of another Contracting State has found, in relation to the same goods, that prosecution for the offence of smuggling is time-barred. In order for products coming from a third country to be considered to be in free circulation in a Member State the three conditions laid down in Article 24 EC must be met. A finding by a court of a Member State that prosecution of a defendant for the offence of smuggling is time-barred does not alter the legal classification of the products in question, since the *ne bis in idem* principle, enshrined in Article 54 of the Convention implementing the Schengen Agreement, binds the courts of a Contracting State only in so far as it precludes a defendant who has already had his case finally disposed of in another Contracting State from being prosecuted a second time for the same acts.

4. The only relevant criterion for applying the concept of 'the same acts' within the meaning of Article 54 of the Convention implementing the Schengen Agreement is identity of the material acts, understood as the existence of a set of concrete circumstances which are inextricably linked together. Accordingly, the marketing of goods in another Member State, after their importation into the Member State where the accused was acquitted because prosecution for the offence of smuggling was time-barred, constitutes conduct which may form part of the 'same acts' within the meaning of Article 54 of the Convention. However, the definitive assessment in this regard is a matter for the competent national courts which are charged with the task of determining whether the material acts at issue constitute a set of facts which are inextricably linked together in time, in space and by their subject-matter.

C-288/05 Kretzinger (Judgment 18 July 2007) **75**

1. Article 54 of the Convention implementing the Schengen Agreement 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;

– Acts consisting in receiving contraband foreign tobacco in one Contracting State and of importing that tobacco into another Contracting State and being in possession of it there, characterised by the fact that the defendant, who was prosecuted in two Contracting States, had intended from the outset to transport the tobacco, after first taking possession of it, to a final destination, passing through several Contracting States in the process, constitute conduct which may be covered by the notion of 'same acts' within the meaning of Article 54. It is for the competent national courts to make the final assessment in that respect.

2. For the purposes of Article 54 of the Convention implementing the Schengen Agreement (CISA), a penalty imposed by a court of a Contracting State 'has been enforced' or is 'actually in the process of being enforced' if the defendant has been given a suspended custodial sentence. A suspended custodial sentence, which penalises the unlawful conduct of a convicted person, constitutes a penalty within the meaning of Article 54 of the CISA. That penalty must be regarded as 'actually in the process of being enforced' as soon as the sentence has become enforceable and during the probation period. Subsequently, once the probation period has come to an end, the penalty must be regarded as 'having been enforced' within the meaning of that provision.

3. For the purposes of Article 54 of the CISA, a penalty imposed by a court of a Contracting State is not to be regarded as 'having been enforced' or 'actually in the process of being enforced' where the defendant was for a short time taken into police custody and/or held on remand pending trial and that detention would count towards any subsequent enforcement of the custodial sentence under the law of the State in which judgment was given. The purpose of detention on remand pending trial is very different from that underlying the enforcement condition laid down in Article 54 of the CISA. Although the purpose of the first is of a preventative nature, that of the second is to avoid a situation in which a person whose trial has been finally disposed of in the first State can no longer be prosecuted for the same acts and therefore ultimately remains unpunished if the State in which sentence was first passed did not enforce the sentence imposed.

4. The fact that a Member State in which a person has been sentenced by a final and binding judgment under its national law may issue a European arrest warrant for the arrest of that person in order to enforce the sentence under Framework Decision 2002/584 on the European arrest warrant and the surrender procedures between Member States cannot affect the interpretation of the notion of 'enforcement' within the meaning of Article 54 of the CISA. That enforcement condition could not, by definition, be satisfied where a European arrest warrant were to be issued after trial and conviction in a first Member State precisely in order to ensure the execution of a custodial sentence which had not yet been enforced within the meaning of Article 54 of the CISA.

That is confirmed by the Framework Decision itself which, in Article 3(2), requires the Member State addressed to refuse to execute a European arrest warrant 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 and that, where there has been sentence, the enforcement condition has been satisfied.

That outcome is supported by the fact that the interpretation of Article 54 of the CISA cannot depend on the provisions of the Framework Decision without giving rise to legal uncertainty that would result, first, from the fact that the Member States bound by the Framework Decision are not all bound by the CISA which, moreover, applies to certain non-Member States and, second, from the fact that the scope of the European arrest warrant is limited, which is not the case in respect of Article 54 of the CISA, which applies to all offences punished by the States which have acceded to that agreement.

Accordingly, the fact that a final and binding custodial sentence could possibly be enforced in the sentencing State following the surrender by another State of the convicted person cannot affect the interpretation of the notion of 'enforcement' within the meaning of Article 54 of the CISA.

76 C-367/05 Kraaijenbrink (Judgment 18 July 2007)

1. Article 54 of the Convention implementing the Schengen Agreement 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;

– Different acts consisting, in particular, first, in holding in one Contracting State the proceeds of drug trafficking and, second, in the exchanging at exchange bureaux in another Contracting State of sums of money also originating from such trafficking should not be regarded as 'the same acts' within the meaning of that article merely because the competent national court finds that those acts are linked together by the same criminal intention; – It is for that national court to assess whether the degree of identity and connection between all the facts to be compared is such that it is possible, in the light of the said relevant abovementioned criterion, to find that they are 'the same acts' within the meaning of the said Article 54.

(see para. 36, operative part)

2. It is apparent from Article 58 of the Convention implementing the Schengen Agreement CISA) that the Contracting States are entitled to apply broader national provisions on the *ne bis in idem* principle with regard to judicial decisions taken abroad. However, that article does not in any way authorise a Contracting State to refrain from trying a drugs offence, in breach of its obligations under Article 71 of the CISA, read in conjunction with Article 36 of the Single Convention on Narcotic Drugs, concluded in New York on 30 March 1961 under the egis of the United Nations, on the sole ground that the person charged has already been convicted in another Contracting State in respect of other offences motivated by the same criminal intention. On the other hand, those provisions do not mean that in national law the competent courts before which a second set of proceedings is brought are precluded from taking account, when fixing the sentence, of penalties which may have already been imposed in the first set of proceedings.

77 C-297/07 Bourquain (Judgment 11 December 2008)

1. Since Article 54 of the Convention implementing the Schengen Agreement (CISA) does not provide that the person concerned must necessarily have been tried in the territory of the Contracting Parties, that provision, the purpose of which is to protect a person whose trial has been finally disposed of against further prosecution in respect of the same acts, cannot be interpreted as meaning that Articles 54 to 58 of the CISA are never applicable to persons who have been tried by a Contracting Party exercising its jurisdiction beyond the territory to which that Convention applies.

2. Article 54 of the Convention implementing the Schengen Agreement (CISA), applied to a judgment in absentia delivered in accordance with the national legislation of a Contracting State or to an ordinary judgment, necessarily implies that the Contracting States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Contracting States even when the outcome would be different if its own national law were applied.

According to the actual wording of Article 54 of the CISA, judgments rendered in absentia are not excluded from its scope of application, the sole condition being that there has been a final disposal of the trial by a Contracting Party. However, the sole fact that the proceedings in absentia would, under the national law governing the proceedings in question, have necessitated the reopening of the proceedings if the person concerned had been apprehended while time was running in the limitation period applicable to the penalty, does not, in itself, mean that the conviction in absentia cannot be regarded as a final decision within the meaning of Article 54 of the CISA.

3. The *ne bis in idem* principle, enshrined in Article 54 of the Convention implementing the Schengen Agreement (CISA), is applicable to criminal proceedings instituted in a Contracting State against an accused whose trial for the same acts as those for which he faces prosecution was finally disposed of in another Contracting State, even though, under the law of the State in which he was convicted, the sentence which was imposed on him could never, on account of specific features of procedure of the law of that State, have been directly enforced.

In that regard, the condition regarding enforcement referred to in that article is satisfied when it is established that, at the time when the second criminal proceedings were instituted against the same person in respect of the same acts as those which led to a conviction in the first Contracting State, the penalty imposed in that first State can no longer be enforced according to the laws of that State.

78 C-491/07 Turansky (Judgment 22 December 2008)

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.

Therefore, a decision of a police authority which, while suspending criminal proceedings, does not under the national law concerned definitively bring the prosecution to an end, cannot constitute a decision which would make it possible to conclude that the trial of that person has been 'finally disposed of' within the meaning of Article 54 of the abovementioned Convention.

C-261/09 Mantello (Judgment 16 November 2010) **79**

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 European arrest warrant and the surrender procedures between Member States 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.