ECLI:EU:C:2023:236

Provisional text

JUDGMENT OF THE COURT (Fifth Chamber)

23 March 2023 (*)

(Reference for a preliminary ruling – Judicial cooperation in criminal matters – Convention implementing the Schengen Agreement – Article 54 – Principle ne bis in idem – Article 55(1)(b) – Exception to the application of the principle ne bis in idem – Offence against the security or other essential interests of the Member State – Article 50 of the Charter of Fundamental Rights of the European Union – Principle ne bis in idem – Article 52(1) – Limitations to the principle ne bis in idem – Compatibility of a national declaration providing for an exception to the principle ne bis in idem – Criminal organisation – Financial crime)

In Case C-365/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Oberlandesgericht Bamberg (Higher Regional Court, Bamberg, Germany), made by decision of 4 June 2021, received at the Court on 11 June 2021, in the criminal proceedings against

MR

joined party:

Generalstaatsanwaltschaft Bamberg

THE COURT (Fifth Chamber),

composed of E. Regan (Rapporteur), President of the Chamber, L.S. Rossi, D. Gratsias, M. Ilešič and I. Jarukaitis, Judges,

Advocate General: M. Szpunar,

Registrar: S. Beer, Administrator,

having regard to the written procedure and further to the hearing on 6 July 2022,

after considering the observations submitted on behalf of:

– MR, by S. Buhlmann and F. Ufer, Rechtsanwälte,

– Generalstaatsanwaltschaft Bamberg, by N. Goldbeck, acting as Agent,

– the German Government, by J. Möller, F. Halabi, M. Hellmann and U. Kühne, acting as Agents,

– the French Government, by A. Daniel and A.-L. Desjonquères, acting as Agents,

– the Austrian Government, by M. Augustin, A. Posch, J. Schmoll and K. Steininger, acting as Agents,

– the European Commission, by S. Grünheid and M. Wasmeier, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 20 October 2022,

gives the following

Judgment

1 This request for a preliminary ruling concerns (i) the validity of Article 55(1)(b) 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 (OJ 2000 L 239, p. 19), signed in Schengen on 19 June 1990, which entered into force on 26 March 1995 ('the CISA'), in the light of Article 50 of the Charter of Fundamental Rights of the European Union ('the Charter'), and (ii) the interpretation of Articles 54 and 55 of the CISA and of Articles 50 and 52 of the Charter.

2 The request has been made in criminal proceedings brought in Germany against MR for formation of a criminal organisation and investment fraud.

Legal context

European Union law

The CISA

3 The CISA was concluded in order to ensure the implementation of 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, signed in Schengen on 14 June 1985 (OJ 2000 L 239, p. 13).

4 Articles 54 to 56 of the CISA appear in Chapter 3 ('Application of the *ne bis in idem* principle') of Title III ('Police and security'). Article 54 of the CISA provides:

'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.'

5 Article 55 of the CISA provides:

‘1. A Contracting Party may, when ratifying, accepting or approving this Convention, declare that it is not bound by Article 54 in one or more of the following cases:

…

(b) where the acts to which the foreign judgment relates constitute an offence against national security or other equally essential interests of that Contracting Party;

…

2. A Contracting Party which has made a declaration regarding the exception referred to in paragraph 1(b) shall specify the categories of offences to which this exception may apply.

…’

6 Article 56 of the CISA states:

‘If a further prosecution is brought in a Contracting Party against a person whose trial, in respect of the same acts, has been finally disposed of in another Contracting Party, any period of deprivation of liberty served in the latter Contracting Party arising from those acts shall be deducted from any penalty imposed. To the extent permitted by national law, penalties not involving deprivation of liberty shall also be taken into account.’

Framework Decision 2008/841/JHA

7 Recital 1 of Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime (OJ 2008 L 300, p. 42) is worded as follows:

‘The objective of the Hague Programme is to improve the common capability of the [European] Union and the Member States for the purpose, among others, of combating transnational organised crime. This objective is to be pursued by, in particular, the approximation of legislation. Closer cooperation between the Member States of the European Union is needed in order to counter the dangers and proliferation of criminal organisations and to respond effectively to citizens’ expectations and Member States’ own requirements. In this respect point 14 of the conclusions of the Brussels European Council of 4 and 5 November 2004 states that the citizens of Europe expect the European Union, while guaranteeing respect for fundamental freedoms and rights, to take a more effective, combined approach to cross-border problems such as organised crime.’

8 Under Article 2 of that framework decision, entitled ‘Offences relating to participation in a criminal organisation’:

‘Each Member State shall take the necessary measures to ensure that one or both of the following types of conduct related to a criminal organisation are regarded as offences:

(a) conduct by any person who, with intent and with knowledge of either the aim and general activity of the criminal organisation or its intention to commit the offences in question, actively takes part in the organisation’s criminal activities, including the provision of information or material means, the recruitment of new members and all forms of financing of its activities, knowing that such participation will contribute to the achievement of the organisation’s criminal activities;

(b) conduct by any person consisting in an agreement with one or more persons that an activity should be pursued, which if carried out, would amount to the commission of offences referred to in Article 1, even if that person does not take part in the actual execution of the activity.'

9 Article 3 of that framework decision, entitled 'Penalties', provides:

'1. Each Member State shall take the necessary measures to ensure that:

(a) the offence referred to in Article 2(a) is punishable by a maximum term of imprisonment of at least between two and five years; or

(b) the offence referred to in Article 2(b) is punishable by the same maximum term of imprisonment as the offence at which the agreement is aimed, or by a maximum term of imprisonment of at least between two and five years.

2. Each Member State shall take the necessary measures to ensure that the fact that offences referred to in Article 2, as determined by this Member State, have been committed within the framework of a criminal organisation, may be regarded as an aggravating circumstance.'

German law

10 When ratifying the CISA, the Federal Republic of Germany adopted a declaration (BGBl. 1994 II, p. 631) pursuant to Article 55(1) thereof, providing, inter alia, that the Federal Republic of Germany is not bound by the provisions of Article 54 of the CISA where, in accordance with Article 55(1)(b) of the CISA, the acts to which the foreign judgment relates constitute the offence provided for in Paragraph 129 of the Strafgesetzbuch (German Criminal Code; 'the StGB').

11 Paragraph 129 of the StGB, entitled 'Forming criminal organisations', in the version applicable to the dispute in the main proceedings, provides:

'(1) Whoever forms an organisation or participates as a member in an organisation the objectives or activities of which are directed at the commission of offences which incur a penalty of a maximum term of imprisonment of at least two years incurs a penalty of imprisonment for a term not exceeding five years or a fine. Whoever supports such an organisation or recruits members or supporters for such an organisation incurs a penalty of imprisonment for a term not exceeding three years or a fine.

(2) An organisation is a structured association of more than two persons, established to exist for a longer period of time, regardless of whether it has formally defined roles for its members, continuous membership or a developed structure and whose purpose is the pursuit of an overriding common interest.

…

(5) In especially serious cases under the first sentence of subparagraph (1), the penalty is imprisonment for a term of between six months and five years. An especially serious case typically occurs where the offender is one of the ringleaders or persons operating behind the scenes of the organisation.'

12 Paragraph 129b of the StGB, entitled 'Foreign criminal and terrorist organisations; confiscation', states in subparagraph (1):

‘Paragraphs 129 and 129a also apply to foreign organisations. If the offence relates to an organisation outside the Member States of the European Union, this applies only if the offence was committed by way of an activity carried out within the territorial scope of the present law or if the perpetrator or the victim is a German national or is in Germany. In cases which fall under the second sentence, the offence is prosecuted only upon authorisation by the Bundesministerium der Justiz und für Verbraucherschutz [(Federal Ministry of Justice and Consumer Protection, Germany)]. Authorisation may be granted for an individual case or, generally, also for the prosecution of future offences relating to a specific organisation. When deciding whether to give authorisation, the Ministry shall take into account whether the organisation’s activities are directed against the fundamental values of a State order which respects human dignity or against the peaceful coexistence of nations and which appear reprehensible when weighing all the circumstances of the case.’

The dispute in the main proceedings and the questions referred for a preliminary ruling

13 MR, an Israeli national, last resident in Austria, was sentenced on 1 September 2020 by final judgment of the Landesgericht Wien (Regional Court, Vienna, Austria) to a term of imprisonment of four years for serious commercial fraud and money laundering.

14 MR served part of that sentence and was then released on parole for the remainder with effect from 29 January 2021. However, by decision of the same date, MR was remanded in custody in Austria pending his surrender pursuant to a European arrest warrant issued, on 11 December 2020, by the Amtsgericht Bamberg (Local Court, Bamberg, Germany) for formation of a criminal organisation and investment fraud. When that period of custody ended on 18 May 2021, he was placed in immigration detention pending removal to Israel, which, it would appear, is where he was on the date on which the request for a preliminary ruling was submitted.

15 Under the European arrest warrant issued in respect of MR, he is accused of having set up, in association with other persons prosecuted, a fraudulent investment scheme in which investors in various European countries, including Germany and Austria, were offered promising investments via the internet. In reality, the sums paid were channelled, inter alia, to MR, who allegedly acted as one of the ringleaders of the criminal organisation concerned.

16 By order of 8 March 2021, MR’s appeal against that European arrest warrant, and against the national arrest warrant on which it is based, was dismissed by the Landgericht Bamberg (Regional Court, Bamberg, Germany) on the ground that, since the sentence imposed on MR by the Landesgericht Wien (Regional Court, Vienna) was handed down for fraud committed to the detriment of injured parties residing in Austria, whereas MR was now being prosecuted in the Landgericht Bamberg (Regional Court, Bamberg) for fraud committed against injured parties residing in Germany, the acts with which those two sets of proceedings were concerned were different, so that the principle *ne bis in idem*, laid down in Article 54 of the CISA, did not apply.

17 In the alternative, the Landgericht Bamberg (Regional Court, Bamberg) referred to Article 55(1)(b) of the CISA, explaining that MR was being prosecuted for an offence under Paragraph 129 of the StGB, which is covered by the declaration made by the Federal Republic of Germany when ratifying the CISA.

18 MR brought a further appeal against that order before the Oberlandesgericht Bamberg (Higher Regional Court, Bamberg, Germany), the referring court.

19 In the light of the conditions for the application of Article 54 of the CISA, the referring court is uncertain as to whether or not the acts in respect of which MR was sentenced in Austria are the same as those for which he is being prosecuted in Germany.

20 However, the referring court considers that Article 54 of the CISA is not necessarily relevant to the determination of the dispute before it. MR is being prosecuted for the formation of a criminal organisation. That offence, provided for in Paragraph 129 of the StGB, is covered by the declaration made by the Federal Republic of Germany under Article 55(1) of the CISA, being one of those offences in respect of which, under Article 55(1)(b) thereof, a Member State has the option of indicating that it is not bound by the provisions of Article 54 of the CISA where the acts to which the foreign judgment relates constitute an offence against the security or other equally essential interests of that Member State.

21 In that regard, the referring court makes clear that the offences referred to in Paragraph 129 of the StGB are, in principle, offences that are directed against the essential interests of the Federal Republic of Germany. The very existence of criminal organisations constitutes a potential risk to public order of a different nature than that resulting from individual tortious acts due to the serious threat to the general public from organised crime. Thus, it is of no relevance, for the purpose of assessing whether a criminal organisation endangers the security or other equally essential interests of the Member State concerned, that that criminal organisation engages exclusively in financial crime and does not also pursue any political, ideological, religious or philosophical objective or seek to gain influence by dishonest means over politics, the media, the public administration, the judiciary or the economy.

22 However, the referring court indicates that the question as to whether the declaration made by the Federal Republic of Germany is compatible with Article 55(1)(b) of the CISA arises only in so far as it is first established that the option envisaged by that provision is itself compatible with Article 50 of the Charter.

23 In those circumstances, the Oberlandesgericht Bamberg (Higher Regional Court, Bamberg) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Is Article 55 of the [CISA] compatible with Article 50 of the [Charter] and does it continue to be valid in so far as it admits, as an exception to the prohibition of double prosecution, that a Contracting Party may, when ratifying, accepting or approving that Convention, declare that it is not bound by Article 54 of the CISA where the acts to which the foreign judgment relates constitute an offence against national security or other equally significant interests of that Contracting Party?

(2) If Question 1 is answered in the affirmative:

Do Articles 54 and 55 of the CISA and Articles 50 and 52 of the Charter preclude an interpretation by the German courts of the declaration made by the Federal Republic of Germany when ratifying the CISA in relation to Paragraph 129 of the [StGB] that the declaration also covers criminal organisations, such as those at issue in the main proceedings, which engage exclusively in financial crime and do not, in addition, pursue any political, ideological, religious or world-view objectives and also do not seek to gain influence by dishonest means over politics, the media, the public administration, the judiciary or the economy?’

Procedure before the Court

24 The referring court requested that the case be dealt with under the urgent preliminary ruling procedure provided for in Article 107 of the Rules of Procedure of the Court of Justice. In the alternative, it requested that the case be dealt with under the expedited procedure, pursuant to Article 105(1) of the Rules of Procedure.

25 With regard, in the first place, to the request for the urgent preliminary ruling procedure to be applied, by decision of 7 July 2021, the Fifth Chamber decided, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, that that request should not be granted, as the conditions of urgency laid down in Article 107 of the Rules of Procedure had not been satisfied.

26 As regards, in the second place, the request for the expedited procedure to be applied, the President of the Court decided, on 9 July 2021, after hearing the Judge-Rapporteur and the Advocate General, that that request should not be granted.

27 It should be recalled that Article 105(1) of the Rules of Procedure provides that, at the request of the referring court or tribunal or, exceptionally, of his own motion, the President of the Court may, where the nature of the case requires that it be dealt with within a short time, after hearing the Judge-Rapporteur and the Advocate General, decide that a reference for a preliminary ruling is to be determined pursuant to an expedited procedure.

28 As it is, the legal uncertainty concerning a requested person, such as the uncertainty affecting MR in the main proceedings, does not constitute an exceptional circumstance that would justify the use of the expedited procedure (order of the President of the Court of 23 December 2015, *Vilkas*, C-640/15, not published, EU:C:2015:862, paragraph 10 and the case-law cited).

29 Moreover, the fact that a request for a preliminary ruling concerns the enforcement of a European arrest warrant is not sufficient in itself to justify the application of the expedited procedure, and the fact that the person concerned is not currently in custody is a reason for refusing a request for the expedited procedure (see, to that effect, order of the President of the Court of 20 September 2018, *OG and PF*, C-508/18 and C-509/18, not published, EU:C:2018:766, paragraphs 11 and 13 and the case-law cited).

Consideration of the questions referred

Preliminary observations

30 It is apparent from the request for a preliminary ruling that not only does the referring court have doubts with regard to the exception to the principle *ne bis in idem* provided for in Article 55(1)(b) of the CISA, but it is also uncertain as to whether the prosecution of the applicant in the main proceedings is covered by that principle.

31 In that regard, it should be recalled that that principle is a fundamental principle of EU law, which is now enshrined in Article 50 of the Charter (judgment of 28 October 2022, *Generalstaatsanwaltschaft München (Extradition and* ne bis in idem*)*, C-435/22 PPU, EU:C:2022:852, paragraph 64 and the case-law cited).

32 Furthermore, the principle *ne bis in idem*, which is also enshrined in Article 54 of the CISA, derives from the constitutional traditions common to the Member States. It is therefore appropriate to interpret that article in the light of Article 50 of the Charter, Article 54 serving to ensure respect for the essence thereof (judgment of 28 October 2022, *Generalstaatsanwaltschaft München*

(Extradition and ne bis in idem*)*, C-435/22 PPU, EU:C:2022:852, paragraph 65 and the case-law cited).

33 Article 50 of the Charter provides that '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'. Thus, the application of the principle *ne bis in idem* is subject to a twofold condition, namely, first, that there must be a prior final decision (the '*bis*' condition) and, second, that the prior decision and the subsequent proceedings or decisions must concern the same facts (the '*idem*' condition) (judgment of 22 March 2022, *bpost*, C-117/20, EU:C:2022:202, paragraph 28).

34 As regards, in particular, the '*idem*' condition, it follows from the very wording of Article 50 of the Charter that that provision prohibits the same person from being tried or punished in criminal proceedings more than once for the same offence (judgment of 22 March 2022, *bpost*, C-117/20, EU:C:2022:202, paragraph 31).

35 In that regard, in the light of the information provided by the referring court and the considerations raised by the interested parties in their written observations and at the hearing, it must be noted that, according to settled case-law, the relevant criterion for the purposes of assessing the existence of the same offence, within the meaning of Article 50 of the Charter, is identity of the material facts, understood as the existence of a set of concrete circumstances which are inextricably linked together and which have resulted in the final acquittal or conviction of the person concerned. Therefore, that article prohibits the imposition, with respect to identical facts, of several criminal penalties as a result of different proceedings brought for those purposes (judgment of 28 October 2022, *Generalstaatsanwaltschaft München (Extradition and* ne bis in idem*)*, C-435/22 PPU, EU:C:2022:852, paragraph 128 and the case-law cited).

36 Moreover, it is also apparent from the case-law of the Court that the legal classification under national law of the facts and the legal interest protected are not relevant for the purposes of establishing the existence of the same offence, in so far as the scope of the protection conferred by Article 50 of the Charter cannot vary from one Member State to another (judgment of 22 March 2022, *bpost*, C-117/20, EU:C:2022:202, paragraph 34 and the case-law cited).

37 In that regard, it must be stated that the '*idem*' condition requires that the material facts be identical. Consequently, the principle *ne bis in idem* is not intended to be applied where the facts at issue are not identical, but merely similar (see, to that effect, judgment of 28 October 2022, *Generalstaatsanwaltschaft München (Extradition and* ne bis in idem*)*, C-435/22 PPU, EU:C:2022:852, paragraph 129 and the case-law cited).

38 Yet, as the Court has made clear, identity of the material facts is understood to mean a set of concrete circumstances stemming from events which are, in essence, the same, in that they involve the same perpetrator and are inextricably linked together in time and space (judgment of 28 October 2022, *Generalstaatsanwaltschaft München (Extradition and* ne bis in idem*)*, C-435/22 PPU, EU:C:2022:852, paragraph 130 and the case-law cited).

39 It is for the referring court, which alone has jurisdiction to rule on the facts, and not for the Court, to determine whether the acts which are the subject of the prosecution at issue in the main proceedings are the same as those in respect of which final judgment has been passed by the Austrian courts. That being so, the Court may provide the referring court with elements of interpretation of EU law in the context of the assessment of the identity of the acts (judgment of

28 October 2022, *Generalstaatsanwaltschaft München (Extradition and* ne bis in idem*)*, C-435/22 PPU, EU:C:2022:852, paragraph 133 and the case-law cited).

40 It is apparent from the request for a preliminary ruling that the applicant in the main proceedings is alleged to have formed and participated in a criminal organisation which had a cross-border dimension and a sophisticated modus operandi and whose activities caused thousands of victims to suffer financial damage, the injured parties residing, in particular, in Germany and in Austria.

41 According to the information provided to the Court, the applicant in the main proceedings was convicted by final judgment in Austria of 'serious commercial fraud and money laundering'.

42 In that context, it must be pointed out that the EU legislature attaches particular importance to the fight against organised crime, as is shown by Framework Decision 2008/841 which specifically deals with it. Recital 1 thereof states, inter alia, that closer cooperation between the Member States of the European Union is needed in order to counter the dangers and proliferation of criminal organisations and to respond effectively to citizens' expectations and Member States' own requirements. Thus, Articles 2 and 3 of that framework decision require Member States to take the necessary measures, first, to ensure that certain types of conduct related to a criminal organisation are regarded as offences and, second, to ensure that those offences are punishable by a maximum term of imprisonment of at least between two and five years.

43 In those circumstances, in order to determine whether the dispute pending before it is covered by the principle *ne bis in idem*, the referring court will need to assess, in particular, to what extent the sentence already handed down to the applicant in the main proceedings by the Landesgericht Wien (Regional Court, Vienna) was imposed on the basis of the same acts as those of which he is accused under the European arrest warrant issued by the Amtsgericht Bamberg (Local Court, Bamberg), or, as was raised in particular at the hearing before this Court, on the basis solely of the acts of fraud committed against the injured parties residing in Austria, and not of those that were detrimental to persons residing in Germany. In the second of those two scenarios, it cannot be concluded that the earlier definitive Austrian decision concerning the applicant in the main proceedings related to the same acts as those covered by the prosecution brought against him in Germany. At most, that earlier decision might be considered to have related to similar acts, which, however, is not sufficient for the '*idem*' condition to be regarded as being satisfied, as is apparent from the case-law cited in paragraph 37 of the present judgment.

44 The questions put by the referring court must be answered in the light of these preliminary observations.

The first question

45 By its first question, the referring court asks, in essence, whether, in so far as it enables a Member State to declare that it is not bound by the provisions of Article 54 of the CISA where the acts to which a foreign judgment relates constitute an offence against the security or other equally essential interests of that Member State, Article 55(1)(b) of the CISA is valid in the light of Article 50 of the Charter.

46 As recalled in paragraphs 31 and 32 of the present judgment, Article 54 of the CISA, which was incorporated into EU law by the Protocol integrating the Schengen *acquis* into the framework of the European Union, annexed to the Treaty on European Union and to the Treaty establishing the

European Community by the Treaty of Amsterdam (OJ 1997 C 340, p. 93), like Article 50 of the Charter, lays down the principle *ne bis in idem*.

47 Consequently, the possibility, provided for in Article 55(1)(b) of the CISA, of a Member State derogating from that principle where the acts to which the foreign judgment relates constitute an offence against the security or other equally essential interests of that Member State, represents a limitation of the fundamental right guaranteed by Article 50 of the Charter.

48 However, such a limitation may be justified on the basis of Article 52(1) thereof (judgment of 22 March 2022, *bpost*, C-117/20, EU:C:2022:202, paragraph 40 and the case-law cited).

49 In accordance with the first sentence of Article 52(1) of the Charter, any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law and respect the essence of those rights and freedoms. According to the second sentence of that provision, subject to the principle of proportionality, limitations on those rights and freedoms may be made only if they are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others.

50 In the present case, first, the limitation of the principle *ne bis in idem* must be considered to be provided for by law, since it arises from Article 55(1)(b) of the CISA (see, by analogy, judgment of 27 May 2014, *Spasic*, C-129/14 PPU, EU:C:2014:586, paragraph 57).

51 Although the requirement that any limitation on the exercise of fundamental rights must be provided for by law implies that the legal basis which permits the interference with those rights must itself define the scope of the limitation on the exercise of the right concerned, that requirement is broadly indissociable from the requirements of clarity and precision arising from the principle of proportionality, and it is by reference thereto that the legal basis must be examined (see, to that effect, judgment of 5 May 2022, *BV*, C-570/20, EU:C:2022:348, paragraph 31 and the case-law cited).

52 Second, it is apparent from the case-law of the Court that a limitation of the principle *ne bis in idem* respects the essence of Article 50 of the Charter where that limitation does no more than allow for further proceedings and penalties in respect of the same acts in pursuit of a distinct objective (see, to that effect, judgment of 22 March 2022, *bpost*, C-117/20, EU:C:2022:202, paragraph 43).

53 In that regard, according to the actual wording of Article 55(1)(b) of the CISA, the exception to that principle under that provision applies only where the acts to which the foreign judgment relates constitute an offence against the security or other equally essential interests of the Member State which intends to rely on that exception.

54 Although it is not necessary, in this instance, to provide an exhaustive definition of the concept of ‘national security’ within the meaning of that provision, it must in any event be compared, as the Advocate General observes in point 60 of his Opinion, to the same term as referred to, in particular, in Article 4(2) TEU.

55 As regards the latter provision, the Court has held that the objective of safeguarding national security corresponds to the primary interest in protecting the essential functions of the State and the fundamental interests of society, by the prevention and punishment of activities capable of seriously destabilising the fundamental constitutional, political, economic or social structures of a country and, in particular, of directly threatening society, the population or the State itself (see, to that

effect, judgments of 6 October 2020, *La Quadrature du Net and Others*, C-511/18, C-512/18 and C-520/18, EU:C:2020:791, paragraph 135, and of 20 September 2022, *SpaceNet and Telekom Deutschland*, C-793/19 and C-794/19, EU:C:2022:702, paragraph 92 and the case-law cited).

56 It follows from this that, harming as they do the security of the Member State concerned, the offences in respect of which Article 55(1)(b) of the CISA permits an exception to the principle *ne bis in idem* must not only be particularly serious but they must affect that Member State itself. The same applies to offences against the other interests of the Member State, as referred to in that provision. Since they must be essential to that Member State in the same way as its security is, those other interests must have a similar importance and, therefore, be just as integral to that Member State.

57 Consequently, in so far as Article 55(1)(b) of the CISA provides for a Member State to be able to derogate from that principle only in respect of offences against the security or other equally essential interests of that Member State, it does respect the essence of that principle, since it permits that Member State to punish offences which affect the Member State itself and, in so doing, to pursue objectives that necessarily differ from those for which the person prosecuted has already been tried in another Member State.

58 Third, in view of the importance of punishing harm to the security or other equally essential interests of the Member State concerned, the limitation of the principle *ne bis in idem* provided for in Article 55(1)(b) of the CISA meets an objective of general interest.

59 Fourth, as regards the principle of proportionality, that principle requires that the limitations which may, in particular, be imposed by acts of EU law on rights and freedoms enshrined in the Charter do not exceed the limits of what is appropriate and necessary in order to meet the legitimate objectives pursued or the need to protect the rights and freedoms of others; where there is a choice between several appropriate measures, recourse must be had to the least onerous. In addition, an objective of general interest may not be pursued without having regard to the fact that it must be reconciled with the fundamental rights affected by the measure, by properly balancing the objective of general interest against the rights at issue, in order to ensure that the disadvantages caused by that measure are not disproportionate to the aims pursued. Thus, the possibility of justifying a limitation of the principle *ne bis in idem* guaranteed in Article 50 of the Charter must be assessed by measuring the seriousness of the interference which such a limitation entails and by verifying that the importance of the objective of general interest pursued by that limitation is proportionate to that seriousness (see, to that effect, judgment of 8 December 2022, *Orde van Vlaamse Balies and Others*, C-694/20, EU:C:2022:963, paragraph 41 and the case-law cited).

60 On that basis, it must be observed that the option provided for in Article 55(1)(b) of the CISA is appropriate for achieving the general interest objective of punishment by a Member State of harm to its security or to its other equally essential interests.

61 Furthermore, in view of the nature and the particular seriousness of such harm, the importance of that general interest objective goes beyond that of combating crime in general, even serious crime. Subject to meeting the other requirements laid down in Article 52(1) of the Charter, such an objective is, therefore, capable of justifying measures entailing interferences with fundamental rights which would not be authorised for the purpose of prosecuting and punishing criminal offences generally (see, to that effect, judgments of 6 October 2020, *La Quadrature du Net and Others*, C-511/18, C-512/18 and C-520/18, EU:C:2020:791, paragraph 136, and of 5 April 2022, *Commissioner of An Garda Síochána and Others*, C-140/20, EU:C:2022:258, paragraph 57 and the case-law cited).

62 That is so, in particular, in the case of a measure which affords a Member State the possibility of declaring that it is not bound by the principle *ne bis in idem* in order to prosecute and punish acts which, although they have already been the subject of a foreign judgment, constitute an offence against the security or other equally essential interests of that Member State. In that regard, it should also be noted that, due to its specific purpose, Article 55(1)(b) of the CISA permits only exceptions that are substantively limited to that principle.

63 In addition, as regards the strict necessity of the exception to that principle under that provision, it must be noted, first of all, that Article 55(2) of the CISA requires that a Member State which has made a declaration regarding the exception referred to in Article 55(1)(b) is to specify the categories of offences to which that exception may apply. Member States wishing to rely on that exception are therefore required to adopt clear and precise rules allowing individuals to predict which acts or omissions are liable to be subject to further prosecution, even if they have already been the subject of a foreign judgment (see, to that effect, judgment of 20 March 2018, *Garlsson Real Estate and Others*, C-537/16, EU:C:2018:193, paragraph 51).

64 Next, Article 56 of the CISA provides that if a Member State brings a further prosecution against a person whose trial, in respect of the same acts, has been finally disposed of in another Member State, first, any period of deprivation of liberty served in the latter Member State arising from those acts must be deducted from any penalty imposed and, second, to the extent permitted by national law, penalties not involving deprivation of liberty must also be taken into account.

65 Thus, the option, provided for in Article 55(1)(b) of the CISA, of derogating from the principle *ne bis in idem* is accompanied by rules that will guarantee that the resulting disadvantages, for the persons concerned, are limited to what is strictly necessary in order to achieve the objective referred to in paragraph 58 of the present judgment (see, to that effect, judgment of 20 March 2018, *Garlsson Real Estate and Others*, C-537/16, EU:C:2018:193, paragraph 54).

66 It follows that that option does not exceed the limits of what is appropriate and necessary in order to enable a Member State to punish the harming of its security or other equally essential interests.

67 Having regard to the above, consideration of the first question has disclosed no factor of such a kind as to affect the validity of Article 55(1)(b) of the CISA in the light of Article 50 of the Charter.

The second question

68 By its second question, the referring court asks, in essence, whether Article 55(1)(b) of the CISA, read in conjunction with Article 50 and Article 52(1) of the Charter, must be interpreted as precluding the courts of a Member State from interpreting the declaration made by that Member State under Article 55(1) of the CISA as meaning that, so far as concerns the offence of forming a criminal organisation, that Member State is not bound by the provisions of Article 54 of the CISA where the criminal organisation in which the person prosecuted participated has engaged exclusively in financial crime.

69 Where a Member State intends, by a declaration under Article 55(1) of the CISA, to exercise the option of derogating from the principle *ne bis in idem* as provided for in Article 55(1)(b) of the CISA, by indicating that, as regards the offences referred to, it is not bound by the provisions of Article 54 of the CISA, such a declaration is capable of respecting Article 50 and Article 52(1) of the Charter, provided that the requirements laid down for that purpose by the CISA, and which, as is

apparent from the answer to the first question, ensure that such an option is compatible with Article 50 of the Charter, are met.

70 Accordingly, it must be stated as a preliminary point that, aside from the question of the scope of the offences at issue in the main proceedings, the requirements set out in paragraph 63 of the present judgment must be met. In that regard, the Federal Republic of Germany made a declaration, when ratifying the CISA, which was published in the *Bundesgesetzblatt* (Federal Law Gazette of the Federal Republic of Germany) stating, in accordance with Article 55(2) of the CISA, that it is not bound by the provisions of Article 54 of the CISA, in particular, where the acts to which the foreign judgment relates constitute an offence under Paragraph 129 of the StGB.

71 Therefore, it appears that clear and precise rules were adopted which allow individuals to predict that the acts relating to the formation of a criminal organisation are liable to be subject to further prosecution, even if they have already been the subject of a foreign judgment, which it is for the referring court to ascertain.

72 In that regard, it should be made clear that the existence of such rules cannot be disputed on the ground that, as the Republic of Austria submitted in particular in its written observations, they require research for which a certain legal expertise is necessary.

73 Indeed, as the Court has held, the fact that the person concerned has to take account not only of the wording of the relevant provisions but also of the interpretation given to them by the national courts, and that that person has to take appropriate legal advice to assess the consequences which a given action may entail, is not, in itself, capable of calling into question the clarity and precision of the rules relating to the exceptions to the principle *ne bis in idem* (see, to that effect, judgment of 5 May 2022, *BV*, C-570/20, EU:C:2022:348, paragraphs 39 and 43).

74 In the light of that preliminary clarification, it must be pointed out that a prosecution conducted as an exception to that principle, pursuant to a declaration by a Member State exercising the option provided for in Article 55(1)(b) of the CISA, can only be intended, in accordance with that provision, to punish harm to the security or other equally essential interests of that Member State. Consequently, it is for the national courts to ascertain whether it is possible to interpret the declaration made by the Member State concerned, under Article 55(1) of the CISA, in such a way that the prosecution initiated on the basis of that declaration meets the requirements of that provision.

75 In that regard, it must be observed, first, that the exception provided for in Article 55(1)(b) of the CISA primarily covers offences – such as espionage, treason or serious harm to the functioning of public authorities – which, by their very nature, relate to the security or other equally essential interests of the Member State concerned.

76 However, it does not follow from this that the scope of that exception is necessarily limited to such offences. Indeed, it cannot be ruled out that a prosecution for offences whose constituent elements do not specifically include harm to the security or other equally essential interests of the Member State may be equally capable of falling within that exception where, in the light of the circumstances in which the offence was committed, it can be duly established that the prosecution in respect of the acts in question is intended to punish harm to that security or to those other equally essential interests.

77 Second, in so far as it concerns the security or other equally essential interests of the Member State concerned, a prosecution conducted in respect of an offence referred to in a declaration

exercising the option provided for in Article 55(1)(b) of the CISA must, as is apparent from paragraphs 55, 56, 61 and 62 of the present judgment, relate to acts which particularly seriously affect the Member State concerned itself.

78 However, not every criminal organisation necessarily and in itself harms the security or other equally essential interests of the Member State concerned. Thus, the offence of forming a criminal organisation can give rise to a prosecution as an exception to the principle *ne bis in idem* under Article 55(1)(b) of the CISA only in the case of organisations whose actions may, due to the elements that distinguish them, be regarded as constituting such harm.

79 In that context, the referring court's queries relate to the relevance that must be attached to the fact that a criminal organisation engages exclusively in financial crime and does not also pursue any political, ideological, religious or philosophical objective or seek to gain influence by dishonest means over politics, the media, the public administration, the judiciary or the economy.

80 In that regard, it must first of all be stated that, in any event, the matters which are referred to in the preceding paragraph and which relate to the objectives pursued or the influence sought are not sufficient to characterise a criminal organisation as necessarily harming the security or other equally essential interests of the Member State concerned, unless the seriousness of the damage which its activities have caused to that Member State is also taken into account.

81 Next, it is not inconceivable that, in certain circumstances, a criminal organisation engaged exclusively in financial crime could harm the security or other equally essential interests of a Member State. In that regard, in order for the actions of that criminal organisation to be considered to amount to such harm, those offences must, irrespective of the actual intention of that organisation and over and above the breaches of public order which every offence entails, affect the Member State itself.

82 In the light of the information available to the Court, it does not appear that, notwithstanding the scale of the financial crimes against the injured parties, the actions of the criminal organisation concerned in the main proceedings had the effect of damaging the Federal Republic of Germany itself, so that the actions of that criminal organisation would appear not to be covered by offences against national security or other equally essential interests of that Member State, which it is for the referring court to ascertain.

83 Having regard to all of the above, the answer to the second question is that Article 55(1)(b) of the CISA, read in conjunction with Article 50 and Article 52(1) of the Charter, must be interpreted as not precluding the courts of a Member State from interpreting the declaration made by that Member State under Article 55(1) of the CISA as meaning that, so far as concerns the offence of forming a criminal organisation, that Member State is not bound by the provisions of Article 54 of the CISA where the criminal organisation in which the person prosecuted participated has engaged exclusively in financial crime, in so far as the prosecution of that person is, in the light of the actions of that organisation, intended to punish harm to the security or other equally essential interests of that Member State.

Costs

84 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber) hereby rules:

1. **Consideration of the first question has disclosed no factor of such a kind as to affect the validity of Article 55(1)(b) 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 on 19 June 1990, which entered into force on 26 March 1995, in the light of Article 50 of the Charter of Fundamental Rights of the European Union.**

2. **Article 55(1)(b) of the Convention implementing the Schengen Agreement, read in conjunction with Article 50 and Article 52(1) of the Charter of Fundamental Rights of the European Union,**

must be interpreted as not precluding the courts of a Member State from interpreting the declaration made by that Member State under Article 55(1) of that convention as meaning that, so far as concerns the offence of forming a criminal organisation, that Member State is not bound by the provisions of Article 54 of that convention where the criminal organisation in which the person prosecuted participated has engaged exclusively in financial crime, in so far as the prosecution of that person is, in the light of the actions of that organisation, intended to punish harm to the security or other equally essential interests of that Member State.

[Signatures]

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* Language of the case: German.