



Council of the
European Union

Brussels, 5 June 2018
(OR. en)

9629/18

JAI 574
COPEN 177
EUROJUST 61
EJN 21

COVER NOTE

From:	EUROJUST
To:	Delegations
Subject:	The Principle of Ne Bis in Idem in Criminal Matters in the Case Law of the Court of Justice of the European Union

Delegations will find attached an overview of the case law of the CJEU regarding the Principle of Ne Bis in Idem in Criminal Matters.

The Principle of Ne Bis in Idem in Criminal Matters in the Case Law of the Court of Justice of the European Union

This document provides an overview of the case law of the Court of Justice of the European Union (“CJEU”) regarding the *ne bis in idem* principle in criminal matters, and explains how this case law has helped shaping the scope and main features of the *ne bis in idem* principle in the EU legal order. It is aimed at providing guidance in the application of the *ne bis in idem* principle in a transnational context.

The table of contents and summaries of judgments have been prepared by Eurojust and do not bind the CJEU.¹ They are not exhaustive and are meant to be used only for reference and as a supplementary tool for practitioners.

The text of the judgments of the CJEU can be found in all official languages of the EU at the CJEU’s website [here](#).

This document is updated until September 2017.

¹ The summaries of some of the cases in this document are based on the summaries contained in the EU CoPen Training Programme, Module 9 Conflicts of Jurisdiction, Transfer of Proceedings and the Ne Bis In Idem Principle (last updated on 31.10.2012).

Legal framework

The *ne bis in idem* principle is included in many national, European and international legal instruments. Within the European Union's area of Freedom, Security and Justice, the main legal sources are Articles 54 to 58 of the Convention Implementing the Schengen Agreement ("CISA") and Article 50 of the Charter of Fundamental Rights of the European Union ("Charter"). In general, the objective of the *ne bis in idem* principle is to ensure that no one is prosecuted for the same acts in several Member States on account of the fact that he exercises his right to freedom of movement (see *infra Gözütok and Brügge, Gasparini*).

The principle is also included as refusal ground in a large number of EU instruments on judicial cooperation in criminal matters, including mutual recognition instruments such as the Framework Decision 2002/584/JHA on the European Arrest Warrant ("FD EAW") and the Directive 2014/41/EU on the European investigation Order in criminal matters.

Moreover, the *ne bis in idem* principle is included in Article 4 of Protocol 7 to the European Convention on Human Rights ("Article 4P7 ECHR").

Chronological list of judgments

To date, the CJEU has handed down fifteen key judgments on the *ne bis in idem* principle in criminal matters, which are presented below following a thematic order. Where relevant, reference is also made to case law of the European Court of Human Rights ("ECtHR").

1. C-187/01 and C-385/01, judgment of 11 February 2003, [*Gözütok and Brügge*](#)
2. C-469/03, judgment of 10 March 2005, [*Miraglia*](#)
3. C-436/04, judgment of 9 March 2006, [*Van Esbroeck*](#)
4. C-150/05, judgment of 28 September 2006, [*Van Straaten*](#)
5. C-467/04, judgment of 28 September 2006, [*Gasparini*](#)
6. C-288/05, judgment of 18 July 2007, [*Kretzinger*](#)
7. C-367/05, judgment of 18 July 2007, [*Kraaijenbrink*](#)
8. C-297/07, judgment of 11 December 2008, [*Bourquain*](#)
9. C-491/07, judgment of 22 December 2008, [*Turanský*](#)
10. C-261/09, judgment of 16 November 2010, [*Mantello*](#)
11. C-617/10, judgment of 26 February 2013, [*Åkerberg Fransson*](#)
12. C-129/14 PPU, judgment of 27 May 2014, [*Spasic*](#)
13. C-398/12, judgment of 5 June 2014, [*M.*](#)
14. C-486/14, judgment of 29 June 2016, [*Kossowski*](#)
15. C-217/15 and C-350/15, judgment of 5 April 2017, [*Orsi and Baldetti*](#)

In addition, a number of cases on the *ne bis in idem* principle are currently **pending** before the CJEU, namely:

- Case C-524/15, **Menci**, lodged on 1 October 2015
The question referred concerns the possibility of conducting criminal proceedings regarding an act (non-payment of VAT) for which a definitive administrative penalty has been imposed on the defendant.
*The [Opinion of the Advocate General](#) was delivered on 12 September 2017 (connected to the Opinions in case C-537/16, **Garlsson Real Estate and others** and in cases C-596/16, **Di Puma** and C-597/16, **Consob**).*
- Case C-390/16, **Lada**, lodged on 13 July 2016
The question referred concerns the compatibility with the *ne bis in idem* principle of a procedure ‘for recognition of the validity’ in a Member State of a final decision taken in a criminal proceedings brought in another Member State.
- Case C-537/16, **Garlsson Real Estate and others**, lodged on 24 October 2016
The main question referred concerns the possibility of conducting administrative proceedings in respect of an act (unlawful conduct consisting in market manipulation) for which the same person has been convicted by a decision that has the force of *res judicata*.
*The [Opinion of the Advocate General](#) was delivered on 12 September 2017 (connected to the Opinions in case C-524/15, **Menci** and in cases C-596/16, **Di Puma** and C-597/16, **Consob**).*
- Case C-596/16, **Di Puma**, lodged on 23 November 2016
- Case C-597/16, **Consob**, lodged on 23 November 2016
In both cases, the main question referred relates to whether a final judgment finding a defendant not to have committed the criminal offence alleged precludes the initiation or prosecution of further proceedings based on the same facts with a view to the imposition of penalties which, on account of their nature and severity, may be regarded as criminal penalties.
*The [Opinion of the Advocate General](#) was delivered on 12 September 2017 (connected to the Opinions in case C-524/15, **Menci** and in case C-537/16, **Garlsson Real Estate and others**).*

Table of contents

1. Different provisions, one principle?	5
2. The temporal scope of application of the <i>ne bis in idem</i> principle	7
3. The material scope of application of the <i>ne bis in idem</i> principle	8
3.1. The “same person” requirement – Natural person and legal person	8
3.2. The “ <i>bis</i> ” requirement – A final decision	9
3.3. The “ <i>idem</i> ” requirement – The same acts	17
3.4. The “enforcement” requirement – If a penalty has been imposed, it has been enforced, it is in the process of being enforced or can no longer be enforced	21
3.5. The “criminal nature” requirement – The thin line between (punitive) administrative sanctions and criminal sanctions	24

1. Different provisions, one principle?

Despite a different wording of the *ne bis in idem* principle in various legal provisions,² it is clear that the CJEU has strived in its case law for a uniform approach vis-à-vis the *ne bis in idem* principle.

In view of the shared objective of Article 54 CISA and Article 3(2) FD EAW, the CJEU has held that an interpretation of the *ne bis in idem* principle given in the context of the CISA is equally valid for the purpose of the FD EAW (*Mantello*).

Similarly, as regards the relationship between Article 54 CISA and Article 50 Charter, the CJEU has held that since the *ne bis in idem* principle is also set out in Article 50, Article 54 CISA must be interpreted in the light of that provision (*M., Kossowski*). Specific differences between Article 54 CISA and Article 50 Charter - such as limitations to the *ne bis in idem* principle that are included in the former provision, but not in the latter - are scrutinised in light of Article 52(1) Charter. For instance, with regard to the enforcement criterion that is included in Article 54 CISA but not in Article 50 Charter, the CJEU concluded that it is compatible with Article 50 Charter (*Spasic*).

Also between Article 50 Charter and Article 4P7 ECHR, where there are obvious differences too,³ the CJEU has underlined that the guaranteed right of the Charter has the same meaning and the same scope as the corresponding right in the ECHR (*Åkerberg Fransson, M.*) and that it is necessary to ensure that the interpretation of Article 50 Charter does not disregard the level of protection guaranteed by the ECHR in so far as Article 50 Charter contains a right corresponding to that provided for in Article 4P7 ECHR (*Orsi and Baldetti*). In this regard, it is

² Compare, for instance: **Article 54 CISA** which states that “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** which states 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”; **Article 3(2) FD EAW** which includes a ground for non-recognition 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”; **Article 4P7 ECHR** which states that: “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. 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. No derogation from this Article shall be made under Article 15 of the Convention”.

³ E.g. Article 50 Charter can apply within the same Member State, but also in a cross-border context, whilst Article 4P7 ECHR can only apply within the same Member State. Another difference is the possibility for reopening a case if there is evidence of new or newly discovered facts, which is explicitly mentioned in Article 4P7 ECHR, but which is not included in the Charter.

particularly interesting to notice that the CJEU and the ECtHR referred already, on different occasions, to each other's case law.⁴

Finally, in several judgments, the CJEU stated that Article 54 CISA necessarily implies that the Contracting States have mutual trust in each other's criminal justice systems and that they recognise the criminal law in force in the other States even when the outcome would be different if their own national law were applied (*Gözütok and Brügge, Van Esbroeck, Gasparini, Bourquain, Kossowski*). The decision at stake of the first State has, however, to constitute a final decision including a determination as to the merits of the case (*Kossowski*).

Summary of relevant cases:

- C-261/09, judgment of 16 November 2010, *Mantello*, see *infra* 3.2.
- C-617/10, judgment of 26 February 2013, *Åkerberg Fransson*, see *infra* 3.5.
- C-129/14 PPU, judgment of 27 May 2014, *Spasic*, see *infra* 3.4.
- C-398/12, judgment of 5 June 2014, *M.*, see *infra* 3.2.
- C-217/15 and C-350/15, judgment of 5 April 2017, *Orsi and Baldetti*, see *infra* 3.1.
- C-187/01 and C-385/01, judgment of 11 February 2003, *Gözütok and Brügge*, see *infra* 3.2.
- C-436/04, judgment of 9 March 2006, *Van Esbroeck*, see *infra* 3.3.
- C-467/04, judgment of 28 September 2006, *Gasparini*, see *infra* 3.2.
- C-297/07, judgment of 11 December 2008, *Bourquain*, see *infra* 3.4.
- C-486/14, judgment of 29 June 2016, *Kossowski*, see *infra* 3.2.

⁴ For instance, in the *Zolotukhin* judgment, the ECtHR referred to the CJEU's *Van Esbroeck* judgment and in *M.*, the CJEU referred to the CJEU's *Zolotukhin* judgment.

2. The temporal scope of application of the *ne bis in idem* principle

The temporal scope of application of the *ne bis in idem* principle has not given rise to many problems in the case law. In determining the temporal scope of this principle, it is the second prosecution which counts. If the first conviction took place before the CISA had entered into force in that State, Article 54 CISA will still apply, provided that the CISA was in force in the Contracting States in question at the time of the assessment of the conditions of the *ne bis in idem* principle by the court before which the second proceedings were brought (*Van Esbroeck*).

Summary of relevant cases:

➤ C-436/04, judgment of 9 March 2006, *Van Esbroeck*

- **Facts:** Van Esbroeck was sentenced by a Norwegian court to five years' imprisonment for illegally importing narcotic drugs into Norway. After serving part of his sentence, he was released on parole and escorted back to Belgium, where a prosecution was brought against him soon after his return. As a result, he was sentenced to one year's imprisonment for, *inter alia*, illegally exporting the same narcotic drugs out of Belgium. The judgment was upheld on appeal. Appeal was then brought before the Belgian Court of Cassation, invoking infringement of the *ne bis in idem* principle (Article 54 CISA).
- **Main question:** Does Article 54 CISA apply 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 CISA was not yet in force in that State at the time at which that person was convicted?
- **CJEU's reply:** Article 54 CISA applies provided that the CISA was in force in the Contracting States in question at the time of the assessment of the conditions of the *ne bis in idem* principle by the court before which the second proceedings were brought. The CJEU's main arguments:
 - The Schengen acquis contains no specific provisions dealing with the entry into force of Article 54 CISA or with its effect in time (para 20);
 - The question of the application of Article 54 CISA arises only when criminal proceedings are brought for a second time against the same person in another Contracting State (para 21).

3. The material scope of application of the *ne bis in idem* principle

According to the applicable legal framework, in light of the interpretation given by the CJEU, several requirements should be taken into account for a situation to be considered a “*bis in idem*”:

- The “same person” requirement – it concerns the same defendant, see *infra* 3.1.
- The “*bis*” requirement – it concerns a final decision, see *infra* 3.2.
- The “*idem*” requirement – it concerns the same acts, see *infra* 3.3.
- The “enforcement” requirement – the penalty has been imposed, it has been enforced, it is in the process of being enforced or can no longer be enforced, see *infra* 3.4.
- The “criminal nature” requirement – The thin line existing between (punitive) administrative sanctions and criminal sanctions, see *infra* 3.5.

3.1. The “same person” requirement – Natural person and legal person

The application of the *ne bis in idem* principle presupposes, in the first place, that it is the same person who is the subject of the penalties or criminal proceedings at issue (*Orsi and Baldetti*). It is clear from the wording of Article 54 CISA and the purpose of the provisions of Title VI of the EU Treaty that “only persons who have already had a trial finally disposed of once” may derive advantage from the *ne bis in idem* principle. Consequently, the *ne bis in idem* principle does not apply to persons other than those whose trial has been finally disposed of in a Contracting State (*Gasparini*).

To date, only in one judgment the CJEU interpreted the meaning of the “same person” requirement with regard to the relation between natural person and legal person and concluded that such a requirement is not met when the tax penalty was imposed on a company with legal personality while the criminal proceedings was brought against a natural person, albeit the natural person was the legal representative of the company subject to tax penalty (*Orsi and Baldetti*).

Summary of relevant cases:

➤ C-217/15 and C-350/15, judgment of 5 April 2017, *Orsi and Baldetti*

- **Facts:** Mr Orsi was the legal representative of S.A. COM Servizi Ambiente e Commercio Srl and Mr Baldetti that of Evoluzione Maglia Srl. Criminal proceedings were brought against Mr Orsi and Mr Baldetti on the ground that they failed, in their capacity as legal representatives of those companies, to pay within the time limit stipulated by law, VAT due on the basis of the annual return in respect of the tax periods at issue in the main proceedings. Before those criminal proceedings were initiated, the amounts of VAT at issue in the main proceedings were subject to

an assessment by the tax authorities which imposed a tax penalty on S.A. COM Servizi Ambiente e Commercio and on Evoluzione Maglia, equivalent to 30% of the amount of VAT owed.

- **Main question:** Whether national legislation, which makes it possible to combine tax penalties and criminal penalties with respect to the same act or omission – consisting of non-payment of VAT –, is compatible with Article 50 Charter, in conjunction with Article 4P7 ECHR?
- **CJEU's reply:** Article 50 Charter must be interpreted as not precluding national legislation which permits criminal proceedings to be brought for non-payment of VAT, after the imposition of a definitive tax penalty with respect to the same act or omission, where that penalty was imposed on a company with legal personality, while those criminal proceedings were brought against a natural person. The CJEU's main arguments:
 - The application of the *ne bis in idem* principle guaranteed in Article 50 Charter presupposes that it is the same person who is the subject of the penalties or criminal proceedings at issue (para 17);
 - In this case, the tax penalties were imposed on two companies with legal personality, whereas the criminal proceedings relate to Mr Orsi and Mr Baldetti, who are natural persons. Consequently, the tax penalties and the criminal charges concerned distinct persons. Therefore, the condition for the application of the *ne bis in idem* principle, according to which the same person must be subject to the penalties and criminal proceedings at issue, appears not to be satisfied (paras 21 and 22);
 - The fact that criminal proceedings have been brought against Mr Orsi and Mr Baldetti in respect of acts or omissions committed in their capacity as legal representatives of companies which were subject to tax penalties is not capable to change the conclusion reached in the previous point (para 23).

3.2. The “bis” requirement – A final decision

According to Article 54 CISA, a person's trial must have been “finally disposed of”. The exact meaning of this wording has raised many questions, but the CJEU's case law has provided some clarifications.

To date, the CJEU has accepted as “a decision that has been finally disposed of” an out-of-court settlement with the public prosecutor (*Gözütok and Brügge*), a court acquittal based on lack of evidence (*Van Straaten*), a court acquittal arising due to the prosecution of the offence being time-barred (*Gasparini*) and a decision of *non lieu*, i.e. a finding that there was no ground to refer the case to a trial court because of insufficient evidence (*M.*).

On the other hand, the CJEU rejected the application of Article 54 CISA in cases where a judicial authority had closed proceedings without any assessment of the unlawful conduct with which the defendant had been charged (*Miraglia*), cases where a police authority, following the expiry

of the limitation period and an examination of the merits of the case, had submitted an order to suspend the criminal proceedings (*Turanský*) and cases where a decision of the public prosecutor to terminate the criminal proceedings against a person was adopted without having undertaken a detailed investigation (*Kossowski*).

The case law of the ECtHR provides some further guidance on the interpretation of the “finality” requirement. In the *Zolotukhin* judgment⁵ the ECtHR held that a decision is final if, according to the traditional expression, it has acquired the force of “res judicata” which is the case when it is irrevocable, that is to say when no further ordinary remedies are available or when the parties have exhausted such remedies or have permitted the time-limit to expire without availing themselves of them.⁶ On the other hand, extraordinary remedies (*Zolotukhin*) are not taken into account for the purposes of determining whether the proceedings have reached a final conclusion. When elaborating further on this distinction, the CJEU held that the possibility under national law of reopening the criminal investigation if new facts/evidence becomes available does not preclude the decision from being regarded as a “final” decision (*M.*).

A crucial factor for the assessment of the finality requirement of the *ne bis in idem* principle is whether the decision at stake definitely bars further prosecution at national level under the law of the State which instituted criminal proceedings against the person (*Turanský, Mantello, M., Kossowski*). The CJEU has underlined that the assessment of the “final” nature of the criminal ruling must be carried out on the basis of the law of the Member State in which that ruling was made (*M., Kossowski*). In the framework of that assessment, a judicial authority can request from the judicial authority of the Member State in whose territory a decision was taken legal information on the precise nature of that decision (*Turanský, Mantello*). The fact that the decision at issue was taken by a prosecuting authority and no penalty was enforced is not a decisive factor for the purpose of ascertaining whether that decision definitely bars prosecution (*Kossowski*).

The interpretation given by the first Member State is, however, not absolute and can be set aside if it is not in line with the objectives of Article 54 CISA or the EU Treaty, which comprise not only the need to ensure the free movement of persons but also the need to promote the prevention and combating of crime within the area of Freedom, Security and Justice (*Miraglia, Kossowski*). In this regard, another important factor for the assessment of the finality requirement of the *ne bis in idem* principle is whether the decision at stake was given after a determination had been made as to the merits of the case, *i.e.* after a detailed investigation has been undertaken (*Kossowski*).

Summary of relevant cases:

- **C-187/01 and C-385/01, judgment of 11 February 2003, *Gözütok and Brügge***
 - **Facts:** In the *Gözütok* case, a German judicial authority prosecuted an individual for an offence of selling narcotic drugs, committed in the Netherlands, whereas a

⁵ ECtHR, 10 February 2009, *Sergey Zolotukhin v. Russia*, paras 107-108.

⁶ On this point, the CJEU clearly takes the same approach as the ECtHR as in the *M.* judgment it explicitly refers to the relevant paragraph of the *Zolotukhin* judgment.

settlement had already been agreed between the Dutch judicial authority and the individual in question. Similarly, in the *Brügge* case, which related to an act of assault and wounding during a traffic accident, proceedings were on-going in a Belgian criminal court despite the conclusion of a settlement between the perpetrator and a German judicial authority.

- **Main question:** Does Article 54 CISA apply in case of out of court settlements?
- **CJEU's reply:** The *ne bis in idem* principle applies to procedures by which the Public Prosecutor in a Member State discontinues, without the involvement of a court, a prosecution brought in that State once the accused has fulfilled certain obligations and, in particular, has paid a certain sum of money determined by the Public Prosecutor. The CJEU's main arguments:
 - The decision is taken by an authority which plays a part in the administration of criminal justice in the national legal system concerned (paras 27-31);
 - The settlement procedure penalises the accused's unlawful conduct (State's right to punish has been exercised) (para 29);
 - The application of Article 54 CISA is not made conditional upon prior harmonisation/approximation of the criminal laws relating to procedures whereby further prosecution is barred (para 32);
 - Member States should have mutual trust in their criminal justice systems and recognise the criminal law in force in the other Member States, even when the outcome would be different if its own national law were applied (para 33);
 - This interpretation is in line with the object and purpose of Article 54 CISA and the principle of *effet utile* (para 35 ff.).

➤ **C-469/03, judgment of 10 March 2005, *Miraglia***

- **Facts:** Criminal investigations were conducted, in cooperation, by the Italian and Dutch authorities, against Mr Miraglia for his involvement in drugs transport between both countries. The Dutch criminal proceedings were closed without any penalty or sanction imposed on the defendant. The Dutch public prosecutor did not initiate a criminal prosecution of the defendant on the ground that a prosecution in respect of the same facts had been brought in Italy. Subsequently, requests for judicial assistance made by the Italian public prosecutor were refused by the Dutch court arguing that such requests would go against Article 54 CISA as the Dutch decision not to prosecute the defendant was a "final decision" in the meaning of Article 54 CISA.
- **Main question:** Does Article 54 CISA apply 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?

- **CJEU's reply:** Article 54 CISA does not apply to such decisions. The CJEU's main arguments:
 - It is the only interpretation that is in line with the objective and purpose of Article 54 CISA, that can ensure the *effet utile* of the later provision and that reflects the very purpose of the relevant Treaty provisions concerning the area of freedom, security and justice (paras 31, 32 and 34).
 - Any other interpretation would make it more difficult, even impossible, to actually penalize in the Member States concerned the unlawful conduct with which the defendant is charged (para 33).

➤ **C-150/05, judgment of 28 September 2006, *Van Straaten***

- **Facts:** Mr Van Straaten was prosecuted in the Netherlands for three offences: (i) importing heroin from Italy into the Netherlands, (ii) possession of heroin and (iii) possession of firearms. He was acquitted of the first charge due to lack of evidence, but was convicted for the other two charges and served his term of twenty months imprisonment. Subsequently, he was prosecuted in Italy for (i) the possession of heroin and (ii) exporting heroin from Italy to the Netherlands. He was in Italy convicted *in absentia* to a term of imprisonment of ten years.
- **Main question:** Does Article 54 CISA apply in respect of a Court decision by which the accused is acquitted for lack of evidence?
- **CJEU's reply:** The *ne bis in idem* principle applies 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 CJEU's main arguments:
 - The wording of Article 54 CISA itself makes no reference to the content of the judgment that has become final, from which it is inferred that the *bis* is not only applicable to judgments convicting the accused (paras 55 and 56);
 - A different interpretation would have the effect of jeopardising the objective of Article 54, namely the right to freedom of movement (paras 57 and 58);
 - A different interpretation would undermine the principles of legal certainty and of the protection of legitimate expectations (para 59).

➤ **C-467/04, judgment of 28 September 2006, *Gasparini***

- **Facts:** Criminal proceedings had been brought in Portugal in 1997 against individuals associated with Minerva, a company that sold olive oil, and who had agreed to import olive oil from Tunisia and Turkey through a Portuguese port. The oil was not declared to the customs authorities and was transported to Spain using false documents to create the impression that it came from Switzerland. The defendants were acquitted in Portugal on the grounds that their prosecution was time-barred under the Portuguese Criminal Code. However, proceedings were also brought in Spain in 1997.

- **Main question:** Does Article 54 CISA apply in respect of a decision of a court of a Contracting State by which the accused is acquitted finally because prosecution of the offence is time-barred?
- **CJEU's reply:** Article 54 CISA applies in respect of a decision of a court of a Contracting State by which the accused is acquitted finally because prosecution of the offence is time-barred. The CJEU's main arguments:
 - The wording of Article 54 CISA, from which it follows that the *ne bis in bis* principle is not applicable solely to judgments convicting the accused (paras 23 and 24);
 - A differing interpretation would have the effect of jeopardising the objective of Article 54, namely the right to freedom of movement (paras 27 and 28);
 - Although limitation periods have not been harmonised, the application of Article 54 is not made conditional upon harmonisation of the criminal laws of the Member States relating to procedures whereby further prosecution is barred (para 29);
 - The Member States must have mutual trust in their respective criminal justice systems and each of them must recognise the criminal law in force in the other Member States, even when the outcome would be different if its own national law were applied (para 30).

➤ **C-491/07, judgment of 22 December 2008, Turanský**

- **Facts:** Criminal proceedings were instituted in Austria against Mr. Turanský, a Slovak national suspected of having carried out, along with others, a serious robbery on an Austrian national in Austria. Since the requested person was in his country of origin, Austria asked the Slovak Republic to reopen proceedings against him. The Slovak Republic agreed and the criminal proceedings in Austria were stayed pending the final decision in Austria. Subsequently, Slovak police authorities took a decision to suspend the proceedings. The Austrian authorities wondered whether such a decision prevented them from continuing their proceedings.
- **Main question:** Does Article 54 CISA apply to a decision whereby a police authority, 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 which had been instituted?
- **CJEU's reply:** Article 54 CISA does not apply to such a decision provided that the suspension decision does not, under the national law of that State, definitely bar further prosecution and therefore does not preclude new criminal proceedings, in respect of the same acts, in that State. The CJEU's main arguments:
 - It must be ascertained whether the decision in question is - under the law of the Contracting State which adopted it - final and binding and whether it leads in that State to the protection granted by the *ne bis in idem* principle (paras 35-36);

- The cooperation mechanism included in Article 57 CISA allows the competent authorities of the second State to request relevant legal information in order to clarify, for example, the precise nature of the decision (paras 37-38);
- In the present case, the national law of the Member State where the decision was taken does not preclude the institution of new criminal proceedings in respect of the same acts in that State;
- Such an interpretation is compatible with the objective of Article 54 CISA and with the relevant Treaty provisions concerning the area of freedom, security and justice (paras 41-44).

➤ **C-261/09, judgment of 16 November 2010, *Mantello***

- **Facts:** An EAW was issued in respect of Mr. Mantello in the context of criminal proceedings instituted against him in Italy for having participated in a criminal organization and for drugs related offences. The German judicial authorities wondered whether Mr. Mantello's surrender should be refused on the basis of the *ne bis in idem* principle since he had been convicted in Italy for the unlawful possession of drugs and he had executed his sentence. When asked for information, the Italian judicial authorities explained that the latter conviction did not preclude the criminal investigations mentioned in the arrest warrant. They did not deny, however, that, in the interest of the investigation, the investigators had not passed on information and evidence related to the offences mentioned in the EAW and had not requested at that time the prosecution of those acts.
- **Main question:** Does the fact that the investigating authorities held evidence concerning acts which constituted the offences referred to in the arrest warrant, but did not submit that evidence for consideration to the court when that court ruled on the individual acts, makes it possible to treat the judgment as if it were a final judgment in respect of the acts set out in that arrest warrant and thus to apply the mandatory ground for non-execution (Article 3(2) FD EAW)?
- **CJEU's reply:** The executing judicial authority cannot apply the mandatory *ne bis in idem* non-execution ground, if, in response to a request for information 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) FD EAW, 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 CJEU's main arguments:
 - The "finality" criterion included in Article 3(2) FD EAW must be determined by the law of the Member State in which the judgment was delivered (para 46);

- A decision which does not, under the law of the Member State which instituted criminal proceedings against a person, definitively bar further prosecution at national level in respect of certain acts, cannot, in principle, constitute a procedural obstacle to the possible opening or continuation of criminal proceedings in respect of the same acts against that person in one of the Member States of the European Union (para 47);
- The FD EAW includes cooperation arrangements so that the executing judicial authority can request from the issuing judicial authority legal information on the precise nature of the judgment in order to decide whether, under the law of that State, the judgment must be considered “final” (para 48);
- In the present case, it was clear from the reply provided by the issuing judicial authority that the first judgment could not be regarded as “final” (paras 49-50).

➤ **C-398/12, judgment of 5 June 2014, M.**

- **Facts:** M., an Italian citizen, residing in Belgium, was the subject of criminal proceedings in respect of multiple unlawful acts of a sexual nature. At the conclusion of an investigation during which various items of evidence were collected and examined, the competent Belgian court made a finding that there was no ground to refer the case to a trial court because of insufficient evidence (decision of “non-lieu”). This decision was confirmed in appeal and a further appeal was dismissed by the Court de cassation. In parallel to the investigation carried out in Belgium, criminal proceedings against M were opened in Italy on the basis of the same facts. At a hearing before the Italian court, M. invoked the *ne bis in idem* principle.
- **Main question:** Does Article 54 CISA apply to a decision making a finding that there is no ground to refer the case to a trial court if that decision of non-lieu precludes, in the Contracting State in which that order was made, new criminal proceedings in respect of the same acts against the person to whom that finding applies, unless new facts and/or evidence against that person become available?
- **CJEU's reply:** Such a decision must indeed be regarded as a “final judgment” for the purpose of Article 54 CISA which precludes new proceedings against the same person in respect of the same acts in another Contracting State. The CJEU's main arguments:
 - The decision of non-lieu was given after a determination as to the merits of the case. It is a definite decision on the inadequacy of the evidence and excludes any possibility that the case might be reopened on the basis of the same body of evidence (paras 28 and 30);
 - The decision bars further prosecution at national level, an assessment which must be made on the basis of the law of the Member State in which that ruling was made (paras 31-33 and 36);

- Article 54 CISA must be read in light of Article 50 Charter and Article 4P7 ECHR and the ECtHR's case law on the "finality" requirement which basically distinguishes between a decision for which ordinary remedies have been exhausted (force of *res judicata*, final decision) and "extraordinary remedies" (which are not taken into account for the purpose of determining whether a decision is final) (paras 35 and 37-39);
- A legal possibility of reopening the criminal investigation if new facts and/or evidence become available is not an extraordinary remedy within the meaning of the ECtHR's case law, but it involves nevertheless the exceptional bringing of separate proceedings based on different evidence rather than the mere continuation of proceedings which have already been closed. Moreover, such an exceptional possibility of reopening can only be brought in the Contracting State in which that order was made (paras 40- 41).

➤ **C-486/14, judgment of 29 June 2016, Kossowski**

- **Facts:** A German public prosecutor's office accused Mr Kossowski of having committed, in Germany, the offence of extortion with aggravating factors. However, the competent German court refused to open trial proceedings on the ground that it is prevented from doing so by the *ne bis in idem* principle. In fact, a Polish public prosecutor's office had already opened a criminal investigation procedure against him in respect of the same facts and had definitively closed it in the absence of sufficient evidence. The specific reasons for the decision of the Polish public prosecutor to close the investigation were that Mr Kossowski had refused to give a statement and that the victim and a hearsay witness were living in Germany, so that it had not been possible to interview them during the investigation and had therefore not been possible to verify statements made by the victim. No other more detailed investigation had been carried out in Poland.
- **Main question:** Do Article 54 CISA and Article 50 Charter apply and thus prohibit the prosecution of an accused person in one Member State where his prosecution in another Member State has been discontinued by the public prosecutor's office, without any obligations imposed by way of penalty having been fulfilled and without any detailed investigation, for factual reasons in the absence of sufficient evidence for a probable conviction, and can be reopened only if essential circumstances previously unknown come to light, where such new circumstances have not in fact emerged?
- **CJEU's reply:** The decision of the Polish prosecutor was not "final" in the meaning of Article 54 CISA. The CJEU's main arguments:
 - Article 54 CISA requires, first of all, that further prosecution has been definitively barred, meaning that the decision "precludes any further prosecution" under the law of the State that has taken the decision (paras 34-35). In the present case, under Polish law, the decision of the Polish

public prosecutor precluded any further prosecution in Poland (paras 36- 37). The fact that the decision was taken by a prosecuting authority (without the involvement of a court) and that no penalty was enforced is not decisive for the assessment of this requirement (paras 38-41);

- Article 54 CISA requires, in the second place, that the decision was given “after a determination has been made as to the merits of the case”. In light of the objective and context of Article 54 CISA and in light of Article 3(2) TEU, this requirement is not fulfilled in a situation in which:
 - the prosecuting authority did not undertake a more detailed investigation for the purpose of gathering and examining evidence;
 - and the prosecuting authority did not proceed with the prosecution solely because the accused had refused to give a statement and the victim and a hearsay witness were living in Germany;
 - and it had not been possible to interview them in the course of the investigation and therefore not been possible to verify statements made by the victim.
- Mutual trust requires that relevant competent authorities of the second Contracting State accept at face value a final decision communicated to them which has been given in the first Contracting State (para 51);
- However, that mutual trust can prosper only if the second Contracting State is in a position to satisfy itself, on the basis of the documents provided by the first Contracting State, that the decision of the competent authorities of that first State does indeed constitute a final decision including a determination as to the merits of the case (para 52).

3.3. The “*idem*” requirement – The same acts

In a series of judgments beginning with *Van Esbroeck*, the CJEU was confronted with a number of cases in which persons who had been sentenced on the basis of a legal qualification in one Member State (e.g. export of drugs) were standing trial in another Member State on the basis of a different legal qualification (e.g. import of drugs). In these judgments, the CJEU had to decide whether the concept of *idem* refers to the facts, to their legal classification or to the legal interest being protected. The CJEU⁷ ruled in *Van Esbroeck* in favour of the first option and stated that the “same acts” is to be understood as the identity of the material acts in the sense of “a set of concrete circumstances which are inextricably linked together in time, in space and by their subject-matter”. Consequently, punishable acts consisting of exporting and importing the same illegal goods constitutes conduct which may be covered by the notion of “same act”.

⁷ Following the approach taken by the CJEU, the ECtHR’s case law also evolved towards a factual (and not legal) *idem*: see ECtHR, 10 February 2009 *Sergey Zolotukhin v. Russia*, paras 82 ff.

The final assessment of the “idem” requirement is, however, in hands of the competent national court.

In subsequent judgments, the CJEU has confirmed this approach (e.g. *Gasparini, Kretzinger*) and has further explained that the inextricable link does not require that the quantities of the drug at issue in the two Contracting States are identical (*Van Straaten*) and that such link does not depend solely on the intentions of the defendant (*Kraaijenbrinck*).

Even though Article 58 CISA entitles the Contracting States to apply broader national provisions on the *ne bis in idem* principle with regard to judicial decisions taken abroad, this margin of discretion is not unlimited (*Kraaijenbrink*).

Summary of relevant cases

- **C-436/04, judgment of 9 March 2006, *Van Esbroeck***
- **Facts:** Van Esbroeck was sentenced by a Norwegian court to five years’ imprisonment for illegally importing narcotic drugs into Norway. After serving part of his sentence, he was released on parole and escorted back to Belgium, where a prosecution was brought against him soon after his return. As a result, he was sentenced to one year’s imprisonment for, *inter alia*, illegally exporting the same narcotic drugs out of Belgium. The judgment was upheld on appeal. Appeal was then brought before the Court of Cassation, invoking infringement of the *ne bis in idem* principle (Article 54 CISA).
- **Main question:** What is the relevant criterion for the purposes of the application of the concept of ‘the same acts’ within the meaning of Article 54 CISA? And, more precisely, are the unlawful acts of *exporting* from one Contracting State and *importing* into another the same narcotic drugs covered by that concept?
- **CJEU’s reply:** The relevant criterion is the 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. Punishable acts of exporting and importing the same narcotic drugs are in principle to be regarded as “the same acts”. The definitive assessment is left to the competent national courts. The CJEU’s main arguments:
 - The wording of Article 54 CISA which mentions the term “acts” (paras 27-28);
 - The EU Treaty does not make the application of Article 54 CISA conditional upon harmonisation or approximation (para 29);
 - Article 54 CISA implies that the Contracting States have mutual trust in each other’s criminal justice systems and that they recognise the criminal law in force in the other States (para 30);
 - The other two possible criteria - legal classification and protected legal interest - can create barriers to the free movement objective of Article 54 CISA (paras 32-35).

➤ **C-150/05, judgment of 28 September 2006, *Van Straaten***

- **Facts:** see *supra* 4.1.
- **Main question:** Does Article 54 CISA apply in the case of exporting and importing the same narcotic drugs in two Contracting States even if the quantities of the drugs that are at issue are not exactly the same?
- **CJEU's reply:** The CJEU refers to the definition of "same acts" given in *Van Esbroeck* and the arguments developed there to confirm that the relevant criterion is "the 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" (paras 41-48). The CJEU clarifies that the quantities of the drugs are not required to be identical (para 49). The CJEU concludes that the export and import of the same narcotic drugs are, in principle, to be regarded as "the same acts" (para 51). The definitive assessment is, however, a matter for the competent national courts (para 52).

➤ **C-467/04, judgment of 28 September 2006, *Gasparini***

- **Facts:** see *supra* 4.1.
- **Main question:** Does the importation and the subsequent sale of goods must be considered as a single act, or as two separate acts?
- **CJEU's reply:** The CJEU refers to the definition of "same acts" developed in *Van Esbroeck* (para 54) to decide that the marketing of goods in another Member State, after their importation into the Member State where the accused was acquitted, constitutes conduct which may form part of the "same acts" within the meaning of Article 54 CISA (para 55). The CJEU also repeats that the definitive assessment is a matter for the competent national courts (para 56).

➤ **C-288/05, judgment of 18 July 2007, *Kretzinger***

- **Facts:** Mr. Kretzinger transported cigarettes from non-EU countries which had previously been smuggled into Greece by thirds parties, by lorry through Italy and Germany, bound for the United Kingdom. They were not presented for customs clearance at any point. Mr. Kretzinger was faced with several criminal proceedings. First, an Italian court found Mr. Kretzinger guilty of importing into Italy and being in the possession of contraband foreign tobacco and failure to pay customs duty and imposed on him *in absentia* a suspended custodial sentence, which became final. Mr. Kretzinger was held briefly in Italian police custody and/or on remand pending trial, following which he returned to Germany. Subsequently, another Italian court imposed, again *in absentia*, and applying the same criminal provisions, a custodial sentence which was not suspended and which has not been executed. Finally, a German court, aware of the Italian judgments but emphasising that they had not been executed, convicted Mr. Kretzinger to a custodial sentence for the

smuggled consignments of cigarettes and the evasion of customs duties. Mr. Kretzinger lodged an appeal before the German Bundesgerichtshof and invoked Article 54 CISA.

- **Main question:** Are the unlawful acts of receiving contraband foreign tobacco in one Contracting State and of importing that tobacco into another Contracting State and being in possession of it there covered by the notion “same acts”, in so far as the defendant, who has been 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?
- **CJEU’s reply:** The CJEU refers to the definition of “same acts” developed in *Van Esbroeck* and the supporting arguments (paras 29-34) and recalls that it already held that punishable acts of exporting and importing the same illegal goods may be covered by the notion “same acts” (para 35). It concludes that the transportation of contraband cigarettes such as those at issue are capable of constituting the “same acts” but that the final assessment is in hands of the competent national courts (paras 36).

➤ **C-367/05, judgment of 18 July 2007, *Kraaijenbrink***

- **Facts:** Ms. Kraaijenbrink was first sentenced in the Netherlands to a suspended custodial sentence for the offence of receiving and handling the proceeds of drug trafficking. Subsequently, she was sentenced in Belgium to a custodial sentence for the offence of money laundering. Ms. Kraaijenbrink lodged an appeal and pleaded a breach of Article 54 CISA.
- **Main question:** Does the notion of “same acts” cover 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 having the same origin, where the national court before which the second criminal proceedings are brought finds that those acts are linked together by the same criminal intention?
- **CJEU’s reply:** The CJEU refers to the definition of “same acts” developed in *Van Esbroeck* (paras 26-28) and adds that the material acts must make up an inseparable whole (para 28). The CJEU then explains that the mere fact that the alleged perpetrator acted with the same criminal intention does not suffice (para 29). In other words, a subjective link between acts which gave rise to criminal proceedings in two States is insufficient; an objective link between the sums of money in the two proceedings must be established (paras 30-31). The assessment of the degree of identity and connexion between all the factual circumstances is in hands of the competent national courts (para 32). The CJEU also refers to Article 58 CISA - which entitles the Contracting States to apply broader national provisions on the *ne bis in idem* principle - and underlines that this provision is not unlimited. It does not authorise States to refrain from trying a drugs offence on the sole ground

that the person charged had already been convicted in another Contracting State in respect of other offences motivated by the same criminal intention (para 34).

3.4. The “enforcement” requirement – If a penalty has been imposed, it has been enforced, it is in the process of being enforced or can no longer be enforced

Contrary to the “finality” requirement and the “same acts” requirement which are included in all relevant European *ne bis in idem* provisions, the “enforcement” criterion is included in Article 54 CISA, but not in Article 50 Charter and not in Article 4P7 ECHR. Notwithstanding this lack of uniformity, the CJEU acknowledged the relevance of the enforcement requirement for the *ne bis in idem* principle in the EU’s area of freedom, security and justice and underlined its compatibility with the Charter (*Spasic*).

In its case law, the CJEU held that out-of-court settlements (*Gözütok and Brügge*) and suspended sentences (*Kretzinger*) must be regarded as penalties which are actually in the process of being enforced or which have been enforced. Similarly, it accepted that the enforcement condition was fulfilled if a penalty could no longer be enforced, regardless of whether that penalty could ever have been executed in practice (*Bourquain*). By contrast, the CJEU rejected the fulfilment of the enforcement criterion in case of a short length of time that a suspect was in police custody and/or being held on remand pending trial (*Kretzinger*) and in case where only one part of the sentence has been enforced (*Spasic*).

Summary of relevant cases

➤ **C-288/05, judgment of 18 July 2007, *Kretzinger***

- **Facts:** see *supra* 4.2.

- **Main questions and CJEU’s reply:**

- Is the “enforcement” condition of Article 54 CISA satisfied if a defendant has been given a suspended custodial sentence? Yes. The CJEU’s main arguments:
 - The mechanism of suspended sentences is a feature of the criminal systems of the Contracting States (para 40);
 - Suspended custodial sentences constitute a penalty (para 42);
 - Another interpretation would be inconsistent with the general approach that suspended sentences are normally passed for less serious offences (para 44).
- Is the “enforcement” condition of Article 54 CISA satisfied if a defendant was taken for a short time in police custody and/or held on remand pending trial and that detention would count towards any subsequent enforcement of the penalty of imprisonment? No. The CJEU’s main arguments:

- The wording of Article 54 CISA indicates that it cannot apply *before* the trial has been finally disposed of whilst both police custody and detention on remand pending trial precede final judgment (paras 49-50);
- The purpose of detention on remand pending trial (preventive nature) is very different from the purpose underlying the enforcement condition of Article 54 CISA (avoid that a person remains unpunished) (para 51).
- Does the possibility of issuing an EAW on the basis of the FD EAW have an effect on the interpretation of the “enforcement” requirement? No. The CJEU’s main arguments:
 - The wording of Article 54 CISA requires that the enforcement condition is satisfied (para 59);
 - Article 3(2) FD EAW indicates that the enforcement condition could not, by definition, be satisfied in a case such as that in the main proceedings (paras 60-61);
 - Legal certainty would be at risk since (1) the Member States bound by the FD EAW are not all bound by the CISA and (2) the scope of the FD EAW is limited (para 62).

➤ **C-297/07, judgment of 11 December 2008, *Bourquain***

- **Facts:** In 1961, Mr Bourquain, a German national serving in the Foreign Legion, was sentenced to death on charges of desertion and homicide by a French military tribunal in Algeria. Mr Bourquain fled. Under the French legislation in force in 1961, the sentence would not have been enforced if Mr Bourquain had reappeared, but new criminal proceedings would have been brought in his presence and the imposition of any penalty would have depended on the outcome of those new proceedings. No other criminal proceedings have since been initiated against Mr Bourquain, either in France or in Algeria. In 2002, a German Public Prosecutor took steps for Mr Bourquain to be tried in Germany for the acts of 1961. At that time, the judgment of 1961 was not enforceable in France, both on account of the statute of limitations and following the amnesty granted in respect of events in Algeria. The German Court, before which the proceedings had been brought, requested the CJEU to give a ruling on the application of the *ne bis in idem* principle.
- **Main question:** Does Article 54 CISA apply 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 have been enforced?
- **CJEU’s reply:** Article 54 CISA applies in those circumstances. The CJEU’s main arguments:
 - The wording of the enforcement condition of Article 54 CISA does not require the penalty, under the law of the sentencing State, to have been capable of being

enforced directly, but requires only that the penalty imposed by a final decision “can no longer be enforced” (para 47);

- The enforcement condition must be satisfied at the time when the second criminal proceedings were instituted (para 48);
- The objective and the *effet utile* of Article 54 CISA would be jeopardised if the application of this provision would be ruled out solely on the ground of the specific features of the French criminal proceedings (paras 49-50).

➤ **C-129/14 PPU, judgment of 27 May 2014, Spasic**

- **Facts:** Mr. Spasic was sentenced by an Italian court to a custodial sentence and a fine for organised fraud without the penalty imposed on him having been enforced. Subsequently, Mr. Spasic was prosecuted in Germany for the same act of fraud committed and trialled of in Italy. Mr. Spasic argued that he could not be prosecuted in Germany for the acts committed in Italy since he had already received a final and binding sentence from the Italian court in respect of those acts. He also paid by bank transfer the fine and produced proof of that payment before the German court.
- **Main questions and CJEU's reply:**
 - Is the enforcement condition of Article 54 CISA compatible with Article 50 Charter? Yes. The CJEU's main arguments:
 - The Explanation relating to the Charter as regards Article 50 expressly mention Article 54 CISA amongst the provisions covered by the horizontal clause in Article 52(1) Charter (para 54);
 - The enforcement condition of Article 54 CISA constitutes a limitation of the right enshrined in that Article within the meaning of Article 52 Charter (para 55).
 - The enforcement condition fulfils all the criteria included in Article 52 Charter (para 56 ff.):
 - The restriction is provided for by law (para 57);
 - The restriction respects the essence of the *ne bis in idem* principle (paras 58-59);
 - The restriction is proportionate: it is appropriate for attaining the objective of preventing the impunity of persons (paras 60- 64);
 - The restriction is necessary: even though there are numerous EU instruments that facilitate cooperation between the Member States in criminal matters, they do not lay down an execution condition similar to that of Article 54 CISA and thus not capable of fully achieving the objective pursued (paras 65-72).
 - Is the enforcement condition satisfied by the mere payment of a fine by a person who was sentenced by the same decision to a custodial sentence which has not been served? No. The CJEU's main arguments:
 - The aim of the enforcement condition of Article 54 CISA is not only to prevent the impunity of persons definitively convicted and sentenced in

the EU, but also to ensure legal certainty through respect for decisions of public bodies which have become final (para 77);

- A uniform application of EU law requires that in the absence of harmonisation, a provision which does not make reference to the law of the Member States must be given an autonomous and uniform interpretation throughout the EU (para 79);
- The *effet utile* of Article 54 CISA requires that this provision also encompasses situations where two principal punishments have been imposed and the wording of Article 54 CISA does not exclude this (paras 80-81);
- Since one of the penalties has not been enforced, the condition cannot be regarded as having been fulfilled. As regards the custodial sentence, Mr. Spasic has not even begun to serve his custodial sentence (paras 82- 83).

3.5. The “criminal nature” requirement – The thin line between (punitive) administrative sanctions and criminal sanctions

The application of the *ne bis in idem* principle laid down in Article 50 Charter presupposes that the measures which have already been adopted against the accused by means of a decision that has become final, are of criminal nature (*Åkerberg Fransson*, confirmed in *Spasic*, para 53).

Whilst, so far, the “criminal nature requirement” of the *ne bis in idem* requirement has only been addressed occasionally in the CJEU’s case law on Article 50 Charter (*Åkerberg Fransson*), the ECtHR has delivered many judgments where Article 4P7 ECHR was invoked in the context of a double punishment stemming from a combination of punitive administrative penalties and criminal penalties.⁸

The CJEU aligned itself with the ECtHR’s views on Article 4P7 ECHR when it stated in *Åkerberg Fransson* that Article 50 Charter does not preclude a Member State from imposing for the same acts a combination of administrative penalties and criminal penalties provided that the administrative penalty is not criminal in nature. Even though the *Åkerberg Fransson* case is a national case of *ne bis in idem* application, it should not be overlooked that Article 50 Charter

⁸ See: http://www.echr.coe.int/ECHR/Homepage_EN. *Inter alia*, judgments *Grande Stevens v. Italy*, 4 March 2014 and *Glantz v. Finland*, 20 May 2014, in which the ECtHR concluded that the fines imposed by the administrative authorities were criminal in nature. Also relevant, *Kapetanios and Others v. Greece*, 30 April 2015, *Österlund v. Finland*, 10 February 2015 (in which the ECtHR held that there was violation of Article 4P7 ECHR) and *A and B v. Norway*, 15 November 2016 (in which the ECtHR held that there was no violation of Article 4P7 ECHR). In the latter judgment, which represents a change in the ECtHR case law on the *ne bis in idem* principle, the ECtHR held that a combination of tax penalties and criminal penalties as punishment for the same tax offences did not infringe the principle *ne bis in idem* affirmed in Article 4P7 ECHR. The ECtHR concluded that there was no duplication of trial or punishment proscribed by that article, although the tax penalties at issue in those cases were of a criminal nature and had become definitive before the imposing of the criminal penalties, because there was ‘a sufficiently close connection, both in substance and in time’ between the tax and criminal proceedings in question (paras 130 and 147). To be noted that in pending case *Menci*, the CJEU, in its Order of 25 January 2017 for the reopening of the oral part of the procedure, refers to the importance of the questions raised by the *A and B v. Norway* judgment of the ECtHR with regard to the interpretation of Article 50 Charter.

has transnational effect. Hence, Member States might be confronted with the transnational application of *ne bis in idem* for punitive sanctions imposed in other Member States.

The CJEU stated that it is for the competent national court to determine on the basis of three criteria whether an administrative sanction is criminal in nature. These criteria, the so-called “*Engel* criteria”, originally developed by the ECtHR,⁹ are alternative and not cumulative: the legal classification of the offence under national law, the very nature of the offence and the nature and degree of severity of the penalty.¹⁰

Summary of relevant cases

➤ C-617/10, judgment of 26 February 2013, *Åkerberg Fransson*

- **Facts:** Swedish tax authorities had accused Mr. Åkerberg Fransson of VAT irregularities and a related failure to comply with information obligations. On these grounds they had fined him with administrative tax penalties. A few years later, Mr. Åkerberg Fransson was prosecuted for the same facts and faced a custodial sentence. The competent Swedish court dealing with the case had some questions about the application of the *ne bis in idem* principle included in Article 50 Charter.
- **Main question:** Should the *ne bis in idem* principle laid down in Article 50 Charter be interpreted as precluding criminal proceedings for tax evasion from being brought against a defendant where a tax penalty has already been imposed upon him for the same acts?
- **CJEU’s reply:** The *ne bis in idem* principle laid down in Article 50 Charter does not preclude a Member State from imposing successively, a tax penalty and a criminal penalty in so far as the first penalty is not criminal in nature, a matter which is for the national court to determine. The CJEU’s main arguments:
 - Article 50 Charter presupposes that the measures which have already been adopted against the defendant by means of a decision that has become final are of a criminal nature (para 33);
 - Article 50 Charter does not preclude a Member State from imposing for the same acts a combination of administrative penalties and criminal penalties provided that the administrative penalty is not criminal in nature (para 34);
 - Three criteria are relevant for the assessment of the criminal nature: the legal classification of the offence under national law, the very nature of the offence and the nature and degree of severity of the penalty (para 35);
 - National authorities and courts remain, in principle, free to apply national standards of protection of fundamental rights as long as the remaining penalties are effective, proportionate and dissuasive (paras 29 and 36).

⁹ The so-called *Engel* criteria were firstly addressed by the ECtHR in the *Engel* judgment and later developed and applied in many cases since then (ECtHR, 8 June 1976, *Engel and Others v. the Netherlands*, para 82).

¹⁰ Also in *Bonda* (C-489/10, judgment of 5 June 2012), the CJEU applied the *Engel* criteria but, in light of them, concluded that the measures under examination (descending from provisions of an EU Regulation related to the common agricultural policy) did not constitute criminal penalties (paras 37 to 46).



Eurojust, Johan de Wittlaan 9, 2517 JR The Hague, Netherlands
Phone: +31 70 412 5000 - E-mail: info@eurojust.europa.eu - Website: www.eurojust.europa.eu
PDF: *Catalogue no.* QP-07-17-119-EN-N • *ISBN* 978-92-9490-209-2 • *doi* 10.2812/828017