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Case-law by the Court of Justice of the European Union on the principle of *ne bis in idem* in criminal matters

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Criminal justice across borders





Executive summary

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 under Article 50 of the Charter of Fundamental Rights of the European Union ('Charter') and Articles 54 to 58 of the Convention Implementing the Schengen Agreement ('CISA'). Where relevant, reference is also made to the European Convention on Human Rights ('ECHR') and the case-law of the European Court of Human Rights ('ECtHR'). The aim of this document is to provide guidance on the application of the *ne bis in idem* principle in a transnational context.

The case-law overview contains summaries of the CJEU's judgments categorised according to a set of important keywords that reflect the main elements of the principle of *ne bis in idem*. A table of keywords and a chronological list of judgments is also provided at the beginning of the document.

The index and summaries of judgments are not exhaustive and are only to be used for reference and as a supplementary tool for practitioners. They have been prepared by Eurojust and do not bind the CJEU. The summaries contain links to the full texts of the judgments of the CJEU, which can be found, in all EU official languages, on the [CJEU's website](#).

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1. Chronological list of judgments

To date, the CJEU has handed down 37 judgments on the *ne bis in idem* principle in criminal matters, which are presented in this document in a thematic order:

1. Joined Cases C-187/01 and C-385/01, **Gözütok** and **Brügge**, Judgment of 11 February 2003
2. Case C-469/03, **Miraglia**, Judgment of 10 March 2005
3. Case C-436/04, **Van Esbroeck**, Judgment of 9 March 2006
4. Case C-150/05, **Van Straaten**, Judgment of 28 September 2006
5. Case C-467/04, **Gasparini**, Judgment of 28 September 2006
6. Case C-288/05, **Kretzinger**, Judgment of 18 July 2007
7. Case C-367/05, **Kraaijenbrink**, Judgment of 18 July 2007
8. Case C-297/07, **Bourquain**, Judgment of 11 December 2008
9. Case C-491/07, **Turanský**, Judgment of 22 December 2008
10. Case C-261/09, **Mantello**, Judgment of 16 November 2010
11. Case C-617/10, **Åkerberg Fransson**, Judgment of 26 February 2013
12. Case C-129/14 PPU, **Spasic**, Judgment of 27 May 2014
13. Case C-398/12, **M.**, Judgment of 5 June 2014
14. Case C-486/14, **Kossowski**, Judgment of 29 June 2016
15. Joined Cases C-217/15 and C-350/15, **Orsi** and **Baldetti**, Judgment of 5 April 2017
16. Case C-524/15, **Menci**, Judgment of 20 March 2018
17. Case C-537/16, **Garlsson Real Estate and others**, Judgment of 20 March 2018
18. Joined Cases C-596/16 and C-597/16, **Di Puma** and **Zecca**, Judgment of 20 March 2018
19. Case C-268/17, **AY**, Judgment of 25 July 2018
20. Case C-234/17, **XC and others**, Judgment of 24 October 2018
21. Case C-665/20 PPU, **X (Mandat d'arrêt européen – Ne bis in idem)**, Judgment of 29 April 2021
22. Case C-505/19 PPU, **Bundesrepublik Deutschland (Notice rouge d'Interpol)**, Judgment of 12 May 2021
23. Case C-790/19 **LG and MH (Autoblanchiment)**, Judgment of 2 September 2021
24. Case C-203/20, **AB and Others (Révocation d'une amnistie)**, Judgment of 16 December 2021
25. Case C-117/20, **bpost**, Judgment of 22 March 2022
26. Case C-151/20, **Nordzucker and Others**, Judgment of 29 April 2022
27. Case C-570/20, **Direction départementale des finances publiques de la Haute-Savoie**, Judgment of 5 May 2022.
28. Case C-435/22 PPU, **Generalstaatsanwaltschaft München (Extradition and ne bis in idem)**, Judgment of 28 October 2022
29. Case C-365/21, **Generalstaatsanwaltschaft Bamberg (Exception au principe ne bis in idem)**, Judgment of 23 March 2023
30. Case C-412/21, **Dual Prod SRL**, Judgment of 23 March 2023

31. Case C-97/21, ***MV-98***, Judgment of 4 May 2023
32. Case C-27/22, ***Volkswagen Group Italia and Volkswagen Aktiengesellschaft***, Judgment of 14 September 2023
33. Case C-55/22, ***Bezirkshauptmannschaft Feldkirch***, Judgment of 14 September 2023
34. Case C-164/22, ***Juan***, Judgment of 21 September 2023
35. Case C-726/21, ***Interconsulting***, Judgment of 12 October 2023
36. Case C-147/22, ***Központi Nyomozó Főügyészség***, Judgment of 19 October 2023
37. Case C-58/22, ***Parchetul de pe lângă Curtea de Apel Craiova***, Judgment of 25 January 2024

Pending cases. In addition, there are three cases on the *ne bis in idem* principle currently pending before the CJEU, namely:

1. Case C-205/23, ***Engie România***. Request for a preliminary ruling from the Tribunalul București (Romania) lodged on 28 March 2023. The questions referred relate to the interpretation of the principle of *ne bis in idem* under Article 50 of the Charter in relation to the duplication of administrative sanctions of a criminal nature against the same facts.
2. Case C-331/23, ***Dranken Van Eetvelde***. Request for a preliminary ruling from the Rechtbank van eerste aanleg Oost-Vlaanderen Afdeling Gent (Belgium) lodged on 25 May 2023. The questions referred relate to the interpretation of the principle of *ne bis in idem* under Article 50 of the Charter in relation to the duplication of administrative and criminal sanctions to value added tax (VAT) offences.
3. Case C-701/23, ***SWIFTAIR***. Request for a preliminary ruling from the Tribunal Judiciaire de Paris (France) lodged on 14 November 2023. The questions referred relate to the interpretation of the principle of *ne bis in idem* under Article 54 of the CISA and Article 50 of the Charter in relation to the notions of final decision and of same person.

2. Index of keywords with reference to relevant judgments

Keyword	Cases
Criminal Nature	<ul style="list-style-type: none"> – C-617/10 Åkerberg Fransson – C-524/15 Menci – C-537/16 Garlsson Real Estate SA – C-596/16 and C-597/16 Di Puma and Zecca – C-151/20 Nordzucker and Others – C-412/21 Dual Prod SRL – C-97/21 MV-98 – C-27/22 Volkswagen
Duplication of proceedings and penalties	<ul style="list-style-type: none"> – C-617/10 Åkerberg Fransson – C-524/15 Menci – C-537/16 Garlsson Real Estate SA – C-596/16 and C-597/16 Di Puma and Zecca – C-117/20 bpost – C-151/20 Nordzucker and Others – C-570/20 Direction départementale des finances publiques de la Haute-Savoie – C-412/21 Dual Prod SRL – C-97/21 MV-98 – C-55/22 Bezirkshauptmannschaft Feldkirch – C-27/22 Volkswagen
EAW	<ul style="list-style-type: none"> – C-261/09 Mantello – C-268/17 AY – C-665/20 PPU X (Mandat d’arrêt européen – <i>Ne bis in idem</i>) – C-203/20 AB and Others – C-365/21 Generalstaatsanwaltschaft Bamberg (Exception au principe <i>ne bis in idem</i>) – C-164/22 Juan
Enforcement condition	<ul style="list-style-type: none"> – C-187/01 and C-385/01 Gözütok and Brügger – C-288/05 Bourquain

	<ul style="list-style-type: none"> – C-129/14 Spasic – C-665/20 PPU X (Mandat d’arrêt européen – <i>Ne bis in idem</i>)
Extradition	<ul style="list-style-type: none"> – C-505/19 PPU Bundesrepublik Deutschland (Notice rouge d’Interpol) – C-435/22 PPU Generalstaatsanwaltschaft München (Extradition and <i>ne bis in idem</i>)
Final decision (<i>bis</i>)	<ul style="list-style-type: none"> – C-187/01 and C-385/01 Gözütok and Brüggel – C-469/03 Miraglia – C-150/05 Van Straaten – C-491/07 Turanský – C-261/09 Mantello – C-398/12 M. – C-486/14 Kossowski – C-268/17 AY – C-505/19 PPU Bundesrepublik Deutschland (Notice rouge d’Interpol) – C-203/20 AB and Others – C-117/20 bpost – C-412/21 Dual Prod SRL – C-55/22 Bezirkshauptmannschaft Feldkirch – C-27/22 Volkswagen – C-147/22 Központi Nyomozó Főügyészség – C-726/21 Interconsulting – C-58/22, Parchetul de pe lângă Curtea de Apel Craiova
National remedies	<ul style="list-style-type: none"> – C-234/17 XC and others
Prosecution	<ul style="list-style-type: none"> – C-505/19 PPU Bundesrepublik Deutschland (Notice rouge d’Interpol)
Same facts (<i>idem</i>)	<ul style="list-style-type: none"> – C-436/04 Van Esbroeck – C-150/05 Van Straaten – C-467/04 Gasparini – C-367/05 Kretzinger – C-367/05 Kraaijenbrink – C-261/09 Mantello



	<ul style="list-style-type: none">– C-665/20 PPU X (Mandat d’arrêt européen – <i>Ne bis in idem</i>)– C-790/19 LG and MH (Autoblanchiment)– C-117/20 bpost– C-151/20 Nordzucker and Others– C-435/22 PPU Generalstaatsanwaltschaft München (Extradition and <i>ne bis in idem</i>)– C-365/21 Generalstaatsanwaltschaft Bamberg (Exception au principe <i>ne bis in idem</i>)– C-27/22 Volkswagen– C-164/22 Juan– C-55/22 Bezirkshauptmannschaft Feldkirch– C-726/21 Interconsulting– C-58/22, Parchetul de pe lângă Curtea de Apel Craiova
Same person	<ul style="list-style-type: none">– C-217/15 and C-350/15 Orsi and Baldetti– C-268/17 AY– C-58/22, Parchetul de pe lângă Curtea de Apel Craiova

3. Legal framework

The principle *ne bis in idem* is a fundamental principle of EU law and a fundamental right of the EU (*bpost*). It is enshrined in Article 50 of the Charter and, within the area of freedom, security and justice, in Articles 54 to 58 of the CISA. The principle is also included as grounds for refusal in a large number of EU instruments on judicial cooperation in criminal matters, including for instance Council Framework Decision 2002/584/JHA on the European arrest warrant ('EAW FD'). This principle prohibits a duplication of proceedings and penalties of a criminal nature for the same acts and against the same person, either within the same Member State or in several Member States.

Article 54 of the CISA. *A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party* ⁽¹⁾.

Article 50 of the Charter. *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* ⁽²⁾.

Article 3(2) of the EAW FD. *The judicial authority of the Member State of execution ... shall refuse to execute the European arrest warrant [(EAW)] in the following cases: ... 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.*

Despite the differences in wording and scope of the *ne bis in idem* principle in various provisions of EU law, the CJEU has striven in its case-law for a uniform approach vis-à-vis the *ne bis in idem* principle (*bpost*). As regards the relationship between Article 54 CISA and Article 50 of the Charter, the CJEU has held that Article 54 CISA must be interpreted in light of that provision (*M., Kossowski, XC and others*). Specific differences between Article 54 CISA and Article 50 of the 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) of the Charter (see *infra* 8.1 on enforcement condition and 8.3 on declarations made by Member States under Article 55 of the CISA). The CJEU also clarified that Article 50 of the Charter has direct effect in national legal orders (*Garlsson Real Estate SA, XC and others, Generalstaatsanwaltschaft München (Extradition and ne bis in idem)*). Similarly, the CJEU has held that an interpretation of the *ne bis in idem* principle given in the context of the CISA and of Article 50 of the Charter is equally valid for the purposes of the EAW FD (*Mantello, X (Mandat d'arrêt européen – Ne bis in idem), Juan*).

The *ne bis in idem* principle is also enshrined in Article 4 of Protocol 7 to the ECHR ('Article 4P7 ECHR').

Article 4P7 ECHR. *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 para 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*

⁽¹⁾ To date, Articles 54 to 58 of the CISA are applicable in all Member States, except for Ireland. They are also applicable in the following countries: Iceland, Liechtenstein, Norway, Switzerland and the United Kingdom.

⁽²⁾ The Charter is applicable in all Member States.

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⁾.

There are obvious differences between Article 50 of the Charter and Article 4P7 ECHR, in particular that Article 50 of the Charter applies both within the same Member State and in a cross-border context, while Article 4P7 can only apply within the same State ⁽⁴⁾. Nevertheless, 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 of the Charter does not disregard the level of protection guaranteed by the ECHR in so far as Article 50 of the Charter contains a right corresponding to that provided for in Article 4P7 ECHR (*Orsi and Baldetti, Menci, Garlsson Real Estate SA*). In this regard, it is particularly interesting to note that the CJEU and the ECtHR have already referred, on different occasions, to each other's case-law (see *infra*, 8.2). However, the CJEU held that infringements of Article 50 of the Charter and Article 54 of the CISA do not require a remedy permitting the reopening of criminal proceedings; such remedies are available under national law only in the event of infringements of the ECHR (*XC*).

Case C-261/09, *Mantello*, Judgment of 16 November 2010

- See *infra*, 6.4.

Case C-617/10, *Åkerberg Fransson*, Judgment of 26 February 2013

- See *infra*, 6.1.

Case C-129/14 PPU, *Spasic*, Judgment of 27 May 2014

- See *infra*, 8.1.

Case C-398/12, *M.*, Judgment of 5 June 2014

- See *infra*, 6.4.

Joined Cases C-217/15 and C-350/15, *Orsi and Baldetti*, Judgment of 5 April 2017

- See *infra*, 6.2.

Joined Cases C-187/01 and C-385/01, *Gözütok and Brügge*, Judgment of 11 February 2003

- See *infra*, 6.4.

Case C-436/04, *Van Esbroeck*, Judgment of 9 March 2006

- See *infra*, 4.

Case C-467/04, *Gasparini*, Judgment of 28 September 2006

- See *infra*, 6.3.

Case C-297/07, *Bourquain*, Judgment of 11 December 2008

- See *infra*, 8.1.

⁽³⁾ Two Member States have not ratified Protocol 7 of the ECHR, namely Germany and the Netherlands, and several others have submitted reservations and declarations to its application. The United Kingdom has also not ratified Protocol 7 of the ECHR. See [here](#) for further details.

⁽⁴⁾ See the [Article 4P7 ECHR case-law guide](#), and in particular ECHR, *Krombach v France* (decision). Another difference is the possibility of reopening a case if there is evidence of new or newly discovered facts, which is explicitly mentioned in Article 4P7 ECHR, but is not included in the Charter.

Case C-486/14, Kossowski, Judgment of 29 June 2016

- See *infra*, 6.4.

Case C-524/15, Menci, Judgment of 20 March 2018

- See *infra*, 6.1.

Case C-537/16, Garlsson Real Estate and others, Judgment of 20 March 2018

- See *infra*, 6.1.

Case C-234/17, XC and others, Judgment of 24 October 2018

- **Facts.** In 2012, criminal investigations were opened in Switzerland against XC, YB and ZA for VAT offences and the Swiss public prosecutor submitted mutual legal assistance requests to the Austrian authorities with a view to questioning the suspects. The suspects brought appeals before the Austrian courts contesting the execution of the requests on the grounds that, after the conclusion of criminal proceedings in Germany and Liechtenstein in 2011, the *ne bis in idem* principle under Article 54 of the CISA precluded further prosecutions. The appeals were dismissed by a final decision of the Austrian Regional Court, which found that there was no infringement of *ne bis in idem*. The suspects therefore then applied to the Austrian Supreme Court on the basis of Para 363(a) of the Code of Criminal Procedure for a rehearing of the criminal proceedings on the grounds that the mutual legal assistance requests infringed the principle of *ne bis in idem* under Article 4P7 ECHR, Article 50 of the Charter and Article 54 of the CISA. The Supreme Court noted that such a remedy was only available for infringements of ECHR rights and wondered whether it should also be extended to infringements of fundamental rights under EU law. It therefore referred the case to the CJEU.
- **Main question.** Do the principles of equivalence and effectiveness require national courts to extend a remedy under national law which, in the event of infringements of the ECHR, permits the rehearing of criminal proceedings already closed by a final national decision to infringements of the fundamental right guaranteed in Article 50 of the Charter and Article 54 of the CISA?
- **CJEU's reply.** **The principles of equivalence and effectiveness do not require national courts to extend a remedy under national law which, in the event of infringements of the ECHR, permits the rehearing of criminal proceedings closed by a national decision having the force of res judicata to infringements of the fundamental right guaranteed in Article 50 of the Charter and Article 54 of the CISA.** The CJEU's main arguments were the following.
 - The principle of equivalence prohibits a Member State from laying down less favourable procedural rules for safeguarding rights that individuals derive from EU law than those applicable to similar domestic action (para 25 of the judgment). However, the procedure for reopening criminal proceedings in the event of infringements of ECHR rights cannot be regarded as similar to the actions for protecting fundamental rights which individuals derive from EU law (para 47) because:
 - the procedure laid down by Para 363(a) of the Code of Criminal Procedure is an exceptional remedy justified by the very nature of the ECHR, whereby infringements of the rights it lays down can only be dealt with by the ECtHR after all domestic remedies have been exhausted, i.e. after a national decision with the force of res judicata (paras 29–35);
 - the EU constitutional framework and the judicial system thereby established guarantee everyone the opportunity to obtain effective protection of rights conferred by the EU legal order before a national decision with the force of res judicata comes into existence (paras 36–46).
 - The principle of effectiveness is not infringed, as the fact that it is impossible to request a rehearing of criminal proceedings closed by a final decision on the ground of an infringement of Article 50 of the Charter and Article 54 of the CISA does not make it

impossible in practice or excessively difficult to exercise the rights conferred by the EU legal order (paras 49–59). It should be noted that:

- consideration should be given to the importance of the principle of res judicata in the EU legal order (paras 52–54);
- in the Austrian legal system there are other legal remedies which effectively guarantee the protection of the rights derived from Article 50 of the Charter and Article 54 of the CISA (paras 55–58).

Case C-665/20 PPU, X (*Mandat d'arrêt européen – Ne bis in idem*), Judgment of 29 April 2021

- See *infra*, 6.4. and 9.1.

Case C-117/20, *bpost*, Judgment of 22 March 2022

- See *infra*, 6.1., 6.3., 6.4. and 8.2.

Case C-365/21, *Generalstaatsanwaltschaft Bamberg (Exception au principe ne bis in idem)*, Judgment of 23 March 2023

- See *infra*, 6.3. and 8.3.

Case C-164/22, *Juan*, Judgment of 21 September 2023

- See *infra*, 6.3.

4. The territorial scope of application of the *ne bis in idem* principle

The *ne bis in idem* principle only binds EU Member States and States Parties to the CISA, though in certain situations it may also have some extra-EU effect. The CJEU held that the *ne bis in idem* principle binds Member States and Contracting States also when taking actions within their territories that contribute to the prosecution by third States, such as provisionally arresting a person who is the subject of an Interpol red notice in view of future extradition (*Bundesrepublik Deutschland (Notice rouge d'Interpol)*) or such as executing an extradition request (*Generalstaatsanwaltschaft München (Extradition and ne bis in idem)*), provided that a final decision on the same facts and against the same person was taken in an EU Member State or Contracting State.

Case C-505/19 PPU, *Bundesrepublik Deutschland (Notice rouge d'Interpol)*, Judgment of 12 May 2021

- See *infra*, 7.

Case C-435/22 PPU, *Generalstaatsanwaltschaft München (Extradition and ne bis in idem)*, Judgment of 28 October 2022

- See also *infra*, 6.3. (*idem*)
- **Facts.** A Serbian national was arrested in Germany on the basis of an extradition request by the United States in order to prosecute him for offences committed between 2008 and 2013. In 2012, the requested person had been finally convicted in Slovenia in relation to the same facts committed until 2010 and he had fully served the sentence imposed on him. The referring court, called to rule on the request for extradition, had doubts as to whether the principle of *ne bis in idem* under Article 54 of the CISA and Article 50 of the Charter is applicable in a similar situation and precludes granting extradition, considering in particular that the Germany-USA Extradition Treaty provides for the possibility to refuse extradition on grounds of *ne bis in idem* only where the final judgment was passed in the requested State and not in another Member State.
- **Main question.** Does the *ne bis in idem* principle under Article 54 of the CISA, read in light of Article 50 of the Charter, preclude the extradition by the authorities of a Member State of a third-country national to another third country where, first, that person has been convicted by final judgment in another Member State for the same acts as those referred to in the extradition request, and has been subject to the sentence imposed, and, second, the extradition request is based on a bilateral extradition treaty limiting the scope of the principle *ne bis in idem* to judgments handed down in the requested Member State?
- **CJEU's reply.** Article 54 of the CISA, read in light of Article 50 of the Charter, must be interpreted as precluding the extradition, by the authorities of a Member State, of a third-country national to another third country, where, first, that national has been convicted by final judgment in another Member State for the same acts as those referred to in the extradition request, and has been subject to the sentence imposed in that State, and, second, the extradition request is based on a bilateral extradition treaty limiting the scope of the principle *ne bis in idem* to judgments handed down in the requested Member State. The CJEU's main arguments were as follows:
 - Article 54 of the CISA, read in light of Article 50 of the Charter, precludes the extradition of a third-country national to another third country, where, first, final judgment has been passed by another Member State, as regards that national, in respect of the same acts as those referred to in the extradition request and, second, 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 that other Member State (para 90):

- Article 54 of the CISA is applicable to the execution of an extradition request, since the concept of ‘prosecution’ within the meaning of Article 54 of the CISA covers not only the provisional arrest in view of extradition to a third country, but also the execution of an extradition request, where it constitutes an act of a Member State contributing to the effective prosecution of a criminal offence in the third country concerned (para 70);
- Article 54 of the CISA is applicable to third-country nationals, regardless of the lawfulness of their stay and of whether or not they enjoy a right to freedom of movement (paras 78-80):
 - the wording of Article 54 of the CISA (‘a person’) and of Article 50 of the Charter (‘no one’) do not establish any link with the status of EU citizen (paras 71-74);
 - neither Article 54 nor any other provision of the CISA make the enjoyment of that fundamental right subject to conditions relating to the legal status of the stay of the person concerned or to the benefit of a right of free movement within the Schengen area (paras 80-82);
 - the principle of *ne bis in idem* also aims at ensuring legal certainty by ensuring compliance with decisions of public bodies of the Member States which have become final and the protection of any person whose trial has been finally disposed in one Member State against further prosecution for the same acts in another Member State contributes to the attainment of that objective (paras 84-85);
- It is not possible, in the event of the extradition of a third-country national, to interpret Article 54 of the CISA restrictively in order to ensure effectiveness of prosecutions where there are reservations as to whether the proceedings before the Slovenian courts took into account all the relevant factors and all information available to the United States authorities (para 91):
 - the principle of mutual trust and of mutual recognition require that the relevant competent authorities of the second Member State accept at face value a final decision communicated to them which has been given in the first Member State (paras 92-94);
- The fact that the Germany-USA Extradition Treaty limits the scope of the principle *ne bis in idem* to judgments delivered in the requested State cannot call into question the applicability of Article 54 of the CISA and the national court must disapply any provision of that Treaty which is incompatible with that principle (para 114):
 - the EU-USA Agreement provides a common framework applicable to extradition procedures to the United States, of which the existing bilateral extradition treaties form part, and is applicable to an extradition procedure made on the basis of a bilateral extradition treaty, where the extradition request has been made after its entry into force (para 96-101);
 - the Member States’ power to adopt rules on extradition procedures must be exercised in accordance with EU law, which includes Article 54 of the CISA and Article 50 of the Charter, a provision that has direct effect (paras 106 and 109);
 - the principle of primacy places the national court under a duty to give full effect to Article 54 of the CISA and Article 50 of the Charter, by disapplying of its own motion any provision of the Germany-USA Extradition Treaty, which is incompatible with it, without having to wait for the Federal Republic of Germany to renegotiate that treaty (paras 108 and 110);
 - assuming that an interpretation of the relevant provisions of the Germany-USA Extradition Treaty in accordance with the principle *ne bis in idem* is to be ruled out, under Article 17(2) of the EU-USA Extradition Treaty a binding judicial decision such as the Slovenian judgment is capable of impeding the obligation to extradite on the requested State in a situation in which the bilateral extradition treaty is unable to resolve the issue (paras 112-113);

- The first para of Article 351 TFEU, providing that the bilateral agreements concluded between the Member States and third countries before 1 January 1958 are not to be affected by the provisions of the Treaties, is not applicable to the Germany-USA Extradition Treaty (para 127):
 - the Germany-USA Extradition Treaty was signed on 20 June 1978 (para 117);
 - Article 351 TFEU allows derogations from the application of EU law and as an exception, it is to be interpreted strictly, therefore not also to an agreement concluded after that date but before the date on which the EU became competent in the field covered by those agreements (paras 118-125);
- However, the principle *ne bis in idem* is not intended to be applied where the facts are not identical but merely similar. Therefore, it cannot preclude extradition as regards offences committed outside the period taken into consideration for the conviction passed in another Member State. Also, it cannot cover any offences covered by the extradition request which, although committed during the same period, concern material acts other than those which were the subject of that conviction (paras 128-135).

5. 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 the principle, it is the second prosecution that counts. If the first conviction took place before the CISA had entered into force in that State, Article 54 of the 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*).

Case C-436/04, *Van Esbroeck*, Judgment of 9 March 2006

- See also *infra*, 6.3 (on *idem*).
- **Facts.** Van Esbroeck was sentenced by a Norwegian court to 5 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 1 year's imprisonment for, inter alia, illegally exporting the same narcotic drugs out of Belgium. The conviction was upheld on appeal. An appeal was then brought before the Belgian Court of Cassation, invoking infringement of the *ne bis in idem* principle (Article 54 of the CISA).
- **Main question.** Does Article 54 of the 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 of the 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 were that:
 - the Schengen acquis contains no specific provisions dealing with the entry into force of Article 54 of the CISA or with its effect in time (para 20 of the judgment);
 - the question of the application of Article 54 of the CISA arises only when criminal proceedings are brought for a second time against the same person in another Contracting State (para 21).

6. 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 satisfied for a situation to be considered a *bis in idem*:

- the ‘criminal nature’ requirement, concerning the two sets of proceedings (see *infra*, 6.1);
- the ‘same person’ requirement, concerning the defendant (see *infra*, 6.2);
- the ‘*idem*’ requirement, concerning the same facts (see *infra*, 6.3);
- the ‘*bis*’ requirement, concerning the existence of a final decision (see *infra*, 6.4).

6.1. The ‘criminal nature’ requirement

The application of the *ne bis in idem* principle laid down in Article 50 of the Charter presupposes that the proceedings and penalties concerned are of a criminal nature (*Åkerberg Fransson, Spasic*). The CJEU held that Article 50 of the 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 (*Åkerberg Fransson*). This ‘criminal nature’ requirement is thus particularly relevant in the context of duplication of criminal and punitive administrative sanctions imposed for the same facts at the end of different proceedings (see *infra*, 7.2).

In this respect, the CJEU clarified that three criteria, which are alternative and not cumulative, are relevant for determining whether the proceedings and penalties concerned are criminal in nature: (1) the legal classification of the offence under national law, (2) the intrinsic nature of the offence and (3) the degree of severity of the penalty (*Åkerberg Fransson, Menci, Garlsson Real Estate SA*). So far, the CJEU has addressed administrative sanctions applicable to VAT offences (*Åkerberg Fransson, Menci*), market abuse offences (*Garlsson Real Estate SA, Di Puma and Zecca*), competition law infringements (*Nordzucker and Others, Volkswagen Group Italia and Volkswagen Aktiengesellschaft*), and other types of administrative measures (*bpost, Dual Prod SRL, MV-98*).

ECtHR. When identifying the criteria for determining the criminal nature of a penalty, the CJEU aligned itself with the ‘*Engel* criteria’ developed by the ECtHR (see in particular ECHR, *Engel and others v the Netherlands, Sergey Zolotukhin v Russia* [Grand Chamber (‘GC’)] and the case-law mentioned in the [Article 4P7 case-law guide](#)).

Case C-617/10, *Åkerberg Fransson*, Judgment of 26 February 2013

- **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 in Article 50 of the Charter.

- **Main question.** Should the *ne bis in idem* principle laid down in Article 50 of the 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 of the Charter does not preclude a Member State from imposing successively a tax penalty and a criminal penalty so long as the first penalty is not criminal in nature, a matter which is for the national court to determine.** The CJEU's main arguments were the following:
 - Article 50 of the 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 of the 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 '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);
 - it is for the national court to determine, in light of the three criteria above, whether the administrative penalties are criminal in nature (para 36);
 - 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).

Case C-524/15, *Menci*, Judgment of 20 March 2018

- See also *infra*, 6.3. (on *idem*) and 8.2. (on duplication of criminal and administrative proceedings).
- **Facts.** Italian tax authorities imposed an administrative penalty for failure to pay VAT for the year 2011, equivalent to 30 % of the amount of VAT owed, on Menci, an Italian national. After the conclusion of the administrative proceedings, criminal proceedings were brought against Menci, with respect to the same acts, before the Italian District Court. The Italian court noted that national law does not prevent a person, such as Menci, from being subject to criminal proceedings after having had a final administrative penalty imposed on him. It had doubts about the compatibility of such legislation with Article 50 of the Charter and thus referred the case to the CJEU.
- **Main question.** Is the administrative penalty provided under national law for failing to pay VAT a penalty of criminal nature?
- **CJEU's reply.** **The administrative proceedings and penalties imposed for failure to pay VAT are criminal in nature.** The CJEU's main arguments were the following.
 - Three criteria are relevant for assessing whether a penalty is of a criminal nature. The first criterion is the legal classification of the offence under national law; the second is the intrinsic nature of the offence; and the third is the degree of severity of the penalty that the person concerned is liable to incur (para 27).
 - It is for the referring court to assess, in light of the criteria above, whether the administrative proceedings and penalties at issue are criminal in nature, but the CJEU may nevertheless provide clarification (para 27) such as the following.
 - Although national law classifies the proceedings at issue as administrative, the application of Article 50 of the Charter extends to proceedings and penalties which must be considered to have a criminal nature on the basis of the other two criteria (paras 29 and 30).
 - As regards the second criterion, it must be ascertained whether the purpose of the penalty is punitive, and the mere fact that it also aims to serve as a deterrent does not mean that it cannot be characterised as a criminal penalty (para 31). In this case, it has a punitive purpose, as it is added to the amount of VAT to be paid by the taxable person (para 32).

- As regards the third criterion, the administrative penalty at issue consists of a fine of 30 % of the VAT, which is added to the payment of that tax, and thus it has a high degree of severity (para 33).

Case C-537/16, *Garlsson Real Estate and others*, Judgment of 20 March 2018

- See also *infra*, 8.2. (on duplication of criminal and administrative proceedings).
- **Facts.** In 2007 the Italian National Companies and Stock Exchange Commission imposed an administrative fine on Garlsson Real Estate SA, Mr Ricucci and Magiste International as a result of breaches of the legislation on market manipulation. Following an appeal, the administrative penalty was reduced by the Court of Appeal. The judgment of the Court of Appeal was subsequently appealed before the Italian Supreme Court of Cassation. The same acts of market manipulation also gave rise to criminal proceedings against Mr Ricucci, leading in 2008 to his conviction and sentencing. After the criminal conviction became final, the Supreme Court of Cassation, before which the appeal on the administrative fine was pending, wondered whether the continuation of the proceedings for the imposition of the administrative penalty at issue was compatible with the principle of *ne bis in idem*. It therefore raised a question of constitutionality before the Italian Constitutional Court, which was declared inadmissible. The Supreme Court of Cassation thus referred the case to the CJEU.
- **Main question.** Is the administrative penalty provided under national law for market manipulation one of criminal nature?
- **CJEU's reply.** The administrative proceedings and penalties imposed for failure to pay VAT are criminal in nature. The CJEU's main arguments were the following.
 - Three criteria are relevant for this assessment. The first criterion is the legal classification of the offence under national law; the second is the intrinsic nature of the offence; and the third is the degree of severity of the penalty that the person concerned is liable to incur (para 28).
 - It is for the referring court to assess, in light of the three criteria above, whether the administrative proceedings and penalties at issue are criminal in nature, but the CJEU may provide clarification (para 29), such as the following.
 - Although national law classifies the proceedings at issue as administrative, the application of Article 50 of the Charter extends to proceedings and penalties which must be considered to have a criminal nature on the basis of the other two criteria (paras 31 and 32).
 - As regards the second criterion, it must be ascertained whether the purpose of the penalty is punitive, and the mere fact that it also pursues a deterrence purpose does not mean that it cannot be characterised as a criminal penalty (para 31). In this case, the administrative penalty at issue is not only intended to repair the harm caused by the offence, but is also intended to serve a punitive purpose as, in certain circumstances, it can be increased by up to three times its amount or to an amount up to 10 times greater than the proceeds or profit obtained from the offence, and it always involves the confiscation of the proceeds of the offence (para 32).
 - As regards the third criterion, an administrative penalty which can be up to an amount 10 times greater than the proceeds or profit obtained from the offence has a high degree of severity (para 33).

Joined Cases C-596/16 and C-597/16, *Di Puma and Zecca*, Judgment of 20 March 2018

- See *infra*, 8.2. (on duplication of administrative and criminal proceedings).

Case C-117/20, *bpost*, Judgment of 22 March 2022

- See *infra*, 6.3. (*idem*), 6.4. (*bis*) and 8.2. (duplication of proceedings).

Case C-151/20, *Nordzucker and Others*, Judgment of 29 April 2022

- See also *infra*, 6.3. (*idem*), 8.2. (duplication of proceedings).
- **Facts and main question.** See *infra*, 6.3. (*idem*)
- **CJEU's reply as to the criminal nature of the measures.**
 - As regards the assessment as to whether the proceedings and penalties concerned are criminal in nature, which is a matter for the referring court, three criteria are relevant: the legal classification of the offence under national law, the intrinsic nature of the offence, and the degree of severity of the penalty which the person concerned is liable to incur (para 30);
 - The application of Article 50 of the Charter is not limited to proceedings and penalties which are classified as 'criminal' by national law, but extends regardless of such a classification under national law to proceedings and penalties which must be considered to have a criminal nature on the basis of the two other criteria (para 31);
 - the *ne bis in idem* principle must be observed in proceedings for the imposition of fines under competition law, where it precludes an undertaking's being found liable or the bringing of proceedings against it afresh on the grounds of anticompetitive conduct for which it has been penalised or declared not to be liable by a prior decision that can no longer be challenged (para 32);
 - the *ne bis in idem* principle in proceedings under competition law is subject to a twofold condition, namely, first, that there must be a prior final decision (the '*bis*' condition) and, secondly, that the prior decision and the subsequent proceedings or decisions concern the same conduct (the '*idem*' condition) (para 33).

Case C-412/21, *Dual Prod SRL*, Judgment of 23 March 2023

- See also *infra*, 6.4. (*bis*) and 8.2. (duplication of proceedings).
- **Facts.** On 1 August 2018, a search was carried out at the premises of Dual Prod, a Romanian company active in the production of alcohol and alcoholic beverages subject to excise duty, and criminal proceedings *in rem* were initiated for suspected infringements of the legislation governing goods subject to excise duty. By decision of 5 September 2018, the administrative authority suspended Dual Prod's authorisation to operate as a tax warehouse for products subject to excise duty, for a period of 12 months, on the basis of mere evidence that criminal offences may have been committed under the legislation governing goods subject to excise duty. On 13 December 2019, the Court of Appeal, reduced the length of that suspension to 8 months. That suspension was fully enforced. After Dual Prod was formally charged, on 21 October 2020, in the criminal proceedings, administrative authority once more suspended Dual Prod's authorisation to operate as a tax warehouse for products subject to excise duty for an indefinite period, pending the final outcome of the criminal proceedings. Dual Prod challenged that decision before the referring court, which harbours doubts as to the applicability of the *ne bis in idem* principle in this case.
- **Main question.** See *infra* 8.2 (duplication of proceedings).
- **CJEU's preliminary remarks as to the criminal nature of the measure imposed.** Three criteria are relevant to assess whether the two suspension measures of the company's authorisation to operate as a tax warehouse for products subject to excise duty at issue in the main proceedings may be classified as 'criminal penalties' (para 27):
 - The first criterion is the legal classification of the offence under national law. Even though the suspension measure is not classified as criminal under Romanian law, the application of the provisions of the Charter protecting persons accused in criminal proceedings extends regardless of such a classification under national law to proceedings and penalties which must be considered to have a criminal nature on the basis of the two other criteria (paras 28-29);
 - The second is the intrinsic nature of the offence. In this regard, it must be ascertained whether the measure has a punitive purpose and the mere fact that it also pursues a deterrent purpose does not mean that it cannot be characterised as a criminal penalty:

indeed, criminal penalties seek both to punish and to deter unlawful conduct. By contrast, a measure which merely repairs the damage caused by the offence at issue is not criminal in nature (para 30):

- In the present case, the suspension measures were imposed in parallel with criminal proceedings and are not intended to make good the harm caused by the offence. Nevertheless, they are aimed not at the general public, but at a particular category of addressees who, because they pursue an activity specifically regulated by EU law, must satisfy the conditions required to obtain an authorisation. If the measures at issue consist of suspending the exercise of those prerogatives on the ground that the competent administrative authority held that the conditions for granting the authorisation were no longer satisfied, this would support the finding that such measures do not have a punitive purpose. Such evidence also appears to arise from the fact that the administrative authorities are not required to order the suspension measures at issue (paras 31-34).
 - As regards the first suspension measure, in order to determine whether the reasons for such decisions reveal a preventive or punitive purpose, it must be assessed the reason why the administrative authority decided to suspend the authorisation of that company for a period of 12 months, and the reason why such a period was reduced to 8 months by the court (para 35).
 - As regards the second suspension measure, it should be noted that that measure ceases only at the end of the ongoing criminal proceedings, which appears to be more characteristic of a preventive or precautionary measure than of a punitive measure (para 36).
- The third is the degree of severity of the penalty that the person concerned is liable to incur. Although each of the two suspension measures is likely to have negative economic consequences, they are nevertheless inherent in the preventive or precautionary nature that such measures appear to have and do not, in principle, reach the degree of severity required to be classified as criminal in nature since, in particular, they do not prevent that company from pursuing economic activities that do not require authorisation to operate as a tax warehouse for products subject to excise duty (para 37).

Case C-97/21, *MV – 98*, Judgment of 4 May 2023

- See also *infra*, 8.2. (duplication of proceedings).
- **Facts.** On 9 October 2019, during an inspection at the premises of *MV – 98*, a company whose main activity is the purchase and resale of cigarettes, the Bulgarian tax authorities found that it had failed to record the sale of a packet of cigarettes worth EUR 2.60 and to issue the fiscal receipt relating to that sale. On that basis, a finding of an administrative offence under the law on VAT was established. The tax authorities then adopted two separate measures: a financial penalty and a coercive administrative measure involving sealing the premises for a period of 14 days. *MV – 98* brought an action against the sealing measure before the referring court, claiming that that measure was disproportionate in view of the minimal value of the sale involved and the fact that it was its first offence under the law on VAT. The referring court is uncertain whether the scheme established by Bulgarian law is consistent with Article 50 of the Charter, on the ground that the financial penalty and the placing under seal are imposed following separate and independent procedures, and may be challenged before different courts, without the possibility of staying one set of proceedings until the other is closed, with the result that there is no coordination mechanism to ensure observance of the requirement of proportionality in relation to the seriousness of the offence committed.
- **Main question.** See *infra*, 8.2. (duplication of proceedings).
- **CJEU's preliminary remarks as to the criminal nature of the measures.** Three criteria are relevant to assess whether the proceedings and penalties concerned may be classified as 'criminal' (para 38):

- The first criterion is the legal classification of the offence under national law. Even though the suspension measure is not classified as criminal under Bulgarian law, the application of the provisions of the Charter protecting the persons accused in criminal proceedings extends regardless of such a classification under national law to proceedings and penalties which must be considered to have a criminal nature on the basis of the two other criteria (paras 40-41);
- The second is the intrinsic nature of the offence. In this regard, it must be ascertained whether the measure has a punitive purpose and the mere fact that it also pursues a deterrent purpose does not mean that it cannot be characterised as a criminal penalty. It is of the very nature of criminal penalties that they seek both to punish and to deter unlawful conduct. By contrast, a measure which merely repairs the damage caused by the offence at issue is not criminal in nature (para 42):
 - In the present case, it is apparent that the measures at issue both pursue objectives of deterrence and punishment of VAT-related offences. In particular, the sealing measure is not intended to enable the recovery of tax debts or the gathering of evidence or to prevent the concealment of the latter, but to bring to an end administrative offences committed and to prevent further offences by preventing the trader concerned from operating (paras 43-44);
- The third is the degree of severity of the penalty that the person concerned is liable to incur. In the present case, both measures appear to be of high severity (para 45).

Case C-27/22, *Volkswagen Group Italia and Volkswagen Aktiengesellschaft*, Judgment of 14 September 2023

- See also *infra*, 6.3 (*idem*), 6.4 (*bis*) and 8.2. (duplication of proceedings).
- **Facts.** In 2016, the Italian Competition and Markets Authority ('AGCM') imposed a fine of 5 million euro on the two companies Volkswagen Group Italia ('VWGI') and Volkswagen Aktiengesellschaft ('VWAG') for having implemented unfair commercial practices, related to the marketing in Italy, from 2009, of diesel vehicles in which software had been installed allowing the distortion of the measurement of emission levels during pollutant emissions inspection tests and for having disseminated promotional messages which contained information relating to the attention allegedly paid by those companies to the level of pollutant emissions and to the alleged compliance of those vehicles with the statutory provisions on emissions. VWGI and VWAG brought an action against that decision before the Italian Regional Administrative Court. While that action was pending, in 2018, the Public Prosecutor's Office of Braunschweig in Germany, by a final decision, imposed a fine of EUR 1 billion on VWAG for the manipulation of exhaust gas from certain diesel engines of the Volkswagen group: part of that amount, EUR 5 million, penalised said conduct and the remainder was intended to deprive VWAG of the economic advantage derived from the installation of that software. The German decision was based on the finding that VWAG infringed the law on administrative offences which penalises negligent breaches of the duty of supervision in the activities of undertakings, as regards the development of that emission distortion software and its installation in 10.7 million vehicles sold worldwide, including approximately 700,000 vehicles in Italy. It also found that the lack of supervision of the development and installation of the abovementioned software was one of the causes which contributed to other infringements committed at the global level by VWAG between 2007 and 2015, as regards the promotion of the vehicles and their retail sale, on account of the fact that those vehicles had been presented to the public as vehicles with particularly low emissions. The German decision became final on the same day, since VWAG paid the fine prescribed and formally waived its right to bring an action against that decision. Therefore, in the proceedings pending before the Italian court, VWGI and VWAG alleged that the AGCM decision had subsequently become unlawful on the grounds of infringement of the principle *ne bis in idem* under Article 50 of the Charter and Article of the 54 CISA. In 2019, that court dismissed the appeal on the ground, inter alia, that the principle *ne bis in idem* does not preclude the fine imposed by the AGCM from being

maintained. VWGI and VWAG brought an appeal against that judgment before the Italian Council of State, which nurtured doubts as to whether the *ne bis in idem* principle was applicable in the present case and therefore referred the case to the CJEU.

- **Main question.** Does Article 50 of the Charter mean that an administrative fine imposed on a company by the competent national consumer protection authority for unfair commercial practices, although classified as an administrative penalty under national legislation implementing Directive 2005/29/EC, constitutes a criminal penalty for the purposes of that provision?
- **CJEU's reply. An administrative fine imposed on a company by the competent national consumer protection authority for unfair commercial practices, although classified as an administrative penalty under national legislation, constitutes a criminal penalty, for the purposes of Article 50 of the Charter, where it has a punitive purpose and has a high degree of severity.** The CJEU's main arguments were the following.
 - As regards the assessment as to whether the proceedings and penalties at issue in the main proceedings are criminal in nature, three criteria are relevant: the legal classification of the offence under national law, the intrinsic nature of the offence, and the degree of severity of the penalty (para 45);
 - It is for the referring court to assess, in light of the three criteria above, whether the administrative proceedings and penalties at issue are criminal in nature, but the CJEU may provide clarification (para 26), such as the following:
 - Although national law classifies the penalty at issue as administrative, the application of Article 50 of the Charter extends to proceedings and penalties which must be considered to have a criminal nature on the basis of the other two criteria (paras 47-48).
 - As regards the second criterion, it must be ascertained whether the purpose of the penalty is punitive, and the mere fact that it also pursues a deterrence purpose does not mean that it cannot be characterised as a criminal penalty (para 49). In this case, the penalty at issue is a mandatory penalty that is additional to other measures which may be taken in respect of unfair commercial practices and which include a prohibition on continuing or repeating the practices in question. It does not seem that said penalty is not intended to punish unlawful conduct but only to deprive the relevant undertaking of the unfair competitive advantage which it acquired due to its wrongful conduct vis-à-vis consumers since: the provision contains no reference whatsoever to that potential objective, the fine varies according to the gravity and duration of the infringement in question, and the fact that the law prescribes a minimum and a maximum amount of the fine would likely result in that objective not being achieved where the unfair competitive advantage exceeds the maximum amount, or where it is lower than the minimum amount (paras 50-52);
 - As regards the third criterion, the degree of severity is determined by reference to the maximum potential penalty prescribed by law. In this case, a financial administrative penalty capable of reaching an amount of EUR 5 million has a high degree of severity (paras 53-54).

6.2. The ‘same person’ requirement – natural and legal persons

The application of the *ne bis in idem* principle presupposes, in the first place, that the same person is the subject of the penalties or criminal proceedings at issue (*Orsi and Baldetti*). It is clear from the wording of Article 54 of the CISA and the purpose of Article 3(2) of the Treaty on the European Union (‘TEU’) that only persons who have already had a trial finally disposed of once may benefit 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 (*Gasparini*, see *infra*, 6.3).

The CJEU has also clarified that the *ne bis in idem* principle does not extend to persons who were merely interviewed in the course of a terminated criminal investigation and whose legal situation as criminally liable for the acts constituting the offence being prosecuted has been examined, such as witnesses (*AY, Parchetul de pe lângă Curtea de Apel Craiova*).

To date, only in one judgment has the CJEU interpreted the meaning of the ‘same person’ requirement with regard to the relation between natural person and legal person: it concluded that the requirement is not met when a tax penalty is imposed on a company with legal personality but the criminal proceedings are brought against a natural person – even if the natural person was the legal representative of the company subject to the tax penalty (*Orsi and Baldetti*).

Joined Cases C-217/15 and C-350/15, *Orsi and Baldetti*, Judgment of 5 April 2017

- **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 grounds 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.** Are Article 50 of the Charter and Article 4P7 ECHR to be interpreted as precluding national legislation that allows 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?
- **CJEU’s reply.** **Article 50 of the Charter must be interpreted as not precluding national legislation that 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 the penalty was imposed on a company with legal personality but the criminal proceedings were brought against a natural person.** The CJEU’s main arguments were the following.
 - The application of the *ne bis in idem* principle guaranteed in Article 50 of the Charter presupposes that the same person 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 of changing the conclusion reached in the previous point (para 23).

Case C-268/17, *AY*, Judgment of 25 July 2018

- See *infra*, 6.4 (*bis*).

Case C-58/22, *Parchetul de pe lângă Curtea de Apel Craiova*, Judgment of 25 January 2024

- See *infra*, 6.4. (*bis*).

6.3. The ‘*idem*’ requirement – the same acts

The application of the *ne bis in idem* principle also presupposes that the criminal proceedings at issue concern the same acts. In accordance with the CJEU’s settled case-law, the relevant criterion for assessing the existence of the same acts is the ‘identity of the material facts’, understood as the existence of a ‘set of concrete circumstances which are inextricably linked together in time and space and which have resulted in the final acquittal or conviction of the person concerned’. Accordingly, the legal classification of the offence under national law and the legal interest protected are not relevant for establishing the existence of the same acts (*Van Esbroek, Van Straaten, Gasparini, Kretzinger, Menci, Garlsson Real Estate and Others, bpost, Nordzucker and Others, Volkswagen, Juan, NK, Interconsulting, Parchetul de pe lângă Curtea de Apel Craiova*).

By contrast, the ‘*idem*’ condition is not satisfied where the facts in question are not identical, but merely similar (*LG and MH (Autoblanchiment), bpost, Nordzucker and Others, Generalstaatsanwaltschaft München (Extradition and ne bis in idem), Volkswagen, Juan, Interconsulting*).

The identity of the facts cannot be assessed in the abstract, but it must be assessed with reference to the territory and the time period in which the conduct in question had such an object or effect (*Nordzucker and Others, Generalstaatsanwaltschaft München (Extradition and ne bis in idem), Generalstaatsanwaltschaft Bamberg (Exception au principe ne bis in idem)*). The CJEU thus clarified that where the acts at issue have a cross-border dimension, criminal proceedings concerning the effects/injured parties of a conduct only in one Member State do not prevent other criminal proceedings limited to the effects/injured parties of the same conduct in another Member State, as the two criminal proceedings would then relate only to similar, not identical, facts (*Nordzucker and others, Generalstaatsanwaltschaft München (Extradition and ne bis in idem), Volkswagen, Juan*). In this regard, the mere reference in a judgment to a factual element relating to the territory of another Member State is insufficient to conclude that that judgment extends also to the effects of that conduct in that Member State, unless the court has actually ruled on that factual element to make out the infringement, to establish the liability and, as the case may be, to impose the penalty (*Nordzucker and Others, Volkswagen, Juan*).

Furthermore, the CJEU has clarified that the mere fact that the alleged perpetrator acted with the same criminal intention does not suffice to establish the identity of the acts (*Kraaijenbrink, Interconsulting*). On the other hand, the fact that one criminal offence requires an additional constitutive subjective element as compared to an administrative punitive penalty is irrelevant for assessing the identity of the material facts (*Menci, Garlsson Real Estate and Others*).

The final assessment of the ‘*idem*’ requirement is, however, in the hands of the competent national court. For that purpose, the competent national court must take into consideration not only the facts included in the enacting terms of the procedural documents from the previous criminal proceedings, but also the facts cited in the grounds of the judgment and all relevant information concerning those proceedings (*Interconsulting*). In particular, the competent national court may request relevant legal information from the authority that took the previous decision on the alleged same facts (*Nordzucker and Others, Interconsulting*).

The notion of ‘same acts’ is also applicable in relation to the grounds for non-execution of surrender related to *ne bis in idem* under the EAW Framework Decision (*Mantello, X (Mandat d’arrêt européen – Ne bis in idem), Juan*).

ECtHR. Following the approach taken by the CJEU in *Van Esbroeck*, the ECtHR's case-law also developed towards a factual (and not legal) notion of *idem*: see ECtHR, *Sergey Zolotukhin v Russia* [GC] and the case-law mentioned in the [Article 4P7 case-law guide](#).

Case C-436/04, *Van Esbroeck*, Judgment of 9 March 2006

- See also *supra*, 5. (temporal scope).
- **Facts.** See *supra*, 5.
- **Main question.** What is the relevant criterion for the application of the concept of 'the same acts' within the meaning of Article 54 of the CISA? And, more precisely, are the unlawful acts of *exporting* narcotic drugs from one Contracting State and *importing* those same drugs into another 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 were the following.
 - The wording of Article 54 of the CISA, which mentions the term 'acts' (paras 27 and 28).
 - The TEU does not make the application of Article 54 of the CISA conditional upon harmonisation or approximation (para 29).
 - Article 54 of the 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 of the CISA (paras 32–35).

Case C-150/05, *Van Straaten*, Judgment of 28 September 2006

- See also *infra*, 6.4. (*bis*).
- **Facts.** Mr Van Straaten was prosecuted in the Netherlands for three offences: (1) importing heroin from Italy into the Netherlands, (2) possession of heroin and (3) possession of firearms. He was acquitted of the first charge due to lack of evidence, but was convicted of the other two charges and served his sentence of 20 months' imprisonment. Subsequently, he was prosecuted in Italy for (1) the possession of heroin and (2) exporting heroin from Italy to the Netherlands. He was convicted in Italy *in absentia* and sentenced to a term of imprisonment of 10 years.
- **Main question.** Does Article 54 of the CISA apply in the case of exporting and importing the same narcotic drugs in two Contracting States even if the quantities of the drugs 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 therein 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).

Case C-467/04, *Gasparini*, Judgment of 28 September 2006

- See also *infra*, 6.4. (*bis*).
- **Facts.** Criminal proceedings had been brought in Portugal in 1997 against individuals associated with Minerva, a company that sold olive oil, 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 had come 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.** Must the importation and subsequent sale of goods be considered a single act, or 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 of the CISA** (para 55). The CJEU also repeats that the definitive assessment is a matter for the competent national courts (para 56).

Case C-288/05, *Kretzinger*, Judgment of 18 July 2007

- **Facts.** Mr Kretzinger transported, from non-EU countries, cigarettes that had previously been smuggled into Greece by third parties, and through Italy and Germany by lorry, 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 of 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 was not executed. Finally, a German court, aware of the Italian judgments but emphasising that they had not been executed, convicted Mr Kretzinger and gave him a custodial sentence for the smuggled consignments of cigarettes and the evasion of customs duties. Mr Kretzinger lodged an appeal before the Supreme Court and invoked Article 54 of the 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 of the '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 of the 'same acts' (para 35). It concludes that **the transportation of contraband cigarettes such as those at issue is capable of constituting the 'same acts' but that the final assessment is in hands of the competent national courts** (para 36).

Case C-367/05, *Kraaijenbrink*, Judgment of 18 July 2007

- **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 of the CISA.

- **Main question.** Does the notion of the ‘same acts’ cover different acts consisting, in particular, firstly of holding the proceeds of drug trafficking in one Contracting State and secondly of exchanging at exchange bureaux in another Contracting State sums of money that have 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 and 31). The assessment of the degree of identity and connection between all the factual circumstances is in the hands of the competent national courts (para 32). The CJEU also refers to Article 58 of the 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 grounds that the person charged has already been convicted in another Contracting State of other offences motivated by the same criminal intention (para 34).

Case C-524/15, *Menci*, Judgment of 20 March 2018

- **Facts.** See *supra*, 6.1. (criminal nature).
- **Main question.** Is the failure to pay the VAT resulting from the annual tax return of a certain year, which is punished under national law by both an administrative and a criminal sanction, covered by the notion of the ‘same offence’, even though the criminal offence requires an additional subjective element?
- **CJEU’s reply. Yes.** The CJEU’s main arguments were the following.
 - The CJEU refers to the definition of ‘same acts’ developed in *Kraaijenbrink* (para 35) and recalls that the classification of the facts under national law and the legal interest protected are not relevant (para 36).
 - In this case, the administrative and criminal penalties relate to the same failure to pay the VAT resulting from the tax return for the tax year 2011 (para 37).
 - The fact that the criminal offence requires an additional constituent subjective element in relation to the administrative penalty is irrelevant (para 38).
 - The CJEU also repeats that the definitive assessment is a matter for the competent national courts (para 38).

Case C-537/16, *Garlsson Real Estate and others*, Judgment of 20 March 2018

- **Facts.** See *supra*, 6.1.
- **Main question.** Is the offence of market manipulation that is the object of the criminal and the administrative proceedings at issue covered by the notion of the ‘same offence’ even though the imposition of the criminal penalties requires an additional subjective element?
- **CJEU’s reply. Yes.** The CJEU’s main arguments were the following.
 - The CJEU refers to the definition of ‘same acts’ developed in *Kraaijenbrink* (para 37) and recalls that the classification of the facts under national law and the legal interest protected are not relevant (para 38).
 - In this case, the administrative and criminal proceedings relate to the same conduct of market manipulation intended to draw attention to the securities of RCS MediaGroup (para 39).
 - The fact that the criminal offence requires an additional constituent subjective element in relation to the administrative penalty is irrelevant (para 40).

- The CJEU also repeats that the definitive assessment is a matter for the competent national courts (para 40).

Case C-665/20 PPU, X (*Mandat d'arrêt européen – Ne bis in idem*), Judgment of 29 April 2021

- See also *infra*, 8.1. (enforcement condition).
- **Facts.** X was arrested in the Netherlands on the basis of an EAW issued by the local court of Berlin for the purposes of prosecuting him for facts committed in Germany and amounting to the attempted murder of his partner and her minor daughter, rape of his partner, severe mistreatment of his partner and deprivation of liberty of his partner and her minor daughter. Before the executing court, X opposed his surrender relying on the *ne bis in idem* principle and arguing that he had already been finally judged in respect of those same facts in a third country, Iran. According to the findings of the executing court, X has been prosecuted in Iran for the aforementioned acts, with the exception of the daughter's deprivation of liberty, which has nevertheless been classified as attempted murder as regards its material elements. He was irrevocably convicted for some of the charges and irrevocably acquitted for others. Under Iranian law, X had to serve a prison sentence of seven years and six months. X has served most of this sentence, but the remainder of the sentence has been remitted as part of a general 'pardon' issued by the Supreme Leader of Iran on the occasion of the 40th anniversary of the Islamic Revolution. The Amsterdam court harbours doubts as to whether these circumstances are covered by the ground for refusal under Article 4(5) of the EAW FD and thus referred the case to the CJEU.
- **Main questions.** Must the concept of 'same acts', contained in Article 3(2) and Article 4(5) of the EAW FD be interpreted uniformly?
- **CJEU's reply. Article 3(2) and Article 4(5) of the EAW FD must be interpreted as meaning that the concept of 'same acts', contained in both provisions, must be interpreted uniformly.** The CJEU's main arguments were the following.
 - **The concept of 'same acts', contained in Article 3(2) and Article 4(5) of the EAW FD must be interpreted uniformly.**
 - Article 4(5), like Article 3(2), makes no express reference to the law of the Member State; therefore, in accordance with settled case-law, it must also be given an autonomous and uniform interpretation (para 72);
 - In *Mantello*, the Court clarified that the concept of 'same facts' also appears in Article 54 CISA and, in view of its shared objective with that of Article 3(2), it must be interpreted in the same way, as referring only to the nature of those acts, encompassing a set of concrete circumstances which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected (para 71);
 - Wording: Article 4(5) and Article 3(2) share the same wording (para 73);
 - Context: the fact that Article 3(2) concerns judgments delivered in the EU, while Article 4(5) those delivered in a third State, cannot justify a different interpretation. It is precisely because the high level of trust that exists between Member States cannot be presumed as regards third States that the fact that the requested person has been finally judged in a third State is listed in the grounds of optional rather than mandatory non-execution. Moreover, the executing judicial authority must have a margin of appreciation when applying Article 4(5), thereby when determining whether it is appropriate to refuse the execution of the EAW, it is able to take into account the trust which it may legitimately place in the criminal system of the third State concerned. Furthermore, to confer on Article 4(5) a narrower scope than Article 3(2) would be hard to reconcile with Article 54 CISA which shares the same scope and is applicable also to some third countries that have acceded to it (paras 76-81);

- Purpose of Article 4(5): like Article 3(2), it is intended to ensure the legal certainty for the requested person by taking into account, within the allowed margin of appreciation, that the requested person was finally judged in a third State (para 82).

Case C-790/19 LG and MH (*Autoblanchiment*), Judgment of 2 September 2021

- **Facts.** In 2018, LG was convicted for the offence of money laundering in relation to funds derived from the offence of tax evasion committed by LG himself. The criminal proceedings relating to tax evasion were closed after LG had repaid the amounts due. Appeals were brought against that judgment before the referring court, which harbours doubts as to whether the perpetrator of the predicate offence can be also the perpetrator of the offence of money laundering or whether this would be incompatible with the principle of *ne bis in idem*. Therefore, it sought an interpretation of the CJEU of Article 1(2)(a) of Directive 2005/60 which provides for the offence of money laundering.
- **Main question.** Is Article 1(2)(a) of Directive 2005/60 to be interpreted as precluding national legislation which provides that the offence of money laundering, within the meaning of that provision, may be committed by the perpetrator of the criminal activity which generated the money in question?
- **CJEU's reply.** **Article 1(2)(a) of Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing must be interpreted as not precluding national legislation which provides that the offence of money laundering, within the meaning of that provision, may be committed by the perpetrator of the criminal activity from which the money concerned was derived.** The CJEU's main arguments were the following.
 - Such interpretation, which applies also to Article 1(3)(a) of Directive 2015/849, which simply replaced Article 1(2)(a) of Directive 2005/60 without making any substantial amendment, **is not incompatible with the principle of *ne bis in idem* enshrined in Article 50 of the Charter** (para 72):
 - Article 50 of the Charter does not preclude the perpetrator of the predicate offence from being prosecuted for the offence of money laundering referred to in Article 1(2)(a) of Directive 2005/60 where the facts in respect of which the prosecution is brought are not identical to those constituting the predicate offence (para 81);
 - The relevant criterion for the purposes of assessing the existence of the same offence is identity of the material facts, understood as the existence of a set of concrete circumstances which are inextricably linked together and which resulted in the final acquittal or conviction of the person concerned. Moreover, 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 (paras 77-80);
 - Money laundering, within the meaning of Article 1(2)(a) of Directive 2005/60, namely, inter alia, the conversion or transfer of property, knowing that such property is derived from criminal activity or from an act of participation in criminal activity, for the purpose of concealing or disguising the illicit origin of the property, constitutes an act distinguishable from the predicate offence, even if that money laundering is carried out by the perpetrator of the predicate offence (para 82);
 - In the present case, it is for the referring court to examine whether Article 50 of the Charter is applicable and, accordingly, to determine whether the predicate offence was the subject of criminal proceedings in which the perpetrator was finally acquitted or convicted. In order to ensure that Article 50 of the Charter is observed, the referring court must satisfy itself that the material facts constituting the predicate offence, namely tax evasion, are not identical to those that led to the prosecution brought for money laundering. There would be no infringement of the principle *ne bis in idem* if it is found that the facts which led to the criminal proceedings for money laundering are not identical to those constituting the

predicate offence of tax evasion, as it appears from the documents before the Court (paras 84-85).

Case C-117/20, *bpost*, Judgment of 22 March 2022

- See also *infra*, 6.1. (criminal nature), 6.4. (*bis*) and 8.2. (duplication of proceedings).
- **Facts.** By judgment of 10 March 2016, the Brussels Court of Appeal annulled the decision of 20 July 2011 of the Belgian Postal Regulator imposing a fine of EUR 2.3 million on *bpost* for infringement of the non-discrimination rule in relation to tariffs, on the ground that the new tariff system established by *bpost* from 2010 was based on an unjustified difference in treatment as between consolidators and direct clients. In the meantime, on 10 December 2012, the Belgian Competition Authority determined that *bpost* had committed an abuse of a dominant position, consisting in the adoption and implementation of the new tariff system in the period between January 2010 and July 2011, which had an exclusionary effect on consolidators and *bpost*'s potential competitors and a loyalty building effect on its main clients, and fined *bpost* EUR 37.399.786 for that abuse, the fine previously imposed by the Postal Regulator having been taken into account in the calculation of that amount. By judgment of 10 November 2016, the Brussels Court of Appeal annulled the Competition Authority's decision because it was contrary to the *ne bis in idem* principle. By judgment of 22 November 2018, the Court of Cassation set aside that judgment and referred the case back to the Brussels Court of Appeal, which referred the case to the CJEU for a preliminary ruling.
- **Main question.** See *infra*, 8.2. (duplication of proceedings);
- **CJEU's findings on the 'idem' condition.** The relevant criterion for assessing the existence of the same offence is the 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 (para 33):
 - Also in the field of EU competition law, the legal classification under national law of the facts and the legal interest protected are not relevant, in so far as the scope of the protection conferred by Article 50 of the Charter cannot vary from one Member State to another, nor, unless otherwise provided by EU law, from one field of EU law to another (paras 34-35);
 - The '*idem*' condition requires the material facts to be identical. By contrast, the *ne bis in idem* principle is not intended to be applied where the facts in question are not identical but merely similar (paras 36-37):
 - In the present case, it is for the referring court to determine whether the facts in respect of which the two sets of proceedings were initiated are identical, by examining the facts taken into account in each of those proceedings, as well as the infringement period alleged (para 38).

Case C-151/20, *Nordzucker and Others*, Judgment of 29 April 2022

- See also *supra*, 6.1. (criminal nature) and *infra* 8.2. (duplication of proceedings).
- **Facts.** The German and Austrian competition authorities started in parallel administrative proceedings against two German companies active in the sugar market for having infringed Article 101 TFEU. By a final judgement of 18 February 2014, the German court imposed a fine on the companies. As a result of the German final decision, the Austrian court dismissed the action brought by the Austrian authority, on the grounds that the agreement at issue had already been subject to a penalty imposed by another national competition authority, with the result that a fresh penalty would be contrary to the *ne bis in idem* principle. The referring court, deciding on appeal against that decision, is nurturing doubts as to whether the *ne bis in idem* principle is applicable in the case at hand.
- **Main question.** Does Article 50 of the Charter preclude an undertaking from having proceedings brought against it by the competition authority of a Member State and fined for an infringement of

Article 101 TFEU on the basis of conduct which has had an anticompetitive object or effect in the territory of that Member State, where that conduct has already been referred to, by a competition authority of another Member State, in a final decision which that authority has adopted in respect of that undertaking, following infringement proceedings under Article 101 TFEU?

➤ **CJEU's reply. Article 50 of the Charter does not preclude an undertaking from having proceedings brought against it by the competition authority of a Member State and fined for an infringement of Article 101 TFEU, on the basis of conduct which has had an anticompetitive object or effect in the territory of that Member State, even though that conduct has already been referred to by a competition authority of another Member State, in a final decision adopted by that authority in respect of that undertaking following infringement proceedings under Article 101 TFEU, provided that that decision is not based on a finding of an anticompetitive object or effect in the territory of the first Member State.** The CJEU's main arguments were the following.

- The '*idem*' condition: if the German authority's final decision did not find that the cartel at issue in the main proceedings existed, and penalise it, on the basis of the cartel's anticompetitive object or effect in Austrian territory, the proceedings before the Austrian court do not relate to the same facts (para 47):
 - The criterion for assessing the existence of the same offence is the 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 (para 38);
 - 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 also in the field of EU competition law, inasmuch as the scope of the protection conferred by that provision cannot, unless otherwise provided by EU law, vary from one field of EU law to another (paras 39-40);
 - The identity of the facts cannot be assessed in the abstract, but must be examined with reference to the territory and the product market in which the conduct in question had such an object or effect and to the period during which the conduct in question had such an object or effect (para 41);
 - It is for the referring court to determine whether the dispute before it relates to the same facts as those which led to the adoption of the German authority's final decision, having regard to the territory, product market and period covered by that decision and for that purpose it may request access, from a competition authority of another Member State, to a decision adopted by that authority and its content (para 42):
 - The mere fact that the German decision refers to a factual element relating to the territory of another Member State is insufficient to conclude that that factual element was one of the constituent elements of the infringement. It must also be ascertained whether that authority has actually ruled on that factual element in order to make out the infringement, to establish the liability for that infringement of the person against whom proceedings were brought and, as the case may be, to impose a penalty on that person, such that the infringement is to be regarded as encompassing the territory of that other Member State (para 44);
 - It is important to consider whether the assessments made by the German authority related exclusively to the German sugar market or also to the Austrian sugar market. It is also relevant whether, in order to calculate the fine on the basis of the turnover achieved in the market affected by the infringement, the German authority took as the basis for its calculation only the turnover achieved in Germany (para 46);

- If, the referring court were to hold that the German authority's final decision did not find that the cartel at issue existed, and penalise it, on the basis of the cartel's anticompetitive object or effect in Austrian territory, that court should rule that the proceedings before it do not relate to the same facts as those giving rise to the German authority's final decision, with the result that the principle *ne bis in idem*, within the meaning of Article 50 of the Charter, would not preclude new proceedings being brought and, where appropriate, new penalties being imposed (para 47);
- If, conversely, the referring court were to hold that the German authority's final decision did find that the cartel at issue existed, and penalised it, on the basis also of the cartel's anticompetitive object or effect in Austrian territory, that court should rule that the proceedings before it do relate to the same facts as those giving rise to the German authority's final decision. Such a duplication of proceedings would amount to a limitation of the fundamental right guaranteed in Article 50 of the Charter (para 48).

Case C-435/22 PPU, *Generalstaatsanwaltschaft München (Extradition and ne bis in idem)*, Judgment of 28 October 2022

- See also *supra*, 4. (territorial scope).
- **Facts.** A Serbian national was arrested in Germany on the basis of an extradition request by the United States in order to prosecute him for offences committed between 2008 and 2013. In 2012, the requested person had been finally convicted in Slovenia in relation to the same facts committed until 2010 and he had fully served the sentence imposed on him. The referring court, called to rule on the request for extradition, had doubts as to whether the principle of *ne bis in idem* under Article 54 of the CISA and Article 50 of the Charter is applicable in a similar situation and precludes granting extradition.
- **Main question.** See *supra* 4 (territorial scope).
- **CJEU's findings on the 'idem' condition.** The principle *ne bis in idem* is not intended to be applied where the facts are not identical but merely similar. Therefore, it cannot preclude extradition as regards offences committed outside the period taken into consideration for the conviction passed in another Member State. Also, it cannot cover any offences covered by the extradition request which, although committed during the same period, concern material acts other than those which were the subject of that conviction (paras 128-135).

Case C-365/21, *Generalstaatsanwaltschaft Bamberg (Exception au principe ne bis in idem)*, Judgment of 23 March 2023

- See also *infra*, 8.3. (declarations made by Member States).
- **Facts.** MR was sentenced by final judgment of a court in Austria to 4 years of imprisonment for serious commercial fraud and money laundering. After serving part of that sentence, he was released on parole for the remainder of the sentence and on the same date, he was remanded in custody in Austria in execution of a German EAW issued for the purposes of prosecution. In the German proceedings, he is accused of forming a criminal organisation and investment fraud, for setting up, in association with other persons, a fraudulent investment scheme to the detriment of investors in various European countries, including Germany and Austria. MR's appeal against that EAW for breach of the *ne bis in idem* principle, laid down in Article 54 of the CISA, was dismissed by a German court on the grounds that, since the sentence handed down in Austria covered only fraud committed to the detriment of injured parties residing in Austria, whereas the prosecution now in Germany related to fraud committed against injured parties residing in Germany, the acts with which those

two proceedings were concerned were different. Furthermore, the *ne bis in idem* principle would not be applicable because MR was being prosecuted for the offence of forming a criminal organisation under Para 129 Criminal Code, which is covered by the declaration made by Germany under Article 55(1)(b) when ratifying the CISA. The German appellate court, called to review that decision, is wondering whether that declaration is still valid in light of Article 50 and 52 of the Charter.

- **Main question.** See *infra*, 8.3. (declarations made by Member States).
- **CJEU's findings on the 'idem' condition.** If the sentence already handed down in Austria relates solely to the acts of fraud committed against the injured parties residing in Austria, and not to those that were detrimental to persons residing in Germany it cannot be concluded that the earlier definitive Austrian decision related to the same acts as those covered by the prosecution brought against him in Germany (para 43):
 - 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 (para 37);
 - 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 (para 38);
 - the accused is alleged to have formed and participated in a criminal organisation which had a cross-border dimension and whose activities caused thousands of victims residing in Germany and in Austria, to suffer financial damage (para 40);
 - if it is ascertained by the referring court that the sentence already handed down in Austria relates solely to the acts of fraud committed against the injured parties residing in Austria, that earlier decision might be considered to have been related to similar acts, which, however, is not sufficient for the '*idem*' condition to be regarded as being satisfied (para 43).

Case C-27/22, Volkswagen Group Italia and Volkswagen Aktiengesellschaft, Judgment of 14 September 2023

- See also *supra*, 6.1. (on criminal nature) and *infra*, 6.4. (bis) and 8.2. (on duplication of criminal and administrative proceedings).
- **Facts.** See *supra*, 6.1.
- **Main question.** See *infra*, 6.4.
- **CJEU's findings as to the 'idem' condition.** As regards the '*idem*' condition, the relevant criterion for the purposes of assessing the existence of the same offence is the 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, Article 50 of the Charter prohibits the imposition, with respect to identical facts, of several criminal penalties as a result of different proceedings. Moreover, 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 (paras 64-67).
 - In this case, the referring court considers that there is 'similarity, if not identity' in the conduct to which the decision at issue and the German decision relate. However, the principle *ne bis in idem* may apply only where the facts to which the two sets of proceedings relate are identical. It is therefore not sufficient that the facts be merely similar (paras 68-70).
 - Although it is for the referring court to assess whether the two proceedings concern the same facts, the Court may nevertheless provide the following clarification (para 71):
 - the relaxation of supervision of the activities of an organisation established in Germany, to which the German decision relates, is conduct that is distinct from the marketing in Italy of vehicles fitted with an illegal defeat device and from the

dissemination of misleading advertising in that Member State, to which the decision at issue relates (para 72);

- insofar as the German decision refers to the marketing of vehicles fitted with such an illegal defeat device, including in Italy, and to the dissemination of incorrect promotional messages concerning the sales of those vehicles, the mere fact that an authority of a Member State, in a decision finding an infringement of law, refers to a factual element relating to the territory of another Member State is insufficient to conclude that that factual element gave rise to the proceedings or was found by that authority to be one of the constituent elements of that infringement. It must also be ascertained whether that authority has actually ruled on that factual element in order to make out the infringement, to establish the liability for that infringement of the person against whom proceedings were brought and, as the case may be, to impose a penalty on that person, such that the infringement is to be regarded as encompassing the territory of that other Member State (para 73, with reference to *Nordzucker and Others*);
- nonetheless, the German decision took into account the sales of such vehicles in other Member States, including Italy, when calculating the penalty imposed. Furthermore, the German decision expressly states that the principle *ne bis in idem*, as enshrined in the German Constitution, precludes the imposition of subsequent criminal penalties on the Volkswagen group in Germany with regard to the defeat device in question and its use. Indeed, according to the German public prosecutor's office, the facts to which that decision relates are the same facts as those concerned by the decision at issue, since the installation of the abovementioned device, the obtaining of type approval and the promotion and sale of the relevant vehicles constitute a set of concrete circumstances which are inextricably linked together (paras 74-75).
 - Should the referring court find that the facts which are the subject of the two sets of proceedings are identical, the duplication of penalties imposed on VWAG would constitute a limitation of the application of the principle *ne bis in idem* (para 76).

Case C-164/22, *Juan*, Judgment of 21 September 2023

- **Facts.** A Spanish national was chairman of the board of directors both of a Portuguese company and of a Spanish company, which controlled entirely the former. The main activity of the two companies was the same: the marketing of investment products which concealed a fraudulent pyramid scheme. The Spanish national is serving a prison sentence in Spain for serious fraud and money laundering which was imposed on him by a judgment of 2018 that became final in 2020. In 2020, he was also sentenced in Portugal to 6 years and 6 months in prison for serious fraud and in 2021, Portugal issued an EAW against him towards Spain for the purpose of executing that sentence. In December 2021, the National High Court of Spain refused to execute that EAW on the grounds that the requested person was a Spanish national, while deciding that he would serve in Spain the sentence imposed in Portugal. The requested person, who brought an appeal against that order, claimed that the EAW may not be executed, and the Portuguese judgment may not be enforced due to an infringement of the principle of *ne bis in idem*. According to him, the facts on which the Spanish judgment is based are the same as those that form the subject of the Portuguese judgment. In that regard, the referring court specifies that the Spanish judgment mainly concerns fraud committed by the Spanish company in Spain, while the Portuguese judgment mainly applies to the activities carried out by the Portuguese company in Portuguese territory alone. Furthermore, the injured persons, as referred to in each of those two judgments, are not identical and those responsible for the acts are only identical in part. Thus the referring court is inclined to consider that the '*idem*' condition appears not to be satisfied. However, it must nevertheless be held that there is a set of criminal acts

in the present case which may be classified as a ‘continuing criminal offence’ within the meaning of Spanish criminal law, which would cover all of the acts, including those committed in Portugal, and a single sentence should be applied to them.

- **Main question.** Does Article 3(2) of the EAW FD preclude the execution of an EAW where the offence on which it is based and the offence for which the requested person has been finally judged in the executing Member State are, in accordance with the law of the executing Member State, to be classified as a ‘continuing criminal offence’?
- **CJEU’s reply.** **Article 3(2) EAW FD precludes the execution of an EAW issued by a Member State where the requested person has already been finally judged in another Member State and is serving a prison sentence there for the offence established in that judgment, provided that that person is being prosecuted in the issuing Member State in respect of the same acts, without it being necessary, in order to establish the existence of the ‘same acts’, to take account of the classification of the offences in question under the law of the executing Member State.** The CJEU’s main arguments follow.
 - Article 3(2) EAW FD reflects the *ne bis in idem* principle enshrined in Article 50 of the Charter, according to which no one may be tried or punished twice in criminal proceedings for the same criminal offence (para 28, with reference to *AY*).
 - In order for that principle to apply, there must be identity of the material facts, which is understood as a set of concrete circumstances stemming from events which are, in essence, the same, in that they are inextricably linked together in time and space, irrespective of the legal classification given to them or the legal interest protected. By contrast, the principle of *ne bis in idem* is not intended to be applied where the facts at issue are not identical, but merely similar (paras 31–33, with reference to *Generalstaatsanwaltschaft Bamberg*).
 - The mere reference in a judgment to a factual element relating to the territory of another Member State is insufficient to conclude that the facts are identical. It must also be ascertained whether the court has actually ruled on that factual element in order to make out the offence, to establish the liability for that offence and, as the case may require, to impose a penalty on that person, such that the offence is to be regarded as encompassing the territory of that other Member State (para 34, with reference to *Nordzucker and Others*).
 - In the present case, subject to verification by the referring court, it appears that the facts referred to in the Spanish and Portuguese judgments are not inextricably linked together and thus not identical (para. 35, with reference to *Generalstaatsanwaltschaft Bamberg*):
 - The requested person repeated in Portugal the fraudulent activity he was carrying out in Spain: although those activities followed the same operating method, they were nevertheless carried out by separate legal entities, one pursuing the fraudulent activity in Spain and the other pursuing the fraudulent activity in Portugal. In addition, there is only occasional overlap between the acts committed in Portugal and those committed in Spain, since the fraudulent activity in Portugal continued after an investigation was opened and activity in Spain ceased. The injured persons were also different. The Spanish judgment concerns the fraudulent activity carried out in Spain to the detriment of persons residing in Spain, while the Portuguese judgment concerns the activity carried out in Portugal to the detriment of persons residing in Portugal (para 36).
 - The fact raised by the referring court that the offences committed in Spain and those committed in Portugal should be classified as a ‘continuing criminal offence’ under Spanish law cannot affect that conclusion, in so far as Article 3(2) EAW FD requires an assessment of the material facts on the basis of objective factors, irrespective of their classification in national law (para 37).

Case C-55/22, *Bezirkshauptmannschaft Feldkirch*, Judgment of 14 September 2023

- See also *infra*, 6.4. (*bis*) and 8.2. (duplication of proceedings).
- **Facts and main question.** See *infra*, 6.4.
- **CJEU's findings as to the 'idem' condition.** As regards the '*idem*' condition, the relevant criterion for the purposes of assessing the existence of the same offence is the identity of the material facts, understood as the existence of a set of concrete circumstances which are inextricably linked together in time, in space and by their subject matter, which resulted in the final acquittal or conviction of the person concerned. By contrast, the principle *ne bis in idem* is not to be applied where the facts in question are not identical but merely similar. Moreover, 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 (paras 56-59):
 - In the present case, the two sets of criminal proceedings concerned material facts that were, in essence, identical, *inter alia* by virtue of their links in time and space: it follows from the inspection carried out at the establishment belonging to NK that four gaming machines were set up, even though no licence had been issued for their operation. The fact that NK was tried, first, in the context of the first set of criminal proceedings, for making prohibited lotteries available in the course of business, and then, in the context of the second set of criminal proceedings, for arranging such lotteries, has no bearing on the finding of the existence of 'the same offence' (para 61).

Case C-726/21, *Interconsulting*, Judgment of 12 October 2023

- See also *infra*, 6.4. (*bis*).
- **Facts.** On 28 September 2015, the Pula County Court in Croatia upheld an indictment accusing, first, GR and Interco of breach of trust in commercial transactions, and, secondly, HS and IT of having incited and aided the commission of that offence. In particular, between December 2004 and June 2006, GR and HS worked together so that Interco purchased immovable property envisaged by Skiper Hoteli for a real-estate project for tourist accommodation and subsequently ensured that Skiper Hoteli bought that immovable property at a price significantly above the market price, so that Interco benefited from an unlawful advantage at the expense of Skiper Hoteli. Two of the accused, GR and HS, were also subject to criminal proceedings in Austria. In accordance with the Austrian indictment issued in 2015, GR and HS were accused of having incited, by having sought the grant of those loans, the former members of the management board of Hypo Alpe Adria Bank to commit the offence of breach of trust or of having aided in its commission for having approved, between September 2002 and July 2005, the grant of loans to Skiper Hoteli, without having either complied with the requirements relating to the provision of sufficient own funds or the monitoring of the use of the funds. By judgment of the Austrian Court of 3 November 2016, which became final in 2019, the two former members of the management board of Hypo Alpe Adria Bank were found guilty in part of the acts of which they were accused and convicted for having approved one of the loans granted to Skiper Hoteli. Conversely, GR and HS were acquitted in relation to the charge alleging that they had, respectively, incited or contributed to the commission of the criminal offences of which the former members of the management board of Hypo Alpe Adria Bank were accused. Furthermore, the Austrian Public Prosecutor's Office conducted a preliminary investigation into whether the immovable property purchased with the loan at issue was purchased at too high a price when the real estate project envisaged by Skiper Hoteli was realised, but terminated that investigation in respect of GR and HS and merely informed them, by means of a notification, that the preliminary investigation against them relating to the 'Skiper case' was brought to an end in so far as it was not covered by the Austrian indictment, on the grounds of insufficient evidence. Thus, the Austrian Public Prosecutor's Office terminated that investigation on the basis of facts that are not specified in the operative part of the Austrian final judgment. The referring court submits that there might be, as regards GR and HS, an 'inextricable link in substance, space and time' between the facts referred to

in the enacting terms of the Croatian indictment and the facts referred to in the enacting terms of the Austrian indictment, those referred to in the operative part and grounds of the Austrian final judgment and those in respect of which the preliminary investigation was conducted by the Austrian Public Prosecutor's Office and which were subsequently omitted from the Austrian indictment. However, in accordance with Croatian case-law, only facts set out in the enacting terms of procedural documents, such as orders dismissing the proceedings, indictments and judgments, are final and can be compared in the context of the application of the principle *ne bis in idem*.

- **Main question.** Does Article 54 of the CISA, read in the light of Article 50 of the Charter, mean that, when assessing whether the principle *ne bis in idem* has been complied with, only the facts cited in the enacting terms of the indictment drawn up by the competent authorities of another Member State and in the operative part of the final judgment delivered in that Member State are to be taken into consideration, or account must also be taken of all facts cited in the grounds of that judgment, including those that were the subject of the preliminary investigation, but which were not included in the indictment?
- **CJEU's reply.** When assessing whether the principle *ne bis in idem* has been complied with, it is necessary to take into consideration not only the facts cited in the enacting terms of the indictment and in the operative part of the final judgment delivered in another Member State, but also the facts cited in the grounds of that judgment, including those that were the subject of the preliminary investigation, but which were not included in the indictment, and all relevant information concerning the material facts covered by previous criminal proceedings conducted in that other Member State and concluded by a final decision. The CJEU's main arguments follow.
 - A national court cannot be required to take into consideration, in the context of the examination of the principle *ne bis in idem* set out in Article of the 54 CISA, only the facts mentioned in the enacting terms of procedural documents from another Member State (para 53):
 - Wording of Article 54 of the CISA and Article 50 of the Charter. It does not lay down a condition relating to the factors to be taken into consideration in the examination of the same acts. Thus, it cannot be inferred that, account should be taken only of the facts set out in the enacting terms of national procedural documents and that it is not possible to take into consideration facts mentioned in the grounds of the procedural documents (paras 46-49);
 - Context of those provisions. A national judicial practice that requires to have regard only to specific parts of procedural acts to the exclusion of any other information which might be received from the authorities of the first Member State does not guarantee the effectiveness of Article 57 of the CISA, which puts in place a cooperation mechanism allowing the competent authorities of the second Member State to request relevant legal information from the authorities of the first Member State, in order to clarify, for example, the precise nature of an adopted decision or the specific acts to which that decision relates (paras 50-52);
 - Only such an interpretation allows the subject matter and purpose of Article 54 of the CISA to prevail over procedural or purely formal matters, which vary as between the Member States concerned, and to ensure that the article has proper effect (para 54).
 - Article 54 of the CISA necessarily implies that the Member States have mutual trust in their respective criminal justice systems and that mutual trust requires that the competent authorities of the second Member State agree to take into account relevant legal information that they might receive from the first Member State (paras 56-58).
 - The '*idem*' condition requires that the material facts be identical, which is understood as 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. By

contrast, the principle *ne bis in idem* is not intended to be applied where the facts at issue are not identical, but merely similar (paras 74-75):

- The mere fact that the court before which the second prosecution is brought finds that the alleged perpetrator acted with the same criminal intention does not suffice to indicate the identity of the facts (para 76);
- Secondly, the principle *ne bis in idem* cannot cover any offences which, although committed during the same period as those which were the subject of a final decision handed down in another Member State, concern material facts other than those which were the subject of that decision (para 81);
- In the present case, the Croatian indictment concerns offences allegedly committed by GR and HS between 2004 and 2006. Secondly, the criminal investigation to which GR and HS were subject in Austria, which was closed by the Klagenfurt Public Prosecutor's Office, concerned material facts that took place from 2002 to July 2005 (para 77);
- It is for the referring court to ascertain, on the basis of an assessment of all the relevant circumstances, whether the Austrian final judgment and any final decision of the Klagenfurt Public Prosecutor's Office to close the investigation related, first, to acts amounting to economic loss allegedly caused by GR and HS to Skipper Hoteli as a result of the acquisition of land at increased prices and, secondly, to the same infringement period as that covered by the Croatian indictment (para 82).

Case C-58/22, *Parchetul de pe lângă Curtea de Apel Craiova*, Judgment of 25 January 2024

- See *infra*, under 6.4. (*bis*).

6.4. The ‘bis’ requirement – a final decision

According to Article 54 of the CISA, a person’s trial must have been ‘finally disposed of’. Similarly, Article 50 of the Charter applies to a person who has already been ‘finally acquitted or convicted’. The exact meaning of this wording has raised many questions, and the CJEU has clarified that two elements are necessary in order for a decision to be regarded as final for the purposes of *ne bis in idem*.

First, it is necessary for the decision at stake to **definitively bar further prosecution at the national level** (*Turanský, Mantello, M., Kossowski, Központi Nyomozó Főügyészség, Interconsulting*). This assessment must be carried out on the basis of the law of the Member State in which that ruling was made (*M., Kossowski, Interconsulting*). In the framework of that assessment, a judicial authority can request that the judicial authority of a Member State in whose territory a decision was taken provide legal information on the precise nature of that decision (*Turanský, Mantello, Interconsulting*). The CJEU has also clarified that the possibility under national law of reopening the criminal investigation if new facts/evidence become available does not preclude the initial decision from being regarded as a ‘final’ decision (*M., Kossowski, Központi Nyomozó Főügyészség*). Also, the fact that the decision at issue was taken by a prosecuting authority without the involvement of a court (*Gözütök and Brügge, Kossowski, AY, Bundesrepublik Deutschland (Notice rouge d’Interpol), Interconsulting, Parchetul de pe lângă Curtea de Apel Craiova*), even where no penalty was enforced (*Kossowski, Központi Nyomozó Főügyészség*), is not a decisive factor for the purposes of ascertaining whether that decision definitively bars prosecution. 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 of the CISA or Article 3(2) of the TEU, 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*).

Second, it is necessary that the decision at stake be **given ‘after a determination has been made as to the merits of the case’**, that is following an assessment of the criminal liability of the person concerned as the suspected offender (*Miraglia, Van Straaten, M., Kossowski, AB and Others (Révocation d’une amnistie), Központi Nyomozó Főügyészség*) and not merely on procedural grounds (*Parchetul de pe lângă Curtea de Apel Craiova*). This condition is satisfied only where that decision contains an evaluation of the material elements of the offence alleged (*Parchetul de pe lângă Curtea de Apel Craiova*). The CJEU held that an acquittal or a decision of *non-lieu* (i.e. a finding that there were no grounds to refer the case to a trial court for lack of evidence) also satisfies this requirement (*Van Straaten, M., Központi Nyomozó Főügyészség, Interconsulting*). However, when a decision is based on lacking or insufficient evidence, it is also necessary that such decision has been preceded by a detailed investigation (*Kossowski, Központi Nyomozó Főügyészség, Parchetul de pe lângă Curtea de Apel Craiova*). At the same time, the CJEU underlined that the finding of a lack of a detailed investigation must constitute an exception rather than the rule and that, in order to reach such finding, there is an obligation to first seek the assistance of the authority who took said decision in clarifying the applicable national law and the reasons for the discontinuation (*Központi Nyomozó Főügyészség*).

To date, the CJEU has accepted as ‘final decision’ an out-of-court settlement with the public prosecutor (*Gözütök and Brügge, Bundesrepublik Deutschland (Notice rouge d’Interpol)*), 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*), a decision of *non-lieu* (*M.*) and a prosecutor’s decision to close the pre-trial investigation taken after a detailed investigation, even though the suspect was not heard (*Központi Nyomozó Főügyészség*).

On the other hand, the CJEU rejected the application of Article 54 CISA/Article 50 Charter on the grounds of a lack of final nature of the decision, 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*), cases where a decision by the public prosecutor to terminate the criminal proceedings against a person was adopted without a detailed investigation having been undertaken (*Kossowski*, *Parchetul de pe lângă Curtea de Apel Craiova*), cases where the public prosecutor closed criminal investigations against unknown persons/*in rem* and the person involved was only interviewed as a witness (*AY*, *Parchetul de pe lângă Curtea de Apel Craiova*) and cases where the proceedings were discontinued on the basis of an amnesty adopted before any determination as to the criminal liability of the person concerned (*AB and Others* (*Révocation d'une amnistie*)).

Finally, the CJEU clarified that, in case of two decisions against the same person for the same facts, the decisive element is which decision became final first, even if that decision was adopted subsequently to that which has not yet acquired the force of *res judicata* (*Volkswagen*).

ECtHR. The CJEU expressly referred to the ECtHR *Zolotukhin* judgment when it concluded that the possibility under national law of reopening the criminal investigation if new facts/evidence become available does not preclude the decision from being regarded as 'final' (*M.*).

The case-law of the ECtHR also provides some further guidance on the interpretation of the 'finality' requirement. In the *Zolotukhin* judgment, 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. 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. In this regard, in *Mihalache v Romania* [GC] the ECtHR clarified that a remedy by which a higher-ranking prosecutor, on its own motion and without being bound to any time limit, can discard the decision of a lower-ranking prosecutor to close the proceedings is to be regarded as an extraordinary remedy and thus does not affect the final nature of that decision.

In the *Mihalache* judgment, the ECtHR referred to the CJEU's case-law (*Kossowski*) and held that for a decision to be final it is also necessary that it be taken after a determination as to the merits of the case. It also clarified that judicial intervention is not necessary in this respect. In *Smoković v Croatia* (decision), the ECtHR held that a decision terminating the proceedings due to the expiry of the statutory limits does not involve any investigation of the charges brought against the defendant, but it is based merely on procedural reasons and therefore cannot be regarded as final. Also, in the ECtHR's case-law, a public prosecutor's decision not to prosecute cannot be regarded as final (*Mihalache*). In the same vein, in the case-law of the ECtHR, the *ne bis in idem* principle is not applicable where criminal proceedings are terminated on the basis of an amnesty for acts which amounted to grave breaches of fundamental rights, such as war crimes against the civilian population (*Marguš v Croatia* (GC)). Furthermore, in *Sabalić v Croatia*, the ECtHR considered that the failure to investigate hate motives behind a violent attack and to take into consideration such motives in determining the punishment for violent hate crimes, amounted

to ‘fundamental defects’ in the proceedings under Article 4 § 2 of Protocol No 7, therefore allowing for their reopening to the detriment of the accused.

For further details, see the [Article 4P7 case-law guide](#).

Joined Cases C-187/01 and C-385/01, *Gözütok and Brügge*, Judgment of 11 February 2003

- See also *infra*, 8.1. (enforcement condition).
- **Facts.** In the *Gözütok* case, a German judicial authority prosecuted an individual for an offence of selling narcotic drugs committed in the Netherlands; however, a 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 ongoing in a Belgian criminal court despite the conclusion of a settlement between the perpetrator and a German judicial authority.
- **Main question.** Does Article 54 of the CISA apply in the 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 were the following:
 - 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 (the State's right to punish has been exercised) (para 29);
 - once the accused has complied with the obligations imposed, the penalty must be regarded as having been enforced (para 30);
 - the application of Article 54 of the 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 each other's 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 objective and purpose of Article 54 of the CISA and the principle of *effet utile* (paras 35-40).

Case C-469/03, *Miraglia*, Judgment of 10 March 2005

- **Facts.** Criminal investigations were conducted by the Italian and Dutch authorities in cooperation against Mr Miraglia for his involvement in transporting drugs between the two 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 grounds 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, which argued that such requests would go against Article 54 of the CISA as the Dutch decision not to prosecute the defendant was a ‘final decision’ in the meaning of Article 54 of the CISA.
- **Main question.** Does Article 4 of the CISA apply to a decision by 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 grounds 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 of the CISA does not apply to such decisions.** The CJEU's main argument were that:
 - it is the only interpretation that is in line with the objective and purpose of Article 54 of the CISA, that can ensure the *effet utile* of the article and that reflects the very purpose of the relevant TEU provisions concerning the area of freedom, security and justice (paras 31, 32 and 34);
 - any other interpretation would make it more difficult, or even impossible, to actually penalise, in the Member States concerned, the unlawful conduct with which the defendant is charged (para 33).

Case C-150/05, *Van Straaten*, Judgment of 28 September 2006

- See also *supra*, 6.3. (*idem*).
- **Facts.** See *supra*, 6.3.
- **Main question.** Does Article 54 of the CISA apply in respect of a court decision by which the accused is acquitted due to lack of evidence?
- **CJEU's reply. The *ne bis in idem* principle applies in respect of a decision by the judicial authorities of a Contracting State by which the accused is acquitted finally due to lack of evidence.** The CJEU's main arguments were that:
 - the wording of Article 54 of the 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 merely 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).

Case C-467/04, *Gasparini*, Judgment of 28 September 2006

- See also *supra*, 6.3. (*idem*).
- **Facts.** See *supra*, 6.3.
- **Main question.** Does Article 54 of the CISA apply in respect of a decision by 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 of the CISA applies in respect of a decision by 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 were that:
 - it follows from the wording of Article 54 of the CISA that the *ne bis in idem* principle is not solely applicable to judgments convicting the accused (paras 23 and 24);
 - a different 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 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 each other's criminal justice systems and each 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).

Case C-491/07, *Turanský*, Judgment of 22 December 2008

- **Facts.** Criminal proceedings were instituted in Austria against Mr Turanský, a Slovak national suspected of having carried out, *inter alia*, a serious robbery of an Austrian national in Austria. Since

the requested person was in his country of origin, Austria asked Slovakia to reopen proceedings against him. Slovakia agreed and the criminal proceedings in Austria were stayed pending the final decision in Slovakia. 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 of the 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 that had been instituted?
- **CJEU's reply.** **Article 54 of the CISA does not apply to such a decision, provided that the suspension decision does not, under the national law of that State, definitively bar further prosecution and therefore does not preclude new criminal proceedings, in respect of the same acts, in that State.** The CJEU's main arguments were that:
 - 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 and 36);
 - the cooperation mechanism included in Article 57 of the 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 and 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 of the CISA and with the relevant TEU provisions concerning the area of freedom, security and justice (paras 41–44).

Case C-261/09, *Mantello*, Judgment of 16 November 2010

- **Facts.** An EAW was issued for Mr Mantello in the context of criminal proceedings instituted against him in Italy for having participated in a criminal organisation and for drug-related offences. The German judicial authorities wondered whether the execution of the EAW 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 completed his sentence. When asked for information, the Italian judicial authorities explained that the conviction did not preclude the further criminal investigations mentioned in the EAW. 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 had evidence concerning acts which constituted the offences referred to in the EAW, but did not submit that evidence for consideration to the court when that court ruled on the individual acts, make it possible to treat the judgment as if it were a final judgment in respect of the acts set out in that EAW and thus to apply the mandatory grounds for non-execution (Article 3(2) of the EAW FD)?
- **CJEU's reply.** **The executing judicial authority cannot apply the mandatory *ne bis in idem* non-execution grounds 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) of the EAW FD, expressly stated that the earlier judgment delivered under its legal system did not constitute a final judgment covering the acts referred to in the EAW that it issued and therefore did not preclude the criminal proceedings referred to in that EAW.** The CJEU's main arguments were that:
 - the 'finality' criterion included in Article 3(2) of the EAW FD 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 against that person in respect of the same acts in one of the Member States of the European Union (para 47);

- the EAW FD includes cooperation arrangements so that the executing judicial authority can request legal information from the issuing judicial authority 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 and 50).

Case C-398/12, *M.*, Judgment of 5 June 2014

- **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 produced a finding that there were no grounds on which to refer the case to a trial court, due to insufficient evidence (i.e. a decision of *non-lieu*). This decision was confirmed at appeal and a further appeal was dismissed by the Court of 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 of the CISA apply to a decision of *non-lieu* if that decision precludes, in the Contracting State in which that decision was made, new criminal proceedings in respect of the same acts against the person to whom the 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 purposes of Article 54 of the CISA, which precludes new proceedings against the same person in respect of the same acts in another Contracting State.** The CJEU’s main arguments were the following.
 - The decision of *non-lieu* was given after a determination as to the merits of the case. It is a definitive decision based 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 of the CISA must be read in light of Article 50 of the 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 purposes 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 nevertheless involves the exceptional bringing of separate proceedings based on different evidence rather than the mere continuation of proceedings that have already been closed. Moreover, such an exceptional possibility of reopening can only be brought in the Contracting State in which the order was made (paras 40 and 41).

Case C-486/14, *Kossowski*, Judgment of 29 June 2016

- **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 grounds that it was prevented from doing so by the *ne bis in idem* principle. A Polish public prosecutor’s office had already opened a criminal investigation procedure

against Mr Kossowski 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 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.** May a decision of the public prosecutor terminating criminal proceedings and finally closing the investigation procedure against a person — albeit with the possibility of its being reopened or annulled if previously unknown essential circumstances come to light - without any penalties having been imposed, be characterised as a final decision for the purposes of those articles, when that procedure was closed without a detailed investigation having been carried out?
- **CJEU's reply. The decision of the Polish prosecutor was not 'final' in the meaning of Article 54 of the CISA.** The CJEU's main arguments were the following.
 - Article 54 of the CISA requires, first of all, further prosecution to have been definitively barred, meaning that the decision 'precludes any further prosecution' under the law of the State that has taken the decision (paras 34 and 35). In the present case, under Polish law, the decision of the Polish public prosecutor precluded any further prosecution in Poland (paras 36 and 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).
 - Secondly, Article 54 of the CISA requires the decision to have been given 'after a determination has been made as to the merits of the case'. In light of the objective and context of Article 54 of the CISA and in light of Article 3(2) of the TEU, this requirement is not fulfilled in a situation in which:
 - the prosecuting authority did not undertake a more detailed investigation for the purposes of gathering and examining evidence;
 - 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 the victim and hearsay witness in the course of the investigation and had 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 only prosper 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).

Case C-268/17, AY, Judgment of 25 July 2018

- See also *supra*, 6.2. (same person).
- **Facts.** AY is a Hungarian national against whom criminal proceedings were initiated in Croatia in 2011 in relation to active corruption. The competent Hungarian authority was requested to provide international legal assistance by interviewing AY as a suspect and delivering a summons to him. No action was taken on that request by Hungary, on the grounds that the execution of the request would have affected Hungarian national interests. Consequently, the Croatian investigation was suspended in December 2012. On the basis of the information communicated by the Croatian authorities, the Hungarian authorities opened their own investigation in 2011. This investigation, which was opened, not against AY as a suspect, but only in connection with the criminal offence, against an unknown person, was terminated in 2012 on the grounds that the acts committed did not constitute

a criminal offence under Hungarian law. In the context of the Hungarian investigation, AY had been interviewed as a witness only. In 2013, after Croatia's accession to the EU and before criminal proceedings were initiated in Croatia, Croatia issued an EAW against AY. The execution of that EAW was refused by Hungary on the grounds that criminal proceedings had already been brought in Hungary in respect of the same acts and those proceedings had been halted. In 2015, following AY's indictment in Croatia, a new EAW was issued, which was, however, never executed by Hungary. The referring Croatian court had doubts as to the interpretation of the grounds for non-execution laid down in Article 3(2) and Article 4(3) of the EAW FD.

- **Main question.** Must Article 3(2) of the EAW FD be interpreted as meaning that a decision by a public prosecutor's office that terminated an investigation opened against an unknown person, during which investigation the person who is the subject of an EAW was interviewed as a witness only, may be relied on for the purposes of refusing to execute the EAW?
- **CJEU's reply. Article 3(2) of the EAW FD (mandatory grounds for non-recognition) cannot be relied upon in the present case.** The CJEU's main arguments were the following:
 - this provision reflects the *ne bis in idem* principle, enshrined in Article 50 of the Charter (para 39);
 - this provision requires the requested person to have been 'finally judged' (para 40), which implies that criminal proceedings had previously been instituted against the requested person (para 43, with reference to *Mantello*);
 - the principle does not extend to persons who were merely interviewed in the course of a criminal investigation, such as witnesses (para 44);
 - as no criminal proceedings were brought against AY, he cannot be considered to have been finally judged within the meaning of Article 3(2) of the EAW FD (para 45).

Case C-505/19 PPU, *Bundesrepublik Deutschland (Notice rouge d'Interpol)*, Judgment of 12 May 2021

- See *infra*, 7. (prosecution).

Case C-203/20, *AB and Others (Révocation d'une amnistie)*, Judgment of 16 December 2021.

- **Facts.** In Slovakia, former members of the Slovak security services were accused of having committed a series of offences in 1995, including the abduction of the son of the then Slovak President. In 1998, an amnesty covering those offences was issued. The criminal proceedings instituted in connection with the offences in question were brought to a definitive end in June 2001. Under Slovak legislation, this closure of prosecution had the same effect as a judgment of acquittal. In 2017, the National Council of the Slovak Republic revoked that amnesty, and the Slovak Constitutional Court subsequently found that the Council's resolution was compliant with the constitution. The criminal proceedings that had been brought to an end by the amnesty were then reopened. The Slovak district court before which those proceedings have been brought intends to issue an EAW against one of the accused persons.
- **Main question.** Must Article 50 of the Charter be interpreted as precluding the issue of an EAW against a person who was subject to a criminal prosecution that was initially discontinued by a final judicial decision adopted on the basis of an amnesty, and resumed following the adoption of a law revoking that amnesty and setting aside that judicial decision?
- **CJEU's reply. Article 50 of the Charter does not preclude the issue of an EAW against a person who was subject to a criminal prosecution that was initially discontinued by a final judicial decision adopted on the basis of an amnesty, and resumed following the adoption of a law revoking that amnesty and setting aside that judicial decision, if that decision was adopted**

before any determination as to the criminal liability of the person concerned. The CJEU's main arguments follow.

- To determine whether a judicial decision constitutes a decision finally disposing of the case against a person, it is necessary, inter alia, to be satisfied that the decision was taken after a determination had been made as to the merits of the case (para 56):
 - By analogy, see the CJEU's case-law on Article 54 of the CISA (para 56).
 - This interpretation is in line with the wording of Article 50 of the Charter. The terms 'convicted' and 'acquitted' imply that the accused person's criminal liability has been examined and a determination has been made (para 57).
 - This interpretation is in line with the objective to prevent the impunity of persons who have committed an offence, as provided for in Article 3(2) TEU (para 58).
- In the present case, it would appear that the sole effect of the decision was to discontinue criminal prosecutions before the Slovak courts could rule on the accused persons' criminal liability; however, the final assessment lies with the referring court (para 60).

Case C-117/20, *bpost*, Judgment of 22 March 2022

- See also *supra*, 6.1. (criminal nature), 6.3. (*idem*) and *infra*, 8.2. (duplication of proceedings).
- **Facts and main question.** See *supra*, 6.3. and *infra*, 8.2.
- **CJEU's findings on the 'bis' condition.** In order for a judicial decision to be regarded as having given a final ruling on the facts subject to a second set of proceedings, that decision must not only have become final but must also have been taken after a determination has been made as to the merits of the case (para 29):
 - In the present case, the Belgian Postal Regulator's decision was annulled by a judgment which has acquired the force of *res judicata* and according to which *bpost* was acquitted in the proceedings brought against it under rules governing the postal sector (para 30).

Case C-412/21, *Dual Prod SRL*, Judgment of 23 March 2023

- See *supra*, 6.1. (criminal nature) and *infra*, 8.2. (duplication of proceedings).

Case C-55/22, *Bezirkshauptmannschaft Feldkirch*, Judgment of 14 September 2023

- See also *supra*, 6.3. (*idem*) and *infra*, 8.2. (duplication of proceedings).
- **Facts.** By decision of 19 February 2018, the Austrian Administrative Authority, imposed on NK an administrative penalty on the grounds that, as the operator of the establishment subject to an inspection, he had made available in the course of business prohibited lotteries. By decision of 13 August 2018, the referring court annulled that decision and terminated the proceedings on the grounds that, on the basis of the findings of fact, NK had not made available games of chance, within the meaning of the relevant national law provisions, but had rather arranged such games. Subsequently, by decision of 30 November 2018, the Administrative Authority imposed on NK an administrative penalty on the grounds that he had arranged in that establishment prohibited lotteries. By decision of 4 July 2019, the referring court annulled that second decision on the grounds that the Administrative Authority had punished NK again for the same acts, simply by adopting another legal classification in respect of those acts in violation of the principle *ne bis in idem*. By decision of 14 June 2021, the Supreme Administrative Court annulled such decision on the grounds that the decision of 13 August 2018 did not preclude the criminal proceedings brought in order to establish whether the second type of offence had been committed from being continued and, thus, NK from being punished for that offence. The referring court, that is once again being called upon to give a ruling, referred the question to the CJEU.

- **Main question.** Does Article 50 of the Charter preclude the imposition of a penalty of a criminal nature on a person for an infringement of a provision of national legislation, if that person has already been the subject of a judicial decision which has become final, given at the end of a hearing with the taking of evidence, and which resulted in that person being acquitted of an infringement of a different provision of that legislation in respect of the same acts?
- **CJEU's reply.** Article 50 of the Charter precludes the imposition of a penalty of a criminal nature on a person for an infringement of a provision of national legislation, if that person has already been the subject of a judicial decision which has become final, given at the end of a hearing with the taking of evidence, and which resulted in that person being acquitted of an infringement of a different provision of that legislation in respect of the same acts. The CJEU's main arguments follow.
 - The referring court observes that the proceedings and penalties at issue in the main proceedings are criminal in nature for the purposes of Article 50 of the Charter, under the three criteria developed by the CJEU (para 47);
 - 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, secondly, that the prior decision must concern the same acts (the '*idem*' condition) (para 48);
 - As regards the '*bis*' condition, in order to determine whether a judicial decision constitutes a decision finally disposing of the case against a person, it is necessary, *inter alia*, to be satisfied that that decision was taken after a determination had been made as to the merits of the case (para 51):
 - In the present case, the referring court took its decision in the light of a determination as to the merits of the case. The first penalty was annulled by the decision of the court of 13 August 2018 that acquired the force of *res judicata*, adopted following a hearing in which the facts were investigated and the evidence enabled the court to conclude that NK had not made prohibited games of chance available in the course of business and that that decision produces, under national law, the effects of a decision of acquittal. Lastly, that court found that NK had arranged such games, but did not impose a penalty in that regard (paras 52-53).

Case C-27/22, Volkswagen Group Italia and Volkswagen Aktiengesellschaft, Judgment of 14 September 2023

- See also *supra*, 6.1. (criminal nature), 6.3. (*idem*) and *infra* 8.2. (duplication of proceedings).
- **Facts.** See *supra*, 6.1.
- **Main question.** Does the principle *ne bis in idem* enshrined in Article 50 of the Charter preclude national legislation which allows an administrative fine of a criminal nature imposed on a legal person for unfair commercial practices to be maintained where that person has been the subject of a criminal conviction in respect of the same facts in another Member State, even if that conviction is subsequent to the date of the decision imposing that fine but became final before the judgment in the judicial proceedings brought against that decision acquired the force of *res judicata*?
- **CJEU's reply.** The principle *ne bis in idem* enshrined in Article 50 of the Charter precludes national legislation which allows a fine of a criminal nature imposed on a legal person for unfair commercial practices to be maintained where that person has been the subject of a criminal conviction in respect of the same facts in another Member State, even if that conviction is subsequent to the date of the decision imposing that fine but became final before the judgment in the judicial proceedings brought against that decision acquired the force of *res judicata*. The CJEU's main arguments were the following.
 - 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) (para 57);

- As regards the *bis* condition, in order for a judicial decision to be regarded as having given a final ruling on the facts subject to a second set of proceedings, that decision must not only have become final but must also have been taken after a determination has been made as to the merits of the case (para 58, with reference to *bpost*). Subject to determination by the referring court, it appears that the proceedings which led to the adoption of the German decision were disposed of by a final decision (para 63):
 - While it is true that the principle *ne bis in idem* presupposes the existence of a prior final decision, it does not necessarily follow that the subsequent decisions precluded by that principle can only be those which were adopted after that prior final decision. Where a final decision exists, that principle precludes criminal proceedings in respect of the same facts from being initiated or maintained (para 59);
 - The German decision became final after the Italian decision to impose an administrative penalty was taken by AGCM. Although the German decision could not be relied upon in order to preclude the proceedings conducted by AGCM and the Italian decision at issue for as long as it had not become final, that was not the case once the German decision became final at a time when the Italian decision was not yet final (para 60);
 - The fact that the German decision became final after VWAG paid the fine prescribed and waived its right to challenge it cannot call that finding into question. The principle *ne bis in idem* applies once a decision of a criminal nature has become final, irrespective of the manner in which that decision has become final (para 61).
 - It appears that the German decision was taken after a determination had been made as to the merits of the case (para 62).
- As regards the '*idem*' condition, see *supra*, 6.3.;
- Should the referring court find that the facts which are the subject of the two sets of proceedings at issue are identical, the duplication of penalties imposed on VWAG would constitute a limitation of the application of the principle *ne bis in idem* enshrined in Article 50 of the Charter (para 76).

Case C-147/22, *Központi Nyomozó Főügyészség*, Judgment of 19 October 2023

- **Facts.** In 2012, the Austrian prosecutor brought criminal proceedings against the defendant, a Hungarian national, on suspicion of corruption for facts occurred between 2005 and 2010 involving bribes of millions of euro to public officials, who remained unknown, through several companies established in different Member States to influence the awarding of a public contract for the supply of new trains for the metro line of Budapest. The suspicions were based on information provided by the United Kingdom via a mutual legal assistance request, on the analysis of banking data of an Austrian company and on the interviews of two additional Austrian suspects. The accused was not interviewed as a suspect, as the investigative measures seeking to locate him proved unsuccessful. In 2014, the Austrian prosecutor ordered the discontinuation of the pre-trial investigation on the grounds that there were no real grounds for continuing the criminal proceedings, since there was no evidence that the accused had committed the offence. That decision was reviewed but the conditions for continuing the proceedings provided under Austrian law had not been met since the corruption alleged against the accused had been time-barred from 2015. In 2019, a Hungarian prosecutor filed an indictment for corruption against the accused before the Budapest High Court, which, in 2020 discontinued those proceedings in accordance with the principle *ne bis in idem*, since they concerned the same acts subject to the Austrian investigation. In 2021, that order was set aside by the Budapest Regional Court of Appeal on the grounds that the Austrian decision discontinuing the investigations could not be regarded as a final decision for the purposes of the principle *ne bis in idem*. The Budapest

High Court, to whom the case was referred back to, thus decided to refer it to the CJEU for a preliminary ruling.

- **Main question.** Does the principle *ne bis in idem* mean that a decision to acquit an accused person, taken in one Member State, following an investigation, must be classified as a final decision, where that person is prosecuted again for those same acts in a second Member State and:
 - the decision was taken by the public prosecutor without the imposition of a penalty and without the intervention of a court and was based on the finding that there was no evidence to show that the accused person had committed the offence;
 - under national law, notwithstanding the finality of such an acquittal, the public prosecutor has the discretion to continue the proceedings under strictly defined conditions, such as the emergence of significant new facts or evidence, provided that, in any event, the offence is not time-barred; and
 - during the investigation, the public prosecutor gathered information without, however, questioning the accused, since the measure of investigation having the nature of a coercive constraint intended to locate him proved unsuccessful?
- **CJEU's reply.** The principle *ne bis in idem* enshrined in Article 54 of the CISA, read in light of Article 50 of the Charter means that a decision to acquit an accused person taken in one Member State, following an investigation, must be classified as a final decision where:
 - it was taken by the public prosecutor without the intervention of a court and was based on the finding that there was no evidence to show that the accused person had committed the offence;
 - under the applicable national law, notwithstanding the finality of such an acquittal, the public prosecutor has the discretion to continue the proceedings under strictly defined conditions, such as the emergence of significant new facts or evidence, and provided that, in any event, the offence is not time-barred; and
 - during the investigation, the public prosecutor gathered information without, however, questioning the accused person, who is a citizen of another Member State, since the measure of investigation having the nature of a coercive constraint aimed at locating him or her proved unsuccessful.

In this context, the fact that the accused person was not questioned may be taken into account along with any other relevant evidence revealing the absence of a detailed investigation in the first Member State, provided that it is established that, in the circumstances of the case, it was reasonably a matter for the public prosecutor of the first Member State to take a measure of investigation ensuring that the accused person was actually questioned which, clearly, could have adduced new facts or evidence capable of casting doubt, to a significant extent, on the merits of a decision to acquit. The CJEU's main arguments were the following.

- As regards the '*bis*' condition, in order for a trial to be regarded as having been 'finally disposed of', two requirements must be met (para 28, with reference to *Kossowski*):
 - Firstly, **further prosecution must be definitively barred:**
 - This requirement is also applicable to the decision of a public prosecutor definitively discontinuing the criminal proceedings, although adopted without the involvement of a court and not in the form of a judgment (para 29, with reference to *Turansky*);
 - It must be assessed on the basis of the national law of the Member State that took such decision, which gives rise, in that State, to the protection conferred by the principle *ne bis in idem*. The fact that, under the applicable national law, criminal proceedings closed by an acquittal may be reopened in the event of 'new or newly discovered facts', such as new evidence, does not call into question its definitive nature, since that possibility of reopening, if it does not constitute an 'extraordinary remedy', nevertheless involves the exceptional bringing of separate proceedings based on different evidence, rather than the mere

continuation of proceedings which have already been closed (para 30, with reference to *M*):

- In the present case, that requirement is met for the following reasons (para 38):
 - under Austrian law, the decision of the public prosecutor to discontinue the proceedings has the effects of a decision which is final, in accordance with the principle *ne bis in idem* (para 37);
 - The fact that Austrian law allows the continuation of the proceedings where ‘new facts or evidence arise and appear to justify the conviction of the accused’, cannot call into question the definitive nature of that decision (para 31);
 - The same applies to the other possibility for continuing the procedure under Austrian law, strictly circumscribed to where ‘the accused was not questioned and no restriction was imposed on him or her in that regard’, – a possibility not open to the public prosecutor, since a ‘constraint’ was brought against him in the form of a measure of investigation aimed at locating him, which proved unsuccessful (paras 32-33).
 - The exceptional nature of those possibilities is reinforced by the fact that a reopening of the procedure is not, in any event, possible if, in the meantime, the offence is time-barred, as was the case here (para 34).
 - The decision of the prosecutor not to make use of one or other of those possibilities on the grounds that the conditions for doing so were not met also cannot call into question the definitive nature of that decision (para 36).
- Secondly, **the decision must have been given following a ‘determination of the merits of the case’**:
 - the fact that the decision to close the proceedings was taken on the grounds that there was no evidence to show that the accused had actually committed the offence does not mean that this condition is not satisfied; on the contrary, an acquittal for lack of evidence is based on an assessment of the merits of the case (para 39, with reference to *Van Straaten*);
 - however, a prosecutor’s decision to close the investigation cannot be held to have been given after a determination as to the merits of the case when it is clear from the reasons stated in that decision that there was no detailed investigation, as otherwise the mutual trust between the Member States could be undermined (para 44, with reference to *Kossowski*);
 - Nevertheless, the finding of the lack of a detailed investigation must constitute the exception rather than the rule (para 53):
 - only in exceptional cases can the second Member State conclude that there is no detailed investigation in the first Member State, where it is apparent from the terms and reasons of said decision that it was not preceded by any actual investigation or assessment of the criminal liability of the accused or that, under the applicable national law, that decision was essentially taken for purely procedural reasons or for reasons of expediency, economy or judicial policy (paras 52-53);
 - The objective of Article 54 of the CISA and the principles of mutual trust and mutual recognition preclude the prosecutor of the second Member State from carrying out a detailed examination of that investigation in order to determine, unilaterally, whether it is sufficiently detailed (paras 54-55);
 - Where the second Member State has serious and specific doubts as to the thoroughness of the investigation, in light of the facts and evidence which were available or which could have been available by taking the measures of

investigation reasonably required, the prosecutor will have to request the assistance of the prosecutor of the first Member State, in particular on the applicable national law and the reasons for the decision to acquit, by having recourse, for example, to the cooperation mechanism provided in Article 57 of the CISA, since, also in the context of the application of the principle *ne bis in idem*, the principle of sincere cooperation under Article 4(3) TEU imposes an obligation on the Member States to assist each other (paras 56-57).

- In the present case, the circumstances listed below tend to confirm that the Austrian investigation is not manifestly lacking in detail, but it is for the referring court to assess the detailed nature of that investigation in light of all relevant evidence, which may also include the fact that the accused was not questioned as a suspect (paras 58-59):
 - In contrast to *Kossowski*, during an investigation which lasted 2 years, the prosecutor had access to bank accounts via a mutual legal assistance request to the United Kingdom and to other bank accounts, those cash flows were analysed and two other suspects were interviewed. Furthermore, after a coordination meeting at Eurojust, the United Kingdom informed the Austrian prosecutor that there was no new evidence leading to the identification of a public official in Hungary. Also, Eurojust informed the Austrian prosecutor that the investigations carried out in Hungary had also not supported the suspicions of an offence (paras 47-49).
 - While it is true that the accused was not questioned, that is because, the coercive measure of investigation aimed at locating him proved unsuccessful. The mere fact that the accused was not interviewed constitutes, in itself, evidence of the absence of a detailed investigation only in so far as national law requires the hearing of the accused prior to the adoption of a decision closing the investigation, whereas under Austrian law such a decision may be adopted without the accused person being questioned (paras 49-50).
 - Although, the fact that the accused person was not interviewed as a suspect cannot, in itself, justify the conclusion that there was no detailed investigation, that circumstance may nevertheless be taken into account along with any other relevant evidence revealing that there was no detailed investigation. To that end, it must be established that it is reasonably a matter for the prosecutor of the first Member State to take a measure of investigation ensuring that the accused person is actually questioned who could have adduced new facts or evidence casting doubt on the merits of an acquittal. That said, a prosecutor cannot be prevented from drawing inferences from the fact that an accused person has voluntarily avoided the opportunity to be interviewed (para 51).

Case C-726/21, *Interconsulting*, Judgment of 12 October 2023

- See also *supra*, 6.3. (*idem*).
- **Facts and main question.** See *supra*, 6.3.
- **CJEU's reply as to whether there is a 'final decision' in the present case.** As regards the 'bis' condition, for a person to be regarded as someone whose trial has been 'finally disposed of' within the meaning of Article 54 of the CISA, the following is necessary:
 - Firstly, that further prosecution has been definitively barred, which must be assessed on the basis of the law of the Member State in which the criminal-law decision in question was taken:

- In the present case, as regards the Austrian final judgment, under Austrian law, such a decision has the force of *res judicata* and precludes further proceedings in respect of the same acts (para 62);
- As regards the decision of the public prosecutor's office to close in part the investigation, on the grounds of insufficient evidence, it must be borne in mind that Article 54 of the CISA also applies to decisions definitively discontinuing prosecutions in a Member State, even where such decisions are adopted without the involvement of a court and do not take the form of a judicial decision.
- It is for the referring court to ascertain whether such a decision definitively bars further prosecution in Austria, by having recourse, if necessary, to the cooperation mechanism provided for in Article 57 of the CISA (paras 64-66);
- Secondly, that that decision was given after a determination had been made as to the merits of the case, and the Court has already held that a decision of the judicial authorities of a Member State by which an accused person is definitively acquitted because of the inadequacy of the evidence must be considered to be based on such a determination (paras 67-68):
 - In order for a decision of the public prosecutor's office to close in part the investigation due to insufficient evidence, taken following a judicial examination during which various items of evidence were collected and examined, to be considered to have been the subject of a determination as to the merits, that decision must contain a definitive assessment of the inadequacy of that evidence and exclude any possibility that the case might be reopened on the basis of the same body of evidence. In the present case, in light of the lack of information available to the Court in that regard, it is for the referring court to ascertain whether that is the case in the main proceedings (para 70).

Case C-58/22, *Parchetul de pe lângă Curtea de Apel Craiova*, Judgment of 25 January 2024

- **Facts.** In Romania, two criminal proceedings were opened against NR, the president of a cooperative company, by, respectively, the public prosecutor's office at the Regional Court of Olt and the public prosecutor's office at the Court of First Instance of Slatina. Both proceedings related to NR's demand made to the employees of that company, during a meeting held on 30 April 2015, that they paid the fees of her lawyer, on pain of their employment contracts being terminated. The public prosecutor's office of Olt brought proceedings *in rem* for the offence of extortion. On 27 September 2016, the public prosecutor's office of Olt adopted an order that no further action be taken in the case, based on the police report which, having interviewed NR and the complainants, concluded that it cannot be considered that NR carried out any offence of extortion on the grounds that she had asked the payment not for her own benefit but for that of her lawyer. The complainants did not challenge that order and on 21 November 2016, the pre-trial court chamber rejected an application for reopening the proceedings and held that the order therefore became final. On the other hand, on 31 January 2017, the public prosecutor's office of Slatina indicted NR for the offence of passive corruption and referred the case for trial. By a judgment of 19 November 2018, the Regional Court of Craiova convicted NR, rejecting the argument relating to an alleged infringement of the principle *ne bis in idem*, on the grounds that the order that no further action be taken in the case by the public prosecutor's office of Olt could not be regarded as a final decision, since it had not been preceded by a detailed investigation of the merits of the case. Furthermore, since the criminal proceedings had been brought *in rem*, on the grounds that there was allegedly no proof that a person had committed the alleged offence of extortion, the criminal liability of NR had not been examined. That judgment was subsequently annulled by the Court of Appeal of Craiova, holding that the *ne bis in idem* principle was applicable. By a judgment of 21 September 2021, deciding on appeal, the High Court of Cassation

referred the case back to the Court of Appeal of Craiova, holding that the order that no further action be taken did not bar any further prosecution as it was not preceded by an assessment of the merits of the case. In those circumstances, the Court of Appeal of Craiova decided to refer a question for a preliminary ruling to the CJEU.

- **Main question.** Does Article 50 of the Charter mean that a person may be regarded as having been finally acquitted as a result of an order that no further action be taken adopted by a public prosecutor in the absence of an examination of the legal situation of that person as criminally liable for the acts constituting the offence prosecuted?
- **CJEU's reply.** **The principle *ne bis in idem* enshrined in Article 50 of the Charter must be interpreted as meaning that a person may not be regarded as having been finally acquitted as a result of an order that no further action be taken in the case adopted by a public prosecutor in the absence of an examination of the legal situation of that person as criminally liable for the acts constituting the offence prosecuted. The CJEU's main arguments follow.**
 - As regards the '*bis*' condition, for a person to be regarded as 'finally acquitted or convicted' the following is necessary:
 - Firstly, that **further prosecution has been definitively barred**, in accordance with national law and the fact that such decision has been adopted by a public prosecutor is not decisive in that assessment (para 49):
 - In the present case, further prosecution was definitively barred, since the complainants did not rely on legal remedies available to challenge the order that no further action be taken in the case, and the pre-trial chamber rejected the re-opening of criminal proceedings (paras 50-51);
 - Secondly, that that **decision was taken after a determination as to the merits of the case**: it is necessary that the order that no further action be taken was adopted following an assessment of the merits of the case and not merely on procedural grounds. This condition is satisfied only if that order contains an evaluation of the material elements of the offence alleged, such as, *inter alia*, an analysis of the criminal liability of NR as the suspected offender (paras 52-53):
 - The terms 'convicted' and 'acquitted' referred to in Article 50 of the Charter necessarily imply that the accused person's criminal liability has been examined and that a determination in that regard has been made (para 54);
 - That interpretation is in line with the objective of preventing impunity in the area of freedom, security and justice, as provided for in Article 3(2) TEU (para 55);
 - In the ECtHR case-law, the finding that there has been a determination as to the merits of a case may be supported by the progress of the proceedings: where an investigation has been initiated after an accusation has been brought, the victim has been interviewed, the evidence has been gathered and examined by the competent authority, and a reasoned decision has been given on the basis of that evidence, it is likely to be concluded that there has been a determination as to the merits of the case. That authority must have evaluated the evidence in the case file and assessed the person's involvement in the events prompting the investigations, for the purposes of determining whether 'criminal' liability of that person has been established (paras 56-57, with reference to *Mihalache v Romania*);
 - When a decision is based on lacking or insufficient evidence, it is also necessary, in order to be able to find that that decision is based on a determination as to the merits of the case, for the adoption of that decision to have been preceded by a detailed investigation (paras 59-62, with reference to *Van Straaten* as regards acquittals, and *M* as regards orders of no grounds to refer the case to a trial court, and *Kossowski*);

- In the present case, the public prosecutor's decision relied on a report by the police, who interviewed the suspect and the complainants in the main proceedings, and received, inter alia, a CD containing an audio recording of the general meeting at issue. Even though this indicates that various items of evidence were collected and examined, on the basis of which an assessment was made as to the merits of the case, nevertheless, the failure to interview five other witnesses, who also participated in that meeting, could constitute an indication of a lack of an examination of the legal situation of NR as criminally liable for the acts constituting the offence prosecuted (para 63);
 - it is for the referring court to satisfy itself that the order that no further action be taken was preceded by an assessment as to the merits of the case and not adopted on the basis of merely procedural grounds (para 64);
- Furthermore, a person cannot be regarded as having been 'finally acquitted or convicted' unless it is clear from the decision that, during the investigation that preceded and irrespective of whether that investigation was brought *in rem* or *in personam* on the basis of national law, his or her legal situation as criminally liable for the acts constituting the offence being prosecuted has been examined. If that were not the case, which it is for the referring court to ascertain, the order that no further action be taken could not be of obstacle to new criminal proceedings being brought against NR, for the same acts (paras 73-74):
 - In the present case, the fact that the criminal proceedings had been brought *in rem* cannot be regarded as irrelevant, since it is clear that NR had not formally acquired the status of a suspect and was heard only as a witness (para 71);
 - Finally, as regards the '*idem*' condition, the fact that the criminal proceedings were brought in those cases relate to different offences (extortion and passive corruption) is irrelevant for the purpose of assessing the existence of the same offence (paras 65-70).

7. The prohibition of a second ‘prosecution’

Once it has been established that there has been a ‘final decision’ against the same person for the ‘same acts’, both Article 50 of the Charter and Article 54 of the CISA prohibit not only further punishment, but also any further prosecution for the same acts in EU Member States and Contracting States. In this regard, the CJEU held that the provisional arrest of a person who is the subject of an Interpol red notice falls within the notion of ‘prosecution’ and is therefore prohibited once it has been established in a final judicial decision that the *ne bis in idem* principle applies (*Bundesrepublik Deutschland (Notice rouge d’Interpol)*).

Case C-505/19 PPU, *Bundesrepublik Deutschland (Notice rouge d’Interpol)*, Judgment of 12 May 2021

- **Facts.** In 2012, at the request of the USA, Interpol published a red notice in respect of WS, a German national, on the basis of an arrest warrant issued by the competent authorities of the USA concerning accusations of corruption. The German public prosecutor’s office of München had already initiated an investigation against WS for the same acts as those covered by the red notice, which was discontinued in 2010 after WS had paid a sum of money. Therefore, in 2013, the German authorities attached an addendum to the red notice in respect of WS, stating that they considered that the *ne bis in idem* principle applied. In 2017, WS brought an action before the referring court (Administrative Court of Wiesbaden) against Germany requesting to take all measures to arrange for the red notice to be removed, on the grounds that the red notice prevented him from travelling to any Member State or Contracting State of the CISA without risking arrest and contrary to Article 21(1) TFEU and Article 54 CISA. The referring court harbours doubts as to whether the *ne bis in idem* principle applies in this case.
- **Main question.** Do Article 54 CISA and Article 21(1) TFEU, read in the light of Article 50 of the Charter, preclude the provisional arrest, by the authorities of a Contracting State or by those of a Member State, of a person in respect of whom Interpol has published a red notice, at the request of a third State, in the case where, first, that person has already been the subject of criminal proceedings in a Member State which have been discontinued by the public prosecutor after the person concerned fulfilled certain conditions and, second, the authorities of that Member State have informed Interpol that, in their opinion, those proceedings relate to the same acts as those covered by that red notice?
- **CJEU’s reply.** **Article 54 CISA and Article 21(1) TFEU, read in the light of Article 50 of the Charter, must be interpreted as not precluding the provisional arrest, by the authorities of a State that is a party to CISA, or by those of a Member State, of a person in respect of whom Interpol has published a red notice, at the request of a third State, unless it is established, in a final judicial decision taken in a State that is a party to the CISA or in a Member State, that the trial of that person in respect of the same acts as those on which that red notice is based has already been finally disposed of by a State that is a party to the CISA or by a Member State respectively.** The CJEU’s main arguments were the following.
 - The authorities of a Contracting State are required to refrain from prosecuting a person for certain acts themselves, or from assisting a third State in the prosecution of such a person by provisionally arresting that person, only if it is established that the trial of that person in respect of the same acts has already been finally disposed of by another Contracting State, within the meaning of Article 54 CISA, and that, consequently, the *ne bis in idem* principle applies (para 82):
 - The *ne bis in idem* principle applies in case of a decision adopted by a public prosecutor which definitively discontinues the proceedings once the accused has

- paid a sum of money, provided that that decision is based on a determination as to the merits of the case (paras 73-74, with reference to *Gozutok and Brugge*);
- The provisional arrest of a person who is the subject of an Interpol red notice by one of the CISA Contracting States, even when the notice was published at the request of a third State, comes within the concept of ‘prosecution’ within the meaning of Article 54 CISA (para 95):
 - Such provisional arrest is likely to facilitate criminal proceedings against that person following his or her potential extradition to the third State (para 87);
 - Such provisional arrest constitutes an action by that Contracting State which thus forms part of criminal proceedings that extend to the territory of the Contracting States and which has the same adverse effect on that person’s right to freedom of movement as would the same action taken in the context of criminal proceedings conducted entirely within that Contracting State (para 94);
 - The lawfulness of the action of one of the Contracting States consisting in the arrest of a person who is the subject of an Interpol red notice depends on its compliance with the *ne bis in idem* principle under Article 54 of the CISA (para 96):
 - Such provisional arrest may, in a situation where there is doubt as to the applicability of the *ne bis in idem* principle, constitute an essential step in order to carry out the necessary checks in that regard while avoiding the risk that the person may abscond. It follows that, in such a situation, Article 54 CISA does not preclude such arrest. The same interpretation applies with regard to Article 21(1) TFEU and Article 50 of the Charter: the provisional arrest is justified by the legitimate aim of preventing that person from evading punishment (paras 84-88);
 - Article 57 CISA provides that the authorities of a Contracting State may, where they have reason to believe that the charge relates to the same acts as those in respect of which a person’s trial has been finally disposed of in another Contracting State, request from the competent authorities of the latter State the information necessary to determine whether the *ne bis in idem* principle applies. The mere possibility that that principle may apply is not sufficient to prevent a Contracting State from taking any further action against the person concerned (para 83);
 - By contrast, when the authorities of a Contracting State or Member State become aware that a final decision has been taken in another Contracting State or Member State establishing that the *ne bis in idem* applies with regard to the acts covered by the Interpol red notice, those authorities are precluded from making a provisional arrest of that person or, as the case may be, from keeping that person in custody (para 89):
 - According to Article 87 of Interpol’s Rules on the Processing of Data, States are required to provisionally arrest a person who is the subject of a red notice only in so far as such measure is ‘permitted under national law and applicable international law’ (paras 98-99);
 - Despite the absence of an EU legal provision on extradition to third States, Member States are required to exercise the power to adopt such rules in accordance with EU law, in particular the right to free movement under Article 21(1) TFEU (para 100);
 - The Member States and the Contracting States must ensure the availability of legal remedies enabling the person concerned to obtain a final judicial decision establishing that the *ne bis in idem* principle applies (para 92).

8. Limitations to the *ne bis in idem* principle

The CJEU has admitted that the principle of *ne bis in idem* guaranteed by Article 50 of the Charter may be subject to limitations on the basis of the horizontal clause provided under Article 52(1) of the Charter (*Spasic*). According to this provision, limitations to the rights guaranteed by the Charter may be justified where they: (1) are provided for by law, (2) respect the essence of those rights and (3) respect the principle of proportionality, i.e. are necessary and genuinely meet other objectives of general interest recognised by the EU or the need to protect the rights and freedoms of others.

So far, the CJEU has assessed three different limitations to the *ne bis in idem* principle under Article 52 of the Charter: the ‘enforcement condition’ under Article 54 CISA (*Spasic*), declarations made by Member States under Article 55 of the CISA (*Generalstaatsanwaltschaft Bamberg (Exception au principe ne bis in idem)*) and the duplication of criminal proceedings and administrative proceedings of a criminal nature against the same person for the same facts (*Menci, Garlsson Real Estate SA, Di Puma and Zecca*).

8.1. The ‘enforcement condition’

Contrary to Article 50 of the Charter, Article 54 of the CISA makes the application of the *ne bis in idem* principle subject to the condition that, upon conviction and sentencing, the penalty imposed ‘has been enforced’, ‘is actually in the process of being enforced’ or can no longer be enforced (known as the ‘enforcement condition’). The same condition is also provided in the grounds for non-execution of an EAW related to the *ne bis in idem* principle under the EAW FD. Notwithstanding this lack of uniformity, the CJEU acknowledged the relevance of the enforcement requirement of the *ne bis in idem* principle to 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 had been fulfilled if a penalty could no longer be enforced, regardless of whether that penalty could ever have been executed in practice (*Bourquain*). In the context of EAW proceedings, the CJEU also confirmed that the enforcement condition is met where an imprisonment sentence has been served in part in the third State in which the sentence was handed down, whilst the remainder of that sentence has been remitted by a non-judicial authority of that State, as part of a general leniency measure that also applies to persons convicted of serious acts and is not based on objective criminal policy considerations (*X (Mandat d’arrêt européen – Ne bis in idem)*). By contrast, the CJEU rejected the possibility that the enforcement condition had been fulfilled in cases of a suspect being held in police custody and/or on remand pending trial for a short time (*Kretzinger*) and in cases where only one part of the sentence had been enforced (*Spasic*).

Joined Cases C-187/01 and C-385/01, *Gözütok* and *Brügge*, Judgment of 11 February 2003

- See also *supra*, 6.4. (*bis*).

Case C-288/05, *Kretzinger*, Judgment of 18 July 2007

- **Facts.** See *supra*, 6.3. (*idem*).
- **Main questions.**

- Is the enforcement condition of Article 54 of the CISA satisfied if a defendant has been given a suspended custodial sentence?
- **The CJEU's reply. Yes.** The CJEU's main arguments were the following:
 - 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);
 - any other 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 of the CISA satisfied if a defendant was held in police custody and/or on remand pending trial for a short time, where that detention would count towards any subsequent enforcement of the penalty of imprisonment?
- **The CJEU's reply. No.** The CJEU's main arguments were the following:
 - the wording of Article 54 of the CISA indicates that it cannot apply *before* the trial has been finally disposed of and where both time in police custody and time in detention on remand pending trial precede the final judgment (paras 49 and 50);
 - the purpose of detention on remand pending trial (prevention) is very different from the purpose underlying the enforcement condition of Article 54 of the CISA (ensuring that a person does not go unpunished) (para 51).
- Does the possibility of issuing an EAW on the basis of the EAW FD have an effect on the interpretation of the enforcement requirement?
- **The CJEU's reply. No.** The CJEU's main arguments were the following:
 - the wording of Article 54 of the CISA requires that the enforcement condition be satisfied (para 59);
 - Article 3(2) of the EAW FD indicates that the enforcement condition cannot, by definition, be satisfied in a case such as that in the main proceedings (paras 60 and 61);
 - legal certainty would be at risk since (1) the Member States bound by the EAW FD are not all bound by the CISA and (2) the scope of the EAW FD is limited (para 62).

Case C-297/07, *Bourquain*, Judgment of 11 December 2008

- **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 had 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 that the CJEU give a ruling on the application of the *ne bis in idem* principle.
- **Main question.** Does Article 54 of the CISA apply to criminal proceedings instituted in a Contracting State against an accused whose trial for the same acts as those for which he currently 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 of the CISA applies in those circumstances.** The CJEU's main arguments were the following:
 - the wording of the enforcement condition of Article 54 of the CISA does not require the penalty, under the law of the sentencing State, to have been possible to enforce directly; it

only requires that the penalty imposed by a final decision ‘can no longer be enforced’ (para 47);

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

Case C-129/14 PPU, *Spasic*, Judgment of 27 May 2014

➤ **Facts.** Mr Spasic was sentenced by an Italian court to a custodial sentence and a fine for organised fraud, but the penalty imposed on him was not enforced. Subsequently, Mr Spasic was prosecuted in Germany for the same act of fraud that he had committed and stood trial for 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 the fine by bank transfer and produced proof of payment before the German court.

➤ **Main questions.**

- Is the enforcement condition of Article 54 of the CISA compatible with Article 50 of the Charter?
- **CJEU's reply. Yes.** The CJEU's main arguments were the following.
 - The Explanation relating to the Charter as regards Article 50 expressly mentions Article 54 of the CISA among the provisions covered by the horizontal clause in Article 52(1) of the Charter (para 54).
 - The enforcement condition of Article 54 of the CISA constitutes a limitation of the right enshrined in that article within the meaning of Article 52 of the Charter (para 55).
 - The enforcement condition fulfils all the criteria included in Article 52 of the Charter:
 - the restriction is provided for by law (para 57);
 - the restriction respects the essence of the *ne bis in idem* principle (paras 58 and 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 of the CISA and thus are 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?
- **CJEU's reply. No.** The CJEU's main arguments were the following.
 - The aim of the enforcement condition of Article 54 of the 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).
 - 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 be given an autonomous and uniform interpretation throughout the EU (para 79).
 - The *effet utile* of Article 54 of the CISA requires that this provision also encompass situations where two principal punishments have been imposed and the wording of Article 54 of the CISA does not exclude this (paras 80 and 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 and 83).

Case C-665/20 PPU, X (*Mandat d'arrêt européen – Ne bis in idem*), Judgment of 29 April 2021

- See also *supra*, 6.3. (*idem*).
- **Facts.** See *supra*, 6.3.
- **Main questions.** Must the concept of 'same acts' contained in Article 3(2) and Article 4(5) EAW FD be interpreted uniformly? Is the condition regarding the execution of the sentence under Article 4(5) EAW FD satisfied where the requested person has served part of the sentence in the third State, whilst the remainder has been remitted by a non-judicial authority of that State, as part of a general leniency measure that also applies to persons convicted of serious acts and is not based on objective criminal policy considerations?
- **CJEU's reply.** Article 4(5) EAW FD, which makes the application of the ground for optional non-execution laid down in that provision subject to the condition that, where there has been a sentence, the sentence has been served, is currently being served or may no longer be executed under the law of the sentencing country, must be interpreted as meaning that that condition is satisfied where the requested person has been finally sentenced, for the same acts, to a term of imprisonment, of which part has been served in the third State in which the sentence was handed down, whilst the remainder of that sentence has been remitted by a non-judicial authority of that State, as part of a general leniency measure that also applies to persons convicted of serious acts and is not based on objective criminal policy considerations. It is for the executing judicial authority, when exercising the discretion it enjoys, to strike a balance between, on the one hand, preventing impunity and combatting crime and, on the other, ensuring legal certainty for the person concerned. The CJEU's main arguments were the following.
 - **The remission of a sentence, granted in accordance with the law of the sentencing country cannot a priori be excluded from the scope of Article 4(5) EAW FD** (para 88):
 - Wording of Article 4(5) EAW FD: it refers to the law of the sentencing country in a general manner; therefore, it is necessary in principle to recognise all leniency measures which have the effect that the penalty imposed may no longer be executed, irrespective of the seriousness of the acts, the authority which granted the measure and the considerations in which it is rooted (paras 86-87);
 - Context of Article 4(5) EAW FD: the condition regarding execution is worded in almost identical terms in Article 3(2) EAW FD and Article 54 CISA, so it must be given identical scope. Furthermore, as Article 3(1) EAW FD envisages the possibility of amnesty in the executing Member State as ground for non-execution, the condition regarding execution in Articles 3(2) and Article 4(5) EAW FD covers amnesties or other leniency measures adopted in the sentencing third country or other Member State (paras 92-95);
 - Purpose of the condition regarding execution in Article 4(5) EAW FD: it aims at preventing offences going unpunished since, if the condition is not satisfied, it prevents the application of the *ne bis in idem* principle and accordingly requires surrender of the requested person. However, the principle of *ne bis in idem* also seeks to ensure legal certainty through respect of decisions of public bodies which have become final, including where the sentence has been remitted by a non-judicial authority as part of a general leniency measure which is not based on objective criminal policy considerations (paras 96-100).
 - However, when applying Article 4(5) EAW FD the executing authority enjoys a margin of discretion allowing it to take into account all the relevant circumstances, including the fact that the requested person has been the object of a general leniency measure, the scope of that measure and the circumstances in which it was taken.

When exercising its discretion, the executing authority must strike a balance between preventing impunity and ensuring legal certainty for the person concerned (paras 101-103).

8.2. Duplication of proceedings and penalties of a criminal nature

The CJEU has held that the duplication of proceedings and penalties of a criminal nature for the same act constitutes a limitation to the *ne bis in idem* principle that may be justified under Article 52(1) of the Charter provided that certain conditions related to its legality, complementarity of the proceedings and proportionality are satisfied.

Types of duplications of proceedings and penalties. The CJEU has addressed different scenarios of duplication of proceedings and penalties of a criminal nature. A first distinction can be drawn between cases of duplication of proceedings and penalties occurring within the same Member State (*Menci, Garlsson Real Estate SA, Di Puma and Zecca, Direction départementale des finances publiques de la Haute-Savoie, Dual Prod, MV-98, Bezirkshauptmannschaft Feldkirch*) and transnational cases, where the two proceedings at issue are pursued in different Member States (*bpost, Nordzucker and Others, Volkswagen*). Secondly, the duplication can concern different types of proceedings: it may result from a combination of criminal proceedings and of administrative punitive proceedings – known as ‘double track enforcement’ (*Menci, Garlsson Real Estate SA, Di Puma and Zecca, Direction départementale des finances publiques de la Haute-Savoie, Volkswagen*) or from a combination of two different administrative punitive proceedings and penalties (*bpost, Nordzucker and Others, Dual Prod, MV-98*) or from a combination of two different criminal proceedings and sanctions (*Bezirkshauptmannschaft Feldkirch*).

Conditions for a justified duplication of proceedings and penalties. The CJEU has clarified that such a limitation of the application of the *ne bis in idem* principle may be justified only if the duplication of proceedings and penalties meets the following conditions:

- 1) **It is provided for by law;**
- 2) **It respects the essence of the right to *ne bis in idem*.** More specifically, the duplication of proceedings must meet an objective of general interest and the two sets of proceedings must pursue complementary aims relating to different aspects of the same unlawful conduct (*Menci, Garlsson Real Estate SA, Nordzucker and Others, MV-98, Bezirkshauptmannschaft Feldkirch*);
- 3) **It complies with the principle of proportionality,** which requires that the duplication of proceedings does not exceed what is appropriate and necessary to attain those objectives (*Di Puma and Zecca*). More specifically, the legislation at issue must first provide for clear and precise rules that make it possible to predict which acts can be subject to a duplication of proceedings and also to predict that there will be coordination between the different authorities (*Menci, Garlsson Real Estate SA, bpost, Direction départementale des finances publiques de la Haute-Savoie, Volkswagen*). Secondly, the two sets of proceedings must be conducted in a sufficiently coordinated manner and within a proximate time-frame (*MV-98, Volkswagen*). Finally, the overall severity of the penalties imposed must not exceed the seriousness of the offence, meaning that any penalty imposed in the first proceedings must be taken into account in the assessment of the second penalty (*Menci, Garlsson Real Estate SA, Direction départementale des finances publiques de la Haute-Savoie, Dual Prod, MV-98*).

ECtHR. In *Menci and Garlsson Real Estate SA*, the CJEU referred to the ECtHR judgment *A and B v Norway*, in which the ECtHR found that a combination of tax penalties and criminal penalties as punishment for the same tax offences did not infringe the principle of *ne bis in idem* affirmed in Article 4P7 ECHR. The ECtHR concluded that there was no duplication of trial or punishment as proscribed by that article, even though 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. For further details, see the [Article 4P7 case-law guide](#).

Case C-524/15, *Menci*, Judgment of 20 March 2018

- See also *supra*, 6.1. (criminal nature) and 6.3. (*idem*).
- **Facts.** See *supra*, 6.1.
- **Main question.** Does Article 50 of the Charter, read in light of Article 4P7 ECHR, preclude national legislation whereby criminal proceedings may be brought against a person for failure to pay VAT even though that person has already been subject to a final administrative sanction in relation to the same acts?
- **CJEU's reply.** Article 50 of the Charter does not preclude national legislation whereby criminal proceedings may be brought against a person, even though that person has already been made subject to a final administrative penalty of a criminal nature in relation to the same acts, on condition that: (1) the legislation pursues an objective of general interest that justifies such a duplication of proceedings and penalties, it being necessary for those proceedings and penalties to pursue additional objectives, (2) it contains rules ensuring coordination which limits the additional disadvantage resulting from the legislation to only what is strictly necessary and (3) it provides for rules making it possible to ensure that the severity of all of the penalties imposed is limited to what is strictly necessary in relation to the seriousness of the offence concerned. The CJEU's main arguments were the following.
 - The administrative proceedings and sanctions at stake are of a criminal nature (see *supra*, 6.1).
 - Both the administrative and the criminal proceedings concern the same offence (see *supra*, 6.3).
 - Duplication of proceedings and penalties of criminal nature constitutes a limitation of the right to *ne bis in idem* under Article 50 of the Charter (para 39); to be justified under Article 52(1) of the Charter such duplication of criminal proceedings and penalties must meet the following conditions.
 - It must be **provided for by law** (para 41). In this case, it is (para 42).
 - It must **respect the essential content of *ne bis in idem*** (para 41). In this case, it appears to do so, as it is only permitted under conditions, which are exhaustively defined (para 43).
 - It must **meet an objective of general interest**, in so far as the two sets of criminal proceedings and penalties pursue complementary aims relating to different aspects of the same unlawful conduct (para 44). In this case, the duplication of criminal proceedings pursues the objective of ensuring the correct collection of VAT and the two proceedings pursue complementary purposes, in that any infringement of VAT rules is punished by the administrative penalties, while only the most serious and intentional infringements are also punished with criminal penalties (paras 44 and 45).
 - It must **comply with the principle of proportionality**, which, in the absence of harmonisation of EU law on the matter, is not called into question by the mere fact that a Member State chose to provide for a duplication of proceedings (paras 46 and

47). With regard to its strict necessity, such legislation must however do the following.

- **Provide for clear and precise rules** as to when an act can be subject to duplication of proceedings (para 49). In this case, the national legislation lays down clearly and precisely the circumstances under which failure to pay VAT may be subject to duplication of criminal proceedings (para 50).
 - **Contain rules ensuring coordination** that limits the disadvantage resulting from such duplication to what is strictly necessary (para 53). In this case, the national legislation contains rules ensuring coordination: it limits criminal penalties to offences which are particularly serious, and the penalties provided (imprisonment) are sufficiently serious to justify the need to initiate independent criminal proceedings (para 54).
 - **Ensure that the severity of all of the penalties imposed does not exceed the seriousness of the offence**, in accordance with the principle of proportionality of penalties under Article 49(3) of the Charter (para 55). In this case, the national legislation prevents the enforcement of the administrative penalties after the criminal conviction, along with qualifying the voluntary payment of the tax debt as a mitigating factor for the determination of the criminal sanction (para 56).
- Even where the legislation at issue appears to comply with the requirements set out above in principle, its practical application must also ensure that the resulting actual disadvantage for the person concerned is not excessive in relation to the seriousness of the offence, which is for the referring court to assess, taking into consideration all the circumstances in the main proceedings (paras 58, 59 and 64).

Case C-537/16, *Garlsson Real Estate and others*, Judgment of 20 March 2018

➤ See also *supra*, 6.1. (criminal nature) and 6.3. (*idem*).

➤ **Facts.** See *supra*, 6.1.

➤ **Main questions.**

1. Does Article 50 of the Charter, read in light of Article 4P7 ECHR, preclude national legislation which permits the possibility of bringing administrative proceedings against a person in respect of unlawful conduct consisting of market manipulation for which the same person has already been finally convicted?
 - **CJEU's reply.** Yes, in so far as the conviction constitutes, given the harm caused to the company by the offence committed, an effective, proportionate and dissuasive punishment for that offence. The CJEU's main arguments were the following.
 - The administrative proceedings and sanctions at stake are of a criminal nature (see *supra*, 6.1).
 - Both the administrative and the criminal proceedings concern the same offence (see *supra*, 6.3).
 - Duplication of proceedings and penalties of a criminal nature constitutes a limitation of the right to *ne bis in idem* under Article 50 of the Charter (para 42); to be justified under Article 52(1) of the Charter such duplication of criminal proceedings and penalties must meet the following conditions.
 - It must be **provided for by law** (para 43). In this case, it is (para 44).
 - It must **respect the essential content of *ne bis in idem*** (para 43). In this case, it appears to do so, as the duplication of criminal proceedings and penalties is only permitted under certain conditions, which are exhaustively defined (para 45).

- It must **meet an objective of general interest**, in so far as the two criminal proceedings and penalties pursue complementary aims relating to different aspects of the same unlawful conduct (para 46). In this case, the duplication of criminal proceedings seeks to protect the integrity of the financial market of the EU and public confidence in financial instruments (para 46), and the two proceedings pursue complementary purposes, in that any infringement of the legislation on market manipulation is punished by administrative penalties, while only the most serious and intentional infringements are also punished with criminal penalties (para 47).
 - It must **comply with the principle of proportionality**, which, in the absence of harmonisation of EU law on the matter, is not called into question by the mere fact that a Member State chose to provide for duplication of proceedings (paras 48 and 49). With regard to its strict necessity, such legislation must however do the following.
 - **Provide for clear and precise rules** as to when an act can be subject to duplication of proceedings (para 51). In this case, the national legislation meets this requirement (paras 52 and 53).
 - **Contain rules ensuring coordination** which limits the disadvantage resulting from such duplication to what is strictly necessary (para 55). In this case, despite the obligation for coordination and cooperation between the public prosecutor's office and the Italian National Companies and Stock Exchange Commission (Consob), the bringing of proceedings relating to an administrative fine of a criminal nature following a criminal conviction for an offence which is liable to be punished by a term of imprisonment and a criminal fine in a range corresponding to that of the administrative fine exceeds what is strictly necessary, in so far as the criminal conviction constitutes an effective, proportionate and dissuasive punishment for the offence (paras 57–59).
 - **Ensure that the severity of all of the penalties imposed does not exceed the seriousness of the offence**, in accordance with the principle of proportionality of penalties under Article 49(3) of the Charter (para 56). In this case this is not ensured, as the mechanism under national law whereby, in the event that an administrative fine is imposed after a criminal penalty, the amount of the administrative fine that can be recovered is limited to the difference between it and the criminal penalty, is applicable only to pecuniary penalties and not to a term of imprisonment (para 60). Therefore it appears that the national legislation at issue goes beyond what is strictly necessary to achieve the objective of general interest mentioned above (para 61). This conclusion is not called into question by the fact that the final criminal conviction has subsequently been extinguished by a pardon, as the *ne bis in idem* principle benefits persons who have been finally acquitted or convicted, including those whose sentence was subsequently extinguished (para 62).
2. Does Article 50 of the Charter confer a directly applicable right?
- **CJEU's reply. Yes.** The CJEU's main arguments were:
 - provisions of primary law which impose precise and unconditional obligations create direct rights with respect to individuals concerned (para 65);
 - Article 50 of the Charter confers a right that is not subject to any conditions and is therefore directly applicable (para 66).

Joined Cases C-596/16 and C-597/16, *Di Puma and Zecca*, Judgment of 20 March 2018

- **Facts.** The Italian National Companies and Stock Exchange Commission (Consob) imposed administrative fines on Mr Di Puma and Mr Zecca for insider dealing. Mr Di Puma and Mr Zecca appealed against that judgment to the Court of Appeal and subsequently to the Court of Cassation. Before the Court of Cassation, they argued that they had been subject to criminal proceedings before the District Court of Milan in respect of the same acts that they were accused of by Consob and that that court had finally acquitted them on the grounds that the acts constituting the offence were not established by a judgment that became final while the administrative proceedings were still pending. The referring court noted that, pursuant to Article 654 of the Code of Criminal Procedure, that criminal judgment had *res judicata* effect with regard to administrative proceedings. Yet it also observed that Article 14(1) of Directive 2003/6 establishes the duty to punish insider dealing with effective, proportionate and dissuasive penalties. The referring court thus wondered whether Article 50 of the Charter, as interpreted in *Åkerberg Fransson*, authorised the bringing of proceedings for an administrative fine of a criminal nature following a final criminal judgment of acquittal where those proceedings may appear necessary in order to comply with the obligation under Article 14(1) of Directive 2003/6 to punish insider dealing with effective, proportionate and dissuasive penalties. It therefore referred the case to the CJEU.
- **Main question.** Does Article 14(1) of Directive 2003/6, read in light of Article 50 of the Charter, preclude national legislation that precludes the bringing of proceedings for an administrative fine of a criminal nature following a final criminal judgment of acquittal on those same acts finding that those acts were not established?
- **CJEU's reply. No.** The CJEU's main arguments were the following.
 - In order to implement Article 14(1) of Directive 2003/6, Member States are also entitled to provide for duplication of criminal and administrative sanctions, complying however with the limits imposed by Article 50 of the Charter (para 26).
 - The bringing of proceedings for an administrative fine of a criminal nature after a final criminal judgment of acquittal on the same facts constitutes a limitation of that fundamental right that may be justified on the basis of Article 52(1) of the Charter (paras 38–40).
 - In this case, the objective of protecting the integrity of the financial markets and public confidence in financial instruments can justify the duplication of proceedings and penalties of a criminal nature, where those proceedings and penalties have additional complementary objectives covering different aspects of the same unlawful conduct at issue (para 42); however, the duplication of proceedings and penalties of a criminal nature is subject to strict compliance with the principle of proportionality (para 43), and the bringing of proceedings for an administrative fine of a criminal nature where a final criminal judgment has established that the acts capable of constituting a violation of the legislation on insider dealing were not established clearly exceeds what is necessary in order to achieve this objective (paras 43 and 44).
 - Therefore Article 50 of the Charter precludes, in such a situation, the bringing of proceedings for an administrative fine, without prejudice to the possibility of reopening criminal proceedings on the basis 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 criminal judgment (para 45).

Case C-117/20, *bpost*, Judgment of 22 March 2022

- See also *infra*, 6.1. (criminal nature), 6.3. (*idem*) and 6.4. (*bis*).
- **Facts.** See *infra*, 6.3.
- **Main question.** Does Article 50 of the Charter preclude a legal person from being fined for an infringement of EU competition law where, on the same facts, that person has already been the

subject of a final decision following proceedings relating to an infringement of sectoral rules concerning the liberalisation of the relevant market?

- **CJEU's reply.** Article 50 of the Charter, read in conjunction with Article 52(1) thereof, does not preclude a legal person from being fined for an infringement of EU competition law where, on the same facts, that person has already been the subject of a final decision following proceedings relating to an infringement of sectoral rules concerning the liberalisation of the relevant market, provided that there are clear and precise rules making it possible to predict which acts or omissions are liable to be subject to a duplication of proceedings and penalties, and also to predict that there will be coordination between the two competent authorities; that the two sets of proceedings have been conducted in a sufficiently coordinated manner within a proximate timeframe; and that the overall penalties imposed correspond to the seriousness of the offences committed. The CJEU's main arguments follow.
- Should the referring court consider that the facts which are the subject of the two sets of proceedings are identical, that duplication would constitute a limitation of the fundamental right guaranteed by Article 50 of the Charter; to be justified under Article 52(1) of the Charter such duplication of criminal proceedings and penalties must meet the following (paras 39-41, with reference to *Menci*):
 - **Be provided for by law.** This is to be verified by the referring court in the present case (para 42);
 - **Respect the essence of that right**, provided that the national legislation does not allow for proceedings and penalties in respect of the same facts on the basis of the same offence or in pursuit of the same objective, but provides only for the possibility of a duplication of proceedings and penalties under different legislation (para 43):
 - In this case, the two sets of legislation at issue pursue distinct legitimate objectives: the object of the sectoral rules at issue in the main proceedings is the liberalisation of the internal market for postal services, whereas the applicable provision of competition law pursues the objective, which is indispensable for the functioning of the internal market, of ensuring that competition is not distorted in that market. It is, therefore, legitimate for the purposes of guaranteeing the ongoing liberalisation of the internal market for postal services, while ensuring the proper functioning of that market, for a Member State to punish infringements, on the one hand, of sectoral rules concerning the liberalisation of the relevant market and, on the other, of the rules applicable to competition law (paras 44-47);
 - **Comply with the principle of proportionality**, which requires that the duplication of proceedings and penalties does not exceed what is appropriate and necessary in order to attain the objectives legitimately pursued by that legislation, and that, when there is a choice between several appropriate measures, recourse must be had to the least onerous and the disadvantages caused must not be disproportionate to the aims pursued (para 48):
 - The fact that two sets of proceedings are pursuing distinct objectives of general interest, which it is legitimate to protect cumulatively, can be taken into account in an analysis of the proportionality, as a factor that would justify that duplication, provided that those proceedings are complementary and that the additional burden which that duplication represents can accordingly be justified by the two objectives pursued (para 49):
 - In this case, national rules which provide for the possible duplication of proceedings and penalties under sectoral rules and competition law are capable of achieving the objective of general interest of ensuring that each of the two sets of legislation concerned is applied effectively, since they are pursuing the distinct legitimate objectives (para 50);

- With regard to the strict necessity, the following conditions must be met (para 51):
 - **Clear and precise rules** that make it possible to predict which acts or omissions are liable to be subject to a duplication of proceedings and penalties, and also to predict that there will be coordination between the different authorities. In this case, there is a provision of national law providing for cooperation and the exchange of information between the authorities concerned, which would constitute an appropriate framework for ensuring the required coordination (para 55);
 - **Sufficient coordination among the two sets of proceedings**, within a proximate timeframe. In the present case, there appears to be a sufficiently close connection in time between the two sets of proceedings conducted and between the decisions taken pursuant to the sectoral rules and to competition law: the Belgian Postal Regulator and the Competition Authority have conducted their proceedings, at least partly, in parallel and the two decisions were adopted on close dates (20 July 2011 and 10 December 2012), given the complexity of competition investigations (para 56);
 - **any penalty imposed in the first proceedings in time must be taken into account in the assessment of the second penalty**. In the present case, the fact that the fine imposed in the second set of proceedings is larger than that imposed in the first does not in itself show that the duplication of proceedings and penalties was disproportionate with regard to the legal person concerned, given, in particular, that the two sets of proceedings may constitute complementary and connected, but nevertheless distinct, legal responses to the same conduct (para 57);
- A full assessment of necessity and the overall analysis of the question as to whether the duplication of proceedings can be justified, can only be undertaken in full ex post, given the nature of some of the factors to be taken into account. Nevertheless, the duplication of the proceedings must be strictly necessary, taking account of the existence of a sufficiently close connection in substance and time between the two sets of proceedings. Accordingly, any justification for a duplication of penalties is subject to conditions intended to limit the functionally distinct character of the proceedings in question and, therefore, the actual impact on the persons concerned of the cumulative proceedings (paras 52-53).

Case C-151/20, *Nordzucker and Others*, Judgment of 29 April 2022

- See also *infra*, 6.3. (*idem*);
- **Facts and main question**. See *infra*, 6.3. (*idem*);
- **CJEU's findings as to the duplication of proceedings and penalties:**
 - A duplication of proceedings and penalties would amount to a limitation of the fundamental right guaranteed in Article 50 of the Charter (para 49);
 - to be justified under Article 52(1) of the Charter such duplication of criminal proceedings and penalties must be provided for by law, respect the essence of those rights and freedoms and, subject to the principle of proportionality, be made only if it is necessary and genuinely meets objectives of general interest recognised by the EU or the need to protect the rights and freedoms of others (para 50);

- As regards the principle of proportionality, Article 101 TFEU pursues the objective, essential for the functioning of the internal market, of ensuring that competition is not distorted in that market (para 51);
- In light of the importance of that objective of general interest, a duplication of criminal proceedings may be justified where those proceedings pursue, for the purpose of achieving such an objective, complementary aims relating to different aspects of the same unlawful conduct (para 52):
 - In this case, if two national competition authorities were to take proceedings against and penalise the same facts in order to ensure compliance with the prohibition on cartels under Article 101 TFEU and the corresponding provisions of their respective national law, those two authorities would pursue the same objective of general interest of ensuring that competition in the internal market is not distorted by agreements, decisions of associations of undertakings or anticompetitive concerted practices (paras 53-56);
 - Accordingly, a duplication of proceedings and penalties that do not pursue complementary aims relating to different aspects of the same cannot in all events be justified under Article 52(1) of the Charter (para 57).

Case C-570/20, *Direction départementale des finances publiques de la Haute-Savoie*, Judgment of 5 May 2022

- **Facts.** In 2014, the French tax authorities filed a complaint with the public prosecutor's office in Annecy against BV, an accountant, for VAT and income tax evasion. In 2017, the Court in Annecy found BV guilty of tax evasion, sentencing him to 12 months imprisonment. BV appealed, arguing that his conviction infringed the principle of *ne bis in idem* under Article 50 of the Charter on the grounds that he had already been subject to a tax adjustment procedure in respect of the same acts which resulted in the imposition of final tax penalties amounting to 40% of the charges evaded. In 2019, the Court of Appeal in Chambéry dismissed BV's appeal, holding that the combination of criminal and tax penalties was consistent with Article 50 of the Charter, since the national legislation at issue complied with the relevant case-law of the French Constitutional Council. BV contested this decision before the Court of Cassation, arguing that the national legislation at issue did not satisfy the requirement of clarity and foreseeability with which a duplication of proceedings and penalties of a criminal nature must comply in accordance with the CJEU case-law and did not ensure that the severity of all of the penalties imposed does not exceed the seriousness of the offence identified.
- **Main questions.** Does Article 50 of the Charter preclude national legislation which allows for a duplication of proceedings and penalties of a criminal nature in the event of VAT tax evasion only in the most serious cases, based only on settled case-law interpreting restrictively those conditions? Does Article 50 of the Charter preclude national legislation which does not ensure, in cases of the combination of a financial penalty and a custodial sentence, by means of clear and precise rules, that all of the penalties imposed do not exceed the seriousness of the offence identified?
- **CJEU's reply.** **Article 50 of the Charter, read in conjunction with Article 52(1) thereof, does not preclude national legislation whereby the duplication of proceedings and penalties of a criminal nature in the event of VAT tax evasion is limited only to the most severe cases, based only on settled case-law interpreting restrictively the legal provisions laying down said condition, provided that it is reasonably foreseeable, at the time when the offence is committed, that that offence is liable to be the subject of duplication of proceedings and penalties of a criminal nature; but precludes national legislation which does not ensure, in cases of the combination of a financial penalty and a custodial sentence, using clear and precise rules, where necessary as interpreted by the national courts, that all of the penalties**

imposed do not exceed the seriousness of the offence identified. The CJEU's main arguments were the following.

- Duplication of proceedings and penalties of criminal nature constitutes a limitation of the right to *ne bis in idem* under Article 50 of the Charter; to be justified under Article 52(1) of the Charter such duplication of criminal proceedings and penalties must meet the following (paras 29-30, with reference to *Menci*, and *Nordzucker and Others*):
 - **Be provided for by law.** In this case it is, however, this requirement is indissociable from that of clarity and precision arising from the principle of proportionality (para 31).
 - **Respect the essence of that right.** In this case, the limitation respects the essential content of *ne bis in idem* as the duplication of criminal proceedings and penalties is only permitted under conditions exhaustively defined (para 32).
 - **Meet an objective of general interest** recognised by the EU or the need to protect the rights and freedoms of others. In this case, the duplication of criminal proceedings meets the objective of general interests of combating VAT offences as it is intended to ensure the collection of all the VAT due (para 33).
 - **Comply with the principle of proportionality.** As regards the strict necessity, such legislation must provide for clear and precise rules which (paras 34-35, with reference to *Menci*):
 - **Allow the individual to predict which acts and omissions are liable to be subject to such a duplication of proceedings and penalties.** Any provision authorising double punishment must comply with the requirements relating to the principle that offences and penalties must be defined by law, as guaranteed by Article 49(1) of the Charter, which is satisfied where the conditions required for a duplication of proceedings derive not only from legislative provisions but also from their interpretation by national courts provided that the individual is in a position to ascertain which acts and omissions may give rise to such a duplication (para 36-39). This is not in principle precluded by the gradual clarification by the national case-law of broad concepts used for the purpose of determining the actions liable to give rise to a duplication of proceedings and penalties of a criminal nature (paras 40-42). The foreseeability required also depends on the content of the law, the field it covers and the status of those to whom it is addressed: in relation to persons carrying on a professional activity, a law may still satisfy that requirement even if the person concerned has to take appropriate legal advice to assess the consequences which a given action may entail (para 43).
 - In the present case, the law provides that VAT evasion, 'regardless of the tax penalties applicable', may also be subject to a criminal fine and a custodial sentence and the Constitutional Council held that the duplication of proceedings may apply only in the most serious cases, based on the amount of the charges evaded, the nature of the actions of the person prosecuted or the circumstances in which those actions occurred. Furthermore, national case-law has applied on several occasions the case-law of the Constitutional Council and has thus further clarified its scope. Subject to the assessment of the referring court, such an interpretation does not appear, in itself, to be unforeseeable. The fact that BV, should have had recourse to legal advice, does not call into question the clear and precise nature of the national legislation, particularly in view of his professional activity (paras 44-48).
 - **Ensure that the severity of all of the penalties imposed does not exceed the seriousness of the offence,** in accordance with the principle of

proportionality of penalties under Article 49(3) of the Charter, which also applies to the combination of penalties of a different kind, such as financial penalties and custodial sentences. In this regard, legislation which provides that the recovery of the criminal fine is limited to the part exceeding the amount of the administrative penalty, without also providing for such a rule in respect of the combination of an administrative penalty and a custodial sentence, does not comply with the requirement of proportionality (paras 49-51, with reference to *Garlsson Real Estate and Others*).

- In this case, the referring court has specified that the limitation whereby the total amount of a penalty imposed must not exceed the highest amount of one of the penalties incurred applies only to penalties of the same kind, namely financial penalties.

Case C-412/21, *Dual Prod SRL*, Judgment of 23 March 2023

- See also *supra*, 6.1. (criminal nature) and 6.4. (*bis*).
- **Facts.** See *supra*, 6.1.
- **Main question.** Does Article 50 of the Charter preclude a penalty from being imposed on a legal person who has already been subject, in respect of the same facts, to a penalty of the same nature but of a different duration?
- **CJEU's reply.** **Article 50 of the Charter does not preclude a criminal penalty, for infringement of the rules on products subject to excise duty, from being imposed on a legal person who has already been subject, in respect of the same facts, to a criminal penalty that has become final, provided that:**
 - the possibility of duplicating those two penalties is provided for by law;
 - national legislation does not allow for proceedings and penalties in respect of the same facts on the basis of the same offence or in pursuit of the same objective, but provides for only the possibility of a duplication of proceedings and penalties under different legislation;
 - those proceedings and penalties pursue complementary aims relating, as the case may be, to different aspects of the same unlawful conduct at issue;
 - there are clear and precise rules making it possible to predict which acts or omissions are liable to be subject to a duplication of proceedings and penalties, and also to predict that there will be coordination between the different authorities; that the two sets of proceedings have been conducted in a manner that is sufficiently coordinated and within a proximate time frame; and that any penalty that may have been imposed in the proceedings that were first in time was taken into account in the assessment of the second penalty, meaning that the resulting burden, for the persons concerned, of such duplication is limited to what is strictly necessary and the overall penalties imposed correspond to the seriousness of the offences committed. The CJEU's main arguments follow.
 - As regards the '*idem*' condition, this requires the material facts to be identical and not merely similar. The identity of the material facts means a set of concrete circumstances stemming from events that are, in essence, the same, in that they are inextricably linked together in time and space (para 52);
 - In the present case, the two suspension measures imposed on Dual Prod are linked to identical material facts, established during the search at that company's premises. The fact that the second suspension measure was ordered on the grounds that Dual Prod was formally charged in criminal proceedings is not such as to alter such a finding, since the purpose of those criminal proceedings is precisely to penalise the same facts established during that search (paras 53-54);

- As regards the ‘bis’ condition, the prior decision must not only have become final but must also have been taken after a determination has been made as to the merits of the case (para 55)
 - In the present case, as regards, first, the definitive nature of the decision imposing the first suspension measure, the referring court will have to ensure that the judicial decision that reduced the duration of that suspension measure had become final on the date on which the second suspension measure was ordered (para 56);
 - As regards, secondly, the condition relating to the assessment of the merits of the case, it is clear from the case-law of the ECHR that, where a penalty has been ordered as a result of the behaviour attributed to the person concerned, it can reasonably be considered that the competent authority had conducted a prior assessment of the circumstances of the case and whether or not the behaviour of the person concerned was lawful (para 57);
- If the two conditions above are met, the combination of the two suspension measures at issue would constitute a limitation of the fundamental right guaranteed in Article 50 that may be justified on the basis of Article 52(1) when the following conditions are satisfied (paras 58-61):
 - **Be provided for by law.** In the present case, the possibility of combining the two suspension measures is under Article 369(3)(b) and (c) of the Tax Code (para 62).
 - **Respects the essence of those rights.** This is the case only on the condition that the national legislation does not allow for proceedings and penalties in respect of the same facts on the basis of the same offence or in pursuit of the same objective, but provides only for the possibility of a duplication of proceedings and penalties under different legislation. That condition does not appear to have been met in the present case (para 63);
 - In the present case, the national legislation seeks to ensure the correct collection of excise duties and to combat fraud and abuse. In light of the importance of that objective of general interest, a duplication of criminal proceedings and penalties may be justified where those proceedings and penalties pursue complementary aims relating to, as the case may be, different aspects of the same unlawful conduct at issue (paras 64-65).
 - **Comply with the principle of proportionality,**
 - With regard to the strict necessity of such duplication of proceedings and penalties, it is necessary to assess whether there are clear and precise rules that make it possible to predict which acts or omissions are liable to be subject to a duplication of proceedings and penalties, and also to predict that there will be coordination between the different authorities, whether the two sets of proceedings have been conducted in a manner that is sufficiently coordinated and within a proximate time frame and whether any penalty that may have been imposed in the proceedings that were first in time was taken into account in the assessment of the second penalty, meaning that the resulting burden, for the persons concerned, of such duplication is limited to what is strictly necessary and the overall penalties imposed correspond to the seriousness of the offences committed (para 67);
 - In the present case, when assessing the second suspension measure imposed on Dual Prod, the competent administrative authority did not take into account the seriousness of the first suspension measure, which is such as to affect the proportionality of that second suspension measure (para 68);
- If the referring court considers that at least one of the two suspension measures does not constitute a criminal penalty, for the purposes of Article 50 of the Charter, the fact remains

that the imposition of the second suspension measure should comply with the principle of proportionality, as a general principle of EU law (para 70).

- The fact that a suspension measure imposed on a legal person suspected of having infringed the rules ensuring the correct collection of excise duties, continues to have effect throughout the criminal proceedings brought against that legal person, even where those proceedings have already exceeded a reasonable period, may indicate a disproportionate infringement of the legitimate right of that legal person to pursue their entrepreneurial activity (para 71).

Case C-97/21, *MV – 98*, Judgment of 4 May 2023

- See also *supra*, 6.1. (criminal nature).
- **Facts.** See *supra*, 6.1.
- **Main question.** Does Article 50 of the Charter preclude national legislation under which a financial penalty and a sealing of business premises may be imposed on a taxpayer for one and the same tax-related offence as a result of separate, autonomous sets of proceedings and which may be challenged before different courts?
- **CJEU's reply.** **Article 50 of the Charter precludes national legislation under which a financial penalty and a measure involving the sealing of business premises may be imposed on a taxpayer for one and the same offence relating to a tax obligation at the end of separate and autonomous procedures, where those measures are liable to challenge before different courts and where that legislation does not ensure coordination of the procedures enabling the additional disadvantage associated with the cumulation of those measures to be reduced to what is strictly necessary and does not ensure that the severity of all penalties imposed is commensurate with the seriousness of the offence concerned.** The CJEU's main arguments follow.
 - A limitation of the fundamental right guaranteed in Article 50 of the Charter that may be justified on the basis of Article 52(1) thereof when the following conditions are satisfied (paras 50-51):
 - **Is provided for by law.** In the present case, that condition is satisfied since the Law on VAT expressly provides, in the event of an offence under Article 118(1) thereof, for the cumulative application of a financial penalty and the sealing of the business premises concerned (para 52);
 - **Respects the essence of those rights and freedoms**, which entails that such a cumulation must, in principle, be subject to conditions which are exhaustively defined. By contrast, an automatic cumulation, not subject to any exhaustively defined condition, cannot be regarded as respecting the essence of that right (paras 33-34):
 - In the present case, the cumulation of the two measures appears to be automatic, since the tax authorities are required systematically to apply both measures, with the result that the national legislation at issue does not ensure respect for the essence of the right provided for in Article 50 of the Charter (para 35);
 - **Complies with the principle of proportionality**, which requires that national legislation must meet the following (paras 56-57):
 - **provide for clear and precise rules** which, first of all, allow the individual to predict which acts and omissions are liable to entail such a cumulation of proceedings and penalties:
 - In the present case, the measures at issue are intended to ensure the objective of public interest related to the correct collection of VAT and to prevent evasion, and the relevant provisions of the law on VAT are

appropriate for attaining those objectives and are both sufficiently clear and precise (para 58).

- **ensure the procedures are coordinated** so as to reduce to what is strictly necessary the additional disadvantage associated with the cumulation of proceedings of a criminal nature conducted independently:
 - In the present case, although the tax authority is required to comply with the principle of proportionality, the national legislation at issue does not authorise it to circumvent the obligation to impose either of those penalties, in view of the automatic nature of the cumulation, or to suspend one of those proceedings until the conclusion of the other, nor to carry out an overall assessment of the proportionality of the cumulative penalties (para 59);
 - Furthermore, although it is possible to have the seal removed early by voluntarily paying the financial penalty, there is nothing obliging the tax authority to impose that penalty whilst the sealing measure is in place and here in fact the financial penalty was imposed only several months after enforcement of the sealing measure (para 60);
 - Lastly, challenges against those measures must be brought before different courts, namely the district court for the financial penalty and the administrative court for the sealing measure; therefore, national legislation does not provide for any procedure ensuring the necessary coordination between those actions or between those courts and the latter must each carry out an independent assessment of the proportionality of the measures referred to them (para 61);
- **make it possible to guarantee that the severity of all of the penalties imposed is commensurate with the seriousness of the offence:**
 - in the present case, each of the measures imposed presents an inherently high degree of severity. Consequently, their cumulative effect may exceed the seriousness of the offence committed and contravene the requirements of the principle of proportionality (para 62).

Case C-55/22, *Bezirkshauptmannschaft Feldkirch*, Judgment of 14 September 2023

- See also *supra*, 6.3. (*idem*) and 6.4. (*bis*).
- **Facts and main question.** See *supra*, 6.4.
- **CJEU's remarks as regards the duplication of proceedings.** The pursuit of criminal penalty proceedings, based on the same acts, would constitute a limitation of the fundamental right that may be justified on the basis of Article 52(1) of the Charter (paras 62-63):
 - Firstly, in the present case, each of the two sets of proceedings was provided for by law (paras 64-65);
 - Secondly, respect for the essence of the fundamental right requires that the national legislation does not allow for the possibility of a duplication of proceedings in respect of the same acts on the basis of the same offence or in pursuit of the same objective, but only under different legislation. In the present case, however, the two sets of proceedings pursue the same objective, namely to penalise illegal offers of games of chance by means of gaming machines, and are based on the same legislation (paras 65-66).

Case C-27/22, *Volkswagen Group Italia and Volkswagen Aktiengesellschaft*, Judgment of 14 September 2023

- See also *supra*, 6.1. (criminal nature), 6.3. (*idem*) and 6.4 (*bis*).
- **Facts.** See *supra*, 6.1.
- **Main question.** Under which conditions may limitations of the application of the principle *ne bis in idem*, enshrined in Article 50 of the Charter, be justified?
- **CJEU's reply.** Article 52(1) of the Charter authorises a limitation to the application of the principle *ne bis in idem* so as to permit a duplication of proceedings or penalties in respect of the same facts, provided that the conditions laid down in Article 52(1) are satisfied, namely (i) that such duplication does not represent an excessive burden for the person concerned; (ii) that there are clear and precise rules making it possible to predict which acts or omissions are liable to be subject to a duplication; and (iii) that the sets of proceedings in question have been conducted in a manner that is sufficiently coordinated and within a proximate timeframe. The CJEU's main arguments were the following.
 - A limitation of the application of the principle *ne bis in idem* may be justified on the basis of Article 52(1) of the Charter, provided that the following conditions are met (paras 87-88):
 - **Be provided for by law.** In this case, it is for the referring court to verify whether, as it appears, the involvement of each of the national authorities concerned was provided for by law (para 89);
 - **Respect the essence of that right.** Such a duplication of proceedings respects the essence of Article 50 of the Charter, provided that it is only possible under different legislations and not on the basis of the same offence or in pursuit of the same objective (para 90);
 - **Meet an objective of general interest.** In this case, the two laws pursue distinct legitimate objectives (para 91);
 - **Comply with the principle of proportionality.** In this regard, public authorities can choose complementary responses through different procedures forming a coherent whole, so as to address different aspects of the social problem involved, provided that the accumulated legal responses do not represent an excessive burden (para 94).
 - As regards the **strict necessity**, the duplication of proceedings may be regarded as justified if it satisfies, *inter alia*, three conditions (paras 95-96):
 - **It does not represent an excessive burden for the person concerned.** In this case, the burden for that company is not excessive since the Italian decision imposes a fine which corresponds to only 0.5 % of the fine prescribed by the German decision (para 97);
 - **It has clear and precise rules making it possible to predict which acts could be subject to a duplication.** In this case, although there are no German nor Italian provisions providing specifically that such conduct could be subject to a duplication of proceedings in different Member States, nothing supports that VWAG could not have predicted that said conduct could give rise to proceedings in at least two Member States, and the clarity and precision of those rules was not called into question (para 98);
 - **There is coordination between the two proceedings**, namely that they have been conducted in a manner that is sufficiently coordinated and within a proximate timeframe. In this case, no coordination took place between the German prosecutor and the AGCM, even though the two proceedings had been conducted in parallel for some months and the German prosecutor had knowledge of the Italian decision when it adopted its own (para 99):
 - Although Regulation 2006/2004 establishes a channel for cooperation and coordination between national authorities

- competent for the enforcement of consumer protection laws, the German prosecutor is not one of those authorities (para 100);
- Although the German prosecutor had approached Eurojust to avoid duplication of criminal proceedings against VWAG in different Member States, the Italian authorities did not wave their criminal proceedings and AGCM did not participate in that attempt of coordination at Eurojust (para 101);
- While it is necessary to take into account the difficulties inherent in a cross-border context where the authorities in question are from different Member States, these cannot justify the disregarding of such a requirement of coordination (para 102).

8.3. Declarations made by Member States under Art. 55 of the CISA

Article 55 of the CISA allows each Member State, when ratifying said convention, to declare that in certain listed cases they are not bound by the principle of *ne bis in idem*. The CJEU so far has addressed only the case under Article 55(1)(b) related to the scenario where ‘the acts to which the foreign judgment relates constitute an offence against national security or other equally essential interests of that Contracting Party’ and has confirmed its validity in light of Article 50 of the Charter, as a limitation to that fundamental right under Article 52 of the Charter. It also clarified that such declaration may also concern a criminal organisation which engaged exclusively in financial crime, in so far as its actions harm the security or other equally essential interests of that Member State (*Generalstaatsanwaltschaft Bamberg (Exception au principe ne bis in idem)*).

Case C-365/21, *Generalstaatsanwaltschaft Bamberg (Exception au principe ne bis in idem)*, Judgment of 23 March 2023

- See also *supra*, 6.3 (*idem*).
- **Facts.** See *supra*, 6.3.
- **Main question.** 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 Germany when ratifying the CISA in relation to Para 129 Criminal Code that the declaration also covers criminal organisations which engage exclusively in financial crime and do not pursue any political, ideological, religious or world-view objectives and do not seek to gain influence by dishonest means over politics, the media, the public administration, the judiciary or the economy?
- **CJEU’s reply.** **The validity of Article 55(1)(b) of the CISA, in the light of Article 50 of the Charter, is not affected. Article 55(1)(b) of the CISA, read in conjunction with Article 50 and Article 52(1) of the Charter, do not preclude an interpretation of the declaration made by a Member State under Article 55(1) 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 light of the actions of that organisation, intended to punish harm to the security or other equally essential interests of that Member State.** The CJEU’s main arguments were the following:
 - Article 55(1)(b) of the CISA, which enables a Member State to declare that it is not bound by 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, is valid in light of Article 50 of the Charter:

- The possibility under Article 55(1)(b) of the CISA to derogate from the *ne bis in idem* 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 justified on the basis of Article 52(1) of the Charter (paras 46-48).
 - It is provided for by law, under Article 55(1)(b) of the CISA.
 - It respects the essence of the principle since, in so far as it enables to derogate from that principle only in respect of offences against the security or other equally essential interests of a Member State, 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 (para 57).
 - It is proportionate to the general objective pursued, taking into account that the importance of that general interest objective goes beyond that of combating crime in general, even serious crime. Firstly, Article 55(1)(b) requires to specify the categories of offences to which that exception may apply. Secondly, Article 56 provides that any period of deprivation of liberty served in the other Member State arising from those acts must be deducted from any penalty imposed and, to the extent permitted by national law, penalties not involving deprivation of liberty must also be taken into account (paras 59-66).
- Article 50 and Article 52(1) of the Charter do not preclude an interpretation of a declaration made under Article 55(1) of the CISA in relation to the offence of forming a criminal organisation which also covers organisations engaged exclusively in financial crime, in so far as the prosecution of the person is, in light of the actions of that organisation, intended to punish harm to the security or other equally essential interests of that Member State:
 - The scope of Article 55(1)(b) of the CISA is not necessarily limited to 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, as other offences may be equally capable of falling within that exception where, in light of the circumstances in which the offence was committed, it can be duly established that the prosecution is intended to punish harm to that security or to those other equally essential interests (paras 75-76);
 - However, not every criminal organisation necessarily and in itself harms the security or other equally essential interests of the Member State concerned. Only those criminal organisations whose actions may, due to the elements that distinguish them, be regarded as constituting such harm are covered by Article 55(1)(b) of the CISA (para 78);
 - In that regard, 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 where, over and above the breaches of public order which every offence entails, those offences affect the Member State itself (para 81);
 - However, in the present case, it does not appear that the actions of the criminal organisation concerned had the effect of damaging Germany itself, so 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 is for the referring court to ascertain (para 82).



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