



EUROJUST

# 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 **2020 edition of Eurojust overview on the case-law of the CJEU on the principle of *ne bis in idem* in criminal matters has been updated up to 15 March 2020**. Compared to the previous edition, published in 2017, it contains five additional judgments, making for a total of 20 judgments between 2003 and 2020.

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 updated version covers, inter alia, the following main topics.

- **Legal framework and relationship between the different provisions.**
- **Temporal scope of application of the *ne bis in idem* principle.**
- **Material scope of application of the *ne bis in idem* principle.** This section specifically addresses the key elements of the criminal nature of the proceedings and penalties, the identity of the offender, the identity of the facts, and the final nature of the decision.
- **Limitations to the *ne bis in idem* principle.** In this respect, besides the 'enforcement condition' under Article 55 of the CISA, the CJEU also recently addressed the duplication of criminal proceedings and penalties and administrative proceedings and penalties of a criminal nature.

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. Legal framework

The *ne bis in idem* principle is included in many national, European and international legal instruments. Within the European Union's area of freedom, security and justice, the main legal sources of the principle are Articles 54 to 58 of the CISA and Article 50 of the Charter. The principle is also included as grounds for refusal in a large number of EU instruments on judicial cooperation in criminal matters, including mutual recognition instruments such as Council Framework Decision 2002/584/JHA on the European arrest warrant ('EAW FD') and Directive 2014/41/EU on the European investigation order in criminal matters.

In general, the *ne bis in idem* principle prohibits duplication of proceedings and penalties of a criminal nature for the same acts and against the same person (see *infra*, *Åkerberg Fransson*), either within the same Member State or in several Member States if the person has exercised their right to freedom of movement (see *infra*, *Gözütok* and *Brügge, Gasparini*).

Moreover, the *ne bis in idem* principle is also enshrined in Article 4 of Protocol 7 to the ECHR ('Article 4P7 ECHR'). Therefore, where relevant, reference is also made to the case-law of the ECtHR and its [Article 4P7 case-law guide](#).

## 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* <sup>(1)</sup>.

## 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* <sup>(2)</sup>.

## 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.*

## 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 paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case. ... No derogation from this Article shall be made under Article 15 of the Convention* <sup>(3)</sup>.

<sup>(1)</sup> 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.

<sup>(2)</sup> The Charter is applicable in all Member States.

<sup>(3)</sup> 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.

## 2. Index of keywords with reference to relevant judgments

Keyword	Article	Case title	Case number
Criminal nature	Article 50 of Charter	<i>Åkerberg Fransson</i> <i>Menci</i> <i>Garlsson Real Estate SA</i>	C-617/10 C-524/15 C-537/16
Duplication of administrative punitive and criminal proceedings	Article 50 of Charter	<i>Åkerberg Fransson</i> <i>Menci</i> <i>Garlsson Real Estate SA</i> <i>Di Puma and Zecca</i>	C-617/10 C-524/15 C-537/16 C-596/16 and C-597/16
EAW	Article 3(2) of EAW FD	<i>Mantello</i> <i>AY</i>	C-261/09 C-268/17
Enforcement condition: <ul style="list-style-type: none"> <li>– compatibility with Charter</li> <li>– out-of-court settlements</li> <li>– pre-trial detention</li> <li>– suspended sentences</li> <li>– partial enforcement</li> <li>– unenforceable sentence</li> </ul>	Article 54 of CISA and Article 50 of Charter	<i>Spasic</i>  <i>Gözütok and Brügge</i> <i>Kretzinger</i> <i>Kretzinger</i>  <i>Spasic</i> <i>Bourquain</i>	C-129/14  C-187/01 and C-385/01 C-288/05 C-288/05  C-129/14 C-297/07
<i>Bis</i> (final decision): <ul style="list-style-type: none"> <li>– decision barring further prosecution</li> <li>– decision on the merits of the case</li> </ul>	Article 54 of CISA and Article 50 of Charter	<i>Turanský</i> <i>Mantello</i> <i>M.</i> <i>Kossowski</i> <i>Miraglia</i> <i>Van Straaten</i> <i>M.</i>	C-491/07 C-261/09 C-398/12 C-486/14 C-469/03 C-150/05 C-398/12



– decision by a public prosecutor		<i>Kossowski</i>	C-486/14
		<i>Gözütok and Brügge</i>	C-187/01 and C-385/01
		<i>Kossowski</i>	C-486/14
		<i>AY</i>	C-268/17
<i>Idem</i> (same facts)	Article 54 of CISA, Article 50 of Charter and Article 3(2) of EAW FD	<i>Van Esbroeck</i> <i>Van Straaten</i> <i>Gasparini</i> <i>Kretzinger</i> <i>Kraaijenbrink</i>	C-436/04 C-150/05 C-467/04 C-367/05 C-367/05
National remedies	Article 54 of CISA, Article 50 of Charter	<i>XC and others</i>	C-234/17
Same person	Article 50 of Charter	<i>Orsi and Baldetti</i> <i>AY</i>	C-217/15 and C-350/15 C-268/17

### 3. Chronological list of judgments

To date, the CJEU has handed down 20 key 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

In addition, there is one case on the *ne bis in idem* principle currently **pending** before the CJEU, namely the following.

- **Case C-505/19, *WS***. Request for a preliminary ruling from the *Verwaltungsgericht Wiesbaden*, Germany, lodged on 3 July 2019. The questions referred relate to the interpretation of Article 54 of the CISA and Article 50 of the Charter (meaning of ‘final decision’ in relation to a public prosecutor’s decision to discontinue criminal proceedings after the accused has fulfilled certain obligations) and the effects of the *ne bis in idem* principle in relation to the execution of Interpol red notice alerts.

## 4. Different provisions, one principle?

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

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

Similarly, as regards the relationship between Article 54 of the CISA and Article 50 of the Charter, the CJEU has held that since the *ne bis in idem* principle is also set out in Article 50, Article 54 of the CISA must be interpreted in light of that provision (*M., Kossowski*). Specific differences between Article 54 of the 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. For instance, with regard to the ‘enforcement condition’ that is included in Article 54 of the CISA but not in Article 50 of the Charter, the CJEU concluded that it is compatible with Article 50 of the Charter (*Spasic*). The CJEU also clarified that Article 50 of the Charter has direct effect in national legal orders (*Garlsson Real Estate SA, XC*).

Also, 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 <sup>(4)</sup>. Nevertheless, the CJEU has underlined that even though the ECHR does not constitute a legal instrument formally incorporated into EU law, 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*, 7.2). 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*).

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

### 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.

<sup>(4)</sup> 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-129/14 PPU, *Spasic*, Judgment of 27 May 2014**

- See *infra*, 7.1.

**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*, 5.

**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*, 7.1.

**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**

- **The facts.** In 2012, criminal investigations were opened in Switzerland against XC, YB and ZA for value added tax (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 Paragraph 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.
- **The 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?

- **The 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 (paragraph 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 (paragraph 47) because:
    - the procedure laid down by Paragraph 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 (paragraphs 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 (paragraphs 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 (paragraphs 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 (paragraphs 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 (paragraphs 55–58).

## 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*).
- **The 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).
- **The 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?
- **The 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 (paragraph 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 (paragraph 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 measures which have already been adopted against the accused by means of a decision that has become final are of a criminal nature (*Åkerberg Fransson*, confirmed in *Spasic*, paragraph 53). 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 an administrative sanction is 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 punitive sanctions applicable to VAT offences (*Åkerberg Fransson*, *Menci*) and market abuse offences (*Garlsson Real Estate SA*, *Di Puma* and *Zecca*). Even though so far the CJEU has only dealt with cases of national application of *ne bis in idem*, it should not be overlooked that Article 50 of the Charter also has transnational effect. Hence, Member States might be confronted with the transnational application of *ne bis in idem* for punitive sanctions imposed in other Member States.

**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

- **The 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.
- **The 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?

- **The 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 (paragraph 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 (paragraph 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 (paragraph 35);
  - it is for the national court to determine, in light of the three criteria above, whether the administrative penalties are criminal in nature (paragraph 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 (paragraphs 29 and 36).

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

- See also *infra*, 6.3 (on *idem*) and 7.2 (on duplication of criminal and administrative proceedings).
- **The 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.
- **The main question.** Is the administrative penalty provided under national law for failing to pay VAT a penalty of criminal nature?
- **The 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 (paragraph 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 (paragraph 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 (paragraphs 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 (paragraph 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 (paragraph 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 (paragraph 33).

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

- See also *infra*, 7.2 (on duplication of criminal and administrative proceedings).
- **The 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.
- **The main question.** Is the administrative penalty provided under national law for market manipulation one of criminal nature?
- **The 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 (paragraph 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 (paragraph 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 (paragraphs 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 (paragraph 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 (paragraph 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 (paragraph 33).

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

- See also *infra*, 7.2 (on duplication of administrative and criminal proceedings).

## 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 of in a Contracting State (*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, such as witnesses (*AY*).

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

- **The 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.
- **The 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?
- **The 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 (paragraph 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 (paragraphs 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 (paragraph 23).

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

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

### 6.3. The '*idem*' requirement – the same acts

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

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

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

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

**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 (on temporal scope).
- **The facts.** See *supra*, 5.
- **The 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?
- **The 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' (paragraphs 27 and 28).
  - The TEU does not make the application of Article 54 of the CISA conditional upon harmonisation or approximation (paragraph 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 (paragraph 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 (paragraphs 32–35).

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

- See also *infra*, 6.4 (on *bis*).
- **The 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.
- **The 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?
- **The 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'** (paragraphs 41–48). The CJEU clarifies that the quantities of the drugs are not required to be identical (paragraph 49). The CJEU concludes that **the export and import of the same narcotic drugs are, in principle, to be regarded as 'the same acts'** (paragraph 51). The definitive assessment is, however, a matter for the competent national courts (paragraph 52).

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

- See also *infra*, 6.4 (on *bis*).
- **The 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.
- **The main question.** Must the importation and subsequent sale of goods be considered a single act, or two separate acts?
- **The CJEU's reply.** The CJEU refers to the definition of 'same acts' developed in *Van Esbroeck* (paragraph 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** (paragraph 55). The CJEU also repeats that the definitive assessment is a matter for the competent national courts (paragraph 56).

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

- **The 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.

- **The 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?
- **The CJEU’s reply.** The CJEU refers to the definition of ‘same acts’ developed in *Van Esbroeck* and the supporting arguments (paragraphs 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’ (paragraph 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** (paragraph 36).

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

- **The 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.
- **The 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?
- **The CJEU’s reply.** **The CJEU refers to the definition of ‘same acts’ developed in *Van Esbroeck* (paragraphs 26–28) and adds that the material acts must make up an inseparable whole (paragraph 28).** The CJEU then explains that the mere fact that the alleged perpetrator acted with the same criminal intention does not suffice (paragraph 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** (paragraphs 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 (paragraph 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 (paragraph 34).

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

- **The facts.** See *supra*, 6.1.
- **The 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?
- **The CJEU’s reply. Yes.** The CJEU’s main arguments were the following.

- The CJEU refers to the definition of ‘same acts’ developed in *Kraaijenbrink* (paragraph 35) and recalls that the classification of the facts under national law and the legal interest protected are not relevant (paragraph 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 (paragraph 37).
  - The fact that the criminal offence requires an additional constituent subjective element in relation to the administrative penalty is irrelevant (paragraph 38).
- The CJEU also repeats that the definitive assessment is a matter for the competent national courts (paragraph 38).

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

- **The facts.** See *supra*, 6.1.
- **The 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?
- **The CJEU’s reply. Yes.** The CJEU’s main arguments were the following.
  - The CJEU refers to the definition of ‘same acts’ developed in *Kraaijenbrink* (paragraph 37) and recalls that the classification of the facts under national law and the legal interest protected are not relevant (paragraph 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 (paragraph 39).
    - The fact that the criminal offence requires an additional constituent subjective element in relation to the administrative penalty is irrelevant (paragraph 40).
  - The CJEU also repeats that the definitive assessment is a matter for the competent national courts (paragraph 40).

## 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, but the CJEU’s case-law has provided some clarifications. The CJEU has held that two elements are necessary in order for a decision to count as finally disposing of the case against a person 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*). The CJEU has underlined that the assessment of the ‘final’ nature of the criminal ruling must be carried out on the basis of the law of the Member State in which that ruling was made (*M., Kossowski*). In the framework of that assessment, a judicial authority can request 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*). 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*). Also, the fact that the decision at issue was taken by a prosecuting authority (*Gözütok and Brügge, Kossowski, AY*), even where no penalty was enforced (*Kossowski*), 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 (*Miraglia, Van Straaten, M., Kossowski*). The CJEU held that this requires a detailed investigation to have been undertaken (*Kossowski*). At the same time, 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 because of insufficient evidence) also satisfies this requirement (*Van Straaten, M.*).

To date, the CJEU has accepted as ‘a decision that has been finally disposed of’ an out-of-court settlement with the public prosecutor (*Gözütok and Brügge*), a court acquittal based on lack of evidence (*Van Straaten*), a court acquittal arising due to the prosecution of the offence being time-barred (*Gasparini*) and a decision of *non-lieu* (*M.*).

On the other hand, the CJEU rejected the application of Article 54 of the CISA in cases where a judicial authority had closed proceedings without any assessment of the unlawful conduct with which the defendant had been charged (*Miraglia*), cases where a police authority, following the expiry of the limitation period and an examination of the merits of the case, had submitted an order to suspend the criminal proceedings (*Turanský*), 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*), and cases where the public prosecutor closed criminal investigations against unknown persons and the person involved was only interviewed as a witness (*AY*).

**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. Yet 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*).

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*, 7.1 (on enforcement condition).

- **The 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.
- **The main question.** Does Article 54 of the CISA apply in the case of out-of-court settlements?
- **The 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 (paragraphs 27–31);
  - the settlement procedure penalises the accused's unlawful conduct (the State's right to punish has been exercised) (paragraph 29);
  - once the accused has complied with the obligations imposed, the penalty must be regarded as having been enforced (paragraph 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 (paragraph 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 (paragraph 33);
  - this interpretation is in line with the objective and purpose of Article 54 of the CISA and the principle of *effet utile* (paragraphs 35-40).

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

- **The 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.
- **The 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?
- **The 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 (paragraphs 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 (paragraph 33).

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

- See also *supra*, 6.3 (on *idem*).
- **The facts.** See *supra*, 6.3.
- **The 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?
- **The 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 (paragraphs 55 and 56);
  - a different interpretation would have the effect of jeopardising the objective of Article 54, namely the right to freedom of movement (paragraphs 57 and 58);
  - a different interpretation would undermine the principles of legal certainty and of the protection of legitimate expectations (paragraph 59).

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

- See also *supra*, 6.3 (on *idem*).
- **The facts.** See *supra*, 6.3.
- **The 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?
- **The 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 (paragraphs 23 and 24);
  - a different interpretation would have the effect of jeopardising the objective of Article 54, namely the right to freedom of movement (paragraphs 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 (paragraph 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 (paragraph 30).

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

- **The 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.

- **The 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?
- **The 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 (paragraphs 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 (paragraphs 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 (paragraphs 41–44).

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

- **The 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.
- **The 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)?
- **The 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 (paragraph 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 (paragraph 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’ (paragraph 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’ (paragraphs 49 and 50).

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

- **The 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.
- **The 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?
- **The 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 (paragraphs 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 (paragraphs 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) (paragraphs 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 (paragraphs 40 and 41).

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

- **The 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.

- **The 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?
- **The 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 (paragraphs 34 and 35). In the present case, under Polish law, the decision of the Polish public prosecutor precluded any further prosecution in Poland (paragraphs 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 (paragraphs 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 (paragraph 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 (paragraph 52).

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

- See also *supra*, 6.2 (on same person).
- **The 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.

- **The 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?
- **The 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 (paragraph 39);
  - this provision requires the requested person to have been 'finally judged' (paragraph 40), which implies that criminal proceedings had previously been instituted against the requested person (paragraph 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 (paragraph 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 (paragraph 45).

## 7. 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 two different limitations to the *ne bis in idem* principle under Article 52 of the Charter: the ‘enforcement condition’ under Article 54 CISA (*Spasic*) 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*).

### 7.1. 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’). 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*). 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 (on *bis*).

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

- **The facts.** See *supra*, 6.3.
- **The 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 (paragraph 40);
    - suspended custodial sentences constitute a penalty (paragraph 42);
    - any other interpretation would be inconsistent with the general approach that suspended sentences are normally passed for less serious offences (paragraph 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 (paragraphs 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) (paragraph 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 (paragraph 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 (paragraphs 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 (paragraph 62).

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

- **The 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.
- **The 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?
- **The 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' (paragraph 47);
  - the enforcement condition must have been satisfied at the time when the second criminal proceedings were instituted (paragraph 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 (paragraphs 49 and 50).

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

- **The 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.
- **The main questions.**
  - Is the enforcement condition of Article 54 of the CISA compatible with Article 50 of the Charter?
  - **The 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 (paragraph 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 (paragraph 55).
    - The enforcement condition fulfils all the criteria included in Article 52 of the Charter:
      - the restriction is provided for by law (paragraph 57);
      - the restriction respects the essence of the *ne bis in idem* principle (paragraphs 58 and 59);
      - the restriction is proportionate: it is appropriate for attaining the objective of preventing the impunity of persons (paragraphs 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 (paragraphs 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?
  - **The 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 (paragraph 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 (paragraph 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 (paragraphs 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 (paragraphs 82 and 83).

## 7.2. Duplication of administrative punitive and criminal proceedings and sanctions

The CJEU has held that the duplication of criminal proceedings and penalties and administrative proceedings and penalties of a criminal nature for the same act (the ‘double-track enforcement system’) 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 are satisfied (*Menci, Garlsson Real Estate SA, Di Puma and Zecca*).

In this regard, the CJEU has so far only addressed cases of national application of *ne bis in idem*, either related to VAT offences, where criminal proceedings were brought after the administrative ones had been finally concluded (*Menci*), or to market manipulation offences, where administrative proceedings were still pending after the criminal proceedings had been terminated by a final decision (*Menci, Garlsson Real Estate SA*). Yet it should not be overlooked that Article 50 of the Charter also has transnational effect. Hence, Member States might be confronted with the transnational application of *ne bis in idem* for duplication of punitive sanctions imposed in different Member States.

**ECtHR.** In *Menci and Garlsson Real Estate SA*, the CJEU referred to the ECtHR judgment *A and B v Norway*, in which the ECtHR changed its previous case-law on the *ne bis in idem* principle. In that case, 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 (on criminal nature) and 6.3 (on *idem*).
- **The facts.** See *supra*, 6.1.
- **The 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?
- **The 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 (paragraph 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 (paragraph 41). In this case, it is (paragraph 42).
  - It must respect the essential content of *ne bis in idem* (paragraph 41). In this case, it appears to do so, as it is only permitted under conditions, which are exhaustively defined (paragraph 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 (paragraph 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 (paragraphs 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 (paragraphs 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 (paragraph 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 (paragraph 50).
    - Contain rules ensuring coordination that limits the disadvantage resulting from such duplication to what is strictly necessary (paragraph 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 (paragraph 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 (paragraph 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 (paragraph 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 (paragraphs 58, 59 and 64).

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

- See also *supra*, 6.1 (on criminal nature) and 6.3 (on *idem*).
- **The facts.** See *supra*, 6.1.
- **The main questions.**
  - 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?
  - **The 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 (paragraph 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 (paragraph 43). In this case, it is (paragraph 44).
      - It must respect the essential content of *ne bis in idem* (paragraph 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 (paragraph 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 (paragraph 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 (paragraph 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 (paragraph 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 (paragraphs 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 (paragraph 51). In this case, the national legislation meets this requirement (paragraphs 52 and 53).

- Contain rules ensuring coordination which limits the disadvantage resulting from such duplication to what is strictly necessary (paragraph 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 (paragraphs 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 (paragraph 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 (paragraph 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 (paragraph 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 (paragraph 62).
- Does Article 50 of the Charter confer a directly applicable right?
- **The 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 (paragraph 65);
  - Article 50 of the Charter confers a right that is not subject to any conditions and is therefore directly applicable (paragraph 66).

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

- **The 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.

- **The 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?
- **The 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 (paragraph 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 (paragraphs 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 (paragraph 42); however, the duplication of proceedings and penalties of a criminal nature is subject to strict compliance with the principle of proportionality (paragraph 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 (paragraphs 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 (paragraph 45).



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