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Schengen and Charter-related *ne bis in idem* protection in the Area of Freedom, Security and Justice: *M* and *Zoran Spasic*

Case C-398/12, *Procura della Repubblica* v. *M.*, judgment of the Court (Fourth Chamber) of 5 June 2014, EU:C:2014:1057; Case C-129/14 PPU, *Zoran Spasic*, judgment of the Court (Grand Chamber) of 27 May 2014, EU:C:2014:586

1. Introduction

The references in *M.* and *Zoran Spasic* raise important legal issues about the transnational application of the *ne bis in idem* right in the AFSJ. In the case of *M.* the national court enquired whether a final judgment that terminates criminal proceedings on the basis of a lack of evidence precludes the initiation or conducting of proceedings in respect of the same facts and the same person in another Contracting State. In the case of *Zoran Spasic* the national court referred a question to the ECJ as to the compatibility between the Schengen *ne bis in idem* protection, laid down in Article 54 of the Schengen implementation Convention (CISA), with Article 50 of the EU Charter of Fundamental Rights (CFR). Article 54 CISA subjects the application of the *ne bis in idem* principle to an enforcement condition. Only if the penalty imposed in the first verdict has been enforced or is actually in the process of being enforced, or can no longer be enforced under the laws of the sentencing State, is a second prosecution barred. A second question concerned the modalities of the enforcement condition. Is the enforcement clause also satisfied if only one part (here: a fine) of two independent parts of the outstanding penalty imposed in the sentencing State (here: a custodial sentence and a fine) has been enforced?

The enforcement condition is not included in Article 50 CFR, the primary source of Union law. However, Article 50 CFR does co-exist with Article 54 CISA and with the *ne bis in idem* provision in Article 4 of Protocol 7 ECHR. The reason why *Spasic* has triggered interesting and important questions has to do with the fact that clarity must be sought concerning the relationship between the different *ne bis in idem* provisions in the AFSJ, but also concerning the very essence of the right and the extent to which exceptions and limitations to the right can be justified under Article 52(1) CFR. National constitutional courts have ruled on these questions in a contradictory way, without referring questions to the ECJ. Overall, it is questionable whether the

enforcement condition is in line with the aim of achieving freedom, security and justice, based on mutual trust, and with the obligation to interpret and apply fundamental rights within the EU in accordance with the EU constitutional framework.[1]

2. *Procura della Repubblica* v. *M*

2.1. *Facts and background, questions to the Court*

M, an Italian citizen residing in Belgium, was investigated in Belgium as a suspect of unlawful sexual behaviour with his grand-daughter, after several allegations by his daughter-in-law in 2004. After intensive investigations, the pre-trial chamber of Mons terminated the criminal proceedings with a "non-lieu" decision on the ground of insufficient facts and/or evidence to support the accusations. This decision was confirmed by the indictment division of the Court of Appeal and by the Cour de Cassation in 2009. That decision definitively concluded the proceedings in Belgium, subject only to the possibility of a *novum* (new facts and/or evidence) emerging. Meanwhile, due to accusations in Italy in 2006, also by his daughter-in-law, the Italian judicial authorities investigated the same facts and decided, four days after the decision of the pre-trial chamber in Mons, to prosecute M for these facts. At a hearing at the Court in Italy, M submitted that he was entitled to rely on the principle of *ne bis in idem* concerning the judgment a week earlier by the Belgian *Cour de Cassation*, which had concluded the parallel proceedings in Belgium. The Italian tribunal referred the following question to the ECJ: "Does a final judgment of 'non-lieu' that terminates criminal proceedings after an extensive investigation but which permits the proceedings to be reopened in the light of new evidence, given by a Member State of the EU and a party to the CISA, preclude the initiation or conduct of proceedings in respect of the same facts and the same person in another Contracting State?"

2.2. *Opinion of Advocate General Sharpston*

The Advocate General directly dealt with the essence of the question, namely the interpretation of "finally disposed of" in Article 54 CISA and admitted that the case law of the ECJ does not provide an unequivocal answer, as the decisions in the appropriate cases had been reached before a trial was held and the defendant was acquitted or found guilty. The Advocate General referred

1. Opinion 2/13, *ECHR Accession,* EU:C:2014:2454, para 177.

to cases such as *Van Straaten*,[2] *Gözütok and Brügge*,[3] *Gasparini*[4] and *Turanský*[5] and came to the conclusion that the Court's approach seems to be similar to that of the ECtHR in relation to Article 4(1) of Protocol 7 to the ECHR, which means that the decisive point is whether the prior acquittal or conviction has already acquired the force of *res judicata*. In terms of the Explanatory Report to the Protocol "this is the case when the (decision) 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". The right under Article 50 CFR has the same meaning and scope as the similar right in Article 4(1) of Protocol 7 to the ECHR, albeit, however, that the scope of Article 50 CFR is wider, as it also includes the transnational dimension in the EU.

Whether the Belgian "non-lieu" decision has finally disposed of the proceedings against M in Belgium has to be assessed according to the *Turanský* test.[6] The decision must bring the criminal proceedings to an end and definitively bar any further prosecution under the law of the Contracting State. The Advocate General had no doubt in this case that the finding of the pre-trial chamber in Mons acquired the force of *res judicata* and satisfies the *Turanský* test. However, the Belgian Government came to the opposite conclusion in its written observation, based on the fact that the possibility exists to reopen the proceedings in light of new facts and/or evidence. The Advocate General first looked at the timing of the parallel proceedings and at what stage and why the defendant might invoke the *ne bis in idem* protection. The Advocate General adopted a clear stance: the Belgian proceedings were not final until the decision of the *Cour de Cassation*. Before this, M could not have relied on the *ne bis in idem* rule. The Advocate General insisted on the fact that, because of the lack of binding rules on conflict of jurisdiction and on the allocation of criminal jurisdiction, the *ne bis in idem* principle resolves the problem in a limited, sometimes arbitrary way. It is not a satisfactory substitute for action to resolve such conflicts according to an agreed set of criteria. In the view, of the Advocate General any further proceedings against a defendant who benefits from a definite decision of "non-lieu" must be initiated in the first Member State of the decision. It is not open to the courts in a second Member State to short-circuit the process (and the procedural guarantees offered to the defendant by the national law of the first Member State) by deciding to use what may (or may not) be "new" facts and/or evidence to try that defendant.

2. Case C-150/05, *Van Straaten* v. *The Netherlands and Italy*, EU:C:2006:614.
3. Joined Cases C-187 & 385/01, *Gözütok and Brügge*, EU:C:2003:87.
4. Case C-467/04, *Gasparini*, EU:C:2006:610.
5. Case C-491/07, *Turanský*, EU:C:2008:768.
6. Elaborated in paras. 34–36 of the Court's decision.

Second, the Advocate General looked at the option that the possible reopening of the case might set aside the *ne bis in idem* rule. After an analysis of Article 4 of Protocol 7, the Advocate General came to the conclusion that new proceedings in Belgium without new facts and/or evidence would have been barred. The same should apply in the cross-border setting. The fact that the Italian judicial authorities came to a different conclusion on the basis of essentially the same facts and/or evidence is not decisive. The possibility of different outcomes is a consequence of the fact that *ne bis in idem* operates notwithstanding the absence of harmonization, based upon a high level of mutual trust.

2.3. *Judgment of the Court*

In its judgment, the Court followed the reasoning of the Advocate General. For an interpretation of "finally disposed of", the Court referred to *Miraglia*[7] (a determination as to the merits of the case) and to *Van Straaten*[8] (definitely acquitted because of the inadequacy of the evidence) and then applied the *Turanský* test[9] (further prosecution must have been definitively barred). The Court came to the conclusion that by means of the decision of the *Cour de Cassation*, the earlier decision of the court acquired the force of *res judicata*. The sole fact that the case could be reopened if new facts/evidence emerge does not mean that the decision cannot be regarded as final for the purposes of Article 54 CISA. The Court also underlined that Article 54 CISA must be interpreted in the light of Article 50 of the Charter, as it has the same meaning and scope as Article 4 of Protocol 7. In *Sergey Zolutukhin* v. *Russia* the ECtHR clearly decided that extraordinary remedies are not taken into account for the purposes of determining whether the proceedings have reached a final conclusion.[10] The reopening of a "non-lieu" under Belgian law does involve, in the view of the Court, the exceptional bringing of separate proceedings based on different evidence, rather than the mere continuation of proceedings which have already been closed.[11] For these reasons the Court concluded that Article 54 CISA must be interpreted as meaning that an order making a finding that there is no ground to refer a case to a trial court which precludes, in the Contracting State in which that order was made, the bringing of new criminal proceedings in respect of the same acts against the person to whom that finding applies, unless new facts and/or evidence against that person

7. Case C-469/03, *Miraglia*, EU:C:2005:156.
8. Case C-150/05, *Van Straaten*.
9. Case C-491/07, *Turanský*.
10. ECtHR, *Sergey Zolutukhin* v. *Russia*, Appl. No. 14939/03, judgment of 10 Feb. 2009, para 108.
11. Para 41.

come to lights, must be considered to be a final judgment for the purposes of that article, thereby precluding new proceedings against the same person in respect of the same acts in another Contracting State.

3. *Zoran Spasic*

3.1. *Background*

Mr Spasic, a Serbian national, was investigated and prosecuted in Regensburg in Germany for organized fraud against a German national, committed in March 2009 in Milan in Italy. In a monetary cash transaction the victim received counterfeit EUR 500 banknotes to a total value of EUR 40 000. On February 2010, the local court in Regensburg issued a national arrest warrant concerning the fraud offences committed in Milan, which served as the basis for the issue of a European Arrest Warrant (EAW) in March 2010. However, Mr Spasic had already been arrested in August 2009 on the basis of an EAW emanating from Innsbruck in Austria in relation to similar offences. In August 2010, he was sentenced in Innsbruck to a custodial sentence of seven years and six months. That decision had become final.

In June 2012, the Milan District Court sentenced Mr Spasic for the same acts as the ones for which Regensburg had issued the EAW for a custodial sentence and a fine of EUR 800, both being principal penalties.[12] The main evidence was based on written confessions that Mr Spasic had made while in custody in Austria. This decision became final in July 2012. In the ECJ's wording it was an *in absentia* decision, but in reality it was a settlement under Article 444 of the Italian criminal procedure by which the suspect and the prosecutor submit an agreement to the court resulting in a reduced sentence.[13] This decision became final in July 2012. The public prosecutor in Milan had first suspended the execution of the custodial sentence by the Milan court, but revoked this suspension in January 2013 and ordered the imprisonment of Mr Spasic with the aim of enforcing the custodial sentence and the payment of the fine of EUR 800. However, a European Arrest Warrant for that purpose had not been issued.

In December 2013, the Austrian authorities surrendered Mr Spasic to Germany,[14] thereby executing the European Arrest Warrant from 2010 and

12. The two penalties in question do not constitute a principal penalty and an ancillary penalty under Italian law.

13. *Patteggiamento sulla pena*.

14. On 20 Nov. 2013, the local court in Regensburg issued a new and extended national arrest warrant for Mr Spasic, including the facts of the 2010 national arrest warrant, but adding new offences.

temporarily suspending the execution of the sentence imposed in Austria. Mr Spasic challenged his pre-trial detention in Regensburg, claiming that in accordance with the *ne bis in idem* principle, he could not be prosecuted in Germany for the acts committed in Milan in March 2009, since he had already received a final and binding sentence from the District Court of Milan in respect of those acts. The local court in Regensburg dismissed the action on 13 January 2014 and referred the case to the Regional Court in Regensburg. By means of a bank transfer, on 23 January 2014 Mr Spasic paid the fine of EUR 800 to the authorities in Milan and produced proof of that payment before the Regional Court in Regensburg, which however upheld the detention order. Mr Spasic appealed against this decision before the Higher Regional Court in Nuremberg, claiming that the enforcement condition of Article 54 CISA, integrated in the EU acquis since the Treaty of Amsterdam, cannot lawfully restrict the scope of the general *ne bis in idem* protection under Article 50 CFR and that, since he had paid the fine of EUR 800, he should be released. On 19 March 2014 the Higher Regional Court referred the following questions to the Court for a preliminary ruling: "1. Is Article 54 [CISA] compatible with Article 50 of the [Charter], in so far as it subjects the application of the *ne bis in idem* principle to the condition 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 State? 2. Is the abovementioned condition, laid down in Article 54 [CISA], also satisfied if only one part (here: a fine) of two independent parts of the outstanding penalty imposed in the sentencing State (here: a custodial sentence and a fine) has been enforced?"

3.2. *View of Advocate General Jääskinen*

The Advocate General was very much aware that the questions that the referring German Court had put to the ECJ constitute a novel issue in the area of judicial cooperation in criminal matters, namely the relationship between Article 50 CFR and Article 54 CISA.

Before tackling the questions, the Advocate General elaborated on two preliminary issues, one on the jurisdiction of the Court and one on the interest at stake. Concerning jurisdiction, the Advocate General stressed that the Court has jurisdiction since CISA has been integrated in EU law and the Court has jurisdiction to assess a directly applicable instrument of secondary law in the light of the Charter. Concerning the interest at stake, the Advocate General underlined that there are no doubts as to the "*bis*" and "*idem*" elements in this case. The case was also strictly limited to the criminal law dimension of *ne bis in idem* and did not refer to cumulative punitive and administrative sanctions. What is essential in this case is the execution or enforcement condition,

formulated in Article 54 CISA and not included in Article 50 of the Charter: "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*" (emphasis added). Related to the first question on the compatibility of the enforcement condition of Article 54 CISA with Article 50 of the Charter, the Advocate General underlined that with the enforcement condition the drafters of the CISA aimed to ensure that the person concerned is actually punished for the offence at least once, thereby precluding impunity. For the Advocate General, this purpose can also be clearly seen in the Court's case law, in particular in *Miraglia*[15] and *Kretzinger*.[16] In order to obtain a clear picture of the meaning and the scope of Article 50 CFR, the Advocate General analysed the corresponding Article 4 of Protocol 7 to the ECHR, that covers the prohibition of double prosecution and that of double punishment. Article 4 does not accept, in a national context, the initiation or continuation of criminal proceedings for the same acts after a final decision, even if that final decision has not been enforced.[17] Secondly, the Advocate General looked at Article 50 CFR of the Charter and its relationship with Article 4 of Protocol 7. The wording is almost identical, only the territorial scope is different, as the CISA *ne bis in idem* principle applies in a transnational context. It is also undisputed, according to the Advocate General, that the Charter must be interpreted in accordance with the corresponding provisions of the ECHR. He however raised the question whether that approach also applies where a provision of the ECHR is not binding on all the Member States. He answered this question in the negative, as non-ratification by some Member States cannot have any bearing on the interpretation, since it does not change the scope of that provision. He concluded on this point with a firm affirmation: "To conclude otherwise would be tantamount to granting the Member States a unilateral power of interpretation as regards the substance of the European Union's system of fundamental rights. In view of the principle of autonomy of EU law, in conjunction with the Court's task of ensuring its uniform interpretation, such a conclusion must be excluded".

In the light of the need for a consistent interpretation of the two norms, the Advocate General posed the question whether the enforcement condition laid down in Article 54 CISA conflicts with Article 50 CFR. In his view it is clear

15. C-469/03, *Miraglia*.

16. C-288/05, *Kretzinger*, EU:C:2007:441.

17. ECtHR, *Sergey Zolutukhin* v. *Russia*, paras. 80–84; ECtHR, *Muslija* v. *Bosnia and Herzegovina*, Appl. No. 32042/11, judgment of 14 Jan. 2014, para 37.

that the enforcement condition makes the application of the *ne bis in idem* principle subject to additional conditions that are not present in Article 50 CFR and do not correspond to the derogations allowed under Article 4(2) of Protocol 7 and do not comply with the case law of the ECtHR – which, however, only has national territorial scope. In his view, the high level of protection ensured by Article 4 of Protocol 7, combined with the AFSJ, where cross-border execution now takes place through EU instruments based on mutual recognition, argues in favour of the rigorous application of Article 50 of the Charter and leads to a *prima facie* incompatibility between the enforcement condition and the Charter. Based on the Explanations relating to the Charter, the *ne bis in idem* principle does apply both within the jurisdiction of one State, but also between the jurisdictions of several Member States; but they also expressly refer to Articles 54–58 CISA, indicating that the very limited exceptions in those articles permitting the Member States to derogate from the *ne bis in idem* rule are covered by the horizontal clause in Article 52(1) of the Charter. For that reason, the Advocate General did not declare that the enforcement condition is incompatible *per se* with the Charter. He did however stress that the Court must take those Explanations duly into consideration, in accordance with the third paragraph of Article 6(1) TEU and Article 52(7) of the Charter, though it is not bound by them in the interpretation of the Charter.[18]

Furthermore, the Advocate General underlined that, where the Explanations refer to the *EU acquis* as regards secondary law, the compatibility of that *acquis* can be called into question in view of the evolution of the case law of the ECtHR and the ECJ, and the development of EU law. He did apply the limitation/derogation test under Article 52(1), however, and came to the conclusion that the enforcement condition is a limitation of the *ne bis in idem* rule that has been provided by law. As to the question whether the enforcement condition respects the essence of the right, he came to an affirmative conclusion, but *expressis verbis* with hesitation. In fact, he considered the cross-border protection not to be part of the essence of the *ne bis in idem* rule. As far as the justification, proportionality and necessity of the enforcement condition are concerned, he clearly stated that a generalized application of the enforcement condition would not meet these criteria. Only in cases of positive duties to investigate, prosecute and punish international crimes or in cases where the cooperation measures applicable under EU law are not sufficient to prevent impunity can the application of the enforcement condition be proportional and justified. In the present case, it is for the national court to determine whether the latter situation arises.

18. See Borowski, "Artikel 51 bis 54" in Meyer (Ed.), *Charta der Grundrechte der Europäischen Union*, 2nd ed. (Nomos Kommentar, 2006).

Concerning the second question, the partial execution of the sentence (only the payment of the fine), the Advocate General examined the legal character of both penalties. They are both principal penalties and in his view it is clear that the custodial sentence had not been enforced or was not in the process of being enforced, but was still enforceable. In this case the enforcement condition of Article 54 CISA had not been met.

3.3. *Judgment of the Court*

In March 2014, the Court granted the referring court's request that the preliminary ruling be dealt with under the urgent procedure (PPU); it delivered its ruling in *Spasic* less than two months later, which can be qualified as very quick, certainly considering the importance and complexity of the case. It is however astonishing that, besides Germany, only France and Italy intervened in the case. As to the jurisdiction of the Court, the ECJ was very straightforward and affirmed its jurisdiction, based on the system laid down in Article 267 TFEU and Article 35 TEU. Moreover, Germany had made a declaration accepting the jurisdiction of the Court to deliver a preliminary ruling in accordance with Article 35(3)(b) TEU. The fact that the order for reference did not mention Article 35 TEU but only referred to Article 267 TFEU cannot of itself make the reference for a preliminary ruling inadmissible. Concerning the national court's first question, the Court referred directly to the explanations relating to the Charter, which do mention expressly Article 54 CISA among the provisions covered by the horizontal clause in Article 52(1) of the Charter. The Court derived from this, without further consideration, that Article 54 CISA constitutes a limitation on the *ne bis in idem* principle that is compatible with Article 50 CFR. This is also provided by law and does not call into question the *ne bis in idem* principle as such.[19] The Court stated that the enforcement condition is intended, *inter alia*, to avoid a situation in which a person definitively convicted and sentenced in one Contracting State can no longer be prosecuted for the same acts in another Contracting State and therefore ultimately remains unpunished if the first State did not execute the sentence imposed. As to proportionality, the Court reiterated that the aim of the AFSJ is to ensure a high level of security and that the enforcement condition of Article 54 CISA is to be seen in that context and is thus appropriate. As regards necessity, the Court took into account the Commission's arguments that there are numerous instruments of mutual legal assistance and mutual recognition to facilitate cooperation between judicial authorities, including the issuing of an European Arrest Warrant, the mutual

19. A position that was also defended by Germany and France.

recognition of financial penalties,[20] the mutual recognition of custodial sentences[21] and the Framework Decision 2009/948[22] containing a specific framework for preventing and resolving conflicts of jurisdiction. However, the Court came to the conclusion that such instruments of mutual assistance do not lay down an enforcement condition similar to that of Article 54 CISA, and, accordingly, are not capable of fully achieving the objective pursued, as these instruments cannot ensure that in the AFSJ persons definitely convicted and sentenced will not enjoy impunity if the State which imposed the first sentence does not execute the penalties imposed. For that reason the enforcement condition does not go beyond what is necessary to prevent, in a cross-border context, the impunity of persons definitively convicted and sentenced in the EU. The Court adds that national courts may, on the basis of Article 4(3) TFEU and the cooperation instruments, contact and consult each other in order to verify whether the Member State which imposed the first sentence really intends to execute the penalties imposed.

As to the second question, the Court stressed that the underlying substantive and procedural laws of the Member States have not been harmonized, but that even in the absence of harmonization there is a need for an autonomous and uniform interpretation throughout the Union. Here the Court fully followed the reasoning of the Advocate General and came to the conclusion that the sentence had not been enforced.

4. Comment

4.1. *Panoply of ne bis in idem rules: A legal patchwork?*

In February 2003, the Court of Justice ruled in *Gözütok and Brügge*[23] for the first time on the rationale and scope of the Schengen *ne bis in idem* principle. At that time, Article 54 CISA was the only binding transnational *ne bis in idem* standard in EU law. The ECJ set aside the aim of the Schengen legislature and gave an autonomous EU interpretation of the principle, based on mutual trust

20. Council Framework Decision 2005/214/JHA of 24 Feb. 2005 on the application of the principle of mutual recognition to financial penalties, O.J. 2005, L 76/16.

21. Council Framework Decision 2008/909/JHA of 27 Nov. 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, O.J. 2008, L 327/27.

22. Council Framework Decision 2009/948/JHA of 30 Nov. 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings, O.J. 2009, L 328/42.

23. Joined Cases C-187 & 385/01, *Gözütok and Brügge*. See Vervaele, case note on *Gözütok and Brügge*, 41 CML Rev. (2004), 795–812.

(para 33) and it was also clear to the ECJ that the integration of the Schengen *acquis* into the framework of the EU was aimed at enhancing European integration and thus at enabling the EU to become more rapidly an area of freedom, security and justice (para 37). How important this mutual trust is for creating "an ever closer Union" is clear from the wording of the ECJ in the recent Opinion 2/13 on accession to the ECHR: "This legal structure is based on the fundamental premise that each Member State shares with all the other Member States, and recognizes that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premise implies and justifies the existence of mutual trust between the Member States that those values will be recognized and, therefore, that the law of the EU that implements them will be respected".[24] The ECJ also underlined in paragraph 177 of Opinion 2/13 that "(f)undamental rights, as recognized in particular by the Charter, must therefore be interpreted and applied within the EU in accordance with the constitutional framework referred to in paragraphs 155 to 176 above." Mutual trust is part of this framework and thus becomes a frame of reference for the autonomous meaning of *ne bis in idem* in the AFSJ.

From the very wording of the text of Article 50 CFR there is no doubt that *ne bis in idem* is a fundamental right with a transnational reach, having an EU-wide territorial scope. Although the wording of the article is very classic and seems to refer only to criminal offences, the text has to be interpreted in the light of the case law of the ECtHR. Article 52(3) CFR states clearly that the meaning and scope of the Charter rights will be the same as the corresponding rights in the Convention. In the Charter Explanations[25] no distinction is made between the Protocols which all the Member States have ratified (the First and Sixth) and those which only some Member States have ratified (including the Seventh). The drafters of the Charters were very well aware of this issue and made a deliberate choice. They never referred to Member States' reservations to the ECHR or its Protocols, either. Although these Explanations are not legally binding, the courts are legally obliged to consider them when interpreting the Charter (Art. 52(7) Charter).

The Opinion of the Advocate General and the ruling of the Court in *M* fully fits within the standing case law of the ECJ, as developed since *Gözütok and Brügge*. The mutual trust between Member States in the AFSJ imposes an acceptance of the differences between each other's systems After an analysis of Article 4 of Protocol 7, the Advocate General came to the conclusion that new proceedings in Belgium without new facts and/or evidence would have been barred. The same should apply in the cross-border setting. The fact that

24. Opinion 2/13, para 168.

25. Explanations relating to the Charter of Fundamental Rights (2007/C 303/02), O.J. 2007, C 303/17.

the Italian judicial authorities came to a different conclusion on the basis of essentially the same facts and/or evidence is not decisive. The possibility of different outcomes is a consequence of the fact that *ne bis in idem* operates, notwithstanding the absence of harmonization, based upon a high level of mutual trust. Also for the Court a final conclusion of the case, based on a *res judicata* decision on the merits, remains, even if that case could be reopened in the eventuality of new evidence: for the interpretation of the *ne bis in idem* right, a final judgment bars other proceedings against the same person for the same facts.

Since the coming into force of the Lisbon Treaty th*e ne bis in idem* protection has however become a legal patchwork and the ECJ ruling in *Spasic* had to address the hierarchy of norms. Although Article 50 CFR is a primary source of Union law, it co-exists with Article 54 CISA, and Article 4 of Protocol 7 ECHR. From the Explanations[26] to the Charter it is clear that, as Article 50 CFR has a corresponding right in Article 4 Protocol 7, its meaning and scope should be the same as the one in the Convention, but Union law may provide more extensive protection, as stipulated in Article 52(3) CFR.[27] The Explanations on Article 52(3) refer also to the autonomy of EU law and the ECJ, which the ECHR's limitations cannot "adversely affect", and also to the case law of the ECJ as a source (along with the case law of the ECtHR) for the interpretation of the "meaning and scope" of the ECHR. This autonomy can obviously only be used, along with Article 52(3), to set higher standards than those of the ECHR. This means that the ECHR must be a floor for Charter rights. In the final report of the working group on the Charter, as part of the Convention proceedings for the Constitutional Treaty,[28] it was already mentioned that Article 50 CFR reflects a higher level of protection in existing Union law, compared to the ECHR.

The Explanations, however, also state that the very limited exceptions in the Conventions permitting the Member States to derogate from the *ne bis in idem* rule are covered by the horizontal clause in Article 52(1) CFR. Certain limitations to the Article 54 CISA *ne bis in idem* principle are also derogations from or reservations to Protocol 7 ECHR. Neither the Netherlands nor Germany has ratified this Protocol. The UK is the only member of the Council of Europe that did not even sign it. Moreover, countries like France and Luxembourg formulated reservations when ratifying. In practice, some Member States have formulated a restricted *ne bis in idem,* or indeed no application thereof at all, in the following situations: offences that have been

26. O.J. 2007, C 303/02.

27. See Peers and Prechal, "Comments on Article 52 CFR, Scope and Interpretation of Rights and Principles" in Peers et al., *The EU Charter of Fundamental Rights* (Hart, 2014).

28. CONV 354/02, 22 Oct. 2002.

committed on national territory (the territoriality clause); the preclusion of punitive administrative sanctions from the scope of application; the interests of national security or other essential interests and/or offences committed by national civil servants. The other essential interests even include drug offences in some countries. They look very much like claw-back clauses of national sovereignty. Article 54 CISA Convention does however contain an enforcement clause as a stand-alone exception: "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*" (emphasis added).

Several national criminal courts have had to deal with the relationship between Article 50 CFR and Article 54 CISA in relation to the enforcement clause. In an interesting Italian case, the judge of preliminary investigations of the Tribunal of Milan ruled on this matter.[29] He had to decide on a committal procedure against two German suspects of a murder in Italy in 1989, for which they had already been sentenced to 5 years and 6 months imprisonment in Germany. After having served these German sentences and having used their EU right of freedom of movement, they were arrested and charged by the Italian prosecution authorities for the same facts. At the time of ratifying the CISA provisions, Italy had used its prerogative to make a reservation under Article 55 CISA, in order to bar the application of Article 54 CISA when the acts to which the foreign judgment relates took place in whole or in part in its own territory (the territoriality clause).[30] The point of departure of the Italian judge was the Union's interest in the freedom of movement within the Area of Freedom, Security and Justice. In his view Article 50 CFR and Article 6 TEU, which do not contain exceptions to the fundamental right and have direct and immediate application in the legal order of the Member States, have *de iure* abrogated the Schengen derogations. He decided not to commit both suspects to trial.[31] The Greek Supreme Court[32] has also ruled in the same sense. Greece had filed a reservation according to Article 55 CISA to exempt *inter alia* drug trafficking offences from the application of the *ne bis in idem* rule. The Greek Supreme Court linked the *ne bis in idem* protection to the principle of the mutual recognition of court judgments and orders. The Greek court

29. *Tribunale di Milano*, *Ufficio del Giudice per le indagini preliminary*, N. 12396/92 RG N.R-N. 3351/94 RG G.I.P., 6 July 2011.

30. Laid down in Art. 7 of the Italian *Legge n. 388 di 1993*.

31. See Amalfitano, "Il principio del *ne bis in idem* tra CAAS e Carta dei diritti fondamentali dell'Unione Europea", 11 *Cassazione Penale* (2012).

32. The Greek Supreme Court (*Areopag*) sitting as a full bench, Judgment No. 1/2011 of 9 June 2011.

considered that Article 50 CFR has to be a directly applicable provision that does not need further harmonization to be triggered and it came to the conclusion that the reservations by Greece under Article 55 CISA had been repealed by the entry into force of the Treaty of Lisbon and the CFR. The German criminal courts have had to deal with cases in which a penalty had been imposed on a person, but this had not been enforced or was in the process of being enforced. The German District Court of Aachen[33] and the German Federal Court of Justice[34] decided that due to Article 52(1) CFR the rights enshrined in the Charter can be restricted by laws that respect the essence of the Charter. In their view Article 54 CISA represents such a restriction, by which Article 50 CFR only applies in accordance with Article 54 CISA, This interpretation has been confirmed by the German Federal Constitutional Court.[35] None of these courts have submitted a preliminary ruling to the ECJ, however.

Given the legal patchwork of provisions and the contradictory national decisions on the compatibility of the enforcement clause with the essence of the right provided for in Article 50 CFR, even at the level of Constitutional Courts, the Higher Regional Court of Nuremberg did exactly what it had to do: it referred the case to the ECJ for a preliminary ruling. Thanks to this reference, the Court had a first opportunity to provide guidance and clarity on the relationship between Article 50 CFR and Article 54 CISA, in the light of Article 4 of Protocol 7 to the ECHR. The ruling of the Court in *Spasic*, however, seems to be an exception to the autonomous interpretation of *ne bis in idem* based on mutual trust in the AFSJ. Instead of starting from mutual trust, the ECJ placed the avoidance of impunity at the forefront as part of achieving security in the AFSJ, and qualifies the Schengen enforcement clause as being compatible with Article 50 CFR. This brings us to the question of the rationale of the Schengen enforcement clause in relation to the essence of the *ne bis in idem* fundamental right.

4.2. *Rationale of the Schengen enforcement clause in relation to the essence of ne bis in idem*

Traditionally, few EU countries recognize the validity of a foreign judgment in criminal matters for execution or enforcement in their national legal

33. 52 Ks 9/08, *Boere*, Decision of 8 Dec. 2010. See Burchard and Brodowski, "The Post-Lisbon principle of transnational *ne bis in idem*: on the relationship between article 50 Charter of Fundamental Rights and Article 54 Convention Implementing the Schengen Agreement", 1 *New Journal of European Criminal Law* (2010*)*, 310–327.

34. BGH 1 StR 57/10, Decision of 25 Oct. 2010, <www.hrr-strafrecht.de/hrr/1/10/1-57-10.php>.

35. 1 BVerfG, 2 BvR 148/11, 15 Dec. 2011, para 43, <www.bundesverfassungsgericht.de/entscheidungen/rk20111215_2bvr014811.html>.

systems without this being founded on a treaty. Even the recognition of *res judicata* in respect of a foreign criminal judgment is problematic, certainly for territorial offences. The recognition of foreign *res judicata* means that the prospect of a new prosecution or punishment is no longer possible (the negative effect) or that the decision has to be taken into account in the context of judgments pending in other cases (the positive effect). Against that background, EU States were not willing to give up their *ius puniendi* because of proceedings – even concluded proceedings – in other EU Member States, and this was the reason why the Schengen *ne bis in idem* principle was conditioned with an enforcement clause. If another Schengen State is not enforcing or is not in the process of enforcing the sentence, other Schengen States can still open criminal proceedings, and prosecute, punish and enforce their decisions. Only if the original sentence can no longer be enforced under the laws of the first sentencing State is further prosecution barred. The rationale for this is very clear. Why should Schengen States accept the final judgment as a bar for further prosecution if that Schengen State has not enforced or is not in the process of enforcing? In that case the other Schengen States have no further specific cooperation instruments at their disposal to deal with this situation. If they want to avoid impunity of the offender, the only option, besides informal contacts, is a second prosecution. This is of course very different from the *Spasic* case where the mutual arrest warrant regime offers far-reaching possibilities for cooperation in avoiding impunity. This is in my view also the reason why this enforcement clause is not included in the Framework Decision on the prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings.[36] This Framework Decision is precisely one of the instruments, besides the competence of Eurojust, to deal with this type of situation. It contains a mediator mechanism for the allocation of cases (investigation and prosecution) between jurisdictions in the EU Member States. In other words, the enforcement clause only makes sense in a setting in which the States cannot have, or do not have at their disposal, cooperation measures such as those applicable under EU law (the transfer of proceedings, the mutual recognition of sentencing, etc.) to prevent impunity. In the common AFSJ unilateral jurisdiction, claims based on territorial clauses no longer make sense.[37] Moreover, the fundamental right to *ne bis in idem* protection should be indifferent to which jurisdiction first started proceedings and which jurisdiction would like to trigger a second prosecution or

36. Council Framework Decision 2009/948/JHA of 30 Nov. 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings, O.J. 2009, L 328/42.

37. Although the enforcement condition has also been inserted in framework decision 2002/584/JHA on the European arrest warrant, it is remarkable that this is not the case for the majority of the other mutual recognition instruments in criminal matters.

punishment. The right should prevail over interests of national sovereignty or territorial jurisdiction claims,[38] because an individual right in a common area cannot depend on unilateral action by a national public authority. That is also the reason why in the Commission's Green Paper on conflicts of jurisdiction and the principle of *ne bis in idem* the rationale of the enforcement clause in the AFSJ was put into question.[39] The essence of the right is that double prosecution and double punishment should be barred if the first decision is a final judgment as defined by the ECJ. Mutual trust obliges Member States to accept each other's decisions. Union loyalty means that Member States have to cooperate in order to avoid the overlapping use of jurisdiction with a potential violation of *ne bis idem* rights.

4.3. *The role of an enforcement condition in the AFSR*

The Court derived directly from the Explanations to the CFR, without analysing the corresponding meaning under Article 4 Protocol 7 to the ECHR, that the enforcement condition in Article 54 CISA constitutes a limitation of the *ne bis in idem* principle that is compatible with Article 50 CFR.

First of all, it is clear that the ECJ has automatically taken the Explanations to the Charter as a guiding standard. As they are not binding law – although, as mentioned above, the courts are legally obliged to have regard to the explanations when interpreting the Charter – the Court could also have established another reasoning on the essence of the right, without using the Article 52(1) CFR limitation scheme, and assessing whether and to what extent and under what conditions the enforcement clause is still compatible with the essence of the right in the EU and mutual trust.[40] In the view of the Advocate General, the high level of protection ensured by Article 4 of Protocol 7, combined with the AFSJ, where cross-border execution now takes place through EU instruments based on mutual recognition, argues in favour of the rigorous application of Article 50 of the Charter and leads to *prima facie* incompatibility between the enforcement condition and the Charter. The Advocate General also rightly underlined that where the Explanations refer to the EU *acquis,* the compatibility of the acquis can be called into question in

38. Rebut, "Article II-110" in Burgorgue-Larsen, Levade and Picod (Eds.), *Traité Etablissant une Constitution pour L'Europe, Partie II, la Charte des Droits de l'Union*, vol. 2 (Bruylant, 2005).

39. COM(2005)696, p. 9.

40. In the same vein, see Eser, "Artikel 47 bis 50", in Meyer (ed.), *Charta der Grundrechte der Europäischen Union*, 2nd ed. (Nomos Kommentar, 2006), p. 524: "Nicht erforderlich ist dagegen das in Art. 54 SDÜ vorgesehene Vollstreckungselement. Demzufolge ist nach Art. 50 eine erneute Verfolgung schon mit Eintritt der Rechtskraft des vorangegangenen Urteils ausgeschlossen".

view of the evolution of the case law of the ECtHR and of the Court of Justice and the development of EU law. Since the publication of the Explanations in 2007, the ECJ and the ECtHR have produced important landmark decisions relating to *ne bis in idem,* and the mutual recognition and mutual trust concepts have become key conceptual issues in the case law and in the Lisbon Treaties. The Court did not seem to be spurred on by the hesitations of the Advocate General in that respect and did not explain the essence of the right in the context of mutual trust and mutual recognition. This is surprising in the light of earlier case law of the ECJ on *ne bis in idem*. If mutual trust imposes the recognition of out-of-court settlements (not harmonized in the EU), why should there then be no recognition of the execution of custodial sentences? There is another important point that is related, in my view, to the essence of the right, namely the transnational scope of the *ne bis in idem* right in the AFSJ. The Advocate General denied that this was part of the essence of Article 50 CFR, but the ECJ remained silent. From the Explanations to Article 50 CFR it is however clear that it has a wider scope than Article 4 Protocol 7 ECHR, and does include the horizontal and vertical transnational dimension in the EU. How can this not be part of the essence of the right? This is exactly the added value of Article 50 CFR and is the essence of the protection against cumulative *ius puniendi* in the AFSJ. All of these points could also have been dealt with by the ECJ in relation to the limitation clause of Article 52(1) CFR, as the "essence" test is the first burden. Unfortunately, without a clear explanation of the rationale of the transnational *ne bis in idem* right, the positive answer to the essence test is more of a declaratory statement than a reasoned argumentation.

Second, concerning the proportionality and necessity test, the other burdens of the limitation clause of Article 52(1) CFR, the Advocate General rejected *in abstracto* compliance and only wanted to apply it to the case *in concreto*. Even then, the test would only fulfil the criteria in the case of positive enforcement obligations for international crimes or where the cooperation measures applicable under EU law are not sufficient to prevent impunity. He left it explicitly to the national courts to decide if these criteria have been met. The ECJ follows another path, however. The aim of the AFSJ is to ensure a high level of security and the enforcement condition of Article 54 CISA is to be seen in that context and is thus appropriate. As far as the necessity test is concerned, the ECJ *did* use the test *in abstracto* and concluded that the existing instruments of mutual legal assistance and mutual recognition and the instruments on preventing and settling conflicts of jurisdiction are not capable of fully achieving the objective of avoiding impunity. The ECJ did not really apply a proportionality test. Security and avoiding impunity is put forward as a legitimate aim in itself. The aim of law enforcement is deemed appropriate

to limit a human right that aims at protection against the *ius puniendi*. The result undermines the very essence of the right. The judgment does not balance the obligation to provide for security with the other core aspects of the AFSJ, such as the free movement of persons, legal certainty, and the right to liberty. Mutual trust and mutual recognition are not used as a framework for the analysis either. Why should Germany be allowed to use the passive nationality principle, as in *Spasic* and many other cases, to commence second proceedings if another Member State has imposed a prison sentence that can be enforced? This should only be done, as the Advocate General stated, if the measures applicable under EU law are not sufficient to prevent impunity. The ECJ should thus have applied an assessment *in concreto,* looking at all the obligations and instruments in place. As for the obligations, the ECJ only referred to optional ("may") means of cooperation between the courts, based on the Union principle of loyalty in Article 4(3) TFEU. In my view, the ECJ should have referred to loyalty to the Union as a basis for an obligation ("must") and not limited to the courts but to all national authorities, including judicial authorities such as prosecutors. As the Advocate General observed, also Article 57 CISA[41] may contain a duty to consult. In my view Article 57 CISA is a clear obligation ("shall") and is thus mandatory. Finally, there is also an obligation to refer to Eurojust in the case of conflicting jurisdiction.[42] As far as the existing instruments are concerned, the references of the ECJ to the existing tools are incomplete, since the coordination of prosecutions and the prevention and settlement of jurisdiction conflicts are part of the core mandate of Eurojust. The necessity test can only be met if all these instruments have been tested and result in a concrete risk of impunity. A risk of impunity is not present when a Member State does not immediately execute the sentence, but only when a Member State does not enforce that sentence within a reasonable time and without clear justifications. This means that only in exceptional

41. Art. 57 CISA: "1. Where a Contracting Party charges a person with an offence and the competent authorities of that Contracting Party have reason to believe that the charge relates to the same acts as those in respect of which the person's trial has been finally disposed of in another Contracting Party, those authorities shall, if they deem it necessary, request the relevant information from the competent authorities of the Contracting Party in whose territory judgment has already been delivered. 2. The information requested shall be provided as soon as possible and shall be taken into consideration as regards further action to be taken in the proceedings under way. 3. Each Contracting Party shall, when ratifying, accepting or approving this Convention, nominate the authorities authorized to request and receive the information provided for in this Article."

42. See Council Decision 2002/187, Art. 13/(7), O.J. 2002, L 63/1, as amended by Council Decision 2009/426, O.J. 2009, L 138/14,.in consolidated version <eurojust.europa.eu/doc library/Eurojust-framework/ejdecision/Consolidated%20version%20of%20the%20Eurojust% 20Council%20Decision/Eurojust-Council-Decision-2009Consolidated-EN.pdf> and the Annex to the Annual Report of The College of Eurojust (2003), "Which jurisdiction should prosecute?".

circumstances could the enforcement clause still make sense in the AFSJ. The concept of mutual trust bars every second prosecution that would aim at a harsher second penalty.

When applying the necessity test *in concreto*, the ECJ should first look at the (legal) facts. Mr Spasic had cooperated with the Italian justice authorities during the investigation and had agreed to a court settlement. He was serving a longer prison sentence for other offences in Austria. The immediate enforcement of the short prison sentence was thus not even an option. In any case, there were no indications that Italy was not willing or was unable to enforce the prison sentence. The Public Prosecutor even revoked the suspension[43] and ordered the imprisonment of Mr Spasic with the aim of enforcing the custodial sentence. He did not send out an European arrest warrant, as in Italy there are policy guidelines by the Ministry of Justice[44] not to issue an EAW for prison sentences of less than 4 years. We have to take into account that one of the problems with the application of the EAW is the disproportionate use thereof by some Member States. The Italian policy guidelines explicitly refer to the proportionality principle. Second, the ECJ should then have assessed whether the *Spasic* case is really a situation that we can qualify as a case of impunity because of unilateral non-enforcement by a judicial authority of a Member State. This question also relates to the second question of the preliminary reference. When can another Member State consider that an imposed criminal sanction is not being enforced or is not in the process of being enforced or can no longer be enforced under the laws of the sentencing State? In the AFSJ, based on mutual trust, one would at least expect that this decision does not only depend on the second State. In other words, the ECJ should have adopted an autonomous interpretation of what "not enforced, not in the process of being enforced or can no longer be enforced" exactly means. In *Kretzinger,* the ECJ in its findings clearly stated that for the purposes of Article 54 CISA, a penalty imposed by a court of a Contracting State "has been enforced" or is "actually in the process of being enforced" if the defendant has been given a suspended custodial sentence. Mr Spasic was even subjected to a firm sentence, but the execution was first suspended and later the suspension was set aside. Why should a suspended custodial sentence qualify as "being enforced" while a firm sentence that is not immediately executed does not? Why should we apply mutual recognition to out-of-court settlements (at the front door) and not on modalities of sentence execution (at the backdoor)? The autonomous interpretation of the

43. In Italy, short prison sentences (less than 2 years) without reoffending are, as a rule, not executed. Many Member States have similar rules.

44. Ministero della Giustizia, Direzione Generale della Giustizia Penale, *Vademecum per l'emissione del mandata d'arresto Europeo*.

ECJ is also important for the mandatory ground of the non-execution of the EAW under Article 3(2)[45] of the framework decision on the European arrest warrant. [46]

To sum up, in the case of *Spasic* there was no need for immediate enforcement, and in fact the prison sentence could not be immediately executed. Mr Spasic, however, was again prosecuted in Germany, because of failing or non-existing consultation and cooperation arrangements between Germany, Austria and Italy and/or because of the unilateral use of jurisdiction by Germany to pursue harsher punishment. Neither of these two reasons can justify a limitation of the *ne bis in idem* right under Article 50 CFR. It would also be strange if the transnational *ne bis in idem* right under Article 50 CFR could be restricted by far-reaching limitations based on impunity, while Article 4 of Protocol 7 is a non-derogable right. The territorial scope might be different, but the meaning should be the same or at least should meet the minimum standards of the ECHR.[47] It would also be strange if the transnational *ne bis idem* right under Article 50 CFR could be severely restricted by limitations under other Conventions in the AFSJ. This would lead to several standards of protection under Article 50 CFR, one for the AFSJ and one for the internal market. And, finally, it should be avoided that national courts further limit Article 50 CFR by accepting that derogations from Article 55 by Member States are legitimate and proportionate limitations of Article 50 CFR, within the meaning of Article 52(1). The ECJ will have a second opportunity in a pending request for a preliminary ruling in the case of *Piotr Kossoskwi*[48] to provide an autonomous and convincing answer to the High Court in Hamburg. The need for an autonomous and uniform interpretation is particularly important when EU provisions contain safeguards for individuals. This is also the reason why this autonomous interpretation should strike the correct balance between law enforcement and the protection of fundamental rights. Already in the Stockholm programme we read: "It is of paramount importance that law enforcement measures, on the one hand, and

45. "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."

46. Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, O.J. 2002, L 190.

47. Tomkin, "Comments on Article 50 CFR, part IV (Limitations and Derogations)" in Peers et al., op. cit. *supra* note 27, at 1409: "It follows from Articles 52 and 53 of the Charter that insofar as a particular case falls within the scope of both the Charter and the ECHR, Article 50 could not be interpreted as permitting a limitation or derogation to the *ne bis in idem* principle that would circumscribe or limit the protection afforded by the corresponding provision of the ECHR".

48. Case C-486/14, *Kossowski*.

measures to safeguard individual rights, the rule of law and international protection rules, on the other, go hand in hand in the same direction and are mutually reinforced".[49]

5. Concluding remarks

Preventing and settling conflicts of jurisdiction and *ne bis in idem* protection are closely related. It is time for the legislature to use the new possibilities in the TFEU, under Article 82 (1b) TFEU and Article 85 TFEU to provide for a legislative solution at the horizontal level and at the vertical (Eurojust) level and to provide for binding decisions when informal mechanisms do not result in achieving the aims of the AFSJ and/or when they infringe the rights of citizens (suspects, convicted persons, victims). Member States and the Union should not only have a duty not to violate the *ne bis in idem* right, but also a duty to protect that right.[50] This positive duty should be constructed as part of the human rights protection under the Charter. Otherwise, it seems that citizens (suspects or convicted persons) will remain at the mercy of the interest of sovereign States. It is difficult to imagine that this could be acceptable under the constitutional legal order of "an ever closer Union" based on mutual trust.

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49. O.J. 2010, C 115/01, point 2.4.

50. Meyer, "Trasnationaler ne-bis-in-idem Schutz nach der GRC zum Fortbestand des Vollstreckungselements aus Sicht des EUGH", 2014, www.hrr-strafrecht.de/hrr/archiv/14-07/index.php?sz=6.

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