AG: Reservation in Relation to Application of ne bis in idem Principle Incompatible with Art. 50 CFR

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On 20 October 2022, Advocate General (AG) *Szpunar* published its opinion on the controversial question of whether declarations made by Schengen States on the basis of Art. 55 CISA, with the consequence that they are not bound by the principle *ne bis in idem* as provided for in Art. 54 CISA, are compatible with the ban of double jeopardy as guaranteed in Art. 50 and Art. 52(1) CFR. The AG concluded that such declarations are incompatible with the CFR and provisions referred to in such declarations cannot be applied in judicial proceedings.

Facts of the case and questions referred

The case before the CJEU (Case C-365/21, *MR / Generalstaatsanwaltschaft Bamberg*) is based on the following facts: On suspicion of forming a criminal organisation and commercial fraud in the form of "cybertrading", the Local Court of Bamberg, Germany issued an arrest warrant against MR on the grounds of risk of absconding and, based on this, a European arrest warrant. MR claimed that these arrest warrants violated the ban of double jeopardy (Art. 54 CISA), because the same acts had already been the subject of a conviction against him by the Regional Court of Vienna, Austria to a term of imprisonment of four years (for offences of serious commercial fraud and money laundering).

However, his complaint was rejected by the Regional Court of Bamberg as unfounded. In particular, the Regional Court pointed out that the prohibition of double jeopardy under the CISA did not apply because Germany had made a reservation upon ratification under Art. 55 (1)(b) CISA. Accordingly, Germany is not bound by Art. 54 CISA where the acts to which the foreign judgment relates constitute an offence against national security and other equally essential interests. This refers, *inter alia*, to offences provided for in Sec. 129 of the German Criminal Code, entitled "Forming criminal organisations".

The Higher Regional Court of Bamberg (*Oberlandesgericht Bamberg*) did not share this legal view and referred the question to the CJEU whether the reservations of exceptions under Art. 55 CISA (made in the 1990s) were still valid against the background of the *ne bis in idem* guarantee enshrined in the meanwhile binding Charter of Fundamental Rights (Art. 50).

AG *Szpunar* argued first that such a reservation was not provided for by law as required by Art. 52(1) CFR. Since the declarations of the reservations must be deposited with the Government of Luxembourg (Art. 139 CISA) and are not published at the EU level, he believed that the requirements of accessibility and foreseeability are not met. Second, the AG argued that Art. 55(1)(b) CISA does not respect the essence of the principle *ne bis in idem*. According to the AG, Art. 55(1) CISA enables a renewed prosecution, conviction and enforcement of a sentence despite a conviction that has become final and has been enforced. This runs directly counter to the very purpose of the principle *ne bis in idem*.

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