

ECJ Clarifies Assessment of "idem" Requirement

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News

On 12 October 2023, the ECJ clarified that national courts must consider all relevant information on the material facts given in another EU Member State if it assesses the "idem" requirement of the principle *ne bis in idem* enshrined in Art. 54 CISA and Art. 50 CFR ([Case C-726/21, INTER CONSULTING](#)).

The underlying case concerned a reference for a preliminary ruling by a Croatian criminal court which has to decide whether it can continue proceedings against defendants involved in possibly illegal commercial transactions in relation to the purchase of immovable property in Croatia. The defendants were already subject to criminal proceedings in Austria where they were prosecuted for having incited managers of an Austrian bank to receive loans on the basis of which they pursued the purchases in Croatia. The defendants were acquitted by an Austrian criminal court for this incitement and, in addition, the Austrian public prosecutor brought a preliminary investigation (which included the sale of immovable property in Croatia) to an end on the ground of insufficient evidence.

According to Croatian case law, only the enacting terms of procedural documents, such as orders to proceed with the judicial investigation, orders dismissing the proceedings, indictments and judgments, are final and can consequently only be the basis for assessing the application of the principle *ne bis in idem*. The referring Croatian court asked whether Union law precludes it from only comparing the facts cited in the enacting terms of the Croatian indictment with the key facts cited in the enacting terms of the Austrian indictment, and in the operative part of the Austrian final judgment.

The ECJ stated that such an interpretation of Art. 54 CISA/Art. 50 CFR would indeed be too narrow and not be compatible with the wording, context, and objective of the principle *ne bis in idem*. As a result, it concluded that the assessment of the "idem" requirement must also take account of "the facts cited in the grounds of [a foreign] judgment, including those that were the subject of the preliminary investigation, but which were not included in the indictment, and all relevant information concerning the material facts covered by previous criminal proceedings conducted in that other Member State and concluded by a final decision."

The ECJ advised the referring court, however, to ascertain whether the conditions of "bis" and "idem" are fulfilled in the present case.

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