

ECJ: Double Prosecution of Criminal Organisation Possible

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News

A Member State can exempt certain offences affecting its national security from the scope of the transnational *ne bis in idem*. This can also concern the offence of forming a criminal organisation in which the person prosecuted participated has engaged exclusively in financial crime, in so far as the action of that organisation intended to punish harm to the security or other equally essential interests of that state.

Background of the case

This is the [ECJ's reply](#) on 23 March 2023 to a reference for preliminary ruling by the Higher Regional Court of Bamberg (Germany) in [Case C-365/21 \(MR / Generalstaatsanwaltschaft Bamberg\)](#). The case at issue concerns a large-scale cybertrading fraud that affected, *inter alia*, Austrian and German investors. MR, who allegedly acted as one of the ringleaders of this criminal organisation, was sentenced to four years of imprisonment in Austria and was to be surrendered to Germany for this investment fraud after having served part of the sentence. The German authorities argued in favour of another prosecution in Germany. They referred to Germany's declaration under Art. 55(1)(b) CISA providing, *inter alia*, that the Federal Republic of Germany is not bound to Art. 54 CISA (the transnational *ne bis in idem* principle) if the acts to which the foreign judgment relates constitute the offence of Sec. 129 of the German Criminal Code, entitled "Forming criminal organisations".

In the light of Art. 50 CFR, the referring court first wondered whether such a declaration is still valid. In the affirmative, it posed the second question of whether the requirements of Art. 55(1)(b) CISA are met if the criminal organisation engaged exclusively in financial crime. For further information → [euCRIM 3/2022, 193](#).

The ECJ's reply to the validity of Art. 55(1)(b) CISA

In the first place, the ECJ confirms the validity of Art. 55(1)(b) CISA. The ECJ calls to mind that Art. 55(1)(b) CISA derogates from the principle of *ne bis in idem* where the acts to which the foreign judgment relates constitute an offence against the security or other equally essential interests of that Member State. Hence, it constitutes a (legitimate) limitation to the fundamental right guaranteed by Art. 50 CFR, which can be justified under the conditions of Art. 52(1) CFR. According to the judges in Luxembourg, Art. 55(1)(b) CISA respects the essence of Art. 50 CFR and the principle of proportionality as required by Art. 52(1) CFR.

Regarding the essence of the principle of *ne bis in idem*, it is argued that the exception in Art. 55(1)(b) CISA permits Member States to apply it to punish offences which affect the Member State itself and thus to pursue objectives that necessarily differ from those for which the person prosecuted has already been tried in another Member State.

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Regarding proportionality, it is stressed that Art. 55(1)(b) CISA is an appropriate option for achieving the general objective of punishment by a Member State of harm to its security or to its other equally essential interests. Moreover, the option for derogation is accompanied by rules guaranteeing that the disadvantages for the person concerned are limited to what is strictly necessary in order to achieve the objective.

The ECJ's interpretation of "security interests" in Art. 55(1)(b) CISA

In the second place, the ECJ clarifies that "an offence against national security" as provided for by Art. 55(1)(b) can also cover offences whose constituent elements do not specifically include harm to the security of the Member States. Thus, the notion goes beyond offences which, by their very nature, relate to security, such as espionage, treason or serious harm to the functioning of public authorities. However, the offence in question must first affect the Member State itself and second particularly seriously affect it. A characterisation as an "offence against national security" must take into account the seriousness of the damage which its activities caused to that Member State. Under these conditions, offences that punish a criminal organisation that engages exclusively in financial crime, can fall under the derogation of Art. 55(1)(b) CISA. The judges in Luxembourg conclude however from the information made available to the Court that the criminal activities in the main proceedings have not had an effect of damaging the Federal Republic of Germany and thus are not covered by Art. 55(1)(b) CISA.

Put in focus

The question on the validity of the reservations in Art. 55(1) CISA were already posed in the *Kossolowski* case (C-486/14), but remained unanswered by the ECJ to date. The ECJ now affirms such validity and recognises Art. 55 CISA as part of Union law that can limit the fundamental right in Art. 50 CFR. It is one of the seldom cases in which the judges at the bench at Kirchberg substantially disagree with the opinion by the Advocate General (AG). In the case at issue, AG *Szpunar* concluded that declarations under Art. 55(1)(b) CISA are incompatible with the CFR and provisions referred to in such declarations cannot be applied in judicial proceedings (→ [eucrim 3/2022, 193](#)). He, *inter alia*, argued that the essence of the *ne bis in idem* principle is not respected. This result was already promoted by [AG Bot in the said Kossolowski case](#).

The question remains, however, whether the ECJ will also apply these lines of argument to the other exceptions provided for in Art. 55(1) CISA, i.e. the possibility to make declarations if the acts to which the foreign judgment relates to took place in the territory of the Member State (lit. a) or were committed by its officials (lit. c). This can trigger further references for preliminary rulings also bearing in mind that the opinion of AG Bot in the *Kossolowski* case referred to Art. 55(1)(a) CISA, i.e. the territoriality clause. And here, the ECJ's developed argument that the criminal proceedings in two Member States pursue essentially different objectives is rather weak.

The second point of the ECJ's judgment in MR deserves attention, too. The Court interpreted the notion of "national security", which also may have impacts on other areas of Union law. Here, the Court did not only look at the nature of the offence, but above all took into account its effects. These must, of course, affect the state itself and be of a high degree of severity. Since the fraud in the main proceedings against MR only affected private investors, the application of Art. 55(1)(b) CISA was excluded. Conversely, the judgment let conclude that fraud committed by criminal organisations that is detrimental to several national budgets, for instance, may be prosecuted twice, if the second prosecuting Member State made a relevant declaration in accordance with Art. 55 CISA. Hence, the judgment in MR can have implications for the prosecution of offences against the EU's financial interests in the future.

It is now finally to the Higher Regional Court of Bamberg to apply the ECJ's answers to the given case. As the judges in Luxembourg indicated, it cannot be believed that the exception in Art. 55(1)(b) CISA applies since

the criminal activities of the organisation have not harmed the Federal Republic of Germany notwithstanding the huge dimension of the fraud scheme. The Higher Regional Court of Bamberg must then apply Art. 54 CISA and mainly answer the question of whether the prosecution in Germany refers to the “same acts” which were subject to the conviction in Austria. Also in this respect, the ECJ provides hints in an exceptional preliminary remark at the beginning of the judgment. In this context, the judges in Luxembourg caution to look closely at the ruling of the Austrian court. Only if the ruling had considered the harm to persons residing in Austria, the German judicial authorities may conclude that the criminal proceedings in Austria did not relate to the same acts as those covered by the prosecution in Germany. In such scenario, the earlier decision may be considered to have been related to “similar acts”, which is not sufficient to satisfy the “*idem*” condition in Art. 54 CISA.

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