

ECJ: Prosecutorial Orders Not to Take Further Action Do Not Automatically Bar Other Criminal Proceedings

Thomas Wahl

On 25 January 2024, the ECJ [delivered a ruling](#) interpreting the *ne bis in idem* principle in Art. 50 CFR with regard to two diverging decisions on criminal liability from different prosecution services (*Case C-58/22 - NR v Parchetul de pe lângă Curtea de Apel Craiova*).

Facts of the case

In the case at issue, NR, the president of Romanian company BX, demanded from some employees to pay a sum of money which she was required to pay, on pain of their contracts of employment being terminated. Her demand not having been satisfied, she issued and signed decisions terminating those contracts. The employees concerned then brought two criminal complaints against NR to two different prosecution services.

The first criminal case before the public prosecutor's office of Slatina, Romania, was conducted *in rem* for the offence of extortion; the public prosecutor in charge adopted, on the basis of a report of the police force in charge of the investigation and without conducting further interviews, an order that no further action be taken. The pre-trial chamber of the Slatina court of first instance rejected an application by the chief prosecutor to reopen the case; the order that no further action be taken in the case therefore became final.

The second criminal proceedings before the public prosecutor's office of Olt, Romania, were conducted *in personam* against NR for the offence of passive corruption. They resulted in a judgment by the Olt Regional Court sentencing NR to a suspended term of imprisonment.

The referring *Curtea de Apel Craiova* (Court of Appeal, Craiova, Romania) was unsure whether the order not to take action by the public prosecutor in Slatina barred any further criminal proceedings, and thus the judgment by the tribunal in Olt infringed NR's right from Art. 50 CFR.

The ECJ's jurisdiction

The ECJ first confirmed its settled case-law on the wide application of the CFR to situations that, at first glance, do not clearly relate to Union law. The conditions of Art. 51(1) CFR, according to which the provisions of the Charter are addressed to the Member States only when they are implementing EU law, are considered satisfied in the present case because NR was convicted for the offence of passive corruption and the

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underlying national law provision ensured the transposition of Framework Decision 2003/568 into the Romanian legal order.

The "*bis*" condition

As regards the merits of the case, the ECJ recalls that the application of the principle *ne bis in idem* is subject to a twofold condition, namely, first, that there must be a prior final decision (the "*bis*" condition) and, secondly, that the prior decision and the subsequent proceedings or decisions must concern the same facts (the "*idem*" condition).

In addition, it recalls that two requirements must be fulfilled in view of the "*bis*" condition:

- Further prosecution has been definitively barred, in accordance with national law;
- The order barring further public prosecution was adopted following a determination as to the merits of the case and not on the basis of merely procedural grounds.

Given the rejection by the Slatina court not to reopen criminal proceedings, the ECJ considers the final nature of the order not to take action and thus sees the first requirement met. However, the ECJ doubts whether the second requirement is met: although the order by the prosecutor in Slatina may contain an assessment of the material elements of the offence alleged, such as, *inter alia*, an analysis of the criminal liability of NR, as the alleged perpetrator of that offence, the failure to interview witnesses could constitute an indication of the lack of such an examination. This is now for the referring court to verify.

The "*idem*" condition

In order to establish the "same criminal offence" as formulated in Art. 50 CFR, the ECJ reaffirms its settled case-law that the legal classification under national law of the facts and the legal interest protected are irrelevant. However, it found that the conduct of the first criminal proceedings *in rem* and the conduct of the second ones *in personam* "cannot be regarded as irrelevant for the purpose of that assessment." It is apparent that NR had not formally acquired the status of a suspect in the first proceedings. In order to recognise the *ne bis in idem* principle, there must be an identity of persons in the two criminal proceedings at issue. This requires that the legal situation as criminally liable for the acts constituting the offence being prosecuted has been examined vis-à-vis NR which seemed not the case.

The ECJ concludes that several aspects of the case speak against regarding NR as having been "finally acquitted" as a result of the first prosecutorial order.

Put into focus

The case at issue gave opportunity for the judges in Luxembourg to recall the principles of the ECJ's settled case-law with regard to the applicability of Art. 50 CFR and the conditions "*bis*" and "*idem*" provided therein. The case calls to mind that, even though the conditions are interpreted broadly in favour of defendants, the requirements as developed and refined in the ECJ's case-law, must be duly assessed in each individual case. There are two main takeaways from the judgment: First, a decision by a prosecutor may not be considered "final" if essential witnesses who are apparently known to the law enforcement authorities have not been interviewed. Second, the "same facts" can only be established if the two criminal proceedings in question concretely eyed the same person. As a result, it is prevented that Art. 50 CFR is misused by "shopping" for the best first decision.

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