

ECJ: Public Prosecutor's Order to Discontinue Proceedings due to Lack of Evidence Triggers ne bis in idem Rule

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The public prosecutor's decision in one EU Member State to close criminal proceedings against a suspect due to lack of sufficient evidence can trigger the ne bis in idem principle. This is the main finding of the ECJ in its [judgment](#) of 19 October 2023 in [Case C-147/22 \(Terhelt5 v Központi Nyomozó Főügyészség\)](#).

Facts of the case and question referred

In the underlying case, the Hungarian National Public Prosecutor's Office filed an indictment (in 2019) against the accused for corruption in the context of the award of public contracts for the supply of new trains in Budapest (Hungary), allegedly committed between 2007 and 2010. However, the referring Hungarian criminal court had doubts as to the admissibility of this indictment because the accused was already subject to investigations for the same corruption case by the Central Public Prosecutor's Office for the prosecution of financial crime and corruption ("WKSTA") in Austria. In 2014, the WKSTA discontinued the pre-trial investigation because there was no evidence that the accused had actually committed the acts of corruption.

The referring court's decision not to admit the indictment because it was in the end not in accordance with the ne bis in idem principle was set aside by the Budapest Regional Court of Appeal. The appeal court argued that Art. 50 CRF/Art. 54 CISA do not apply because it was not established that the order of discontinuance by the Austrian public prosecutor's office was based on a sufficiently detailed and complete assessment of the evidence. The appeal court also put forth the argument that evidence collected by the Hungarian prosecution service in its indictment is more comprehensive than that produced by the Austrian counterpart and the accused was not interviewed as a suspect by the Austrian authorities. The Hungarian referring court asked in essence whether, under the given circumstances, the conclusion by the appeal court was right.

The ECJ's ruling

The case gave the ECJ the opportunity to clarify the requirements of the transnational ne bis in idem rule in Art. 54 CISA, especially whether the order by the Austrian public prosecutor's office can be considered as

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"finally disposed of" (element of "*bis*"). The judges in Luxembourg reiterate their settled case law that the element of "*bis*" is fulfilled under two conditions:

- Further prosecution must have been "definitively barred" following the adoption of the criminal decision in question;
- The decision must have been given following a "determination of the merits of the case".

Decision definitively barred?

With regard to the requirement that further prosecution must be definitively barred, the ECJ examines two circumstances referred to by the Hungarian court. First, the ECJ points out to previous case law that Art. 54 CISA is also applicable to decisions of an authority responsible for administering criminal justice in the national legal system concerned, such as a public prosecutor's office, definitively discontinuing criminal proceedings in a Member State without the imposition of a penalty, and although such decisions are adopted without the involvement of a court and do not take the form of a judgment.

Second, the law of the first Member State (here: Austria) must confer a definitive nature to the decision in question. This is the case if the law establishes conditions under which criminal proceedings cannot merely be continued but involve the exceptional bringing of separate proceedings based on different evidence. According to the ECJ, this is the case under Austrian law since it provides the possibility to continue proceedings once closed only under strictly circumscribed procedures (i.e., if (1) "the accused person was not questioned in respect of the offence ... and no restriction was imposed on him or her in that regard," or (2) "new facts or evidence arise or appear which, alone or in combination with other results of the proceedings, appear to justify the conviction of the accused ..." - § 193 para. 2 of the Austrian Code of Criminal Procedure).

It follows that the circumstances referred to by the Hungarian court do not cast doubt on the fact that the requirement that further prosecution must have been "definitively barred" is satisfied.

Sufficient determination of the merits of the case?

With regard to the objection that a determination of the merits of the case might not have been made by the Austrian public prosecutor, the ECJ stresses that, as a rule, an acquittal for lack of evidence is based on an assessment of the merits of the case. Making recourse to the principles of mutual trust and mutual recognition, the judges in Luxembourg clarify that it is only in exceptional cases that the second Member States can conclude that there is no detailed investigation in the first Member State. Criteria for this are the following:

- It is apparent from the terms of the criminal decision concerned that it was not preceded by any actual investigation or assessment of the criminal liability of the accused person;
- Under the applicable national law, the discontinuance decision was essentially taken for reasons which must be regarded as purely procedural; or
- The decision in question was taken for reasons of expediency, economy or judicial policy.

The circumstance that the person under investigation was not interviewed as a suspect can be an indicator for a non-detailed investigation but cannot alone justify this conclusion.

Put in focus

Persons can benefit from the rule not being prosecuted twice in the Schengen area if basically two conditions are fulfilled, 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) - Art. 54 CISA / Art. 50 CFR. The judgment in the present case includes several important clarifications as regards the first condition of "bis". The judgment continues the settled case law that the conditions of the ne bis in idem principle are generally interpreted in a broad way in favour of the individual. It also confirms that criminal proceedings that started in a first EU Member State should also be continued there. The ECJ does not require high standards for the "bis" condition. The judgment contains three important findings:

- The "bis" condition is not only fulfilled if courts decide on a criminal case but also if any authority competent in the administration of criminal justice takes relevant decisions (such as the public prosecutor);
- The ne bis in idem principle is already triggered if a criminal case is "disposed of" due to the lack of sufficient evidence after pre-trial investigations;
- The definitive nature of a decision can be acknowledged if the law of the first Member State provides any hurdles for reopening criminal proceedings. Therefore, it is sufficient that any blocking effect (*Sperrwirkung*) results from the decision in question.

Another important point in the present judgment is that the ECJ clarifies the criteria under which a "determination of the merits of the case" had taken place. Interestingly, the ECJ seems here to transfer its line of arguments used for the interpretation of the EU's cooperation instruments to the interpretation of the ne bis in idem principle. While the ECJ stresses for instance in relation to the European Arrest Warrant that the executing state must, in principle, accept the decision and conditions in the issuing state (and is only entitled to review them in exceptional circumstances), the chamber uses the same argument in its present judgment. In this context, it stressed in [para. 55 of the judgment](#):

"By contrast, that objective [of Art. 54 CISA, i.e., to ensure that a person who has been finally acquitted in one Member State may travel within the Schengen area without fear of being prosecuted in another Member State for the same acts] and those principles [mutual trust and recognition between Member States] preclude the public prosecutor's office of the second Member State, when it intends to prosecute a person who has already been prosecuted and who has been the subject, following an investigation, of a final acquittal in respect of the same acts in one Member State, from carrying out a detailed examination of that investigation in order to determine, unilaterally, whether it is sufficiently detailed in the light of the law of the first Member State."

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