

# ECJ Rules on "Same Act" in Terrorist Offences

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## News

The EU's *ne bis in idem* principle prevents a person from being punished for individual terrorist acts if that person has already been punished by another Member State for involvement in a terrorist association with a view to preparing a terrorist act. This is the main statement in the [ECJ's ruling](#) of 11 September 2025 in [Case C-802/23 \(MSIG\)](#). The prohibition of double punishment always applies if the totality of the specific circumstances of which a person is accused in a second criminal proceeding essentially concern the same events as in a previous proceeding. Whether the legal systems of the Member States classify actual conduct differently in legal terms is irrelevant.

### Facts of the case and question referred

The answer to the question on the interpretation of the "same acts" was given to a reference for preliminary ruling brought by the *Audiencia Nacional* (National High Court, Spain) that involves the prosecution of an ETA terrorist in France and Spain. Following a European Arrest Warrant executed in 2019, *MSIG* is charged in Spain for an act committed as ETA senior leader. Concretely, the Spanish public prosecutor alleged *MSIG* for having been responsible for a grenade attack on a police station in Oviedo in 1997. According to the charge, *MSIG*, solely acting from France, set the course of action of ETA's terrorist commandos operating in Spain and supplied weapons to the commandos. Hence, the Spanish prosecutor charged her for terrorism offences consisting in damage to property, attempted murder and actual bodily harm regarding the events in Oviedo.

However, French courts had already convicted her in four judgments (2000–2010) for "involvement in a criminal association with a view to preparing a terrorist act". The referring court noted that the French judgments cover, from a temporal point of view, all of *MSIG*'s activities carried out from France as a leader of ETA and *MSIG* served 20 years of imprisonment in France for these convictions, including *MSIG*'s responsibility for the planning of ETA's operations and the supply of resources for the purpose of carrying out attacks.

Against this background, the *Audiencia Nacional* is faced with the question as to whether prosecuting *MSIG* again in Spain would violate the *ne bis in idem* principle under Art. 54 CISA and Art. 50 of the Charter of Fundamental Rights of the EU. More precisely, the referring court sought clarification on how the concept of the "same act" should be interpreted in situations in which EU Member States classify and present acts in judgments differently. It noted that, while the *ne bis in idem* principle requires materially identical acts, it is unclear whether this refers to objective events alone or includes their legal classification. In the case at hand,

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both France and Spain prosecuted MSIG based on the same underlying conduct, but each applied a different legal classification: France viewing MSIG as the leader of a terrorist organisation, preparing terrorist acts by means of one or more acts, even if the terrorist acts themselves would have been physically carried out by other persons; Spain treating MSIG as a direct perpetrator, namely as the person whose action or omission directly caused the damage.

### The ECJ's judgment and reasoning

The ECJ reiterated its case-law on the concept of identity of the material acts as the basis for the interpretation of the *idem* condition ("the same acts") under Art. 54 CISA and Art. 50 CFR, in particular:

- The application of the *ne bis in idem* principle is not prevented by the possibility of divergent legal classifications of the same acts;
- Decisive is the assessment of "the same conduct", and not whether or not the constituent elements of the offences at issue in the French judgments were identical;
- The authorities of the second prosecuting Member State (here: Spain) must take into consideration all relevant information concerning the material acts, not only the operative parts of the French judgments and indictments.

The ECJ stressed that the most relevant issue in the present case is that French judgments and indictments established MSIG's criminal liability for giving general lines of action from France to terrorist commandos operating in Spain and in supplying those commandos with the material resources to carry out the actions; the specific charge in Spain for MSIG's act in connection with the attack carried out in Oviedo is seemingly covered by this liability.

In conclusion, the Court held that Art. 54 CISA, interpreted in light of Art. 50 of the Charter, must be understood to mean that the concept of "same acts" includes a situation in which a person is prosecuted in one Member State for terrorist offences after having already been convicted in another Member State for participation in a terrorist organisation, provided that both proceedings relate to the same underlying criminal conduct. The fact that the legal characterisation of the acts or the protected legal interests may differ between Member States does not prevent application of the *ne bis in idem* principle.

### Put in focus

The ECJ's decision in the MSIG case shows how difficult it is in practice to distinguish between "identical acts" and "similar acts". The former would trigger the transnational *ne bis in idem* principle, the latter not. Although the Audiencia Nacional has the final say in this specific case, the ECJ indicated that the criterion of the "same act" in the sense of its "identity of material acts" doctrine should be met: if the Spanish allegations are essentially based on the same acts committed by MSIG from France, renewed prosecution would be inadmissible. Two lessons can be drawn from the ruling in MSIG:

- Judicial authorities confronted with a *ne bis in idem* question would need to consider not only the operative part of judicial decisions, but also the reasoning and evidentiary basis underlying those decisions, including any facts discussed during the investigative phase;
- A comprehensive factual assessment rather than a formalistic comparison of legal classifications must be made.

In the end, the ECJ's judgment reinforces the area of freedom, security and justice in favour of individuals who are to be prosecuted for their same wrongdoing twice in the EU.

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