Reports of Cases

OPINION OF ADVOCATE GENERAL
BOT
delivered on 15 December 2015[1]

Case C-486/14

Criminal proceedings
against
Piotr Kossowski(Request for a preliminary ruling from the

Hanseatisches Oberlandesgericht Hamburg (Higher Regional Court, Hamburg, Germany))

(Reference for a preliminary ruling — Area of freedom, security and justice — Convention implementing the Schengen Agreement — Articles 54 and 55(1)(a) — Charter of Fundamental Rights of the European Union — Articles 50 and 52(1) — Ne bis in idem principle — Validity of the reservation concerning the application of the ne bis in idem principle — Schengen acquis — Principle of mutual recognition — Mutual trust — Prosecution of the same person in another Member State on the basis of the same acts — Concept of 'same offence' — Concept of final disposal — Examination of the merits — Rights of victims)

1. This case raises for the first time the issue of the validity of the reservations concerning the application of the *ne bis in idem* principle, contained in Article 55 of the Convention implementing the Schengen Agreement,[2] in the light of Article 50 of the Charter of Fundamental Rights of the European Union ('the Charter').

2. In particular, the Hanseatisches Oberlandesgericht Hamburg (Higher Regional Court, Hamburg) asks whether the option given to Member States, under Article 55(1)(a) of the CISA, not to apply that principle where the acts to which the foreign judgment relates took place in whole or in part in their own territory is a limitation of Article 50 of the Charter which is permissible under Article 52(1) of the Charter.

3. This case also gives the Court occasion to clarify its case-law on the concept of 'finally disposed of' or 'finally acquitted or convicted' within the meaning of Article 54 of the CISA and Article 50 of the Charter.

4. In this Opinion, I will set out the reasons which lead me to consider that the reservation in Article 55(1)(a) of the CISA should be declared invalid. I will then explain why, in my view, the *ne bis in idem* principle expressed in Article 54 of the CISA and Article 50 of the Charter should be interpreted as meaning that an order of discontinuance made by the public prosecutor's office, closing

1 — Original language: French.

2 — Convention of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, signed in Schengen on 19 June 1990 (OJ 2000 L 239, p. 19, 'the CISA').

investigative proceedings, cannot be characterised as a final disposal for the purposes of those articles, where it is clear from the reasons stated in that order that the matters making up the very essence of the legal situation, such as hearing the victim and the witness, have not been examined by the judicial authorities concerned.

I – **Legal framework**

A – *EU law*

5. The *ne bis in idem* principle is set out in the Charter, Article 50 of which provides as follows:

'No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.'

6. Moreover, Article 52(1) of the Charter states that 'any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others'.

7. Article 54 of the CISA provides that 'a person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party'.

8. Article 55 of the CISA states that:

'1. A Contracting Party may, when ratifying, accepting or approving this Convention, declare that it is not bound by Article 54 in one or more of the following cases:

(a) where the acts to which the foreign judgment relates took place in whole or in part in its own territory; in the latter case, however, this exception shall not apply if the acts took place in part in the territory of the Contracting Party where the judgment was delivered;

…

4. The exceptions which were the subject of a declaration under paragraph 1 shall not apply where the Contracting Party concerned has, in connection with the same acts, requested the other Contracting Party to bring the prosecution or has granted extradition of the person concerned.'

9. In accordance with that provision, the Federal Republic of Germany made the following reservation regarding Article 54 of the CISA:

'The Federal Republic of Germany is not bound by Article 54 of the Convention

(a) where the acts to which the foreign judgment relates took place in whole or in part on its own territory.' [3]

3 — BGBl. 1994 II, p. 631.

10. Along with the Protocol integrating the Schengen *acquis* into the framework of the European Union, which was annexed to the Treaty on European Union and to the Treaty establishing the European Community by the Treaty of Amsterdam,[4] the CISA has been incorporated into EU law.

B – *Polish law*

11. Article 282 of the Law on the Criminal Code (ustawa — Kodeks karny) of 6 June 1997[5] provides that any person who, with the intention of obtaining a pecuniary advantage, forces another person, by violence or threats of personal injury or death, or of violent damage to property, to dispose of his property, or the property of another, or to cease an economic activity, shall be punished by a term of imprisonment of one to ten years.

12. Article 327(2) of the Law on the Criminal Procedure Code (ustawa — Kodeks postępowania karnego) of 6 June 1997[6] states that investigative proceedings which have been finally discontinued may only be reopened, by order of the public prosecutor's office, against a person who has been subject to investigative proceedings as a suspect, where essential facts or evidence, which were unknown during the previous proceedings, come to light.

13. In accordance with Article 328(1) of the Criminal Procedure Code, the public prosecutor's office may annul a final decision to discontinue investigative proceedings against a person who has been the subject of such proceedings as a suspect where it finds that the discontinuance of the investigative proceedings was unfounded. Under Article 328(2) of the code, after the expiry of six months from the date when the discontinuance of investigation proceedings becomes final, the public prosecutor's office may annul or vary the decision, or the reasons given for it, only in favour of the suspect.

II – **The main proceedings and the questions referred**

14. In the main proceedings, the Public Prosecutor's Office, Hamburg, (Staatsanwaltschaft Hamburg) opened investigative proceedings against Mr Kossowski, accusing him of acts against the victim, carried out on 2 October 2005 in Hamburg (Germany), which, under German criminal law, constituted extortion with aggravating factors. It was alleged that after threatening the victim, making him sign a contract for the sale of his vehicle, and forcing him to drive him to a service station, Mr Kossowski had fled in that vehicle.

15. On 20 October 2005, at a roadside check in Kołobrzeg (Poland), the Polish authorities stopped the same vehicle, which was being driven by Mr Kossowski, and questioned him with a view to enforcing a term of imprisonment to which he had been sentenced in Poland in another matter. After making enquiries concerning the vehicle, the District Public Prosecutor's Office, Kołobrzeg, (Prokuratura Rejonowa w Kołobrzegu) also opened investigative proceedings against Mr Kossowski concerning the accusation of extortion with aggravating factors, on the basis of the events which had taken place in Hamburg on 2 October 2005. It is thus common ground that those proceedings and the proceedings opened by the Hamburg public prosecutor's office relate to the same facts.

16. As a matter of mutual legal assistance, the Regional Public Prosecutor's Office, Koszalin (Prokuratura Okręgowa w Koszalinie, Poland), requested a copy of the investigation file from the public prosecutor's office of Hamburg. After asking to be informed of the further action envisaged by the Polish authorities, the public prosecutor's office of Hamburg sent a copy of the file in August 2006.

4 — OJ 1997 C 340, p. 93, 'the Schengen Protocol'.

5 — Dz. U. 1997, No 88, item 553.

6 — Dz. U. 1997, No 89, item 555, 'the Criminal Procedure Code'.

17. By decision of 22 December 2008, the district public prosecutor's office of Kołobrzeg indicated that the criminal proceedings which were ongoing in relation to Mr Kossowski would be discontinued for lack of sufficient grounds. The reasons given for the order of discontinuance were that Mr Kossowski had refused to give a statement, that the victim and a hearsay witness were living in Germany, so that it had not been possible to question them in the course of the investigation, and that it had not therefore been possible to verify the statements made by the victim, which, in part, were inexact and contradictory.

18. On 24 July 2009 the public prosecutor's office of Hamburg issued a European arrest warrant against Mr Kossowski, and a request for his extradition was made by the Federal Republic of Germany to the Republic of Poland by letter of 4 September 2009.

19. Execution of the arrest warrant was refused by decision of the Sąd Okręgowy w Koszalinie (Regional Court, Koszalin, Poland) of 17 September 2009, on the basis that the decision to discontinue the criminal proceedings made by the district public prosecutor's office of Kołobrzeg was final within the meaning of Article 607p(1)(2) of the Criminal Procedure Code.

20. On 7 February 2014 Mr Kossowski, who was still wanted in Germany, was arrested in Berlin (Germany). On 17 March 2014 the public prosecutor's office of Hamburg brought charges against him with regard to the events of 2 October 2005.

21. By decision of 18 June 2014, the Landgericht Hamburg (Regional Court, Hamburg, Germany) refused to open trial proceedings against Mr Kossowski, on the basis that further prosecution had been barred, for the purposes of Article 54 of the CISA, by the decision of the district public prosecutor's office of Kołobrzeg. The Landgericht Hamburg (Regional Court, Hamburg) had already, on 4 April 2014, discharged the European arrest warrant issued in respect of Mr Kossowski, who, having been remanded in custody, was released.

22. The public prosecutor's office of Hamburg appealed against the decision of the Landgericht Hamburg (Regional Court, Hamburg) to the Hanseatisches Oberlandesgericht Hamburg (Higher Regional Court, Hamburg), which, being in doubt as to the interpretation of the relevant EU law, decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Do the reservations declared at the time of ratification by the contracting parties to the CISA pursuant to Article 55(1)(a) of the CISA — specifically, the reservation at (a) declared by the Federal Republic of Germany when depositing its instrument of ratification, that it is not bound by Article 54 of the CISA, "where the acts to which the foreign judgment relates took place in whole or in part in its own territory … " — continue in force following the integration of the Schengen *acquis* into the legal framework of the European Union by the Schengen Protocol …, as preserved by the Schengen Protocol to the Treaty of Lisbon; are these exceptions proportionate limitations on Article 50 of the Charter within the meaning of Article 52(1) of the Charter?

(2) If that is not the case, are the prohibitions on double punishment and double prosecution laid down by Article 54 of the CISA and Article 50 of the Charter to be interpreted as prohibiting prosecution of an accused person in one Member State — in the present case, … Germany — where his prosecution in another Member State — in the present case, … Poland — has been discontinued by the public prosecutor's office, without any obligations imposed by way of penalty having been fulfilled and without any detailed investigation, for factual reasons in the absence of sufficient evidence for a probable conviction, and can be reopened only if essential circumstances previously unknown come to light, where such new circumstances have not in fact emerged?'

III – **Analysis**

23. By its first question, the referring court asks essentially whether, following the integration of the Schengen *acquis* into EU law and in the light of Article 50 of the Charter, the reservation provided for by Article 55(1)(a) of the CISA remains valid.

24. In the event of such a reservation no longer being valid, the referring court asks essentially whether the *ne bis in idem* principle expressed in Article 54 of the CISA and Article 50 of the Charter is to be interpreted as meaning that an order of discontinuance made by the public prosecutor and terminating investigative proceedings can be characterised as a final disposal, for the purposes of those articles, where it is made without either the victim or the witness being heard in the course of those proceedings.

A – *The validity of Article 55(1)(a) of the CISA*

25. I reject, at the outset, the view taken by the European Commission in its written observations [7] and at the hearing, according to which it may be unnecessary to consider the first of the referring court's questions. The Commission observes that Article 55(4) of the CISA provides that 'the exceptions which were the subject of a declaration under paragraph 1 shall not apply where the Contracting Party concerned has, in connection with the same acts, requested the other Contracting Party to bring the prosecution or has granted extradition of the person concerned'. In the Commission's view, the fact that the German judicial authorities cooperated with the Polish judicial authorities, sent them a copy of their investigation file, and did not object to any Polish criminal proceedings being brought, amounts to an implied request to bring a prosecution within the meaning of that provision.

26. I do not agree with that analysis.

27. I observe, first, that the territorial jurisdiction of criminal courts is normally, in national law, a matter of public policy. Territorial jurisdiction will necessarily determine what national law is applicable, since jurisdiction based on personal status is unknown to the criminal law. Indeed, the territorial nature of criminal law is an expression of the sovereignty of the Member States. Accordingly, and as a matter of principle, it does not seem to me that the question of German or Polish criminal law applies can depend on the operation of a mechanism which is based on implications, as suggested by the Commission. In my view, it can only depend on a request having been made expressly by the court of one Member State and accepted expressly by the other.

28. Secondly, it appears that there is nothing in the file sent by the referring court to the Court to indicate that any such request was made, in any form. On the contrary, the public prosecutor's office of Hamburg states, in its written observations, that the regional public prosecutor's office of Koszalin was not asked to proceed with the prosecution. If one adds to that the fact that the Koszalin prosecutor's reply explicitly set out the investigative measures which should have been carried out in order to bring the matter before the court, but were not, it becomes clear that he never considered himself to be responsible for bringing the prosecution. Otherwise, it would have been a simple matter for him to ask the competent German judicial authorities to question those whose statements were lacking.

29. It must also be borne in mind that, in sending the copy of the investigation file, the public prosecutor's office of Hamburg expressly asked to be informed of the further action envisaged by the Polish judicial authorities. [8]

7 — Point 69.

8 — See point 16 of this Opinion.

30. Finally, I observe that the public prosecutor's office of Hamburg sent only a copy of the investigation file, keeping the original. The approach of the public prosecutor's office of Hamburg is in fact in accordance with a fundamental judicial practice normally followed by the prosecuting authorities as a matter of prudence, under which prosecutions are only brought on the basis of the original of the supporting investigation file. This rule, learned through practice, is an approach to preventing double prosecution, and thus a practical way of preventing as far as possible infringement of the *ne bis in idem* principle, the essential rationale of which is to avoid double prosecutions leading to double convictions.

31. For all of those reasons, I do not consider that the public prosecutor's office of Hamburg can be regarded as having relinquished jurisdiction.

32. It is now necessary to consider whether the reservation provided for by Article 55(1)(a) of the CISA is valid, following the integration of the Schengen *acquis* into EU law and in the light of Articles 50 and 52(1) of the Charter. On this last point, I note that this reservation constitutes a limitation on the *ne bis in idem* principle, within the meaning of Article 52(1) of the Charter, inasmuch as the explanations relating to the Charter, and specifically Article 50, expressly mention Articles 54 to 48 of the CISA as being among the provisions covered by the horizontal clause in Article 52(1) of the Charter.

33. Concerning the first point raised by the referring court, that is, the consequences of the integration of the Schengen *acquis* for the validity of Article 55(1)(a) of the CISA, my view is that, in principle, such integration did not, in and of itself, render the provision invalid.

34. The CISA was incorporated into EU law by the Schengen Protocol as part of the 'Schengen *acquis*', as defined in the annex to that protocol. It is apparent from Article 2 of Decision 1999/436/CE [9] and from annex A to that decision that the Council of the European Union designated Articles 34 TEU and 31 TEU as the legal bases of Articles 54 to 58 of the CISA, and thus of Article 55 of the CISA.

35. While it is beyond argument that the reservation provided for by Article 55(1)(a) of the CISA is part of the Schengen *acquis* and has become an integral part of EU law, that does not resolve the question of whether the content of that provision is compatible with EU law as it currently stands, deriving in part from the case-law of the Court and in part from the terms of the Charter, both of which post-date the drafting of the CISA and its integration as part of the Schengen *acquis*. The first paragraph of the preamble to the Schengen Protocol stated that this was a means 'in particular, [of] enabling the European Union to develop more rapidly into an area of freedom, security and justice'. It is thus evident that, having been integrated for that purpose, the Schengen *acquis* cannot work against the area of freedom, security and justice. I must therefore investigate whether, in the case under consideration, the reservation relied on constitutes an obstacle to the construction of that area and, if necessary, propose either that it should be declared invalid, or that it should be interpreted, if possible, so as to accord with the will of the EU legislature.

36. The primary historical basis for the *ne bis in idem* principle, recognised from very early times, is to protect individuals against the arbitrariness of being tried several times for the same act under different descriptions.

37. The first references to this principle date from the Roman era, where the praetor's interdict *bis de eadem re ne sit actio* expressed it in the form which has endured. The principle is unquestionably one of the fundamental rights of the citizen vis-à-vis the power of trial and conviction. It has become an essential principle of criminal law.

9 — Council Decision of 20 May 1999 determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the Schengen *acquis* (OJ 1999 L 176, p. 17).

38. While retaining this fundamental aspect of protection of individual liberties, an additional purpose has been given to the *ne bis in idem* principle in the context of the area of freedom, security and justice: that of ensuring freedom of movement.

39. This new dimension inevitably led to cross-border applicability of the principle within the European Union. The necessity thus arose of combining the Member States' various systems of criminal justice, a set of laws characterised by undeniable points of similarity as well as unquestionable differences, particularly with regard to procedure. In order to surmount the difficulties caused by diversity among systems which had not been the subject of measures of harmonisation or approximation — Member States generally being hostile to such measures in the field of criminal law — the Court applied the principle of mutual recognition.

40. Indeed, the Member States made this principle the cornerstone of judicial cooperation at the Tampere European Council of 15 and 16 October 1999. The Treaty of Lisbon enshrines the principle by making it the foundation of judicial cooperation within the EU in criminal matters. [10]

41. In the judgment in *Gözütok and Brügge* [11] the Court stated that 'whether the *ne bis in idem* principle enshrined in Article 54 of the CISA is applied to procedures whereby further prosecution is barred (regardless of whether a court is involved) or to judicial decisions, *there is a necessary implication* that the Member States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Member States even when the outcome would be different if its own national law were applied'. [12]

42. I would emphasise the words 'necessary implication', which, in my view, have a particular meaning. Having regard to the fact that, in the preceding lines of the judgment, the Court had pointed out that nowhere in the EU Treaty or the CISA is the operation of the *ne bis in idem* principle made conditional on prior harmonisation or approximation of laws, those words mean that the operation of the principle, which has become fundamental as a prerequisite for the practical implementation of freedom of movement, demands that Member States place trust in each other. Accordingly, differences in national laws cannot obstruct the operation of the principle. [13]

43. The intention of the EU legislature, in adopting the principle of mutual recognition, was to overcome the almost insurmountable difficulties which had been encountered, due in particular to the failure of efforts to approximate national laws in advance. The Court followed the legislature by giving due effect to the principle in its case-law. The phrase used must therefore be understood as meaning that mutual trust is not a prerequisite for the operation of mutual recognition, but a consequence which is imposed on Member States by the application of that principle. [14] In other words, the application of the principle of mutual recognition requires the Member States to place trust in each other regardless of the differences in their respective national laws.

44. The strength of the principle, expressed in that way, is justified by the importance of creating the area of freedom, security and justice for the creation of the European Union. This area is a supporting dimension of the single area of movement and economic activity, in that it provides that area with a legal framework containing the individual rights of citizens of the Union. In that regard it clearly relates to the concept of Union citizenship, and contributes to giving that concept concrete reality.

10 — See Article 82(1) TFEU. See also Article 67 TFEU.

11 — C-187/01 and C-385/01, EU:C:2003:87.

12 — Paragraph 33. My emphasis.

13 — It will also be noted that the FEU Treaty provides a legal basis for approximating laws solely to facilitate mutual recognition.

14 — Otherwise the earlier difficulties which were intended to be avoided would inevitably reappear.

45. It is thus in the light of this innovation of case-law that the validity of the reservation provided for by Article 55(1)(a) of the CISA and entered by the Federal Republic of Germany must now be assessed. Does the particular force given to the principle of mutual recognition mean that the reservation ought to be declared invalid?

46. While, as I have already noted, the reservation did not become obsolete simply because of the integration of the Schengen *acquis* into EU law, nevertheless it cannot work against it.

47. In my view the reference made by the German Government, at the hearing, to the concept of utility or necessity represents a suitable approach.

48. It is beyond doubt that the effect of the reservation provided for by Article 55(1)(a) of the CISA is to deprive the *ne bis in idem* principle of its content. Having regard to the considerations referred to above in relation to the link between this principle and that of mutual recognition and to the fundamental importance of the latter principle for the construction of the area of freedom, security and justice, this consideration alone is sufficient to conclude that the reservation should be declared invalid.

49. An exception could only be made to this conclusion if it were justified by the need to give the reservation useful effect in favour of a superior interest which would not hinder the development of the area of freedom, security and justice.

50. Accordingly, I shall consider, from this perspective and on the basis of the German Government's argument, the possibility that the reservation may be useful or necessary.

51. In this regard, I am of the view that reference to the concept of usefulness or necessity leads to the conclusion that the reservation provided for by Article 55(1)(a) of the CISA is of no utility, precisely because it is no longer necessary as a result of the correct application of the Court's case-law, in line with the provisions of the Charter, as I shall now proceed to explain.

52. The expressions used by the Court to define the factual circumstances in which the *ne bis in idem* principle applies must not lead us into error and, above all, must not be taken out of the context of the present state of development of the case-law or the wording of the Charter, which is clearly applicable here.

53. The CISA uses the concept of the 'same acts'. The Charter for its part uses that of the same 'offence'. It is clearly this latter concept — whose meaning is to be found in the case-law produced by the Court in developing the rules governing the applicability of the *ne bis in idem* principle — which is relevant for present purposes.

54. The Court has distilled from the concept of the 'same acts' a conception which is not purely factual, but legal. In its judgment in *Mantello*[15] it recognised this concept as having the status of an 'autonomous concept of EU law'. For the Court, as for the Charter, the sameness of the acts to which the CISA refers is nothing other than the similarity of the offences, which is to be assessed not by reference to descriptions peculiar to each national law, but by reference to the substance of the offences in question.

55. The Court thus defined the circumstances in which acts are the same by stating that it is a matter of whether they are the same in substance (thus, without taking account of the expressions used in national law) and inextricably linked together in time, in space and by their 'subject-matter'.[16] In so doing the Court gave, through this form of words, a classic definition of the concept of an offence,

15 — C-261/09, EU:C:2010:683.

16 — See judgments in *Kraaijenbrink* (C-367/05, EU:C:2007:444, paragraphs 26 and 27 and the case-law cited) and *Mantello* (C-261/09, EU:C:2010:683, paragraph 39 and the case-law cited).

referring to the identity of an act understood with the meaning — the substance — given to it by the wrongful intention of the person acting. An act cannot have a specific criminal description, that is, one which cannot be confused with another, if it is separated from its purpose, that is, from its intention. The difference between an injury that is caused unintentionally and one that is caused intentionally is not one of degree, but of kind, even where the consequences of the second are less serious than those of the first.

56. I emphasise the word 'subject-matter', for what is the subject-matter of the act if not its purpose or object, that is, the intention with which it is carried out? If the subject-matter of the act is to enable the doer voluntarily to appropriate the property of another, if that is what he wishes to do, then he is guilty of theft and it is indeed with the intention of making such an appropriation that the act has been done.

57. By taking the subject-matter of the acts into account in its definition of when acts are materially identical for the purposes of the *ne bis in idem* principle, the Court was alluding to the classic conception of an offence and aligning itself with the wording of the Charter, even before its entry into force. Moreover, in its case-law the Court has sometimes expressly invoked the concept of intention as a constituent part of the definition of the concept of the same acts. [17]

58. I now return to the example given by the German Government at the hearing.

59. The German Government contemplated a situation in which a foreign national who has committed a crime of violence in Germany, with the intention of justifying or glorifying Nazism, is convicted of those acts of violence in his country of origin, under a law which does not include, in its description, any reference to the specific element of justifying or glorifying Nazism. In such a case, according to the German Government, the reservation provided for in Article 55(1)(a) of the CISA should apply. I think not.

60. Intention, in the traditional sense of the term in criminal law, is generally defined as the will directed towards a purpose. In this sense, it is distinct from motive, which is the offender's reason for committing the offence. Motive is generally unimportant at the point of characterising the offence, in that it is not part of the legal definition of the punishable material act. Whether a person steals because he is in need of food or out of greed, theft is committed. The purpose of the material act is to appropriate property belonging to another. It is with this intention that the offender understands the act. The motive of the dishonest appropriation may be found, for example, in a state of need or a desire for profit. The offence — theft — is the same in both cases, and the court will differentiate them by taking the motive into account so as to tailor the sentence which is imposed, or, where appropriate, to dispense with any sentence.

61. However, a Member State may consider that an act done with a particular motive — in this example that of justifying or glorifying Nazism — disturbs its public order in a particular way, and may therefore decide to make it a specific offence by making the motive, which is the reason for the act but takes objective form in its commission, a constituent element of a specific offence carrying a specific penalty. This is perfectly permissible and legitimate, since it relates to public order in the Member State and thus to its national values. However, in making it a specific offence, the national legislature will have made justifying or glorifying Nazism one of the features of the material element of the offence.

17 — In this regard, it should be noted that the in the judgment in *Kretzinger* (C-288/05, EU:C:2007:441), the Court made reference to intention in characterising the material acts as identical.

62. I should emphasise at this point that this interpretation does not conflict in any way with the clear position of the Court, which has stated that only the material identity of the acts should be taken into account, independently of the descriptions applied and the interests protected. The issue I have just addressed does not relate to the question of what interests are to be protected, but of whether or not, regardless of the descriptions applied, there are two offences which are in substance the same.

63. If what is before us is not the same offence, as this expression is to be understood under the Charter together with the case-law of the Court, then the situation being examined lies outside the scope of the *ne bis in idem* principle.

64. The question of whether or not the difference of description reflects a difference of substance, having regard to the definitions given by the Court, is clearly a matter for the tribunal of fact, that is, the national court, subject to any question it asks of the Court in the event of doubt as to a concept which, as has been seen, is an autonomous concept of EU law.

65. It may be objected that practical difficulties of application may arise. Where a difference in the offences is relied on, a first conviction already having been made in another Member State, what is the appropriate way to proceed? What if a sentence has already been carried out?

66. The principles I have referred to would lead to the second prosecution being declared to be permissible, as the difference relied on prevents the *ne bis in idem* principle from operating. However, it cannot be disguised that, although different overall, the offences in question are identical in part. An approach of simply cumulating the sentences finally pronounced in both Member States would certainly be open to criticism. The solution, which is simple and has been implemented in national law in several instances, is for only the more severe of the two sentences to be served. This is the only approach which seems to me to cover the full range of possible factual circumstances in a way which is acceptable, having regard to the principles. Otherwise, what is to be done where sentence relating to one of the offences has already been passed and served in a Member State? Under the practice I suggest, if the earlier sentence — which has been served — proves to be the more severe, then no 'supplementary' punishment can be imposed on the offender. If it proves to be the more lenient, the offender will serve only the difference between the sentence already served and the sentence subsequently imposed.

67. It seems to me to follow from the foregoing that there is in fact no longer any necessity for the reservation provided for by Article 55(1)(a) of the CISA, either in the present case or any other. Since the Court's case-law and the Charter make it possible to ensure that regard is had to differences of substance between offences, permitting a Member State to block the operation of the *ne bis in idem* principle in different circumstances would make it an empty principle, and would cast doubt over the system which forms the basis of the area of freedom, security and justice.

68. Having regard to all the foregoing considerations, I am of the opinion that the reservation provided for by Article 55(1)(a) of the CISA does not respect the essence of the *ne bis in idem* principle as expressed in Article 50 of the Charter, and must therefore be declared invalid.

B – *The concept of final disposal*

69. By its second question, the referring court asks essentially whether the *ne bis in idem* principle expressed in Article 54 of the CISA and Article 50 of the Charter should be interpreted as meaning that an order of discontinuance made by the public prosecutor's office, discontinuing investigative proceedings, can be classified as a 'final' disposal for the purposes of those articles, where it has been made without hearing either the victim or the witness in the course of the proceedings.

70. The Court has considered the concept of final disposal on several occasions. It is apparent from its case-law that the essential factors which must be examined, in order to determine whether the decision at issue may be characterised as 'final', are as follows: the decision must have been given after a determination of the merits of the case, and it must, within the national legal system, act as a bar to further prosecution of the offender. [18]

71. The Court has held that an order of discontinuance at the end of an investigation during which various items of evidence have been collected and examined must be considered to have been the subject of a determination as to the merits, in so far as it is a definitive decision on the inadequacy of that evidence and excludes any possibility that the case might be reopened on the basis of the same body of evidence. [19]

72. In the Commission's view, this case-law should be applied to the present case. [20] I do not share that view.

73. It is apparent from the order of discontinuance at issue in the main proceedings that it was made on the ground that Mr Kossowski had refused to make a statement, that the victim and a hearsay witness were living in Germany, as a result of which it had not been possible to question them in the course of the investigation, and that it had not been possible to verify the statements made by the victim, which in part were inexact and contradictory.

74. The very essence of the *ne bis in idem* principle lies in the mutual recognition of judicial decisions, which presupposes mutual trust on the part of the Member States. Does this, however, prevent the Member States from ascertaining whether the conditions for the application of the *ne bis in idem* principle are in fact met, and particularly whether there has been a decision on the merits?

75. The concept of the 'merits of the case' might evoke the idea of a detailed critical examination of the proceedings in question. The Member State carrying out that examination would, in a sense, be 'judging' the proceedings of the other Member State before indicating whether or not it accepted them. This would amount to reintroducing the exequatur, which would be unacceptable as it would deprive the principle of mutual recognition of any meaning and would collide squarely with the very idea of an area of freedom, security and justice.

76. Nevertheless, compelling the judicial authorities of a Member State blindly to enforce all decisions with no right of scrutiny would surely taint mutual recognition in cases where, objectively, questions obviously arise.

77. It would serve no purpose for the Court to lay down the circumstances in which the *ne bis in idem* principle may validly be applied if the existence of those circumstances could not be objectively determined. Indeed, it is to this concern for transparency of decisions within the system of justice, which is one of the elements of the rule of law, that the need to give reasons for judicial decisions corresponds. In an area of freedom, security and justice, such transparency is indispensible to the dialogue of judges and prosecutors.

78. Accordingly, where it is apparent from the reasons — which will necessarily be stated — for the decision whose relevance is contested that, undeniably, the requirements laid down by the Court are not met, the court before which the applicability of the *ne bis in idem* principle is raised is entitled not to apply it, subject, in cases of doubt, to a reference to the Court — a step which has been taken in the present case.

18 — See judgment in *M* (C-398/12, EU:C:2014:1057, paragraphs 28 and 31 and the case-law cited).

19 — Ibid. (paragraph 30).

20 — See paragraph 50 et seq. of its observations.

79. It emerges simply from a reading of the matters set out in the Polish decision that, incontestably, the merits of the case were not addressed. The decision states that the accused did not cooperate and did not explain himself, that the accused was not confronted with the victim, although this would appear to have been necessary because inaccuracies had been identified in the victim's statement, and that the witness had not been interviewed, due amongst other things to the fact that those individuals lived in Germany, no request for mutual legal assistance having been made in this regard. It therefore seems evident that the matters making up the very substance of the legal situation confronting the German and Polish judicial authorities were not examined by the Polish judicial authorities.

80. Furthermore, while a true area of freedom, security and justice is achieved through the mutual recognition of judicial decisions, and thus through the necessary mutual trust between the Member States, this cannot work to the detriment of the guarantee that fundamental rights will be respected, in particular the rights of the victim. The application of the *ne bis in idem* principle can never result in the recognition of decisions which are manifestly contrary to fundamental rights.

81. It is manifest, in the main proceedings, that the rights of the victim have not been guaranteed, in particular the right to be heard, the right to information and the right to compensation. [21]

82. The reasons stated in the order of discontinuance show that the victim was not heard. Furthermore, the decision not to prosecute was notified to him with a deadline for responding — a period of seven days — which was completely insufficient to allow him time, in a Member State other than that of his residence, to have it translated if necessary, to take legal advice and then, potentially, to bring an action which, relating as it would to the facts of the case, would require sight of the procedural documents — something which in this case was clearly impossible.

83. Furthermore, while criminal law is intended to punish the violation of public order, it is also intended to enable the victim to obtain compensation for the damage arising from the commission of the acts which constitute the material element of the offence. This is a further ground for holding that, on this occasion, having regard to the basic right of victims, the Polish decision could not have brought the *ne bis in idem* principle into operation, and thus deprive the victim of any right to compensation.

84. Accordingly, I consider that the *ne bis in idem* principle expressed in Article 54 of the CISA and Article 50 of the Charter should be interpreted as meaning that an order of discontinuance made by the public prosecutor's office, terminating investigative proceedings, cannot be characterised as a final disposal for the purposes of those articles, where it is clear from the reasons stated in that order that the matters making up the very substance of the legal situation, such as hearing the victim and the witness, have not been examined by the judicial authorities concerned.

IV – **Conclusion**

85. Having regard to all of the foregoing considerations, I suggest that the Court should answer the Hanseatisches Oberlandesgericht Hamburg (Higher Regional Court, Hamburg) as follows:

(1) The reservation provided for by Article 55(1)(a) of the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, signed in Schengen on 19 June 1990, does not respect the essence of the *ne bis in idem* principle as expressed in Article 50 of the Charter of Fundamental Rights of the European Union and must therefore be declared invalid.

21 — See Articles 3, 4 and 9 of Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings (OJ 2001 L 82, p. 1).

(2) The *ne bis in idem* principle expressed in Article 54 of that convention and in Article 50 of that charter must be interpreted as meaning that an order of discontinuance made by the public prosecutor's office, terminating investigative proceedings, cannot be characterised as a final disposal for the purposes of those articles, where it is clear from the reasons stated in that order that the matters making up the very substance of the legal situation, such as hearing the victim and the witness, have not been examined by the judicial authorities concerned.