Reports of Cases

OPINION OF ADVOCATE GENERAL
EMILIOU
delivered on 6 July 2023 [1]

Case C-147/22

Központi Nyomozó Főügyészség
joined parties:
Terhelt5

(Request for a preliminary ruling from the Fővárosi Törvényszék (Budapest High Court, Hungary))

(Reference for a preliminary ruling – Charter of Fundamental Rights of the European Union – Article 50 – Convention implementing the Schengen Agreement – Article 54 – Principle *ne bis in idem* – Discontinuance of proceedings – Decision of a public prosecutor – Assessment of the merits – Detailed investigation – Examination of the evidence)

I. Introduction

1. The principle *ne bis in idem* – which, in a nutshell, prohibits a duplication both of proceedings and of penalties of a criminal nature for the same facts and against the same person – is enshrined, inter alia, in Article 50 of the Charter of Fundamental Rights of the European union ('the Charter') and Article 54 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 ('the CISA'). [2]

2. In its case-law, the Court has clarified that decisions to discontinue proceedings adopted by public prosecutors during the investigation stage may also trigger the principle *ne bis in idem*, but only if they have been adopted after a determination has been made as to the merits of the case, following a detailed investigation. [3] In the present case, the referring court asks the Court of Justice, in particular, to clarify the criteria under which an investigation should be considered to be 'detailed' for the purposes of the principle *ne bis in idem*.

1 Original language: English.

2 OJ 2000 L 239, p. 19.

3 See below, point 34 of this Opinion.

II. Legal framework

A. European Union law

3. Article 54 of the CISA, included in Chapter 3 thereof, is entitled 'Application of the *ne bis in idem* principle' and provides:

'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.'

B. Hungarian law

4. Article XXVIII(6) of the Magyarország Alaptörvénye (Hungarian Basic Law) provides that, without prejudice to the extraordinary remedies provided for by law, no one shall be liable to criminal prosecution or conviction for a criminal offence in respect of which he or she has been acquitted or convicted by final decision under the legislation of Hungary or, in the context of an international treaty or an act of the European Union, under the legislation of another State.

5. In accordance with Paragraph 4(3) of the büntetőeljárásról szóló 2017. évi XC. törvény (Law XC of 2017 on Criminal Procedure; 'the Law of Criminal Procedure'), criminal proceedings may not be instituted and, if instituted, must be discontinued if the acts committed by the offender have already been adjudicated upon by final decision, without prejudice to the extraordinary remedy proceedings and certain special proceedings available. Subparagraph 7 of the same paragraph provides, for its part, that criminal proceedings may not be instituted and, if instituted, must be discontinued if the acts committed by the offender have been adjudicated upon by final decision in a Member State of the European Union or if, in a Member State, the acts in question have been the subject of a substantive decision which, under the law of that State, precludes in respect of the same acts both the institution of new criminal proceedings and the reopening of criminal proceedings *ex officio* or by ordinary judicial appeal.

C. Austrian law

6. Paragraph 190 of the Strafprozessordnung (Code of Criminal Procedure; 'the StPO'), entitled 'Closure of the investigation procedure', provides:

'The prosecution must put an end to the criminal proceedings and close the investigation procedure when:

1. the offence underlying the investigation is not punishable by law or it would be unlawful for legal reasons to continue to prosecute the defendant, or

2. there is no real reason to continue the proceedings against the defendant.'

7. Paragraph 193 of the StPO, entitled 'Further proceedings', states:

'(1) Once the proceedings are closed, no further investigation may be conducted against the defendant; if necessary, the prosecution orders his or her release. However, if the decision relating to the continuation of the procedure requires certain acts of investigation or administration of evidence, the public prosecutor's office may, from time to time, order the carrying out of them or carry them out.

(2) The public prosecutor's office may order the continuation of an investigation closed under Paragraph 190 or 191 as long as the criminal proceedings relating to the offence are not time-barred and if:

1. the defendant was not questioned in respect of this offence … and no restriction was imposed on him or her in this 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 …

…'

III. Facts, procedure and the questions referred for a preliminary ruling

8. On 22 August 2012, the Zentrale Staatsanwaltschaft zur Verfolgung von Wirtschaftsstrafsachen und Korruption (Central Public Prosecutor's Office for the Prosecution of Financial Crimes and Corruption, Austria; 'the WKStA') opened criminal investigations against a Hungarian national ('Accused Person 5') on suspicion of bribery, and two co-accused persons on suspicion of money laundering, embezzlement and corruption.

9. The investigations concerned events that took place between 2005 and 2010 and involved suspected bribes to public officials through several companies established in different Member States in order to influence the decision to be taken in a public procurement procedure for the supply of new trains for two metro lines in Budapest, Hungary. This included transfers of, overall, several million euro as payment for consultancy services which, it was suspected, were never provided.

10. In order to win that public tender, Accused Person 5 – who was allegedly aware of the real objectives and the fictitious nature of the consultancy contracts – was suspected of having undertaken to procure an illicit advantage with a view to corrupting the person or persons in a position to influence the decision-makers for that contract. More specifically, between 5 April 2007 and 8 February 2010, Accused Person 5 allegedly made several payments from a company totalling more than EUR 7 000 000 to public officials who were perpetrators of the passive bribery offence and who remained unknown.

11. The suspicions concerning Accused Person 5 were based on the investigative information provided following a request for legal cooperation made by the Serious Fraud Office, United Kingdom, as well as on the provision of bank account information and on the interviews with the two Austrian nationals under investigation.

12. Accused Person 5 was not interviewed as a suspect during the WKStA's investigation, as the investigative measure taken by the WKStA on 26 May 2014 to locate him – a measure capable of being classified as a coercive measure for the purposes of Paragraph 193(2) of the StPO – proved unsuccessful.

13. By order of 3 November 2014, the WKStA discontinued the pre-trial investigation for lack of evidence. The WKStA subsequently re-examined the situation several times, but found each time that the conditions for continuing the investigation and bringing proceedings under national law were not met. In particular, it considered that the acts of corruption alleged against Accused Person 5 had been time-barred in Austria since 2015 at the latest.

14. On 10 April and 29 August 2019, the Központi Nyomozó Főügyészség (National Public Prosecutor's Office, Hungary; 'the KNF') filed with the Fővárosi Törvényszék (Budapest High Court, Hungary) an indictment initiating criminal proceedings in Hungary against Accused Person 5 for bribery within the meaning of Paragraph 254(1) and (2) of the Hungarian Criminal Code.

15. By order of 8 December 2020, the Fővárosi Törvényszék (Budapest High Court) closed the criminal proceedings against Accused Person 5 in application of the principle *ne bis in idem*, on the ground that the facts alleged against that person corresponded to those which had been the subject matter of the investigation before the WKStA.

16. The order of the Fővárosi Törvényszék (Budapest High Court) was subsequently set aside on appeal by an order of the Fővárosi Ítélőtábla (Regional Court of Appeal of Budapest, Hungary) of 15 June 2021. That court held that the WKStA's decision of 3 November 2014 closing the investigation could not be regarded as a final decision within the meaning of Article 50 of the Charter and Article 54 of the CISA. In that regard, that court took the view that the available documents did not allow for a clear determination of whether the WKStA's decision to close the investigation was based on a sufficiently thorough and complete assessment of the evidence. In its view, there was no evidence that the WKStA had collected evidence apart from interviewing the two Austrian suspects who were co-accused along with Accused Person 5, or that it had heard any of the almost 90 persons named by the KNF in its indictment, with a view to interviewing them or gathering evidence. In addition, Accused Person 5 was not interviewed as a suspect. The Fővárosi Ítélőtábla (Regional Court of Appeal of Budapest) thus referred the case back to the Fővárosi Törvényszék (Budapest High Court) for a fresh assessment.

17. It is against that background that, harbouring doubts as to the correct interpretation of the relevant provisions of EU law, the Fővárosi Törvényszék (Budapest High Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Does the [principle] *ne bis in idem …*, laid down in Article 50 of [the Charter] and in Article 54 of the [CISA], preclude the pursuit of criminal proceedings instituted in one Member State against the same person and for the same acts as formed the subject of criminal proceedings instituted in another Member State which have already been finally terminated by a decision of the public prosecutor ordering the discontinuance of the pre-trial investigation?

(2) Is the fact that, even though the decision of the public prosecutor ordering the discontinuance of the criminal proceedings (pre-trial investigation) in one Member State leaves open the possibility for the pre-trial investigation to be reopened up until such time as prosecution of the criminal offence becomes time-barred, the public prosecutor's office did not consider there to be grounds for reopening the aforementioned pre-trial investigation of its own motion, compatible with the [principle] *ne bis in idem* … laid down in Article 50 of the [Charter] and in Article 54 of the [CISA], and does that fact permanently preclude the institution of new criminal proceedings in [another] Member State against the same person and for the same acts?

(3) Is a pre-trial investigation discontinued in respect of an accused person who was not questioned in his [or her] capacity as a person under judicial investigation in connection with a criminal offence relating to the co-accused persons, but in respect of whom measures of investigation were carried out in his [or her] capacity as an accused person, and in relation to whom the discontinuance of the pre-trial investigation was based on investigative information provided following a request for legal cooperation, as well as on the provision of bank account information and on the questioning of the co-accused persons in their capacity as persons under judicial investigation, compatible with the [principle] *ne bis in idem* … laid down in Article 50 of the [Charter] and in Article 54 of the [CISA], and can such a pre-trial investigation be regarded as being sufficiently thorough and exhaustive?'

18. Written observations in the present proceedings have been submitted by the KNF, Accused Person 5, the Hungarian, Austrian and Swiss Governments and the European Commission. Those parties also replied to a question for written answer sent by the Court as a measure of organisation of procedure, asking them about the criteria which, in their view, a national court should use when assessing whether the requirement of a 'detailed investigation', within the meaning of the judgment of 29 June 2016, *Kossowski*,[4] is met.

19. In accordance with the Court's request, the present Opinion will deal only with the third question referred for a preliminary ruling.

IV. Analysis

20. By its third question, the referring court seeks some clarifications with regard to the '*bis*' component of the principle *ne bis in idem*: the duplication of proceedings.

21. The referring court asks the Court, in essence, whether a decision by a public prosecutor to discontinue proceedings in respect of an accused person who was not questioned during the investigation, but in respect of whom measures of inquiry were carried out, and in relation to whom information was gathered through cooperation with other Member States' authorities, examination of a bank account, and the questioning of two co-accused persons, must be regarded as being based on a detailed investigation and, consequently, bring the accused person within the scope of the principle *ne bis in idem*, under Article 50 of the Charter and Article 54 of the CISA.

[4] C-486/14, EU:C:2016:483 ('the judgment in *Kossowski*').

22. I am not sure that the Court can and should answer a question formulated in those terms. Indeed, the referring court asks the Court to carry out a legal assessment that amounts, de facto, to an *application* of the relevant provisions of EU law to the specific circumstances of the case. However, that is not the role of the Court in the context of proceedings under Article 267 TFEU.

23. The role of the Court, in a preliminary ruling procedure, is to provide the referring court with all the elements of *interpretation* of EU law that will enable it to solve the dispute pending before it.[5] This means that, in a case such as the present one, the Court must clarify the conditions under which the principle *ne bis in idem* enshrined in Article 50 of the Charter and Article 54 of the CISA is applicable, thus, permitting the referring court to assess for itself whether or not a prosecutor's decision to close an investigation without taking further action may trigger that principle.[6]

24. By contrast, it is the role of the referring court to, inter alia, interpret national law, examine the procedural acts included in the case file, if necessary question the parties (prosecutor and/or accused person) regarding the weight and significance of the specific acts of investigation, and on the basis of the above, apply the relevant (EU and national) provisions in the case at hand.

25. In the light of the above considerations, I am of the view that the third question must be reformulated as seeking to ascertain the conditions under which a decision by a public prosecutor to discontinue proceedings in respect of an accused person is based on a 'detailed investigation' – within the meaning of the Court's case-law – and, consequently, entitle that person to the protection of the principle *ne bis in idem*, in conformity with Article 50 of the Charter and Article 54 of the CISA.

26. That question raises an issue which I have recently dealt with in my Opinion in *Parchetul de pe lângă Curtea de Apel Craiova*.[7] In the present Opinion, I shall therefore refer to the relevant passages of my Opinion in *Parchetul*, whilst taking into account the specificities of the case currently pending before the referring court as well as the arguments put forward by the parties who submitted observations in the present proceedings.

A. The 'bis' condition as requiring an assessment of the merits of the case[8]

27. Article 50 of the Charter precludes double prosecution and punishment where the person 'has already been finally acquitted or convicted'. In turn, Article 54 of the CISA guarantees the protection of the principle *ne bis in idem* to any person 'whose trial has been finally disposed of'. In that regard, the Court's case-law has made clear that, for a criminal-law decision to be regarded as a final ruling on the facts subject to a second set of proceedings, 'that decision must not only have become final but must also have been taken after a determination has been made as to the merits of the case'.[9]

5 See, to that effect, judgment of 14 July 2022, *Volkswagen* (C-134/20, EU:C:2022:571, paragraph 33).

6 See, similarly, Opinion of Advocate General Ruiz-Jarabo Colomer in *Gözütok and Brügge* (C-187/01 and C-385/01, EU:C:2002:516, points 36 and 37).

7 C-58/22, EU:C:2023:464 ('my Opinion in *Parchetul*').

8 The present Section (A) of the Opinion reproduces, by and large, points 48, 49 and 59 to 84 of my Opinion in *Parchetul*.

9 See, for example, judgment of 23 March 2023, *Dual Prod* (C-412/21, EU:C:2023:234, paragraph 55 and the case-law cited).

28. So, there are two aspects of the decision in question that should be examined in order to determine whether a subsequent set of proceedings gives rise to duplication of proceedings precluded by the principle *ne bis in idem*: one concerns the definitive character of the decision (its 'finality'), the other concerns the content thereof (whether it dealt with 'the merits of the case'). The third question referred in the present case concerns the second aspect.

29. In order for the principle *ne bis in idem* to be triggered, a judicial decision must be taken after a determination has been made as to the merits of the case; this follows – as the Court has pointed out – from the very wording of Article 50 of the Charter, since the terms 'convicted' and 'acquitted' referred to in that provision necessarily imply that the accused person's criminal liability has been examined, and that a determination in that regard has been made. [10]

30. The Court has also had opportunity to clarify that a decision of the judicial authorities of a Member State by which an accused person is definitively acquitted due to the inadequacy or lack of evidence must be considered, in principle, to be based on a determination as to the merits of the case. [11]

31. In the same vein, I would say that an assessment of the merits includes the situations in which the proceedings are terminated and the charges dismissed because – despite the factual elements of the offence having being ascertained – there were grounds exonerating the presumed offender (for example, self-defence, state of necessity or *force majeure*), or making him or her unaccountable (for example, the person was underage or suffered from a severe mental disorder). [12]

32. By contrast, the Court has also made clear that decisions in which a person is acquitted, the charges dismissed, or the proceedings discontinued on mere procedural grounds or that, at any rate, do not involve any evaluation of the person's criminal liability, cannot be considered 'final' for the purposes of the principle *ne bis in idem*. [13] That is typically the case, in my view, of proceedings terminated on grounds of, for example, amnesty, immunity, *abolitio criminis*, or for proceedings being time-barred. [14]

33. In this context, I should point out that the case-law indicates that the requirement that the decision contains an assessment of the merits of the case – that is, criminal liability of the person being under investigation – cannot be verified on a purely formal basis.

[10] See, to that effect, judgment of 16 December 2021, *AB and Others (Revocation of an amnesty)* (C-203/20, EU:C:2021:1016, paragraphs 56 and 57 and the case-law cited; 'the judgment in *AB and Others*'). Note also that Article 4 of Protocol No 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms refers to final acquittal or conviction.

[11] See, to that effect, judgment of 5 June 2014, *M* (C-398/12, EU:C:2014:1057, paragraphs 28 and 29 and the case-law cited).

[12] Opinion of Advocate General Ruiz-Jarabo Colomer in *van Straaten* (C-150/05, EU:C:2006:381, point 65).

[13] See, inter alia, judgments of 15 October 2002, *Limburgse Vinyl Maatschappij and Others* v *Commission* (C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, EU:C:2002:582, paragraphs 54 to 69); of 10 March 2005, *Miraglia* (C-469/03, EU:C:2005:156, paragraphs 31 to 34); of 22 December 2008, *Turanský* (C-491/07, EU:C:2008:768, paragraphs 40 to 45); and the judgment in *AB and Others*, paragraph 61. See also ECtHR, decision of 15 March 2005, *Horciag v. Romania* (CE:ECHR:2005:0315DEC007098201).

[14] Regarding proceedings being time-barred, I must admit that the judgment of 28 September 2006, *Gasparini and Others* (C-467/04, EU:C:2006:610, paragraphs 22 to 33) appears to come to a different conclusion. However, I am of the view that, on that point, the judgment in *Gasparini and Others* cannot be reconciled with the subsequent case-law of the Court on acquittals on procedural grounds. Indeed, proceedings closed because they were time-barred generally involve no evaluation of the criminal liability of the person. In addition, and at any rate, that passage of the judgment in *Gasparini and Others* has been, in my view, implicitly overruled by the judgment of 8 September 2015, *Taricco and Others* (C-105/14, EU:C:2015:555) in which the Court regarded national rules on a statute of limitations as rules of a procedural nature. I would add that such a position is consistent with the case-law of the ECtHR: see, for example, decision of 5 December 2019, *Smoković v. Croatia* (CE:ECHR:2019:1112DEC005784912, paragraphs 43 to 45).

34. Naturally, when a decision to discontinue proceedings is expressly based on procedural grounds, there is no need for any additional verification: the decision is inherently incapable of triggering the principle *ne bis in idem*. However, when a decision is based on a lack of or insufficient evidence, an additional step is required. Indeed, as found by the Court in the judgment in *Kossowski*,[15] echoed by the European Court of Human Rights ('the ECtHR') in *Mihalache*,[16] a true determination as to the merits of the case necessarily implies a detailed investigation. Hence, it must be established whether such a detailed investigation has taken place or not.

35. Those findings – with which I entirely agree – require some explanation.

1. The need to verify the existence of a detailed investigation

36. In their case-law, both the Court of Justice and the ECtHR have extended the scope of protection of the principle *ne bis in idem* beyond the realm of judicial decisions *sensu stricto*. Both courts have ruled that decisions of other public authorities, taking part in the administration of criminal justice at national level, on which national law confers powers to establish and penalise unlawful conduct, such as public prosecutors, could also be considered to be 'final' decisions for the purposes of the principle *ne bis in idem*. That is so despite the fact that no court is involved in the process, and that the decision in question does not take the form of a judicial decision.[17]

37. That extension constitutes a significant improvement for the protection of the rights of individuals under criminal law and procedure. Nevertheless, I hardly need to point out that a decision of a prosecutor to discontinue proceedings during the investigation phase cannot be equated *ipso facto* to a decision of a court to acquit an individual, delivered after a proper trial has taken place, in which evidence is presented to the judge (or jury), discussed by the parties, and finally assessed by the judge (or jury).

38. As is well known, the criminal systems of the Member States contain a variety of rules and principles governing, on the one hand, the conditions in which prosecutors may or must investigate alleged offences and, where appropriate, institute criminal proceedings against the suspected offenders, and, on the other hand, the grounds on which criminal proceedings may be discontinued. For example, in a number of Member States, reasons relating to the lack of public interest, sufficient seriousness of the crime or complaint by the victim, past behaviour of the accused, or even budget constraints, constitute valid grounds for a prosecutor to close the investigation.[18]

39. In addition, regardless of whether, in the criminal system of a Member State, prosecution is in principle mandatory or discretionary, it is inevitable that considerations of judicial expediency, economy or policy (such as, for instance, current workload, enforcement priorities, financial and labour costs of the investigation) may influence the decisions of prosecutors to investigate, more or less proactively, an alleged offence or, conversely, to discontinue proceedings. It would be little more than wishful thinking to assume that every prosecutor in the European Union decides the

[15] See the judgment in *Kossowski*, paragraphs 48, 53 and 54.

[16] ECtHR, judgment of 8 July 2019, *Mihalache v. Romania* (CE:ECHR:2019:0708JUD005401210, §§ 97 and 98; '*Mihalache*').

[17] See, inter alia, judgments of 11 February 2003, *Gözütok and Brügge* (C-187/01 and C-385/01, EU:C:2003:87, paragraphs 27, 28 and 31), and of 12 May 2021, *Bundesrepublik Deutschland (Interpol red notice)* (C-505/19, EU:C:2021:376, paragraph 73 and the case-law cited). Similarly, ECtHR, *Mihalache*, §§ 94 and 95.

[18] See, for example, the Concurring Opinion of Judge Pinto de Albuquerque in *Mihalache*, §§ 10 et seq.

fate of the investigations and proceedings of which he or she is in charge solely on the basis of his or her personal conviction regarding the guilt of the alleged offender, and his or her ability to establish such guilt in court.

40. It seems to me that considerations of that kind may have an even greater weight when prosecutors are faced with transnational crimes, taking place in and/or affecting two or more Member States, committed by offenders who take advantage of their right, derived from EU law, to move freely across the national borders. In those situations, it is clear that some prosecutors may be better placed than others to complete an investigation successfully and, if need be, bring proceedings against the possible offenders. It is equally obvious that actual coordination of several prosecutors, based in different Member States, possibly thousands of kilometres apart, each working in his or her own language, and potentially ignoring the existence of parallel proceedings, is not something which can be taken for granted – notwithstanding the existence of specific instruments on this matter. [19]

41. Therefore, in a system based on mutual trust that applies trans-nationally, it is in my view absolutely crucial that the principle *ne bis in idem* is applicable only if the decision of a prosecutor to discontinue proceedings is based on the assessment of the merits of the case, which is the result of a detailed investigation, revealed by a thorough evaluation of a sufficiently comprehensive body of evidence.

42. Indeed, when the criminal liability of the person under investigation was excluded on the basis of an inadequate and fragmentary body of evidence, it may be safely assumed that the prosecutor's decision was based, to a significant extent, on reasons of judicial expediency, economy or policy.

43. Naturally, the fact that a prosecutor carried out a thorough evaluation of a sufficiently comprehensive body of evidence does not mean that, when taking the decision to terminate the proceedings, all doubts regarding the criminal liability of the person under investigation need necessarily be dispelled. In fact, a prosecutor may have to draw the necessary consequences from the fact that, regardless of his or her personal opinion about the guilt of the person concerned, a detailed investigation did not produce a body of evidence likely to support a conviction.

44. Yet, as long as the investigation was reasonably exhaustive and meticulous, the decision to close the proceedings can, de facto, be equated to an acquittal. As mentioned in point 30 above, the Court has accepted that decisions based on the inadequacy or lack of the evidence must be considered, in principle, to be based on a determination as to the merits of the case. In my view, this is the logical consequence, inter alia, of the principle of the presumption of innocence. [20]

45. The above considerations beg the following question: how should a determination as to whether a decision such as that at issue is based on a detailed investigation be made?

[19] See, in particular, Article 57 of the CISA which provides, inter alia, that 'where a Contracting Party charges a person with an offence and the competent authorities of that Contracting Party have reason to believe that the charge relates to the same acts as those in respect of which the person's trial has been finally disposed of in another Contracting Party, those authorities shall, if they deem it necessary, request the relevant information from the competent authorities of the Contracting Party in whose territory judgment has already been delivered'. See also Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings (OJ 2009 L 328, p. 42).

[20] That principle is enshrined, inter alia, in Article 48(1) of the Charter.

2. Examination of the decision to discontinue proceedings

46. Whether a prosecutor's decision to discontinue proceedings was based on a detailed investigation should be determined mainly on the basis of the statement of reasons contained in the body of the decision itself [21] (where necessary, read in conjunction with the documents referred to and/or annexed thereto [22]). It is indeed that document which explains the grounds for the discontinuance and the elements of evidence relied on for that purpose.

47. For example, as the Court has found in its judgment in *Kossowski*, the fact that, in a specific case, neither the victim nor a potential witness was interviewed during the investigations may be considered to be an indication that no detailed investigation was undertaken. [23] Conversely, as the ECtHR stated in *Mihalache*, where a criminal investigation has been initiated after a complaint has been brought against the person in question, the victim has been interviewed, the evidence has been gathered and examined by the competent authority, and a reasoned decision has been given on the basis of that evidence, such factors are likely to lead to a finding that there has been a determination as to the merits of the case. [24]

48. Hence, a case-by-case assessment has to be made, mainly in the light of the actual content of the decision to close the proceedings. [25] Should anything be unclear in that decision, nothing prevents the authorities in the second Member State from making use of the instruments of cooperation established within the EU legal system [26] in order to seek the necessary clarifications from the authorities of the first Member State. [27]

49. However, for reasons of legal certainty and predictability, it is crucial that the main elements which make it possible to understand the grounds on which a decision to discontinue proceedings is taken should be included in the body of the decision (as completed by the documents referred to and/or annexed thereto, as the case may be). Indeed, the alleged offender must be able to verify whether, in the light of the relevant EU and domestic law, the decision in question is likely to trigger the application of the principle *ne bis in idem*. [28] Accordingly, *ex post* exchanges of information may be useful to clarify the scope and meaning of the decision, or to complete the statement of reasons thereof, but cannot fundamentally alter its content.

50. At this stage, it may be useful to emphasise an important point. The above assessment cannot be interpreted as permitting the criminal authorities acting in a second set of proceedings to, in essence, review the correctness of the decisions adopted in a first set of proceedings. That would go against the principle of mutual trust, a principle which lies at the heart of the EU rules on the area of freedom, security and justice, and would render the principle *ne bis in idem* largely ineffective. [29]

21 See, to that effect, the judgment in *Kossowski*, paragraph 52.

22 See, in more detail, my Opinion in *GR and Others* (C-726/21, EU:C:2023:240, points 35 to 53).

23 The judgment in *Kossowski*, paragraph 53.

24 *Mihalache*, § 98.

25 Ibid., § 97.

26 For example, Article 57 of the CISA and Framework Decision 2009/948 (see footnote 18 above).

27 See, by analogy, judgment of 16 November 2010, *Mantello* (C-261/09, EU:C:2010:683, paragraph 48).

28 See Opinion of Advocate General Bobek in *bpost* (C-117/20, EU:C:2021:680, point 119).

29 See, similarly, Opinion of Advocate General Bot in *Kossowski* (C-486/14, EU:C:2015:812, points 75 and 76).

51. The authorities acting in a second set of proceedings are entitled only to check the (substantive and/or procedural) nature of the reasons for which the first prosecutor decided to discontinue proceedings. To that end, those authorities should be permitted to verify that the prosecutor has done so after reviewing a comprehensive body of evidence, and without failing to gather – because it was considered impossible, too difficult or simply unnecessary – additional evidence that was likely to be of particular relevance to the assessment.

52. For the rest, the findings made in the decision to discontinue proceedings adopted by the first prosecutor (for example, the probative value of the evidence assessed) should be taken at face value. The authorities acting in a second set of proceedings are precluded from undertaking a fresh assessment of the evidence already examined by the first prosecutor.[30] Mutual trust in the operation of the criminal systems of the Member States requires that national criminal authorities respect the findings made by other national authorities, whatever 'verdict' is reached.[31]

53. In that connection, perhaps a further point of clarification may be useful. The need to verify that a decision to discontinue proceedings involved an assessment of the merits of the case on the basis of a detailed investigation is a requirement that concerns, quite clearly, 'simple' decisions to discontinue the proceedings, that is to say, those decisions in which the proceedings are terminated and the person that was under investigation – metaphorically speaking – 'walks free'.

54. Indeed, under the law of all Member States there exists a number of alternative dispute resolution mechanisms that can lead to the discontinuance of the criminal proceedings in exchange for the presumed offender accepting the imposition of a mild(er) administrative penalty or alternative punitive measure. It is self-evident that this type of decisions to discontinue the proceedings should normally be considered, for the purposes of the principle *ne bis in idem*, as equivalent to convictions. That is so regardless of whether they involve a formal finding of liability of the presumed offender. Since the case-law on this point is relatively clear, there is in my view no need to delve further in that respect.[32]

B. The rationale and objective of the principle ne bis in idem[33]

55. The above interpretation of the principle *ne bis in idem* seems to me to be the most consistent with its rationale and objective. In that regard, I would recall that such a principle is a very old legal construct, traces of which have been found, inter alia, in the *Code of Hammurabi*, the works of Demosthenes, *The Digest of Justinian* as well as numerous medieval canon laws.[34] In the (now) European Union – even in the absence of any provision to that effect – that principle was enunciated as early as the mid-1960s, and considered to be linked to the idea of natural justice.[35]

30 See, to that effect, judgment of 5 June 2014, *M* (C-398/12, EU:C:2014:1057, paragraph 30).

31 See, inter alia, judgment of 28 October 2022, *Generalstaatsanwaltschaft München (Extradition and ne bis in idem)* (C-435/22 PPU, EU:C:2022:852, paragraphs 92 and 93 and the case-law cited). See also Opinion of Advocate General Ruiz-Jarabo Colomer in *van Straaten* (C-150/05, EU:C:2006:381, points 52 and 63).

32 See especially judgment of 11 February 2003, *Gözütok and Brügge* (C-187/01 and C-385/01, EU:C:2003:87). See also Opinion of Advocate General Ruiz-Jarabo Colomer in *Gözütok and Brügge* (EU:C:2002:516, points 83, 88, 89, 97 and 106), and Concurring Opinion of Judge Bošnjak, joined by Judge Serghides, in *Mihalache*.

33 The present Section (B) of the Opinion reproduces, by and large, points 108 to 118 of my Opinion in *Parchetul*.

34 Coffey, G., 'A History of the Common Law Double Jeopardy Principle: From Classical Antiquity to Modern Era', *Athens Journal of Law*, Vol. 8, Issue 3, July 2022, pp. 253 to 278.

35 See judgment of 5 May 1966, *Gutmann* v *Commission* (18/65 and 35/65, EU:C:1966:24) and, with further references to early case-law, View of Advocate General Jääskinen in *Spasic* (C-129/14 PPU, EU:C:2014:739, point 43).

56. It would appear that, whereas the precise meaning and scope of the principle *ne bis in idem* have varied somewhat throughout the centuries, the understanding regarding its dual rationale has remained relatively consistent: equity and legal certainty. [36]

57. On the one hand, it is generally considered unfair and arbitrary that the State, 'with all its resources and power [makes] repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity'. [37] The principle *ne bis in idem* is thus meant, in the first place, to prevent a situation whereby a person is put 'in jeopardy' more than once. [38]

58. On the other hand, the principle *ne bis in idem* is also inextricably linked to the principle of *res judicata*: the idea that, in order to ensure both the stability of the law and legal relations, and the sound administration of justice, judicial decisions which have become definitive should no longer be called into question. [39]

59. In the EU legal system, the protection of the principle *ne bis in idem* finds a third rationale: ensuring free movement of persons within the area of freedom, security and justice. The Court has emphasised, with reference to Article 54 of the CISA, that a person whose case has already been finally disposed of must be able to move freely without having to fear a fresh prosecution for the same acts in another Member State. [40]

60. Consequently, those objectives militate against an excessively restrictive interpretation of the principle *ne bis in idem*. At the same time, however, an excessively wide application of the principle would conflict with other public interests that deserve protection.

61. I refer, in particular, to the general interest of society in effectively pursuing offenders, [41] and to the specific interest of the victims of crimes not only to obtain compensation from the offenders, but also to see that 'justice is served'. [42] After all, the very name 'area of freedom, security and justice' implies that freedom cannot come at the expense of security and justice. The latter concept must be intended, undoubtedly, as justice for all individuals: alleged perpetrators as well as alleged victims. That is why, pursuant to Article 3(2) TEU, within that area, free movement of persons must be ensured in conjunction with appropriate measures with respect to, inter alia, the prevention and combating of crime. [43]

62. In that regard, it cannot be ignored that a superficial approach to the application of the principle *ne bis in idem* could lead to some abuses and manipulation by offenders, who could resort – as correctly pointed out by the Hungarian Government – to 'forum shopping' in order to

[36] See, Coffey, G., cited in footnote 34 above. Similarly, Opinion of Advocate General Ruiz-Jarabo Colomer in *Gözütok and Brügge* (C-187/01 and C-385/01, EU:C:2002:516, point 49).

[37] As stated by the U.S. Supreme Court in *Green v. United States* (1957) 355 US 184 at 187. See also Opinion of Advocate General Bot in *Kossowski* (C-486/14, EU:C:2015:812, point 36).

[38] In that regard, see Opinion of Advocate General Sharpston in *M* (C-398/12, EU:C:2014:65, point 48).

[39] As regards the concept of '*res judicata*', see, among many, judgment of 30 September 2003, *Köbler* (C-224/01, EU:C:2003:513, paragraph 38). On the relationship between the two concepts, see judgment of 22 March 2022, *Nordzucker and Others* (C-151/20, EU:C:2022:203, paragraph 62 and the case-law cited).

[40] See judgment of 12 May 2021, *Bundesrepublik Deutschland (Interpol red notice)* (C-505/19, EU:C:2021:376, paragraph 79 and the case-law cited).

[41] See, to that effect, judgments of 29 April 2021, *X (European arrest warrant – Ne bis in idem)* (C-665/20 PPU, EU:C:2021:339, paragraph 97), and the judgment in *AB and Others*, paragraph 58.

[42] See Opinion of Advocate General Bot in *Kossowski* (C-486/14, EU:C:2015:812, point 80), and Opinion of Advocate General Bobek in *BV* (C-129/19, EU:C:2020:375, point 113).

[43] See, in that regard, judgment of 10 March 2005, *Miraglia* (C-469/03, EU:C:2005:156, paragraph 34).

ensure impunity for their actions. Indeed, when crimes are investigated by several prosecutors at the same time, there is a real risk that the least well-placed (or the most under-staffed or overworked) prosecution office might de facto prevent the carrying out of a serious investigation into that crime, since a decision to discontinue the proceedings from that office could pre-empt action from any other prosecution office.

63. In addition, on this side of the scale too there is an EU-related interest that deserves serious consideration: mutual trust. It follows from consistent case-law that mutual trust can be maintained and reinforced only if the authorities of a Member State can satisfy themselves that, in another Member State, there has been a proper assessment of the criminal liability of a suspected offender.[44] In the absence of any such assessment, there is simply no basis for mutual trust to operate. How could a national court rely on, or defer to, an evaluation, by another court, of a person's liability that, in fact, was not thoroughly carried out?

64. Thus, it is of the utmost importance that, when interpreting Article 50 of the Charter and Article 54 of the CISA, a fair balance between those interests be struck. In particular, the effective protection of individual rights should be reconciled with the legitimate interest of the Member States to prevent impunity for criminals.[45] That is the core idea that guided me in the present Opinion (as well as in my previous Opinions) when, having reviewed and reflected on the case-law, I attempted to propose to the Court what I believe to be a 'balanced' approach to the interpretation of the principle *ne bis in idem*.

65. In particular, I do not see how a person whose liability for an alleged crime was, during a first set of proceedings, examined only at the investigation stage and on the basis of an inadequate and fragmentary body of evidence, could validly claim that a subsequent set of proceedings in which his or her involvement is examined on the basis of a robust and comprehensive body of evidence, would put that person 'in jeopardy' twice and/or conflict with the principle of *res judicata*.

C. The present case

66. As I emphasised in points 23 and 24 above, it is in principle for the referring court to assess whether or not the conditions discussed above are satisfied in the case pending before it. Nevertheless, with a view to best assisting that court, I will now offer some brief considerations with regard to the possible application of the principle *ne bis in idem* to the main proceedings.

67. *In concreto*, the crucial aspect raised by the third question referred is whether the acts of investigation mentioned as having been performed (gathering of information through cooperation with other Member States' authorities, examination of a bank account, and the questioning of two co-accused persons), and as having not been performed (interview of the person in question), indicate that the public prosecutor in Austria has actually carried out a sufficiently detailed investigation.

68. I very much doubt that the Court could give a 'yes or no' answer to such a question. In fact, a simple list of investigative measures carried out or not carried out tells us little (if anything) about the completeness and thoroughness of the investigation undertaken by the public prosecutor in

[44] See judgment of 12 May 2021, *Bundesrepublik Deutschland (Interpol red notice)* (C-505/19, EU:C:2021:376, paragraph 81 and the case-law cited).

[45] Similarly, Opinions of Advocate General Bobek in *Bundesrepublik Deutschland (Interpol red notice)* (C-505/19, EU:C:2020:939, point 93), and in *bpost* (C-117/20, EU:C:2021:680, point 121).

question. The Court is not cognizant, in particular, of (i) the complexity of the relevant facts, (ii) what the evidence gathered showed, and (iii) what additional evidence could possibly have been gathered.

69. The evaluation of the detailed nature of an investigation is, as mentioned in point 48 above, necessarily a case-by-case assessment that depends on all relevant circumstances. There is no checklist of possible investigative measures which, by simply ticking or not ticking boxes, could indicate to the authorities whether a given investigation was adequate or not. Not only do the Member States have, as mentioned above, different legal rules in that regard, but also and more importantly, each case is different.

70. Some cases may require numerous acts of investigation and other much less so. In some cases the evidentiary framework may be inconclusive despite being composed of several pieces of evidence, whereas in other cases the gathering of few key pieces of evidence might be enough to reach sufficient clarity regarding the criminal liability of the accused person.

71. In addition, the detailed nature of an investigation is not determined solely by *how many* measures of inquiry were conducted, but also – as emphasised by the Hungarian Government – by *how carefully* the results of that investigation were examined.

72. Therefore, I would urge the Court to leave the final assessment on those points to the referring court. That being said, I would add only two final remarks.

73. First, it is entirely possible that the variety and nature of the acts of investigation performed by the Austrian prosecutor could be taken as an indication that – as the Austrian Government argues – that prosecutor has indeed carried out a detailed investigation. On the other hand, however, I certainly do not agree with that government that an investigation should be considered insufficient and thus incapable of triggering the principle *ne bis in idem* only in very extreme or special circumstances. In my view, there can be no presumption in that regard. Publicly available data suggests that a significant number of criminal investigations in the Member States that are closed on account of the inadequacy or lack of evidence are also based on reasons of judicial expediency, economy or policy.

74. Moreover, I understand that the Austrian prosecutor decided not to continue the investigation and bring proceedings on the ground, inter alia, that the investigation of the crimes of which Accused Person 5 was suspected was time-barred in Austria. As I explained above, in point 32 of this Opinion, decisions terminating proceedings due to a statute of limitation do not, generally, involve any evaluation of the criminal liability of the person and, as such, they must be regarded as inherently incapable of triggering the principle *ne bis in idem*. That is an element that, in my view, the referring court might need to consider.

75. Second, I agree with the Swiss Government that the mere fact that the accused person could not be heard does not, by itself, indicate that the investigation was not sufficiently detailed. I see no reason which could justify considering the interview of the accused person a *condition sine qua non* for an investigation to be regarded as being adequately exhaustive and thorough.

76. Thus, unless the authorities in Hungary have specific elements to take the view that such an interview was sufficiently likely to provide elements of a significant weight for the assessment of the criminal liability of the accused person – by that, I mean elements that, if taken into account, could potentially sway the balance in favour of a prosecution of that person – the fact that it was

impossible to carry out such an interview cannot be considered, taken by itself, a sufficient reason for considering the investigation to be inadequate. In that regard, I should stress that, since the stage of the criminal proceedings concerned is that of the investigation, the standard to be applied when assessing the 'what if' scenario cannot be one of certainty or near certainty, but is necessarily one of balance of probabilities.

77. On the other hand, however, a public prosecutor is certainly not precluded from drawing inferences from the fact that an accused person may have voluntarily evaded the possibility of being heard, for instance by making himself or herself unavailable to the police authorities.

78. In the light of the above considerations, I take the view that the concept of 'detailed investigation', within the meaning of the Court's case-law on the principle *ne bis in idem*, must be understood as an investigation in which the public prosecutor has adopted a decision to discontinue proceedings after a thorough evaluation of a sufficiently comprehensive body of evidence. In order to verify whether that was the case, the authorities in the second Member State should consider, in particular, whether (i) the decision to close the proceedings was based, to a significant extent, on reasons of judicial expediency, economy or policy, and (ii) the prosecutor in the first Member State has failed to gather – because it was considered impossible, too difficult or simply unnecessary – additional evidence that was likely to be of particular relevance to the assessment of the criminal liability of the accused person.

V. Conclusion

79. In conclusion, I propose that the Court answer the third question referred for a preliminary ruling by the Fővárosi Törvényszék (Budapest High Court, Hungary) as follows:

Article 50 of the Charter of Fundamental Rights of the European Union, and Article 54 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, must be interpreted as meaning that a decision by a public prosecutor to discontinue proceedings in respect of an accused person is based on a 'detailed investigation' and, consequently, entitle the accused person to the protection of the principle *ne bis in idem*, when the public prosecutor has adopted that decision after a thorough evaluation of a sufficiently comprehensive body of evidence. In order to verify whether that was the case, the authorities in the second Member State should consider, in particular, whether (i) the decision to close the proceedings was based, to a significant extent, on reasons of judicial expediency, economy or policy, and (ii) the prosecutor in the first Member State has failed to gather – because it was considered impossible, too difficult or simply unnecessary – additional evidence that was likely to be of particular relevance to the assessment of the criminal liability of the accused person.