Reports of Cases

JUDGMENT OF THE COURT (Sixth Chamber)

14 September 2023 *

(Reference for a preliminary ruling – Article 50 of the Charter of Fundamental Rights of the European Union – Principle *ne bis in idem* – Final termination of a first set of proceedings brought for an infringement of a provision of national legislation on games of chance – Administrative penalty of a criminal nature imposed for the same acts for an infringement of a different provision of that legislation – First set of proceedings terminated on account of an incorrect legal classification of the offence committed)

In Case C-55/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Landesverwaltungsgericht Vorarlberg (Regional Administrative Court, Vorarlberg, Austria), made by decision of 18 January 2022, received at the Court on 28 January 2022, in the proceedings

NK

v

Bezirkshauptmannschaft Feldkirch,

THE COURT (Sixth Chamber),

composed of P.G. Xuereb (Rapporteur), President of the Chamber, A. Kumin and I. Ziemele, Judges,

Advocate General: A.M. Collins,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Austrian Government, by J. Schmoll and C. Leeb, acting as Agents,

– the Polish Government, by B. Majczyna, acting as Agent,

– the European Commission, by S. Grünheid and M. Wasmeier, acting as Agents,

* Language of the case: German.

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 50 of the Charter of Fundamental Rights of the European Union ('the Charter').

2 The request has been made in proceedings between NK and the Bezirkshauptmannschaft Feldkirch (District Administrative Authority, Feldkirch, Austria) concerning administrative penalties imposed on NK by the authority for infringements of Austrian legislation on games of chance.

Legal context

3 Paragraph 2 of the Glücksspielgesetz (Law on games of chance) of 21 December 1989 (BGBl. 620/1989) in the version applicable to the facts in the main proceedings ('the GSpG'), entitled 'Lotteries', provides:

'(1) Lotteries are games of chance

1. which an operator arranges, organises, offers or makes available, and

2. in which gamblers or other persons make a payment (stake) in connection with participation in a game of chance, and

3. in which the prospect of a payment (payout) is provided by the operator, gamblers or other persons.

(2) An operator is a person who, independently, exercises a permanent activity in order to receive income from the carrying out of games of chance, even if that activity is not intended to make a profit.

Where several persons, in agreement with each other, offer in one place partial services in order to carry out games of chance with the making of payments within the meaning of points 2 and 3 of subparagraph 1, all the persons participating directly in the carrying out of the game of chance are deemed to be operators, even if some of them do not have the intention of receiving income or participate only in the arrangement, organisation or offer of the game of chance.

…

(4) Prohibited lotteries are lotteries for which no licence or authorisation under the present Federal law has been granted, and which are not excluded from the Federal State's monopoly of games of chance provided for in Paragraph 4.'

4 Paragraph 52 of the GSpG, entitled 'Provisions on administrative penalties', provides:

'(1) An administrative offence punishable by a fine imposed by the administrative authorities of up to EUR 60 000 … is committed where:

1. a person, for the purpose of participation from national territory, arranges, organises or makes available in the course of business prohibited lotteries within the meaning of Paragraph 2(4), or participates in them as an operator within the meaning of Paragraph 2(2);

…

(2) In the event of an infringement of point 1 of subparagraph 1 by means of a maximum of three gaming machines or other objects which infringe the legislation, a fine of between EUR 1 000 and EUR 10 000 shall be imposed for each gaming machine or other object which infringes the legislation, or of between EUR 3 000 and EUR 30 000 in the case of a first and subsequent repeated infringement. In the event of an infringement by means of more than three gaming machines or other objects which infringe the legislation, the fine shall be between EUR 3 000 and EUR 30 000 for each gaming machine or other object which infringes the legislation, or between EUR 6 000 and EUR 60 000 in the case of a repeated infringement.'

The dispute in the main proceedings and the question referred for a preliminary ruling

5 NK is the operator of an establishment called I.

6 During an inspection carried out at that establishment on 29 December 2017, it was found that four gaming machines – which were in working order – were set up in that establishment, even though no licence had been issued for their operation.

7 By decision of 19 February 2018, the District Administrative Authority, Feldkirch, imposed on NK an administrative penalty consisting of four fines, coupled with custodial sentences in lieu of fines, for offences in the third case of Paragraph 52(1)(1) of the GSpG, read in conjunction with Paragraph 2(2) and (4) and Paragraph 4 thereof, on the ground that, as the operator of the I establishment, he had made available in the course of business games of chance in the form of prohibited lotteries.

8 By decision of 13 August 2018, the Landesverwaltungsgericht Vorarlberg (Regional Administrative Court, Vorarlberg, Austria), which is the referring court in the present case, annulled the decision of 19 February 2018 and terminated the proceedings on the ground that, on the basis of the findings of fact, NK had not made available games of chance, within the meaning of the third case of Paragraph 52(1)(1) of the GSpG, but had arranged such games, within the meaning of the first case of Paragraph 52(1)(1) thereof. According to that court, alteration of the decision of the District Administrative Authority, Feldkirch, to the effect that NK, as the operator of the I establishment, was responsible for arranging prohibited games of chance would have entailed an 'unlawful substitution of the acts'.

9 Neither the District Administrative Authority, Feldkirch, nor the Bundesminister für Finanzen (Federal Minister for Finance, Austria) brought an appeal on a point of law against the decision of 13 August 2018, even though both had the legal possibility of doing so.

10 By decision of 30 November 2018, the District Administrative Authority, Feldkirch, imposed on NK an administrative penalty consisting of four fines, coupled with custodial sentences in lieu of fines, for offences in the first case of Paragraph 52(1)(1) of the GSpG, read in conjunction with Paragraph 2(2) and (4) and Paragraph 4 thereof, on the ground that, as the owner of gaming machines and as the operator of the I establishment, he had arranged in that establishment, on 29 December 2017, games of chance in the form of prohibited lotteries.

11 By decision of 4 July 2019, the referring court annulled the decision of 30 November 2018. It observed that the District Administrative Authority, Feldkirch, had punished NK again for the same acts, committed in the same place and at the same time, simply by adopting another legal classification in respect of those acts. According to that court, this constituted double or multiple punishment for the purpose of Article 4(1) of Protocol No 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950. Consequently, it took the view that the decision of 30 November 2018 was to be annulled and that it was necessary to close the administrative penal proceedings.

12 The District Administrative Authority, Feldkirch, lodged an appeal on a point of law with the Verwaltungsgerichtshof (Supreme Administrative Court, Austria) against the decision of 4 July 2019.

13 By decision of 14 June 2021, the Verwaltungsgerichtshof (Supreme Administrative Court) annulled the decision of 4 July 2019 on the ground that the final termination of the criminal proceedings by decision of 13 August 2018 did not preclude the criminal proceedings brought in order to establish whether an offence in the first case referred to in Paragraph 52(1)(1) of the GSpG had been committed from being continued and, thus, NK from being punished for that offence.

14 The referring court, which, following the decision of 14 June 2021, is once again being called upon to give a ruling, states that, under Paragraph 63(1) of the Verwaltungsgerichtshofgesetz (Law on the Supreme Administrative Court), it is in principle bound by the legal analysis of the Verwaltungsgerichtshof (Supreme Administrative Court), but that, according to the case-law of that court, that obligation does not apply if, subsequent to the decision of the Verwaltungsgerichtshof (Supreme Administrative Court), a divergent decision is given by the Court of Justice.

15 The referring court asks whether Article 50 of the Charter precludes new proceedings if criminal proceedings brought under the GSpG in respect of the same acts as those which form the subject of those new proceedings, but under a different provision of the GSpG, were terminated at the end of a hearing in which those facts were investigated.

16 As regards the applicability of the Charter, the referring court observes, first of all, that, where a Member State relies on overriding requirements in the public interest in order to justify legislation which is liable to obstruct the exercise of the freedom to provide services, such justification must be interpreted in the light of the general principles of EU law, in particular the fundamental rights guaranteed by the Charter.

17 Next, it observes, relying in particular on the judgment of 30 April 2014, *Pfleger and Others* (C-390/12, EU:C:2014:281, paragraphs 35 and 36), delivered following a reference from an Austrian court which was also called upon to apply Austrian legislation on games of chance, that

reliance by a Member State on exceptions provided for by EU law in order to justify a restriction on a fundamental freedom guaranteed by the FEU Treaty must be regarded as 'implementing Union law' within the meaning of Article 51(1) of the Charter.

18 Lastly, it states that EU citizens are customers of the establishment operated by NK and that one employee of that establishment is a national of the Republic of Bulgaria, and therefore of another Member State.

19 As regards the principle *ne bis in idem*, the referring court notes, first of all, that that principle is enshrined not only in Article 50 of the Charter, but also, inter alia, in 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 (OJ 2000 L 239, p. 19), signed in Schengen on 19 June 1990, which entered into force on 26 March 1995 ('the CISA').

20 Next, it observes that, in the judgment of 9 March 2006, *Van Esbroeck* (C-436/04, EU:C:2006:165, paragraph 27 et seq.), the Court of Justice stated that Article 54 of the CISA, which uses the wording 'the same acts', refers only to the existence of the acts at issue and not to their legal classification.

21 The referring court also notes that, in its judgment of 20 March 2018, *Garlsson Real Estate and Others* (C-537/16, EU:C:2018:193, paragraphs 37 and 38), the Court stated that the relevant criterion for the purposes of assessing the existence of the same offence is identity of the material facts, understood as the existence of a set of concrete circumstances which are inextricably linked together and which resulted in the final acquittal or conviction of the person concerned and that the legal classification, under national law, of the facts and the legal interest protected is not relevant for the purposes of establishing the existence of the same offence, in so far as the scope of the protection conferred by Article 50 of the Charter cannot vary from one Member State to another.

22 Lastly, it notes that, in the judgment of 29 June 2016, *Kossowski* (C-486/14, EU:C:2016:483), the Court stated that, in order to determine whether a decision such as that before it constitutes a decision which finally closes proceedings against a person for the purpose of Article 54 of the CISA, it is necessary to be satisfied that that decision was given after a determination had been made as to the merits of the case.

23 As regards the case before it, the referring court observes, as a preliminary point, that it is not necessary to clarify whether it was correct to terminate the first set of proceedings, since those proceedings were finally terminated.

24 Next, it states that, in principle, the first set of criminal proceedings, in which the facts were investigated, resulted in the acquittal of the appellant in the main proceedings and that the second set of criminal proceedings related to the same acts. It takes the view that the prohibition of double prosecution applies irrespective of the legal classification given to those facts and that, consequently, Article 50 of the Charter must be interpreted as precluding further punishment of NK, even though the first decision, which acquitted him, stated that the games in question constituted prohibited games of chance. However, in view of that latter circumstance, it does not consider that interpretation to be so obvious as to leave no scope for any doubt.

25 In those circumstances, the Landesverwaltungsgericht Vorarlberg (Regional Administrative Court, Vorarlberg) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Is the principle [*ne*] *bis in idem*, as guaranteed by Article 50 of the Charter, to be interpreted as meaning that the competent administrative penal authority of a Member State is prevented from imposing a fine on a person for infringement of a provision of the legislation on games of chance if administrative penal proceedings brought previously against the same person for an infringement of a different provision of the legislation on games of chance (or, more generally, a rule from the same field of law), which were based on the same [acts], were finally terminated after an oral hearing with the taking of evidence had been held?'

The jurisdiction of the Court

26 Both the Austrian Government and the European Commission submit that the Court of Justice lacks jurisdiction on the ground that the referring court has neither indicated in a sufficiently specific manner the extent to which the provisions of national law at issue were adopted for the purpose of implementing EU law nor in what way, despite its purely domestic character, the dispute pending before it has a connecting factor with the provisions of EU law on the fundamental freedoms that makes the preliminary ruling on interpretation necessary for it to give judgment in that dispute.

27 Article 51(1) of the Charter provides that its provisions are addressed to the Member States only when they are implementing EU law.

28 In that regard, the Court's settled case-law states that the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by EU law, but not outside such situations. In this respect the Court has already observed that it has no power to examine the compatibility with the Charter of national legislation lying outside the scope of European Union law. On the other hand, if such legislation falls within the scope of European Union law, the Court, when requested to give a preliminary ruling, must provide all the guidance as to interpretation needed in order for the national court to determine whether that legislation is compatible with the fundamental rights the observance of which the Court ensures (judgments of 26 February 2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraph 19, and of 5 May 2022, *BPC Lux 2 and Others*, C-83/20, EU:C:2022:346, paragraph 26 and the case-law cited).

29 The Court has also held that, where it is apparent that national legislation is such as to obstruct the exercise of one or more fundamental freedoms guaranteed by the Treaty, it may benefit from the exceptions provided for by EU law in order to justify that fact only in so far as that complies with the fundamental rights enforced by the Court. That obligation to comply with fundamental rights manifestly comes within the scope of EU law and, consequently, within that of the Charter. The use by a Member State of exceptions provided for by EU law in order to justify an obstruction of a fundamental freedom guaranteed by the Treaty must, therefore, be regarded as 'implementing Union law' within the meaning of Article 51(1) of the Charter (judgment of 30 April 2014, *Pfleger and Others*, C-390/12, EU:C:2014:281, paragraph 36).

30 In addition, the Court has previously held that services which a provider carries out without moving from the Member State in which he or she is established for recipients established in other Member States constitute the provision of cross-border services for the purposes of

Article 56 TFEU (judgments of 11 June 2015, *Berlington Hungary and Others*, C-98/14, EU:C:2015:386, paragraph 26, and of 3 December 2020, *BONVER WIN*, C-311/19, EU:C:2020:981, paragraph 19).

31 In the present case, the referring court considers Article 50 of the Charter to be applicable, since, in accordance with the judgment of 30 April 2014, *Pfleger and Others* (C-390/12, EU:C:2014:281, paragraphs 35 and 36), delivered following a reference from an Austrian court which was also called upon to apply Austrian legislation on games of chance, that legislation is liable to obstruct the exercise of the freedom to provide services guaranteed by Article 56 TFEU. The referring court has also stated that EU citizens, that is to say, citizens of Member States other than the Republic of Austria, were customers of NK's establishment, which is established in the jurisdiction of the Landesverwaltungsgericht Vorarlberg (Regional Administrative Court, Vorarlberg) in Austria, and is situated only 40 km from the border with Germany.

32 In those circumstances, it must be held that the Court has jurisdiction to rule on the request for a preliminary ruling.

Admissibility

33 The Austrian Government maintains that the request for a preliminary ruling must be rejected as inadmissible, since it does not make it possible to determine the provisions of national law to which the referring court specifically refers or the extent to which that court has doubts, in the light of such provisions, as to the interpretation of EU law. The Commission, for its part, submits that that request is inadmissible on the ground that the factual and legal material necessary to give a useful answer to the question referred and to demonstrate the relevance of the question for the resolution of the dispute is lacking in the present case.

34 In that regard, it must be borne in mind that, in the context of the cooperation between the Court of Justice and the national courts established in Article 267 TFEU, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of EU law, the Court is, in principle, bound to give a ruling (judgment of 5 May 2022, *Universiteit Antwerpen and Others*, C-265/20, EU:C:2022:361, paragraph 22 and the case-law cited).

35 It follows that questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of EU law that is sought is unrelated to the actual facts of the main action or its object, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgment of 5 May 2022, *Universiteit Antwerpen and Others*, C-265/20, EU:C:2022:361, paragraph 23 and the case-law cited).

36 Thus, since the order for reference serves as the basis for the procedure followed before the Court, it is essential that the national court should, in that decision, set out the factual and legislative context of the dispute in the main proceedings and give at the very least some explanation of the reasons for the choice of the EU law provisions which it seeks to have interpreted and of the link it establishes between those provisions and the national legislation applicable to the proceedings pending before it (judgment of 5 May 2022, *Universiteit Antwerpen and Others*, C-265/20, EU:C:2022:361, paragraph 24 and the case-law cited).

37 Those cumulative requirements concerning the content of a request for a preliminary ruling are expressly set out in Article 94 of the Rules of Procedure of the Court of Justice. It follows therefrom, in particular, that the request for a preliminary ruling must contain the 'statement of the reasons which prompted the referring court or tribunal to inquire about the interpretation or validity of certain provisions of European Union law, and the relationship between those provisions and the national legislation applicable to the main proceedings'.

38 The referring court has stated that it was called upon to rule on the lawfulness of a second decision imposing a penalty, for the same acts in respect of the same person, for an offence in the first case of Paragraph 52(1)(1) of the GSpG, namely the arrangement of games of chance in the form of prohibited lotteries, after the termination of a first set of criminal proceedings based on the third case of Paragraph 52(1)(1) of the GSpG, namely the making available of such games of chance. It has explained that, consequently, it had doubts as to the interpretation of the principle *ne bis in idem*, enshrined in Article 50 of the Charter, which it considers applicable, since, in accordance with the judgment of 30 April 2014, *Pfleger and Others* (C-390/12, EU:C:2014:281, paragraphs 35 and 36), legislation such as that at issue in the main proceedings is liable to obstruct the exercise of the freedom to provide services guaranteed by Article 56 TFEU. As regards the interpretation of that principle, the referring court has observed, inter alia, that, although it took the view that, in principle, the first set of criminal proceedings, in which the facts had been investigated, had led to NK being acquitted and that the prohibition of double prosecution laid down in Article 50 of the Charter applied irrespective of the legal classification given to those facts, since the first decision had stated that the games in question constituted prohibited games of chance, it did not consider the answer to be given to the question referred to be so obvious as to leave no scope for any doubt.

39 Consequently, the referring court has stated the reasons which have prompted it to inquire about the interpretation of certain provisions of EU law and the relationship that it identifies between those provisions and the national legislation applicable to the dispute in the main proceedings.

40 Consequently, the request for a preliminary ruling is admissible.

Consideration of the question referred

41 By its single question, the referring court asks, in essence, whether Article 50 of the Charter, in so far as it lays down the principle *ne bis in idem*, must be interpreted as precluding the imposition of a penalty of a criminal nature on a person for an infringement of a provision of national legislation which is liable to obstruct the exercise of the freedom to provide services, within the meaning of Article 56 TFEU, if that person has already been the subject of a judicial decision which has become final, given at the end of a hearing with the taking of evidence, and which resulted in that person being acquitted of an infringement of a different provision of that legislation in respect of the same acts.

42 Article 50 of the Charter, entitled 'Right not to be tried or punished twice in criminal proceedings for the same criminal offence', provides that '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'.

43 As a preliminary point, it should be noted that the principle *ne bis in idem* prohibits a duplication both of proceedings and of penalties of a criminal nature for the purposes of that article for the same acts and against the same person (judgment of 22 March 2022, *bpost*, C-117/20, EU:C:2022:202, paragraph 24 and the case-law cited).

44 As regards the assessment as to whether the proceedings and penalties concerned are criminal in nature, it is apparent from the case-law that three criteria are relevant in the context of that assessment. The first is the legal classification of the offence under national law, the second is the intrinsic nature of the offence, and the third is the degree of severity of the penalty which the person concerned is liable to incur (judgments of 4 May 2023, *MV – 98*, C-97/21, EU:C:2023:371, paragraph 38 and the case-law cited, and of 14 September 2023, *Volkswagen Group Italia and Volkswagen Aktiengesellschaft*, C-27/22, …, paragraph 45).

45 It is for the referring court to assess, in the light of those criteria, whether the proceedings and penalties at issue in the main proceedings are criminal in nature for the purposes of Article 50 of the Charter.

46 In that regard, it must be borne in mind that the application of Article 50 of the Charter is not limited to proceedings and penalties which are classified as 'criminal' by national law, but extends, irrespective of such a classification under domestic law, to proceedings and penalties which must be considered to have a criminal nature on the basis of the two other criteria referred to in paragraph 44 of the present judgment (judgments of 4 May 2023, *MV – 98*, C-97/21, EU:C:2023:371, paragraph 41 and the case-law cited, and of 14 September 2023, *Volkswagen Group Italia and Volkswagen Aktiengesellschaft*, C-27/22, …, paragraph 48).

47 Since the referring court observes, in its request for a preliminary ruling, that the proceedings and penalties at issue in the main proceedings are criminal in nature for the purposes of Article 50 of the Charter, under the criteria set out in paragraph 44 of the present judgment, it should be examined whether the conditions for the application of the principle *ne bis in idem* are satisfied.

48 It is apparent from the case-law that the application of the principle *ne bis in idem* is subject to a twofold condition, namely, first, that there must be a prior final decision (the '*bis*' condition) and, secondly, that the prior decision and the subsequent proceedings or decisions must concern the same acts (the '*idem*' condition) (judgment of 22 March 2022, *bpost*, C-117/20, EU:C:2022:202, paragraph 28).

49 As regards the '*bis*' condition, in order to determine whether a judicial decision constitutes a decision finally disposing of the case against a person, it is necessary, inter alia, to be satisfied that that decision was taken after a determination had been made as to the merits of the case (judgment of 16 December 2021, *AB and Others (Revocation of an amnesty)*, C-203/20, EU:C:2021:1016, paragraph 56 and the case-law cited).

50 That interpretation is confirmed by the 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 (judgment of 16 December 2021, *AB and Others (Revocation of an amnesty)*, C-203/20, EU:C:2021:1016, paragraph 57).

51 As a corollary to the *res judicata* principle, the principle *ne bis in idem* aims to ensure legal certainty and fairness; in ensuring that once the person concerned has been tried and, as the case may be, punished, that person has the certainty that he or she will not be tried again for the same offence (judgment of 22 March 2022, *Nordzucker and Others*, C-151/20, EU:C:2022:203, paragraph 62).

52 In the present case, it is apparent from the findings of the referring court, first of all, that the first penalty imposed on NK for an infringement of the legislation on games of chance was annulled by a decision of that court of 13 August 2018 that has acquired the force of *res judicata*, adopted following a hearing in which the facts were investigated. Next, the referring court has observed that the findings in the procedure for taking evidence enabled it to conclude, in that decision, that NK had not made prohibited games of chance available in the course of business, within the meaning of the third case of Paragraph 52(1)(1) of the GSpG, and that that decision produces, under national law, the effects of a decision of acquittal. Lastly, that court found that NK had arranged such games, within the meaning of the first case of Paragraph 52(1)(1) of the GSpG, but did not impose a penalty in that regard.

53 It follows from the factors set out in the preceding paragraph that, in the context of the first proceedings, the referring court took its decision in the light of a determination as to the merits of the case and was able to rule on the criminal liability of the accused person, which it is, however, for that court to verify.

54 As regards the '*idem*' condition, according to the Court's case-law, it follows from the very wording of Article 50 of the Charter that that provision prohibits the same person from being tried or punished in criminal proceedings more than once for the same offence (judgment of 22 March 2022, *bpost*, C-117/20, EU:C:2022:202, paragraph 31).

55 In the present case, it is common ground that the two sets of criminal proceedings at issue concern the same person, namely NK.

56 According to the Court's case-law, the relevant criterion for the purposes of assessing the existence of the same offence is identity of the material facts, understood as the existence of a set of concrete circumstances which are inextricably linked together and which resulted in the final acquittal or conviction of the person concerned. Therefore, Article 50 of the Charter prohibits the imposition, with respect to identical facts, of several criminal penalties at the conclusion of different proceedings brought for those purposes (judgments of 20 March 2018, *Garlsson Real Estate and Others*, C-537/16, EU:C:2018:193, paragraph 37, and of 2 September 2021, *LG and MH (Self-laundering)*, C-790/19, EU:C:2021:661, paragraph 78).

57 In order to assess whether such a set of concrete circumstances exists, the competent national courts must determine whether the material facts in the two proceedings constitute a set of facts which are inextricably linked together in time, in space and by their subject matter (judgment of 2 September 2021, *LG and MH (Self-laundering)*, C-790/19, EU:C:2021:661, paragraph 79 and the case-law cited).

58 Moreover, in the light of the case-law referred to in paragraph 56 of the present judgment, the '*idem*' condition requires the material facts to be identical. By contrast, the principle *ne bis in idem* is not intended to be applied where the facts in question are not identical but merely similar (judgment of 22 March 2022, *bpost*, C-117/20, EU:C:2022:202, paragraph 36).

59 The Court has also held that the legal classification, under national law, of the facts and the legal interest protected are not relevant for the purposes of establishing the existence of the same offence, in so far as the scope of the protection conferred by Article 50 of the Charter cannot vary from one Member State to another (judgments of 20 March 2018, *Menci*, C-524/15, EU:C:2018:197, paragraph 36, and of 2 September 2021, *LG and MH (Self-laundering)*, C-790/19, EU:C:2021:661, paragraph 80) or, unless otherwise provided by EU law, from one field of EU law to another (judgment of 22 March 2022, *bpost*, C-117/20, EU:C:2022:202, paragraph 35).

60 It is for the referring court, which alone has jurisdiction to rule on the facts, to determine whether the dispute before it relates to facts which are identical to those which gave rise to the decision of 13 August 2018, referred to in paragraph 52 of the present judgment.

61 It is apparent from the order for reference that, in the view of the referring court, the two sets of criminal proceedings at issue concerned the investigation of material facts that were, in essence, identical, inter alia by virtue of their links in time and space. Thus, it follows from the inspection carried out on 29 December 2017 at the establishment belonging to NK that four gaming machines – which were in working order – were set up at that establishment, even though no licence had been issued for their operation. In those circumstances, the fact that NK was tried, first, in the context of the first set of criminal proceedings, for making prohibited lotteries available in the course of business, and then, in the context of the second set of criminal proceedings, for arranging such lotteries, can be regarded, on the basis of the case-law cited in paragraph 59 of the present judgment, as having no bearing on the finding of the existence of 'the same offence'.

62 In that context, it should be noted that the pursuit of criminal penalty proceedings, based on the same acts, would constitute a limitation of the fundamental right enshrined in Article 50 of the Charter.

63 Nonetheless, a limitation of the fundamental right enshrined in Article 50 of the Charter may be justified on the basis of Article 52(1) thereof (judgment of 22 March 2022, *bpost*, C-117/20, EU:C:2022:202, paragraph 40 and the case-law cited).

64 In accordance with the first sentence of Article 52(1) of the Charter, any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law and respect the essence of those rights and freedoms. According to the second sentence of Article 52(1) thereof, subject to the principle of proportionality, limitations on those rights and freedoms may be made only if they are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others.

65 In the present case, in the first place, it is apparent from the order for reference that each of the two sets of proceedings brought by the District Administrative Authority, Feldkirch, which resulted in the decision of 13 August 2018 and the decision of 30 November 2018, and in a duplication of proceedings, was provided for by law.

66 As regards, in the second place, respect for the essence of the fundamental right enshrined in Article 50 of the Charter, it must be borne in mind that the possibility of a duplication of proceedings and penalties respects the essence of Article 50 of the Charter, provided that the national legislation does not allow for proceedings and penalties in respect of the same acts on the basis of the same offence or in pursuit of the same objective, but provides only for the possibility of a duplication of proceedings and penalties under different legislation (judgment of 22 March 2022, *bpost*, C-117/20, EU:C:2022:202, paragraph 43).

67 The two sets of proceedings brought by the District Administrative Authority, Feldkirch, which have resulted in a duplication of proceedings, pursue the same objective, namely to penalise illegal offers of games of chance by means of gaming machines, and are based on the same legislation.

68 In the light of the foregoing considerations, the answer to the question referred is that Article 50 of the Charter, in so far as it lays down the principle *ne bis in idem*, must be interpreted as precluding the imposition of a penalty of a criminal nature on a person for an infringement of a provision of national legislation which is liable to obstruct the exercise of the freedom to provide services, within the meaning of Article 56 TFEU, if that person has already been the subject of a judicial decision which has become final, given at the end of a hearing with the taking of evidence, and which resulted in that person being acquitted of an infringement of a different provision of that legislation in respect of the same acts.

Costs

69 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Sixth Chamber) hereby rules:

Article 50 of the Charter of Fundamental Rights of the European Union, in so far as it lays down the principle *ne bis in idem,*

must be interpreted as precluding the imposition of a penalty of a criminal nature on a person for an infringement of a provision of national legislation which is liable to obstruct the exercise of the freedom to provide services, within the meaning of Article 56 TFEU, if that person has already been the subject of a judicial decision which has become final, given at the end of a hearing with the taking of evidence, and which resulted in that person being acquitted of an infringement of a different provision of that legislation in respect of the same acts.

[Signatures]