Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

19 October 2023 *

(Reference for a preliminary ruling – Convention implementing the Schengen Agreement – Article 54 – Charter of Fundamental Rights of the European Union – Article 50 – Principle *ne bis in idem* – Admissibility of criminal prosecution for corruption of an accused person in one Member State after the closure of the criminal proceedings brought against him in respect of the same acts by the public prosecutor's office of another Member State – Conditions which must be satisfied in order for the accused person's trial to be regarded as having been finally disposed of – Condition of an assessment of the merits of the case – Requirement for a detailed investigation – No questioning of the accused person)

In Case C-147/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Fővárosi Törvényszék (Budapest High Court, Hungary), made by decision of 20 January 2022, received at the Court on 1 March 2022, in the criminal proceedings against

Terhelt5,

intervening party:

Központi Nyomozó Főügyészség,

THE COURT (Second Chamber),

composed of A. Prechal (Rapporteur), President of the Chamber, F. Biltgen, N. Wahl, J. Passer and M.L. Arastey Sahún, Judges,

Advocate General: N. Emiliou,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Terhelt5, by B. Gyalog, ügyvéd,

– Központi Nyomozó Főügyészség, by G. Egri and P. Fürcht, acting as Agents,

* Language of the case: Hungarian.

– the Hungarian Government, by M.Z. Fehér, K. Szíjjártó and M. Tátrai, acting as Agents,

– the Austrian Government, by A. Posch, J. Schmoll and E. Samoilova, acting as Agents,

– the Swiss Government, by L. Lanzrein and V. Michel, acting as Agents,

– the European Commission, by B. Béres and M. Wasmeier, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 6 July 2023,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of 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 and entered into force on 26 March 1995 ('the CISA'), and of Article 50 of the Charter of Fundamental Rights of the European Union ('the Charter').

2 The request has been made in criminal proceedings brought in Hungary by the Központi Nyomozó Főügyészség (National Public Prosecutor's Office, Hungary) ('the KNF') against Terhelt5, a Hungarian national ('the accused'), in essence, for offences of corruption in respect of which he had already been the subject of criminal proceedings in Austria, which resulted in a discontinuance of the proceedings ordered by the Zentrale Staatsanwaltschaft zur Verfolgung von Wirtschaftsstrafsachen und Korruption (Central Public Prosecutor's Office for the prosecution of financial crime and corruption, Austria) ('the WKStA').

Legal context

European Union law

3 Article 54 of the CISA, which is in Chapter 3, entitled 'Application of the *ne bis in idem* principle', of Title III thereof, provides as follows:

'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.'

4 Article 57(1) of the CISA states:

'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.'

Hungarian law

5 Paragraph XXVIII(6) of the Magyarország Alaptörvénye (Hungarian Basic Law) provides:

'Without prejudice to the exceptional cases provided for by the Law on legal remedies, no one shall be liable to be prosecuted or convicted of an offence for which he or she has already been acquitted or convicted by final decision in Hungary or – to the extent determined by an international treaty or a legal instrument of the European Union – in another State.'

6 In accordance with Paragraph 4(3) of the büntetőeljárásról szóló 2017. évi XC. törvény (Law XC of 2017 on 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 extraordinary remedy proceedings and certain special proceedings available.

7 Paragraph 4(7) of that law provides 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 Member 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.

8 Paragraph 254 of the Büntető Törvénykönyvről szóló 1978. évi IV. törvény (Law IV of 1978 establishing the Criminal Code) provided:

'(1) Any person who grants or promises an undue advantage to an employee or member of a budgetary body, professional organisation or social organisation, or to someone else in his or her interests, for breach of his or her obligation, commits an offence and shall be liable to a custodial sentence of up to three years.

2. The offence shall be punishable by a custodial sentence of up to five years if the undue advantage is granted or promised to an employee or member of a budgetary body, professional organisation or social organisation empowered to take measures autonomously.'

Austrian law

9 Paragraph 190 of the Strafprozessordnung (Code of Criminal Procedure) ('the StPO'), entitled 'Closure of the investigation procedure', is worded as follows:

'The prosecution must discontinue the criminal proceedings and close the investigation procedure where:

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

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

10 Under Paragraph 193 of the StPO, entitled 'Continuation of the proceedings':

'(1) Once the proceedings are closed, no further investigation may be conducted against the accused person; if necessary, the prosecution orders his or her release. However, if the decision relating to the continuation of the proceedings requires certain acts of investigation or administration of evidence, the public prosecutor's office may, from time to time, order the carrying out of those acts 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 accused person was not questioned in respect of the offence … and no restriction was imposed on him or her in that regard, or

2. new facts or evidence arise or appear which, alone or in combination with other results of the proceedings, appear to justify the conviction of the accused …

…'

11 In accordance with Paragraph 195 of the StPO, a person who has been the victim of an offence may, under certain conditions, request the continuation of an investigation procedure which has been closed, as long as that offence is not time-barred. If the public prosecutor's office considers that the victim's request is justified, it must continue the proceedings irrespective of the requirements laid down in Paragraph 193(2), points 1 or 2, of the StPO.

12 Paragraph 307 of the Strafgesetzbuch (Criminal Code) ('the StGB'), entitled 'Corruption', in the version applicable to the dispute in the main proceedings, provides in paragraph 1 thereof:

'Whosoever

…

6. … offers, promises or procures from a foreign public official, for himself or herself or for a third party, an advantage in order to perform or refrain from, in breach of his or her duties, acts in the performance of his or her duties for the purpose of obtaining or retaining a contract or any other unfair advantage in international transactions, shall be liable to a term of imprisonment of up to two years.

…'

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

13 On 22 August 2012, the WKStA brought criminal proceedings in Austria against two persons of Austrian nationality for suspicion of money laundering, embezzlement and corruption, within the meaning of Paragraph 307(1)(6) of the StGB, and against the defendant, on suspicion of corruption, within the meaning of that provision.

14 The investigations concerned facts which occurred between 2005 and 2010 and involved suspected bribes to public agents through several companies established in different Member States in order to influence the decision to be taken in a procedure for the award of a public contract for the supply of new trains for two metro lines in Budapest (Hungary). This included, inter alia, transfers of sums totalling several million euros, as payment for consultancy services which it was suspected had never actually been provided.

15 The accused, who was allegedly aware of the fictitious nature of the consultancy contracts and their real objective, was suspected of having sought to corrupt, with a view to obtaining that public contract, the person or persons in a position to influence the decision-makers for that contract. In particular, he allegedly made, between 5 April 2007 and 8 February 2010, several payments from a company totalling more than EUR 7 million to public officials who were perpetrators of the passive bribery offence and who remained unknown.

16 Those suspicions against the accused were based on information provided by the Serious Fraud Office (United Kingdom) ('the SFO') in the context of a request for judicial assistance relating to an investigation into a United Kingdom group of undertakings, the analysis of banking data of an Austrian company the production of which was ordered by the WKStA and the interviews of the Austrian suspects, referred to in paragraph 13 of the present judgment, who were interviewed as witnesses.

17 The accused was not interviewed as a suspect in the context of the investigation carried out by the WKStA, as the investigative measures taken by that public prosecutor's office on 26 May 2014 seeking to locate him proved unsuccessful.

18 By order of 3 November 2014, the WKStA discontinued the pre-trial investigation without further action being taken, taking the view, referring to the results of the investigations carried out up to that point by the Austrian, United Kingdom and Hungarian authorities, that there were no real grounds for continuing the criminal proceedings, within the meaning of Paragraph 190(2) of the StPO. That public prosecutor's office considered that, since there was no evidence that one of the suspects referred to in paragraph 13 of the present judgment and the accused had actually committed the acts of corruption referred to in Paragraph 307(1)(6) of the StGB, those acts had not been established with sufficient certainty to give rise to a criminal conviction, with the result that it was necessary to discontinue the proceedings.

19 The WKStA reviewed that decision to discontinue the proceedings on a number of occasions but, on each occasion, had to find that the conditions for continuing the proceedings, laid down in Paragraphs 193 and 195 of the StPO, had not been met since, in particular, the corruption alleged against the accused had been time-barred in Austria from 2015 at the latest.

20 On 10 April and 29 August 2019, the KNF filed with the Fővárosi Törvényszék (Budapest High Court, Hungary), the referring court, an indictment on the basis of which criminal proceedings were brought in Hungary against the accused for acts of corruption, within the meaning of Paragraph 254(1) and (2) of Law IV of 1978 establishing the Criminal Code, referred to in paragraph 8 above.

21 Taking the view that the acts of corruption alleged against the accused were the same as those which had already been the subject of investigations conducted in Austria by the WKStA before their discontinuance by that public prosecutor's office, the referring court, by order of

8 December 2020, brought those criminal proceedings to an end in accordance with the principle *ne bis in idem*, as enshrined in Paragraph 4(3) and (7) of Law XC of 2017 on Criminal Procedure, referred to in paragraph 6 of the present judgment.

22 That order was set aside by an order of the Fővárosi Ítélőtábla (Budapest Regional Court of Appeal, Hungary) of 15 June 2021, which referred the case back to the referring court.

23 According to the Fővárosi Ítélőtábla (Budapest Regional Court of Appeal), the order of the WKStA of 3 November 2014 discontinuing the investigation, referred to in paragraph 18 of the present judgment, cannot be regarded as a final decision, within the meaning of Article 50 of the Charter and Article 54 of the CISA, since the available documents do not make it possible to establish clearly that that order is based on a sufficiently detailed and complete assessment of the evidence. In particular, there is nothing to show that the WKStA gathered evidence other than the interview of the two Austrian suspects referred to in paragraph 13 of the present judgment and that it interviewed any of the 90 persons named by the KNF in its indictment, with a view to questioning them or taking a statement. Furthermore, the accused was not interviewed as a suspect.

24 In those circumstances, 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 closed 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?’

Consideration of the questions referred

25 By its three questions, which it is appropriate to examine together, the referring court asks, in essence, whether the principle *ne bis in idem* enshrined in Article 54 of the CISA, read in the light of Article 50 of the Charter, must be interpreted as meaning that a decision to acquit an accused person, taken in one Member State, following an investigation relating, in essence, to acts of corruption, must be classified as a final decision, within the meaning of those articles, where that person is prosecuted again for those same acts in a second Member State and:

– the decision to acquit was taken by the public prosecutor's office of the first Member State without the imposition of a penalty and without the intervention of a court and was based on the finding that there was no evidence to show that the accused person had actually committed the offence with which he or she is charged;

– under the national law applicable in the first Member State, notwithstanding the finality of such an acquittal, the public prosecutor's office has the discretion to continue the proceedings under strictly defined conditions, such as the emergence of significant new facts or evidence, provided that, in any event, the offence is not time-barred; and

– during the investigation, the public prosecutor's office of the first Member State gathered information without, however, questioning the accused, who is a citizen of another Member State, as a suspect, since the measure of investigation having the nature of a coercive constraint intended to locate him has ultimately proved to be unsuccessful.

26 As a preliminary point, it should be noted 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 facts (the 'idem' condition) (judgment of 23 March 2023, *Dual Prod*, C-412/21, EU:C:2023:234, paragraph 51 and the case-law cited).

27 As regards the second of those conditions, the referring court expressly relies on the premiss that, in the present case, it is satisfied.

28 As regards the first condition, it must be borne in mind that, according to the Court's settled case-law, in order for a person's trial to be regarded as having been 'finally disposed of', within the meaning of Article 54 of the CISA, further prosecution must have been 'definitively barred' following the adoption of the criminal decision in question, such as, in the present case, an acquittal. Secondly, that decision must have been given following a 'determination of the merits of the case' (see, to that effect, judgment of 29 June 2016, *Kossowski*, C-486/14, EU:C:2016:483, paragraphs 34 and 42 and the case-law cited).

29 In the present case, in the first place, as regards the requirement that further prosecution must be definitively barred, it must be borne in mind, in the light of the circumstances referred to in the first two indents referred to in paragraph 25 above, that, according to the Court's case-law, first, Article 54 of the CISA is also applicable to decisions of an authority responsible for administering criminal justice in the national legal system concerned, such as a public prosecutor's office, definitively discontinuing criminal proceedings in a Member State without the imposition of a penalty, and although such decisions are adopted without the involvement of a court and do not take the form of a judgment. Secondly, that requirement must be assessed on the basis of the law of the Contracting State which made the criminal decision in question and

must ensure that the decision in question gives rise, in that State, to the protection conferred by the principle *ne bis in idem* (see, to that effect, judgments of 22 December 2008, *Turanský*, C-491/07, EU:C:2008:768, paragraphs 35 and 36, and of 29 June 2016, *Kossowski*, C-486/14, EU:C:2016:483, paragraphs 35 and 39 and the case-law cited).

30 In that context, it is also apparent from the Court's case-law that the fact that, under the applicable national law, criminal proceedings closed by an acquittal may be reopened in the event of 'new or newly discovered facts', such as new evidence, cannot call into question the definitive nature of that decision since it does not definitively bar further prosecution, provided that that possibility of reopening, if it does not constitute an 'extraordinary remedy', nevertheless involves the exceptional bringing of separate proceedings based on different evidence, rather than the mere continuation of proceedings which have already been closed (see, to that effect, judgment of 5 June 2014, *M*, C-398/12, EU:C:2014:1057, paragraphs 37 to 40).

31 In the present case, in the light of that case-law, the fact that Austrian law provides, first, in Paragraph 193(2), point 2, of the StPO, for the continuance of proceedings closed following the adoption of an acquittal decision under strict conditions, that is to say, where 'new facts or evidence arise or appear, alone or in combination with other results of the proceedings, appear to justify the conviction of the accused', cannot call into question the definitive nature of that decision.

32 The same applies, secondly, to the other possibility for continuing the procedure provided for by Austrian law, which is also strictly circumscribed, namely where, in accordance with Paragraph 193(2), point 1, of the StPO, 'the accused person was not questioned in respect of this offence … and no restriction was imposed on him or her in that regard'.

33 That possibility, if it does not constitute an 'extraordinary remedy', involves, in the light of the twofold condition to which it is subject, the exceptional bringing of separate proceedings, rather than the mere continuation of proceedings which have already been closed, with a view to reviewing the acquittal decision in the light of the statements made by the accused person in the event that he or she might subsequently be questioned. Furthermore, it should be noted that, in the case in the main proceedings, that possibility was not open to the public prosecutor's office after the adoption of the acquittal decision, since it is common ground that, even though the accused was not questioned, a 'constraint' was nevertheless brought against him in the form of a measure of investigation aimed at locating him, which proved to be unsuccessful.

34 The strictly circumscribed and exceptional nature of those possibilities of continuing a procedure which had already been closed is further reinforced by the fact that, in accordance with Paragraph 193(2) of the StPO, a reopening of the procedure is not, in any event, possible if, in the meantime, the offence is time-barred. That was the case here, since it is common ground that, at least since 2015, the limitation period for the offence took effect, that is to say, only a few months after the adoption of the acquittal decision, in November 2014.

35 In addition, the mere fact, to which the national court refers in its second question, that, under the applicable national law, there are possibilities to reopen previously closed proceedings to the extent that the offence is not yet time-barred but that, in the present case, the public prosecutor's office did not make use of them before that limitation period took effect is not such as to call into question the definitive nature of a decision to close the proceedings where further prosecution is not definitively time-barred.

36 Since those exceptional possibilities for proceedings to be continued which have previously been discontinued, as strictly defined by Paragraph 193(2) of the StPO, are not capable of affecting the definitive nature of a decision to discontinue the proceedings taken on the basis of Paragraph 190 of the StPO, the decision taken by the public prosecutor's office not to make use of one or other of those possibilities on the ground that the conditions for doing so were not met also cannot call into question the definitive nature of that decision.

37 Furthermore, in its written observations, the Austrian Government, referring to the case-law of the Oberster Gerichtshof (Supreme Court, Austria) and to Austrian academic writings, argued that, under Austrian law, since the decision of the public prosecutor's office to discontinue proceedings in accordance with Paragraph 190 of the StPO 'cannot be challenged by means of an ordinary appeal, it produces from the time of its adoption the effects of a decision which is final, both from a substantive and a procedural point of view'. Among its effects, that government refers to the so-called blocking ('*Sperrwirkung*') effect resulting from such a decision, in accordance with the principle *ne bis in idem*, in respect of all the authorities of the other Member States, provided that that decision was taken following a prior examination of the merits and an assessment of the substance of the offence which the accused person is suspected of having committed.

38 It follows that the circumstances referred to in the first two indents referred to in paragraph 25 above are not such as to cast doubt on the fact that, in the present case, the requirement, referred to in paragraph 28 above, that further prosecution must have been 'definitively barred' is satisfied.

39 As regards, in the second place, the requirement, also referred to in paragraph 28 of the present judgment, that the decision to close the criminal proceedings in question must have been made following a 'determination of the merits of the case', it must be pointed out, first, that the fact, referred to in the first indent of paragraph 25 above, that the decision to close the proceedings was taken on the ground that there was no evidence to show that the accused had actually committed the offence of which he is accused does not mean that that second condition is not satisfied. On the contrary, the Court has already held that an acquittal for lack of evidence is based on an assessment of the merits of the case (judgment of 28 September 2006, *Van Straaten*, C-150/05, EU:C:2006:614, paragraph 60).

40 Secondly, it is apparent from the case-law that the assessment of the finality of the judgment, for the purposes of Article 54 of the CISA, must be carried out in the light not only of the objective of that article, which is essentially to ensure that any person who has been convicted and has served his or her sentence or, as the case may be, has been acquitted by a final judgment in a Member State may travel within the Schengen area without fear of further prosecution, for the same acts, in another Member State, but also of the need to promote the prevention and combating of crime, within the area of freedom, security and justice, in accordance with Article 3(2) TEU (see, to that effect, judgments of 29 June 2016, *Kossowski*, C-486/14, EU:C:2016:483, paragraph 47, and of 28 October 2022, *Generalstaatsanwaltschaft München (Extradition and* ne bis in idem), C-435/22 PPU, EU:C:2022:852, paragraph 78 and the case-law cited).

41 Thirdly, it must be recalled that both the principle of mutual trust between the Member States and the principle of mutual recognition, which is itself based on the mutual trust between the latter, are, in EU law, of fundamental importance given that they allow an area without internal borders to be created and maintained (judgment of 28 October 2022, *Generalstaatsanwaltschaft München (Extradition and* ne bis in idem), C-435/22 PPU, EU:C:2022:852, paragraph 92 and the case-law cited).

42 As regards, in particular, Article 54 of the CISA, the Court has held that it necessarily implies that the Member States have mutual trust in their respective criminal justice systems in that each of them consents to the application of the criminal law in force in the other Member States even when the outcome would be different if its own national law were applied. That mutual trust requires the relevant competent authorities of the second Member State to accept at face value a final decision communicated to them which has been given in the first Member State (judgment of 28 October 2022, *Generalstaatsanwaltschaft München (Extradition and* ne bis in idem), C-435/22 PPU, EU:C:2022:852, paragraph 93 and the case-law cited).

43 However, it is also apparent from case-law that that mutual trust can prosper only if the second Contracting State is in a position to satisfy itself, on the basis of the documents provided by the first Contracting State, that the decision of the competent authorities of that first State does indeed constitute a final decision including a determination as to the merits of the case (judgment of 12 May 2021, *Bundesrepublik Deutschland (Interpol red notice)*, C-505/19, EU:C:2021:376, paragraph 81 and the case-law cited).

44 Fourthly, the Court held that a decision of the prosecuting authorities terminating criminal proceedings and closing the investigation procedure cannot be held to have been given after a determination as to the merits of the case and, accordingly, cannot be characterised as a 'final decision' for the purposes of Article 54 of the CISA when it is clear from the reasons actually stated in that decision that there was no detailed investigation, as otherwise the mutual trust between the Member States could be undermined. In that regard, the fact that neither the victim nor a potential witness was interviewed is an indication that no detailed investigation was undertaken in the case in the main proceedings (judgment of 29 June 2016, *Kossowski*, C-486/14, EU:C:2016:483, paragraph 53).

45 In the light of that case-law, the question arises whether, in the case at issue in the main proceedings, the WKStA's decision to close the criminal proceedings was adopted following a 'detailed investigation' within the meaning of the judgment of 29 June 2016, *Kossowski* (C-486/14, EU:C:2016:483), with the result that that decision may be regarded as having been made following an assessment of the merits as required by Article 54 of the CISA, in the light of the circumstances referred to by the referring court in its third question and reproduced in the third indent referred to in paragraph 25 of the present judgment, namely that, during the investigation, the prosecuting authorities gathered information in the context of a request for mutual legal assistance and following access to bank accounts and the interview of two other suspects, but did not question the accused, since the measure of investigation having the nature of a coercive constraint aimed at locating him ultimately proved unsuccessful.

46 As is apparent from paragraph 48 of the judgment of 29 June 2016, *Kossowski* (C-486/14, EU:C:2016:483), in the case which gave rise to that judgment, the prosecuting authority did not proceed with the prosecution 'solely because the accused had refused to give a statement and the victim and a hearsay witness were living in Germany, so that it had not been possible to interview them in the course of the investigation [in Poland] and had therefore not been possible to verify statements made by the victim, [without a more detailed investigation having been undertaken for the purpose of gathering and examining evidence]'. The Court inferred from this that the decision terminating the criminal proceedings on the basis of such an investigation did not constitute a decision which had been preceded by an assessment of the merits.

47 By contrast, in the present case, it is common ground, first, that, during an investigation which lasted more than two years, the WKStA had access to bank accounts in the context of a request for mutual legal assistance from the United Kingdom authorities, namely the SFO, and to other bank accounts, and interviewed two other suspects of Austrian nationality referred to in paragraph 13 of the present judgment.

48 Furthermore, in its written observations, the Austrian Government states that the cash flows identified following access to those bank accounts were analysed by the Bundesamt für Korruptionsprävention und Korruptionsbekämpfung (Austrian Federal Bureau of Anti-Corruption, Austria). After a coordination meeting of the European Union Agency for Criminal Justice Cooperation (Eurojust) in May 2014, the SFO informed the WKStA that there was no new evidence leading to the identification of a public official in particular in Hungary, since access to accounts, both in Slovakia and in Cyprus, had not provided any information in that regard. In addition, it was doubtful whether the forwarding of the account information requested by the SFO in Liechtenstein could provide further clarification. On 3 November 2014, Eurojust informed the WKStA that the investigations carried out by the Hungarian judicial authorities had also not supported the suspicions of an offence.

49 Secondly, while it is true that, in the present case, the accused was not questioned, it is common ground that that is because, as the referring court points out in its third question, he had nevertheless been the subject of a coercive measure of investigation aimed at locating him, even though that measure ultimately proved unsuccessful.

50 As the Swiss Government has also argued, in essence, the mere fact that the accused person was not interviewed during the investigation constitutes, in itself, evidence of the absence of a detailed investigation only in so far as the applicable national law requires the prosecution authorities to hear the accused person prior to the adoption of a decision closing the investigation. It should be borne in mind that Paragraph 193(2), point 1 of the StPO expressly provides for the possibility of criminal proceedings being continued after an acquittal where the accused has not been questioned in respect of the offence of which he or she is suspected and provided that no restriction has been imposed on him or her in that regard. Therefore, it appears that, in accordance with the applicable national law, in certain circumstances, such a decision may be adopted without the accused person being questioned.

51 Although, in such a case, the fact that the accused person was not interviewed as a suspect cannot, in itself, justify the conclusion that there was no detailed investigation, the fact remains, as the Advocate General also observed, in essence, in point 76 of his Opinion, that that circumstance may nevertheless be taken into account along with any other relevant evidence revealing that there was no detailed investigation. To that end, it must be established that, in the circumstances of the case, it is reasonably a matter for the public prosecutor's office of the first Member State to take a measure of investigation ensuring that the accused person is actually questioned who, clearly, could have adduced new facts or evidence capable of casting doubt, to a significant extent, on the merits of an acquittal. That said, as the Advocate General also observed in point 77 of his Opinion, a public prosecutor's office cannot be prevented from drawing inferences from the fact that an accused person has voluntarily avoided the opportunity to be interviewed, for example, by making himself or herself unavailable to the police authorities.

52 In general, it is only in somewhat exceptional cases that the second Member State can conclude that there is no detailed investigation in the first Member State, namely where, under the applicable national law of the first Member State, that is manifestly the case, having regard, first of

all, to the reasons set out in that decision and any information communicated before its adoption by the first Member State in response, where appropriate, to a request addressed to it by the second Member State.

53 The finding by the second Member State of the lack of a detailed investigation must constitute the exception rather than the rule, it being understood that, as the Advocate General stated, in essence, in points 32 and 39 to 42 of his Opinion, such a finding is necessary in any event where it is apparent from the terms of the criminal decision concerned that it was not preceded by any actual investigation or assessment of the criminal liability of the accused person or that, under the applicable national law, that decision was essentially taken for reasons which must be regarded as purely procedural or for reasons of expediency, economy or judicial policy.

54 Such a view is in keeping with the specific objective of Article 54 of the CISA, which is to ensure that a person who has been finally acquitted in one Member State may travel within the Schengen area without fear of being prosecuted in another Member State for the same acts, as referred to in paragraph 40 above, and with the principles of mutual trust and recognition between Member States which underlie the principle *ne bis in idem* enshrined in that provision and in Article 50 of the Charter, as is apparent from paragraphs 41 and 42 of the present judgment.

55 By contrast, that objective and those principles preclude the public prosecutor's office of the second Member State, when it intends to prosecute a person who has already been prosecuted and who has been the subject, following an investigation, of a final acquittal in respect of the same acts in one Member State, from carrying out a detailed examination of that investigation in order to determine, unilaterally, whether it is sufficiently detailed in the light of the law of the first Member State.

56 Furthermore, where the public prosecutor's office of the second Member State has serious and specific doubts as to the thoroughness or sufficiently detailed nature of the investigation carried out by the public prosecutor's office of the first Member State in the light of the facts and evidence which were available to that public prosecutor's office at the time of the investigation or which could actually have been available to it by taking the measures of investigation reasonably required in the light of the circumstances of the case, that public prosecutor's office will have to approach the public prosecutor's office of the first Member State in order to request its assistance, in particular on the applicable national law and the reasons for the decision to acquit taken following that investigation, by having recourse, for example, to the cooperation mechanism provided for that purpose in Article 57 of the CISA.

57 In that regard, it should be recalled that, in relations between Member States, account must be taken of the principle of sincere cooperation laid down in Article 4(3) TEU, which imposes an obligation on the Member States, generally and therefore, inter alia, in the context of the application of the principle *ne bis in idem* as enshrined in Article 54 of the CISA, to respect each other and assist each other in carrying out tasks which flow from the Treaties.

58 However, although the facts recalled in paragraphs 47 to 50 of the present judgment, in so far as they are established, tend to confirm that the investigation carried out in the first Member State is not manifestly lacking in detail, the fact remains that, as the Advocate General also observed, in essence, in point 66 of his Opinion, it is ultimately for the referring court which has to decide in the present case whether the principle *ne bis in idem* is applicable to assess the detailed nature of the investigation in the light of all the relevant evidence in that regard.

59 In the context of that overall assessment, as has already been pointed out in paragraph 51 of the present judgment, the referring court may, in certain circumstances, take into account, among any other relevant evidence indicating that the investigation conducted in the first Member State was not detailed, the fact that the accused person was not questioned as a suspect.

60 In the light of the foregoing, the answer to the questions referred is that the principle *ne bis in idem* enshrined in Article 54 of the CISA, read in the light of Article 50 of the Charter, must be interpreted as meaning that a decision to acquit an accused person, taken in one Member State, following an investigation relating, in essence, to acts of corruption, must be classified as a final decision, within the meaning of those articles, where the same accused person is prosecuted again in a second Member State for the same acts and where:

– the decision to acquit was taken by the public prosecutor's office of the first Member State without the imposition of a penalty and without the intervention of a court and was based on the finding that there was no evidence to show that the accused person had actually committed the offence with which he or she is charged;

– under the national law applicable in the first Member State, notwithstanding the finality of such an acquittal, the public prosecutor's office has the discretion to continue the proceedings under strictly defined conditions, such as the emergence of significant new facts or evidence, and provided that, in any event, the offence is not time-barred; and

– during the investigation, the public prosecutor's office of the first Member State gathered information without, however, questioning the accused person, who is a citizen of another Member State, since the measure of investigation having the nature of a coercive constraint aimed at locating him or her ultimately proved unsuccessful,

it being understood that the fact that the accused person was not questioned by the public prosecutor's office of the first Member State may be taken into account by the public prosecutor's office of the second Member State among any other relevant evidence revealing the absence of a detailed investigation in the first Member State, provided, however, that it is established that, in the circumstances of the present case, it was reasonably a matter for the public prosecutor's office of the first Member State to take a measure of investigation ensuring that the accused person was actually questioned which, clearly, could have adduced new facts or evidence capable of casting doubt, to a significant extent, on the merits of a decision to acquit.

Costs

61 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national 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 (Second Chamber) hereby rules:

The principle *ne bis in idem* enshrined 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, signed in Schengen on

19 June 1990 and entered into force on 26 March 1995, read in the light of Article 50 of the Charter of Fundamental Rights of the European Union,

must be interpreted as meaning that a decision to acquit an accused person taken, in one Member State, following an investigation relating essentially to acts of corruption must be classified as a final decision, within the meaning of those articles, where the same accused person is prosecuted again in a second Member State for the same acts and where:

– **the decision to acquit was taken by the public prosecutor's office without the imposition of a penalty and without the intervention of a court and was based on the finding that there was no evidence to show that the accused person had actually committed the offence with which he or she is charged;**

– **under the applicable national law, notwithstanding the finality of such an acquittal, the public prosecutor's office has the discretion to continue the proceedings under strictly defined conditions, such as the emergence of significant new facts or evidence, and provided that, in any event, the offence is not time-barred; and**

– **during the investigation, the public prosecutor's office of the first Member State gathered information without, however, questioning the accused person, who is a citizen of another Member State, since the measure of investigation having the nature of a coercive constraint aimed at locating him or her ultimately proved to be unsuccessful,**

it being understood that the fact that the accused person was not questioned by the public prosecutor's office of the first Member State may be taken into account by the public prosecutor's office of the second Member State along with any other relevant evidence revealing the absence of a detailed investigation in the first Member State, provided, however, that it is established that, in the circumstances of the case, it was reasonably a matter for the public prosecutor's office of the first Member State to take a measure of investigation ensuring that the accused person was actually questioned which, clearly, could have adduced new facts or evidence capable of casting doubt, to a significant extent, on the merits of a decision to acquit.

[Signatures]