Reports of Cases

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JÄÄSKINEN
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Case C-129/14 PPU

Zoran Spasic

Request for a preliminary ruling from the Oberlandesgericht Nürnberg (Germany)

(Urgent preliminary ruling procedure — Police and judicial cooperation in criminal matters — Ne bis in idem principle — Schengen acquis — Article 54 of the Convention Implementing the Schengen Agreement — Articles 50 and 52(1) of the Charter of Fundamental Rights of the European Union — Article 4 of Protocol No 7 to the European Convention on the Protection of Human Rights and Fundamental Freedoms — Conviction in respect of the same acts — Condition of execution of a penalty imposed in criminal proceedings — Two-part sentence)

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1 — Original language: French.

I – Introduction

1. The present proceedings arise from an action brought against the decision to maintain the effects of an arrest warrant issued by the German authorities in relation to Mr Spasic, a Serbian national, who is currently remanded in custody pending trial in Germany on the basis of that warrant.[2] Mr Spasic was convicted in Italy for fraud, in relation to the same acts which form the subject-matter of the aforementioned warrant.

2 — It should be noted that the German authorities issued several national and European arrest warrants, which were also subsequently amended. See the factual background for details.

2. By its questions referred for a preliminary ruling, the Oberlandesgericht Nürnberg (Nuremberg Higher Regional Court, Germany) thus puts before the Court a novel issue in the area of judicial cooperation in criminal matters. The Court is asked to clarify the relationship between Article 50 of the Charter of Fundamental Rights of the European Union ('the Charter'), which ensures the right not to be tried or punished twice in criminal proceedings for the same criminal offence (the *ne bis in idem* principle), and Article 54 of the Convention Implementing the Schengen Agreement ('CISA'),[3] concerning the application of that principle.

3. In particular, the referring court wishes to know whether the application of the condition laid down in Article 54 CISA — according to which the prohibition on criminal prosecutions for the same acts applies only if '[the penalty] 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' ('the execution condition')[4] — may be regarded as a justified limitation of Article 50 of the Charter for the purpose of Article 52(1) thereof. That question will lead the Court to clarify the scope of the *ne bis in idem* principle in a cross-border context, having regard to the current stage of construction of the area of freedom, security and justice. The Court is also asked to interpret the execution condition laid down in Article 54 CISA where the penalty is composed of two independent parts.

4. Since Article 50 of the Charter corresponds to Article 4 of Protocol No 7 to the European Convention on the Protection of Human Rights and Fundamental Freedoms,[5] the present request for a preliminary ruling entails an examination of that protocol's effect on the interpretation of the *ne bis in idem* principle.

5. In that respect, I note first of all that the execution condition laid down in Article 54 CISA authorises the authorities of Member State B to initiate or continue criminal proceedings despite the existence of a final decision adopted by Member State A in respect of the same person and in relation to the same acts. In a national context, such an approach would be prohibited under Article 4 of Protocol No 7, as interpreted in the judgments of the European Court of Human Rights in *Sergey Zolotukhin v. Russia*[6] and *Muslija v. Bosnia-Herzegovina*,[7] and under Article 50 of the Charter, which, according to the explanations relating to the Charter, has the same meaning and the same scope as the corresponding right in the European Convention on the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR'), where the *ne bis in idem* principle is applied within a Member State. Accordingly, the limits of the discretion of the national authorities of Member State B in the light of the requirements stemming from the Charter must also be examined.[8]

3 — 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).

4 — *Kretzinger*, C-288/05, EU:C:2007:441, paragraph 39.

5 — Signed in Strasbourg on 22 November 1984, as amended by Protocol No 11 since the entry into force of that protocol on 1 November 1998 ('Protocol No 7').

6 — *Sergey Zolotukhin v. Russia* [GC], no. 14939/03, §§ 80 to 84, ECHR 2009.

7 — *Muslija v. Bosnia and Herzegovina*, no. 32042/11, § 37, 14 January 2014, relating to the duplication of proceedings.

8 — It seems that the German authorities have a discretion as regards prosecutions for acts committed outside the territory to which the penal code is applicable. See Paragraph 153c (§153 c) of the German Code of Criminal Procedure (Strafprozeßordnung).

II – Legal Framework

A – *The ECHR*

6. Article 4 of Protocol No 7, entitled 'Right not to be tried or punished twice' provides as follows:

'1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and the penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

3. No derogation from this Article shall be made under Article 15 of the [ECHR].'[9]

B – *EU law*

1. The Charter

7. Article 50 of the Charter, entitled 'Right not to be tried or punished twice in criminal proceedings for the same criminal offence', is worded as follows:

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

8. Article 52 of the Charter, entitled 'Scope and interpretation of rights and principles', provides:

'1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others. … [10]

3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

…

9 — According to paragraph 26 of the Explanatory Report on Protocol No 7, '[Article 4] embodies the principle that a person may not be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted (*non bis in idem*)': http://conventions.coe.int/Treaty/EN/Reports/Html/117.htm.

10 — It can be seen from the explanations relating to Article 50 of the Charter that the *non bis in idem* rule applies not only within the jurisdiction of one State but also between the jurisdictions of several Member States, and that this corresponds to the *acquis* in Union law. It is indicated that the rule prohibiting cumulation refers to cumulation of two penalties of the same kind, that is to say criminal law penalties. The very limited exceptions in Articles 54 to 58 CISA, Article 7 of the Convention on the Protection of the European Communities' Financial Interests and Article 10 of the Convention on the fight against corruption permitting the Member States to derogate from the *non bis in idem* rule are covered by the horizontal clause in Article 52(1) of the Charter concerning limitations. As regards the situations referred to by Article 4 of Protocol No 7, namely the application of the principle within the same Member State, the guaranteed right has the same meaning and the same scope as the corresponding right in the ECHR.

7. The explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States.'

2. The Schengen *acquis* in EU law

a) The Schengen Agreement

9. On 14 June 1985, the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic signed an agreement in Schengen on the gradual abolition of checks at their common borders. [11]

b) The CISA

10. The CISA, which was concluded on 19 June 1990 by the contracting parties and entered into force on 26 March 1995, provides the following in Article 54 (which is contained in Chapter III, entitled 'Application of the *ne bis in idem* principle'):

'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.'

11. Article 55 CISA lists the cases in which a Member State may declare that it is not bound by Article 54. Article 56 lays down the rule that any period of deprivation of liberty served in one contracting party is to be deducted from any penalty imposed in another State. Penalties not involving deprivation of liberty are also to be taken into account, to the extent permitted by national law. Article 57 concerns the exchange of relevant information between the competent authorities. In accordance with Article 58, the foregoing provisions do not preclude the application of broader national provisions on the *ne bis in idem* principle with regard to judicial decisions taken abroad.

c) The Protocol on the Schengen *acquis*

12. By Protocol (No 2) integrating the Schengen *acquis* into the framework of the European Union, annexed to the Treaty on European Union and to the Treaty establishing the European Community ('the Protocol on the Schengen *acquis*'), [12] the body of law known as 'the Schengen *acquis*', which also includes the CISA, [13] was integrated into EU law.

13. Article 2 (1) of that protocol reads as follows:

'From the date of entry into force of the Treaty of Amsterdam, the Schengen *acquis*, including the decisions of the Executive Committee established by the Schengen agreements which have been adopted before this date, shall immediately apply to the thirteen Member States referred to in Article 1, [14] without prejudice to the provisions of paragraph 2 of this Article. …

11 — OJ 2000 L 239, p. 13.

12 — OJ 1997 C 340, p. 93.

13 — See the annex to the Protocol on the Schengen *acquis*, section 2.

14 — The Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Finland and the Kingdom of Sweden.

… The Council … shall determine, in conformity with the relevant provisions of the Treaties, the legal basis for each of the provisions or decisions which constitute the Schengen *acquis*.

With regard to such provisions and decisions and in accordance with that determination, the Court of Justice of the European Communities shall exercise the powers conferred upon it by the relevant applicable provisions of the Treaties. …

…

As long as the measures referred to above have not been taken and without prejudice to Article 5(2), the provisions or decisions which constitute the Schengen *acquis* shall be regarded as acts based on Title VI of the Treaty on European Union.'

14. The Schengen *acquis* was integrated into the TFEU by Protocol (No 19).[15] Protocol (No 36) on transitional provisions, annexed to the TFEU,[16] indicates, in Articles 9 and 10, the legal effects of the acts of the institutions, bodies and agencies of the Union adopted on the basis of the TEU prior to the entry into force of the Treaty of Lisbon.

III – The dispute in the main proceedings, the questions referred for a preliminary ruling and the procedure before the Court

15. The accused in the main proceedings, Mr Spasic, is a Serbian national, against whom the Staatsanwaltschaft Regensburg (public prosecutor's office, Regensburg, Germany) has brought criminal proceedings for organised fraud committed in Milan on 20 March 2009. The victim of that offence, Mr Soller, a German national, delivered the sum of EUR 40 000 in lower denomination banknotes to Mr Spasic, in exchange for EUR 500 banknotes which were subsequently found to be counterfeit.

16. On the basis of a European Arrest Warrant issued on 27 August 2009 by the Staatsanwaltschaft Innsbruck (public prosecutor's office, Innsbruck, Austria) in relation to a series of similar offences committed in Austria and Germany in 2008, Mr Spasic was arrested in Hungary on 8 October 2009 and was then surrendered to the Austrian authorities. He was finally convicted in that Member State on 26 August 2010.

17. On 25 February 2010, the Amtsgericht Regensburg (Local Court, Regensburg, Germany) issued a national arrest warrant concerning the fraud offence committed in Milan, which served as the basis for the European Arrest Warrant issued by the Staatsanwaltschaft Regensburg on 5 March 2010. On 20 November 2013, the Amtsgericht Regensburg issued an expanded national arrest warrant for Mr Spasic, section I of which refers to the fraud offence committed in Milan on 20 March 2009.

18. The Tribunale ordinario di Milano (Milan District Court, Italy), by a decision of 18 June 2012, sentenced Mr Spasic, *in absentia*, to a custodial sentence and a fine of EUR 800, for the offence committed in Milan on 20 March 2009. I note, in that regard, that the decision of the Tribunale di Milano became final on 7 July 2012, with the result that the proceedings in Germany were conducted, in part, at the same time as the proceedings in Italy.

15 — OJ 2008 C 115, p. 290.
16 — OJ 2008 C 115, p. 322.

19. On 6 December 2013, in execution of the European Arrest Warrant of 5 March 2010, the Austrian authorities surrendered Mr Spasic to the German authorities. He has been remanded in custody pending trial in Germany since that date.[17] In Austria, Mr Spasic had begun to serve an eight-year prison sentence. In view of his surrender to the German authorities, the execution of the sentence imposed in Austria has been provisionally suspended. However, it is not clear from the file whether it is envisaged that Mr Spasic will be returned to Austria before or after he serves the sentence that may be imposed in Germany.

20. The accused brought an action before the Amtsgericht Regensburg (Local Court, Regensburg) challenging the decision ordering his continued detention, claiming, in essence, that in accordance with the *ne bis in idem* principle, he could not be prosecuted in Germany for the acts committed in Milan, since he had already received a final and executable sentence from the Tribunale ordinario di Milano in respect of those acts.

21. After the Amtsgericht Regensburg dismissed his action, Mr Spasic submitted to the Landgericht Regensburg (Regional Court, Regensburg) proof of the payment of the sum of EUR 800 on 23 January 2014, thus proving that the financial penalty imposed by the decision of the Tribunale di Milano had been executed.

22. By decision of 28 January 2014, the Landgericht Regensburg upheld the decision of the Amtsgericht Regensburg, indicating that the continuation of the remand in custody could be based only on the acts described in section I of the arrest warrant of 20 November 2013, and rejected the action as to the remainder.

23. Mr Spasic subsequently brought an appeal before the referring court, claiming, in essence, that the execution condition laid down in Article 54 CISA cannot lawfully restrict the scope of Article 50 of the Charter and that, since he had performed the penalty imposed, by paying the fine of EUR 800, he should be released.

24. In those circumstances, the Oberlandesgericht Nürnberg decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘1. Is Article 54 [CISA] compatible with Article 50 of the [Charter], in so far as it subjects the application of the ne bis in idem principle to the condition 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 State?

2. Is the abovementioned condition, laid down in Article 54 [CISA], also satisfied if only one part (here: a fine) of two independent parts of the outstanding penalty imposed in the sentencing State (here: a custodial sentence and a fine) has been enforced?’

25. In the order for reference, the referring court requested that the present request for a preliminary ruling be dealt with under the urgent procedure pursuant to Article 107 of the Rules of Procedure of the Court. As can be seen from the file, under German law, the accused’s remand in custody pending trial cannot be extended beyond six months, barring a specific reason to the contrary. That extension clearly depends on the interpretation of EU law.

17 — Under Article 121 of the German Code of Criminal Procedure, entitled ‘Remand in custody beyond six months’, ‘if a judgment imposing a custodial sentence has not been delivered …, remand in custody for the same act may be extended beyond six months only if the particular difficulty or scope of investigations or any other significant reason prevents a judgment being delivered and justifies the continuation of the remand in custody …’.

26. By decision of 31 March 2014, the designated Chamber of the Court decided to grant the referring court's request that the preliminary ruling be dealt with under the urgent procedure. The case was assigned to the Grand Chamber pursuant to Article 113(2) of the Rules of Procedure.

27. Written observations were submitted by the representatives of Mr Spasic, of the Federal Republic of Germany, of the Council and of the European Commission. At the hearing held on 28 April 2014, those parties as well as the French Republic and the Italian Republic were heard.

IV – Analysis

A – *Preliminary observations*

1. The jurisdiction of the Court

28. First of all, I am of the view that the Court has jurisdiction to answer the first question referred for a preliminary ruling on the basis of Article 267 TFEU and the second question on the basis of Article 35 EU. [18]

29. As regards the second question in particular, the CISA enjoys, on the basis of the Protocol on the Schengen *acquis*, a status analogous to that of decisions, framework decisions or conventions for the purpose of Article 34 EU. Accordingly, the Court's jurisdiction to answer the second question is based on Article 35 EU [19] in conjunction with Article 2 and Annex A to Council Decision 1999/436/EC, [20] which is, moreover, confirmed in the extensive case-law relating to Article 54 CISA.

30. As regards the first question, it is true that, under former Article K.7 resulting from the Treaty of Amsterdam (now Article 35 EU), the Court did not have jurisdiction to examine the validity of conventions, either in the context of preliminary rulings or in that of the review of legality. However, the first question expressly refers to a potential incompatibility between the Charter and a provision of the CISA and not the invalidity of the latter. I note, in that respect, that Article 134 CISA states that the provisions of that convention are to apply only in so far as they are compatible with Community law. [21]

31. Since it has undoubtedly formed an integral part of EU law since its 'communitisation', the CISA cannot escape the requirement of review in the light of the Charter. The Court, by virtue of its exclusive jurisdiction, ensures, pursuant to Article 19 TEU, that in the interpretation and application of the Treaties the law is observed. [22] Its power to interpret primary law must be regarded as established with regard to the CISA, since that convention is a *sui generis* act of EU law which is at the same level as secondary law in the hierarchy of norms.

18 — I do not think that the Council's reference to the recent adoption of the directive regarding the European Investigation Order, which is to replace the corresponding provisions of the CISA, can alter that conclusion. See Directive of the European Parliament and of the Council regarding the European Investigation Order in criminal matters, pending publication in the *Official Journal of the European Union* (see PE-CONSE 122/13).

19 — It is apparent from the information concerning the date of entry into force of the Treaty of Amsterdam, published in the *Official Journal of the European Communities* of 1 May 1999 (OJ 1999 L 114, p. 56), that the Federal Republic of Germany made a declaration on the basis of Article 35(2) EU by which it accepted the jurisdiction of the Court to give preliminary rulings in accordance with the arrangements laid down in Article 35(3)(b) EU. It should be noted that Article 35 EU is to remain applicable *ratione temporis* for five years after the entry into force of the Treaty of Lisbon, namely until 1 December 2014.

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

21 — For an analysis, see, Van Raepenbusch, S., 'Le traité d'Amsterdam et la Cour de justice', *Bulletin de la Cour*, September 1997, No 51.

22 — On the division of competences between the first and the third pillars, see *Commission* v *Council*, C-170/96, EU:C:1998:219.

32. In any event, it can be seen from the Court's case-law that the Court has jurisdiction to assess a directly applicable instrument of secondary law in the light of the Charter. [23]

2. The interests at stake

33. The implementation, in the context of the European Union, of the Schengen *acquis* — which includes Article 54 CISA relating to the principle of *ne bis in idem* — is intended to enhance European integration and, in particular, to enable the European Union to develop more rapidly into an area of freedom, security and justice, which it is the European Union's objective to maintain and develop. At present, that ambitious objective still faces problems of jurisdictional conflict in the area of criminal law, in the present case between the Italian Republic, as *locus delicti*, and the Federal Republic of Germany as the Member State of which the victim is a national. [24]

34. As Advocate General Sharpston pointed out in her Opinion delivered in *M*, '[a]t present, there are no agreed EU-wide rules on the allocation of criminal jurisdiction. The application of the *ne bis in idem* principle resolves the problem in a limited, sometimes an arbitrary, way. It is not a satisfactory substitute for action to resolve such conflicts according to an agreed set of criteria.' [25]

35. The source of the *ne bis in idem* principle at the transnational level is the risk that, if an offence relates in some way to several legal systems, each will assert its own jurisdiction, thus creating the possibility of cumulation of state punishment. [26] That being said, the present case does not concern the problems linked to the application of the *ne bis in idem* principle that have recently been the subject-matter of intense judicial and academic discussion, at both European and national level, in particular as regards criminal and administrative proceedings in relation to the same acts. Moreover, in those discussions the question was how the concept of identity of offence and that of 'judgment by a final decision' are to be determined in the event that the proceedings have not been disposed of by a decision of a court.

36. In this instance, the present case comes fully within the scope of Article 54 CISA. It is undisputed that the proceedings in Italy and in Germany concern the same acts [27] and, *mutatis mutandis*, the offence of fraud. The criminal nature of the two sets of proceedings cannot be called into question, [28] nor the judicial and final — since 7 July 2012 — nature of the Tribunale ordinario di Milano's judgment of 18 June 2012. [29]

37. In other words, both the '*bis*' and the '*idem*' elements are present in the case at hand. In fact, it is the execution condition laid down in Article 54 CISA that, having regard to the fundamental right enshrined in Article 50 of the Charter, is at the heart of the present reference for a preliminary ruling.

38. In that respect, it is clear that the execution condition laid down in Article 54 CISA does not appear in Article 50 of the Charter. Furthermore, I note that the scope of Article 50 of the Charter has not yet been definitively demarcated by the Court's case-law.

23 — *McB.*, C-400/10 PPU, EU:C:2010:582, paragraph 52.

24 — As can be seen from the request for a preliminary ruling, in accordance with Article 7(1) of the German Criminal Code (*Strafgesetzbuch*), the accused comes under the jurisdiction of the Federal Republic of Germany in criminal matters as a result of the victim's nationality.

25 — C-398/12, EU:C:2014:65, paragraph 51. For attempts to address the problem, Advocate General Sharpston refers, in a footnote, to the Commission's *Green Paper* (SEC(2005) 1767) *on Conflicts of Jurisdiction and the Principle of ne bis in idem in Criminal Proceedings*, COM(2005) 696 final.

26 — Da Cunha Rodrigues, J.N., 'À propos du principe "Ne bis in idem" — Un regard sur la jurisprudence de la Cour de justice des Communautés européennes', *Une communauté de droit,* Festschrift für Gil Carlo Rodriguez Iglesias, Berlin, 2003, p. 165.

27 — *van Esbroeck*, C-436/04, EU:C:2006:165, paragraphs 27 and 36; *van Straaten*, C-150/05, EU:C:2006:614, paragraphs 41, 47 and 48; and *Mantello*, C-261/09, EU:C:2010:683, paragraph 39.

28 — *van Straaten* (EU:C:2006:614, paragraph 55) and, *a contrario*, *Miraglia*, C-469/03, EU:C:2005:156, paragraphs 29 and 30.

29 — See, to that effect, *Gasparini and Others*, C-467/04, EU:C:2006:610, paragraph 33, and *van Esbroeck* (EU:C:2006:165, paragraph 21).

39. The *ne bis in idem* principle is also applicable to areas which do not fall within the scope of 'general' criminal law,[30] a current example being competition law, in which the application of the principle is subject to the threefold condition of identity of the facts, unity of the offender and unity of the legal interest protected.[31] Thus, the national authorities and the Commission may bring concurrent proceedings against the same economic operator and impose fines on it for the same acts because the two proceedings pursue different ends.[32]

40. In addition, the *ne bis in idem* principle applies in the area of checks and penalties for irregularities committed under EU law,[33] which the Court noted in relation to the cumulative application of administrative penalties.[34]

41. Accordingly, I take the view, from the outset, that the analysis of the scope of the *ne bis in idem* principle in the light of the Charter in the present case must be limited to the area of *general criminal law* alone, thus excluding issues relating to administrative penalties, with all the implications and specificities entailed by that category of criminal law.

42. Lastly, since the wording of Article 50 of the Charter is almost identical to that of Article 4 of Protocol No 7, the only difference being their territorial scope, it is particularly important to examine the case-law of the European Court of Human Rights on this matter.

B – *The first question, concerning the relationship between Article 54 CISA and Article 50 of the Charter*

1. The *ne bis in idem* principle

43. The *ne bis in idem* principle, characterised by the Court as a 'general requirement of natural justice',[35] is universally acknowledged in national legal systems. However, public international law does not impose that principle on States and it is not regarded as falling within the scope of the concept of a fair trial enshrined in Article 6 ECHR.[36]

30 — The autonomous nature of the concept of a 'criminal charge' was established by the European Court of Human Rights in *Engel and Others v. the Netherlands*, 8 June 1976, Series A no. 22. By the term 'general' I mean punitive criminal law, which reflects a serious social or moral condemnation of the act in question and which is classified as such by the applicable law. See also *Bonda*, C-489/10, EU:C:2012:319, paragraph 37 et seq.

31 — That principle therefore precludes a penalty being imposed on the same person more than once for the same unlawful conduct for the purpose of protecting the same legal asset. See *Aalborg Portland and Others* v *Commission*, C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6, paragraph 338.

32 — *Wilhelm and Others*, 14/68, EU:C:1969:4, paragraph 11; *Tréfileurope* v *Commission*, T-141/89, EU:T:1995:62, paragraph 191; and *Sotralentz* v *Commission*, T-149/89, EU:T:1995:69, paragraph 29. Furthermore, the preservation of undistorted competition within the European Union or in the European Economic Area is regarded as a different aim from the protection of a third country's market. The Commission is therefore not required to follow the rule against cumulation of penalties and take into account penalties imposed previously. See, on the application of the *ne bis in idem* principle, *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission*, T-224/00, EU:T:2003:195, paragraphs 90 to 93. That judgment also contains an analysis of the scope of Article 50 of the Charter, which is not applicable in the event of infringement of competition law on a global scale.

33 — See the preamble to Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests (OJ L 312, p. 1).

34 — *Beneo-Orafti*, C-150/10, EU:C:2011:507, paragraph 68 et seq.

35 — *Wilhelm and Others* (EU:C:1969:4, paragraph 11).

36 — European Court of Human Rights, *X. v. Federal Republic of Germany*, no. 7680/76, Commission decision of 16 May 1977, Decisions and Reports (DR) 9, p. 192; *X. v. Belgium*, no. 7697/76, Commission decision of 16 May 1977, DR 9, p. 197; and *Gestra v. Italy*, no. 21072/92 Commission decision of 16 January 1995, DR 80-B, p. 89.

44. In EU law, the applicability of the *ne bis in idem* principle [37] has been recognised by the Court since *Gutmann* v *Commission* in 1966. [38] As the Court has subsequently held, 'the principle of *non bis in idem*, also enshrined in Article 4 of Protocol No 7 …, constitutes a fundamental principle of Community law the observance of which is guaranteed by the judicature'. [39] It has therefore been the source of an especially extensive body of case-law, particularly in the areas of competition law, cooperation in criminal matters and the protection of the European Union's financial interests, which, in my view, suggests that there is no single, uniform concept of *ne bis in idem* covering all areas of EU law. Lastly, that principle's status as a fundamental right is recognised in Article 50 of the Charter.

45. Without going into detail, it should be borne in mind that the maxim *ne bis in idem* covers two distinct legal aspects or ideas. [40] First, the principle of exhaustion of proceedings ('Erledigungsprinzip'), which prohibits further prosecution on the same matter and with regard to the same person and, secondly, the principle of taking into account ('Anrechnungsprinzip'), which requires that where there has already been a conviction for the same act in another country, the second decision must take the sentence handed down in the earlier decision into account in a way that leads to a reduction of the second sentence. [41] As Advocate General Colomer explained, the first aspect is based on the need for legal certainty, while the second reflects the need for fairness, of which the proportionality rule is a tool. [42]

46. It is undisputed that, in view of its wording, Article 54 CISA concerns only the first aspect, namely the prohibition of double prosecution, whereas the wording of Article 50 of the Charter and that of Article 4 of Protocol 7 cover both aspects.

2. The execution condition laid down in Article 54 CISA and its application by related instruments

47. Article 54 CISA is the first provision that establishes a binding *ne bis in idem* rule applicable to cross-border relations in criminal law matters. [43] While a provision essentially identical to Article 54 CISA appeared in the Convention on Double Jeopardy, that convention never entered into force. [44] In addition, there were precedents for the transnational execution condition in the European conventions on extradition. [45]

37 — I note that, often, as for example in the explanations relating to the Charter, that principle is called '*non bis in idem*'. According to van Boeckel, the alternative '*ne bis in idem*' is more correct as regards the rules of Latin grammar. See van Boeckel, Blas, *The Ne Bis In Idem Principle in EU Law*, Kluwer Law International BV, Alphen an den Rijn, 2010, p. 31.

38 — Joined Cases 18/65 and 35/65, EU:C:1966:24.

39 — *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, paragraph 59, and *Showa Denko* v *Commission*, C-289/04 P, EU:C:2006:431, paragraph 50.

40 — Those principles are incorporated respectively in the latin phrases '*nemo debet bis vexari pro una et eadem causa*' and '*nemo debet bis puniri pro uno delicto*'.

41 — Commission communication to the Council and the European Parliament: Mutual recognition of final decisions in criminal matters [COM(2000) 495 final].

42 — Opinion in *Gözütok and Brügge* (C-187/01 and C-385/01, EU:C:2002:516, points 49 and 50).

43 — In fact, the first prohibition on double prosecution and double punishment at the Community level was established by a comparable but little-known text: the Resolution of the European Parliament of 12 April 1989 adopting the Declaration of fundamental rights and freedoms (see, in particular, Articles 20 and 25 of that declaration, relating to the *ne bis in idem* principle) (OJ 1989, C 120, p. 51).

44 — The Convention between the Member States of the European Communities on Double Jeopardy of 25 May 1987, referred to by the Court in its judgment in *Gözütok and Brügge*, C-187/01 and C-385/01, EU:C:2003:87, paragraph 46.

45 — See Article 2 of the Additional Protocol to the European Convention on Extradition of 13 December 1957 which amended Article 9 of that convention. See also Article 35 of the European Convention on the Transfer of Proceedings in Criminal Matters of 15 May 1972.

48. It seems clear to me why the drafters of the CISA made the application of the *ne bis in idem* principle subject to the condition that the penalty 'has been enforced, is actually in the process of being enforced or can no longer been enforced'. As noted by the German government and the Council, that condition is intended to ensure that the person concerned is actually *punished for the offence at least once*; in other words, that provision is intended to *prevent impunity*. That purpose of preventing impunity can be clearly seen from the Court's case-law, in particular *Miraglia* [46] and *Kretzinger*. [47]

49. The *ne bis in idem* principle, subject to the execution condition, was subsequently incorporated in Framework Decision 2002/584/JHA [48] and is among the grounds for mandatory non-execution of a European arrest warrant. [49] Before the adoption of that framework decision, a person convicted and sentenced in criminal proceedings could easily prevent the execution of his sentence by moving between Member States, and in particular by returning to the Member State of which he was a national. The framework decision, along with other EU law measures adopted subsequently, have increased the effectiveness of criminal prosecutions in cross-border situations and facilitated the execution of sentences handed down in criminal proceedings. [50]

50. In addition, an execution condition similar to that in Article 54 CISA is set out in Article 7 of the Convention on the protection of the European Communities' financial interests [51] and in Article 10 of the Convention on the fight against corruption involving officials of the European communities or officials of Member States of the European Union. [52]

51. On the other hand, several instruments of secondary law, including, inter alia, Article 9 of Framework Decision 2008/909/JHA, [53] refer to the *ne bis in idem* principle among the grounds for non-execution of a sentence, without that principle being subject to an execution condition. [54]

52. Whilst the emergence of a more effective system of cooperation in criminal law matters cannot in itself affect the interpretation of the execution condition laid down in Article 54 CISA, that development must have some bearing on the assessment of the compatibility of that article with Article 50 of the Charter and on its assessment in terms of proportionality for the purpose of Article 52(1) of the Charter. As the Commission noted in the Green Paper cited below, [55] '[t]his condition was justified in a traditional system of mutual assistance, where enforcing a penalty in other Member States sometimes proved to be difficult. It is questionable whether it is still needed in an area of freedom, security and justice, where cross-border enforcement now takes place through the mutual recognition EU instruments'. [56]

46 — *Miraglia* (EU:C:2005:156, paragraphs 33 and 34).

47 — *Kretzinger* (EU:C:2007:441, paragraph 51).

48 — Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1).

49 — On the interpretation of the grounds for non-execution of a European arrest warrant, see, inter alia, *Kozłowski*, C-66/08, EU:C:2008:437, and *Wolzenburg*, C-123/08, EU:C:2009:616.

50 — See, in that respect, the measures referred to in footnotes 85 to 87 of the present View.

51 — Council Act of 26 July 1995 drawing up the Convention on the protection of the European Communities' financial interests (OJ 1995 C 316, p. 48).

52 — Council Act of 26 May 1997 drawing up, on the basis of Article K.3 (2)(c) of the Treaty on European Union, the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union (OJ 1997 C 195, p. 1).

53 — Council Framework Decision of 27 November 2008 on the application of the principle of mutual recognition to judgements in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union (OJ 2008 L 327, p. 27).

54 — See footnote 87 below.

55 — *Green Paper on Conflicts of Jurisdiction and the Principle of ne bis in idem in Criminal Proceedings.*

56 — Ibid. (section 3).

3. Article 4 of Protocol No 7

53. Unlike Article 54 CISA, Article 4 of Protocol No 7 does not apply to cross-border relations; its scope is strictly limited to situations internal to a State. As I have already mentioned, that article does not include an execution condition similar to that laid down in Article 54 CISA, but does, however, cover both the prohibition of double prosecution and that of double punishment.

54. Protocol No 7 was adopted on 22 November 1984 by 43 members of the Council of Europe, including all the Member States of the European Union with the exception of the Federal Republic of Germany, the Kingdom of the Netherlands, and the United Kingdom of Great Britain and Northern Ireland. As can be seen from the draft agreement on the accession of the European Union to the ECHR, that protocol is not among the measures to which accession by the European Union was envisaged. [57] The lack of reference to that protocol in the order for reference may thus be explained by the fact that the Federal Republic of Germany has not ratified it. [58] However, upon the signature of that protocol, it made certain declarations. [59]

55. In accordance with Article 4(1) of Protocol No 7, no one is to be liable to be tried or punished twice in criminal proceedings. According to the second paragraph of that article, the reopening of the case is nevertheless possible, in accordance with the law and the penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case. Article 4(3) of Protocol No 7 prohibits any derogation from that article under Article 15 ECHR, which allows, in time of war or other public emergency threatening the life of the nation, the adoption of measures derogating from the obligations under the ECHR.

56. In short, Article 4 of Protocol No 7 therefore ensures *a level of protection which, without being absolute, is nevertheless higher* than that provided by the provisions of the ECHR in general.

57. The provisions of Article 4 of Protocol No 7 have been the source of a rich and varied body of case-law of the European Court of Human Rights, which, in my view, has lacked precision as regards the definition of the concepts of criminal prosecution or of a penalty imposed in criminal proceedings and, in particular, as regards the interpretation of the concept of an offence.

58. As regards the latter issue, in *Sergey Zolotukhin*, the European Court of Human Rights interpreted the concept of an offence as referring to 'those facts which constitute a set of concrete factual circumstances involving the same defendant and inextricably linked together in time and space'. [60] It therefore reconciled its case-law with that of the Court of Justice in relation to Article 54 CISA and with the 'identity of the material acts', which is the only relevant criterion for the purposes of the application of that article. [61]

57 — See Article 1 of the draft accession agreement: http://www.coe.int/t/dghl/standardsetting/hrpolicy/accession/Meeting_reports/47_1(2013)008rev2_EN.pdf

58 — It seems that the absence of ratification is linked to Article 1 of Protocol No 7. See the report of the Bundestag, p. 3: http://dip21.bundestag.de/dip21/btd/17/129/1712996.pdf

59 — Declaration made at the time of signature, on 19 March 1985, accessible on the site of the Council of Europe: http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?CL=ENG&NT= 117&VL= 0

60 — *Sergey Zolotukhin* [GC], cited above, § 84.

61 — In that context, that concept has been interpreted as referring only to the nature of the acts, encompassing a set of concrete circumstances which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected (see *van Esbroeck*, EU:C:2006:165, paragraphs 27, 32, 36 and 42; *Gasparini and Others*, EU:C:2006:610, paragraph 54; *van Straaten*, EU:C:2006:614, paragraphs 41, 47 and 48; and *Kraaijenbrink*, C-367/05, EU:C:2007:444, paragraph 26). It must also be pointed out that the concept of 'same acts', which also appears in Framework Decision 2002/584/JHA on the European arrest warrant, has been interpreted by the Court as being an autonomous concept of EU law (see *Mantello*, EU:C:2010:683, paragraph 38).

59. The case-law of the European Court of Human Rights unanimously confirms that the *ne bis in idem* principle concerns not only double punishment, but also double prosecution.[62] The purpose of Article 4 of Protocol No 7 is to prohibit the duplication of criminal proceedings that have been finally disposed of. A decision is final 'if it has acquired the force of *res judicata*. This is the case when it is irrevocable, that is to say when no further ordinary remedies are available or when the parties have exhausted such remedies or have permitted the time-limit to expire without availing themselves of them'.[63]

60. In addition, it can be seen from a recent judgment of the European Court of Human Rights in *Muslija* that Article 4 of Protocol No 7 prohibits the continuation of concurrent criminal proceedings after one set of proceedings has resulted in a final decision. *In such a situation, the other criminal proceedings must be terminated.*[64]

4. Article 50 of the Charter and its relationship with Article 4 of Protocol No 7

61. As I have already noted, the wording of Article 50 of the Charter is almost identical to that of Article 4 of Protocol No 7, the only difference being the territorial scope of the *ne bis in idem* principle, which, as regards the Charter, covers all of the European Union,[65] whereas, as regards Article 4 of Protocol No 7, that scope covers only the territory of a State.

62. It is undisputed that the Charter must be interpreted in accordance with the corresponding provisions of the ECHR. However, the question that arises is whether that approach also applies where a provision of the ECHR is not binding on all the Member States. In that respect, as regards whether the case-law of the European Court of Human Rights should be taken fully into account for the purpose of the interpretation of the *ne bis in idem* principle in EU law, various views have already been expounded.[66]

63. In my opinion, the fact that some Member States have not ratified Protocol No 7 cannot have any bearing on the interpretation of Article 50 of the Charter, since it does not change the scope of that provision. To conclude otherwise would be tantamount to granting the Member States a unilateral power of interpretation as regards the substance of the European Union's system of fundamental rights. In view of the principle of the autonomy of EU law, in conjunction with the Court's task of ensuring its uniform interpretation, such a conclusion must be excluded.

64. Accordingly, Article 50 should be given an interpretation consistent with Article 4 of Protocol No 7, starting from the premise that the meaning of the two provisions is identical as regards the identical terms used therein.

62 — In that respect, I note a terminological inconsistency in the French language version of the Charter between the title of Article 50, which refers to the right not to be 'jugé ou puni pénalement deux fois', and the wording of that article, which provides that no one shall be liable to be 'poursuivi ou puni pénalement'.

63 — See, inter alia, *Nikitin v. Russia*, no. 50178/99, § 37, ECHR 2004-VIII; *Horciag v. Romania*, no. 70982/01, 15 March 2005; *Muslija v. Bosnia and Herzegovina*, no. 32042/11, 14 January 2014; and *Zigarella v. Italy*, no. 48154/99, 3 October 2002.

64 — 'Thus the two proceedings were conducted concurrently. At the time the minor-offences conviction became final and required the force of res iudicata, the criminal proceedings were pending before the first-instance court. In these circumstances, the Court considers that the Municipal Court should have terminated the criminal proceedings following the delivery of a "final" decision in the first proceedings', (*Muslija*, cited above, § 37).

65 — According to the explanations relating to Article 52 of the Charter, Article 50 corresponds to Article 4 of Protocol No 7, but its scope is extended to EU level between the Courts of the Member States.

66 — See the Opinion of Advocate General Kokott in *Bonda*, C-489/10, EU:C:2011:845, point 43, and the Opinion of Advocate General Cruz Villalón in *Åkerberg Fransson*, C-617/10, EU:C:2012:340, point 109.

5. Does the execution condition laid down in Article 54 CISA conflict with Article 50 of the Charter?

65. In view of the complexity of the present issue, I propose to analyse the relationship between Article 54 CISA and Article 50 of the Charter as follows. First, I will examine whether there is any incompatibility between the two provisions. Then, if no such incompatibility can be found, I will examine whether there is an interference with the fundamental right not to be tried or punished twice in criminal proceedings for the same criminal offence. In that context, it will be necessary to assess whether the execution condition laid down in Article 54 CISA is liable to constitute such an interference. Lastly, it will be necessary to examine the conditions set out in Article 52 of the Charter, in particular that of respecting the essence of the fundamental right at issue, and the proportionality of the interference arising from Article 54 CISA as regards Article 50 of the Charter.

66. It is undisputed that the execution condition laid down in Article 54 CISA makes the application of the *ne bis in idem* principle subject to additional conditions which are not present in Article 50 of the Charter and which do not correspond to the derogations allowed under Article 4(2) of Protocol No 7.

67. In addition, it seems to me that the application of that condition leads to a result that is not materially in accordance with the abovementioned case-law of the European Court of Human Rights, which, however, is applicable and limited to situations internal to a Member State only. The execution condition laid down in Article 54 CISA does not, in itself, prevent the initiation or continuation of prosecution for the same acts, even where the person concerned has been finally acquitted or convicted in another Member State.

68. However, the premise that the execution condition is incompatible with the ECHR, which is put forward by Mr Spasic's representative, may be envisaged in four situations that fall within the scope of the expression 'within the Union' set out in Article 50 of the Charter. Those are the situations of double prosecution by the authorities of the European Union, double prosecution by the national authorities and those of the European Union, double prosecution at the national level and double prosecution in different Member States. Since only the latter two situations are relevant in the area of cooperation in criminal matters as EU law stands at present, the discussion must be limited to those two cases.

69. In my view, the particularly high level of protection ensured by Article 4 of Protocol No 7, in accordance with which no one may be tried or punished again in criminal proceedings for the same acts, and the development of the area of freedom, security and justice, where cross-border execution now takes place through EU instruments relating to mutual recognition, argue in favour of the rigorous application of Article 50 of the Charter. There is therefore a prima facie incompatibility between the execution condition laid down in Article 54 CISA and the Charter.

70. However, that conclusion is liable to contradict the explanations relating to the Charter, which seem to establish a distinction between national situations and cross-border situations as regards the application of the *ne bis in idem* principle.

71. According to those explanations, '[a]s regards the situations referred to by Article 4 of Protocol No 7, namely the application of the principle within the same Member State, the guaranteed right has the same meaning and the same scope as the corresponding right in the ECHR'. Article 50 therefore corresponds to Article 4 of Protocol No 7, but 'its scope is extended to EU level between the Courts of the Member States'. That seems to indicate that, in cross-border situations, the meaning and the scope of Article 50 of the Charter may diverge from the ECHR. However, it appears that the drafters of the explanations relating to the Charter took the view that the EU *acquis* referred to in those explanations constitutes a limitation on the exercise of the fundamental right enshrined in Article 50 of the Charter in accordance with Article 52(1) thereof.

72. Moreover, in view of the great many situations in which the *ne bis in idem* principle may be applicable, both outside and within the scope of general criminal law, the vague wording of Article 50 of the Charter does not allow any unequivocal and uniform conclusions to be drawn as regards situations less clear than that of the present case.

73. For all of those reasons, I do not think that the Court should declare the execution condition incompatible per se with the Charter.

6. Does the execution condition constitute a limitation or a derogation for the purpose of Article 52(1) of the Charter?

– The existence of an interference constituting a breach of a fundamental right

74. If the interpretation of the explanations relating to the Charter set out above is accepted, it seems to me that it is impossible to deny the existence of any conflict between the execution condition and Article 50 of the Charter. A rule cannot be regarded as a limitation on or derogation to a fundamental right unless it constitutes an interference with the fundamental right concerned. [67]

75. Referring to the case-law of the German superior courts [68] and to the explanations relating to the Charter in the version updated in 2007, [69] the referring court claims that Article 54 CISA constitutes a limitation within the meaning of Article 52(1) of the Charter. According to the referring court, the phrase in those explanations — '[t]he very limited exceptions in those Conventions permitting the Member States to derogate from the "*non bis in idem*" rule' — refers to the conventions [70] that contain the *ne bis in idem* principle formulated in accordance with the CISA model, or to their derogating provisions, including Articles 54 to 58 CISA.

76. It is indeed the case that the Court must take those explanations duly into consideration in accordance with the third paragraph of Article 6(1) TEU and Article 52(7) of the Charter. [71] That implies *a contrario* that the Court is not bound by those explanations in the interpretation of the Charter. Furthermore, where those explanations refer to the EU *acquis* as regards secondary law, that does not mean, in my opinion, that the compatibility of that *acquis* with the Charter cannot be called into question in view of the evolution of the case-law of the European Court of Human Rights and of the Court of Justice and the development of EU law.

77. While I do not wish to take a position on the status of Articles 55 to 58 CISA in the light of Article 52(1) of the Charter, it seems to me that some of those provisions clearly establish limitations on the fundamental right embodied in the *ne bis in idem* principle.

78. That quality is less clear as regards Article 54 CISA. The objective of the execution condition laid down in that provision is to demarcate or to specify the field of application of the *ne bis in idem* rule in a cross-border context rather than to establish a limitation to or derogation from that rule. It is true that, in its written observations, the Commission characterised the execution condition as a condition of application of Article 54 CISA, and not an exception to that provision. However, that internal characterisation of the provision of the CISA is irrelevant as regards the relationship between Article 54 CISA as a whole and Article 50 of the Charter, in the light of Article 52 of the Charter.

67 — See, recently, *Digital Rights Ireland*, C-293/12 and C-594/12, EU:C:2014:238, paragraph 32 et seq.

68 — The Bundesgerichtshof and the Bundesverfassungsgericht.

69 — OJ 2007 C 303, p. 17. However, no changes were made as regards Article 50 of the Charter.

70 — See footnote 10.

71 — *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraph 20.

79. In that respect, it must be examined whether the characterisation of a rule as a limitation depends on a subjective or an objective assessment.

80. In the first case, a rule constitutes a limitation within the meaning of Article 52(1) of the Charter only if it has been adopted as such. That hypothesis — which would probably exclude the execution condition laid down in Article 54 CISA from the scope of Article 52 of the Charter — therefore requires that the legislature have adopted the rule for the purposes of limiting the fundamental right concerned and that, upon adopting the limitation, it also took into account its proportionality within the meaning of the second sentence of that article.

81. However, I think that the concept of limitation referred to in Article 52(1) of the Charter must be regarded as an objective concept. Thus, any provision of EU law, or of national law implementing EU law, which, *de jure* or *de facto*, is liable to limit the exercise of the rights and freedoms recognised in the Charter, may be subject to an assessment of its compatibility with the Charter and, accordingly, of whether it is liable to constitute a limitation within the meaning of Article 52 of the Charter. Moreover, the review of the compatibility of provisions of European law with the fundamental rights enshrined in the Charter, which was not legally binding until 2009, applies as regards provisions adopted previously.[72]

82. Consequently, the application of the execution condition provided for in Article 54 CISA may constitute a limitation, within the meaning of Article 52(1) of the Charter, of the fundamental right enshrined in Article 50 of the Charter.

– The justification for the interference as regards the conditions set out in Article 52(1) of the Charter

83. As a preliminary, it should be borne in mind that the Court has acknowledged that, with certain exceptions,[73] fundamental rights do not constitute unfettered prerogatives and may be restricted, provided that the restrictions in fact correspond to objectives of general interest pursued by the measure in question and that they do not constitute, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed.[74] The Court therefore seeks, in its case-law, to strike a fair balance between, on the one hand, the various rights and interests and, on the other, the fundamental rights and economic freedoms,[75] and in carrying out that balancing, it also takes into account the objectives underlying the limitation of a fundamental right.[76]

84. The European Court of Human Rights applies a similar line of reasoning[77] in acknowledging that some rights may be limited, provided that the limitations applied do not undermine the very core of the right. In addition, such limitations may be reconciled with the provision of the ECHR concerned only if they pursue a legitimate aim and if there is a reasonable relationship of proportionality between the means employed and the legitimate aim sought to be achieved.[78] In particular, as regards

72 — For examples of an examination of measures of secondary law adopted before the entry into force of the Treaty of Lisbon in the light of the Charter, see *Association belge des Consommateurs Test-Achats and Others*, C-236/09, EU:C:2011:100; *Volker und Markus Schecke and Eifert*, C-92/09 and C-93/09, EU:C:2010:662; and *Digital Rights Ireland* (EU:C:2014:238).

73 — See, to that effect, *Schmidberger*, C-112/00, EU:C:2003:333, paragraph 80, which refers to the right to life or the prohibition of torture and inhuman or degrading treatment or punishment.

74 — *Wachauf*, 5/88, EU:C:1989:321, paragraph 18; *Dokter and Others*, C-28/05, EU:C:2006:408, paragraph 75 and the case-law cited; and *G. and R.*, C-383/13 PPU, EU:C:2013:533, paragraph 33.

75 — See *ex multis*, *Promusicae*, C-275/06, EU:C:2008:54; *Scarlet Extended*, C-70/10, EU:C:2011:771; *Bonnier Audio and Others*, C-461/10, EU:C:2012:219; *Trade Agency*, C-619/10, EU:C:2012:531; *Deutsches Weintor*, C-544/10, EU:C:2012:526; *Schmidberger* (EU:C:2003:333); and *Commission v Germany*, C-271/08, EU:C:2010:426.

76 — *Volker und Markus Schecke and Eifert* (EU:C:2010:662, paragraphs 67 to 71), and *Schwarz*, C-291/12, EU:C:2013:670, paragraphs 36 to 38.

77 — The three categories of right for the purpose of the ECHR are rights that may be expressly limited, rights falling within the scope of Article 15 ECHR and rights of an absolute nature such as Article 3 ECHR. See Peers, S., Prechal, S., *The EU Charter of Fundamental Rights*, *A Commentary*, Hart Publishing 2014, p. 1462.

78 — On the right of access to court, see *Fogarty v. the United Kingdom* [GC], no. 37112/97, ECHR 2001-XI (extracts).

interference with the freedoms enshrined in the ECHR, a finding of interference does not mean that the Convention has been breached, but rather requires an examination of whether such interference fulfils the conditions of formal legality (it is provided for by law), of substantive legality (it pursues legitimate aims having regard to the provision concerned) and whether such interference constitutes a necessary measure in a democratic society. [79]

85. I note that the first sentence of Article 52(1) of the Charter authorises limitations of the fundamental rights recognised in the Charter provided that they are provided for by law and respect the essence of the rights and freedoms concerned. The second sentence of that article makes those limitations subject to a proportionality criterion. [80]

86. In the present case, it is self-evident that the execution condition meets the criterion that it must be *provided for by law*.

87. As regards *respecting the essence* of the fundamental right in question, I take the view, not without hesitation, that the execution condition also meets that criterion.

88. It is indeed difficult to determine the distinct essence of the *ne bis in idem* principle. Nevertheless, taking as a basis the development of the international and national protection of that fundamental right, it seems possible to identify its 'core'. Thus, the essence of that fundamental right could be regarded as consisting in (i) the prohibition of proceedings initiated after a final conviction or acquittal (ii) in the area of general criminal law (iii) by the authorities of the same Member State (iv) concerning the same acts (v) having the same legal status in view of the interest protected under the applicable national law, (vi) provided that there has been no fundamental defect in the first proceedings and (vii) that there is no new evidence. However, that fundamental right is not applicable to particularly serious crimes such as genocide.

89. Accordingly, interference may be permitted outside the scope of general criminal law, where several offences are committed by the same act, or in cross-border situations. That latter case is, inter alia, that of Article 54 CISA, which does not prevent new criminal proceedings for the same acts as those for which the person concerned has already been finally convicted and sentenced in another Member State. Moreover, that is precisely Mr Spasic's situation.

90. In the light of those observations, I conclude that Article 54 CISA, which reflects the *ne bis in idem* principle in a cross-border context, respects the essence of the *ne bis in idem* principle as a fundamental right.

– The justification in the light of the proportionality test

91. In those circumstances, it is necessary to examine the proportionality of the interference that has been found to exist. In that regard, it should be borne in mind that, according to the settled case-law of the Court, the principle of proportionality requires that acts of the EU institutions be appropriate for attaining the legitimate objectives pursued by the legislation at issue and do not exceed the limits of what is appropriate and necessary in order to achieve those objectives. [81]

79 — For a classic example, see the judgment of the European Court of Human Rights in *Silver and Others v. the United Kingdom*, 25 March 1983, Series A no. 61.

'Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.'

81 — See, to that effect, *Afton Chemical*, C-343/09, EU:C:2010:419, paragraph 45; *Volker und Markus Schecke and Eifert* (EU:C:2010:662, paragraph 74); *Nelson and Others*, C-581/10 and C-629/10, EU:C:2012:657, paragraph 71; *Sky Österreich*, C-283/11, EU:C:2013:28, paragraph 50; *Schaible*, C-101/12, EU:C:2013:661, paragraph 29; and *Digital Rights* (EU:C:2014:23, paragraph 46).

92. As regards the *objective of general interest* underlying the limitation at issue in the present case, the fundamental right not to be tried or punished twice in criminal proceedings for the same criminal offence, enshrined in Article 50 of the Charter, is limited by Article 54 CISA on the basis of an objective recognised by the European Union, namely preventing impunity in the context of the establishment of the area of freedom, security and justice without internal frontiers within the meaning of Article 3(2) TEU, in which the free movement of persons is ensured.

93. As regards the *appropriateness* of the execution condition for attaining the objective of preventing impunity, it is first necessary to ascertain the justification for the exercise of criminal jurisdiction by the German authorities to prosecute Mr Spasic after his final conviction and sentencing by the Tribunale di Milano. It seems to me that two possibilities may be envisaged in that respect.

94. If the purpose of the criminal proceedings is to seek to impose on Mr Spasic a second penalty more severe than that imposed by the Tribunale di Milano judgment of 18 June 2012 — which was a reduced sentence resulting from an agreement concluded between the accused and the public prosecutor — in order to ensure a higher level of protection for the victim, a German national, it must be pointed out that EU law does not make the application of the *ne bis in idem* principle conditional upon the harmonisation or approximation of the criminal laws of the Member States. It is therefore necessary that the Member States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Member States even when the outcome would be different if its own national law were applied.[82] That ground cannot therefore be regarded as justifying the application of the execution condition in the light of the proportionality principle.

95. If, on the other hand, the application of the execution condition laid down in Article 54 CISA is based on the fear that, if criminal proceedings are not initiated in Germany, Mr Spasic will remain unpunished for the offence he committed in Milan, the interference with the fundamental right enshrined in Article 50 of the Charter is, in principle, appropriate for attaining the objective of preventing impunity.

96. However, that latter possibility also raises the issue of the requirement of mutual trust between Member States as regards their respective criminal justice systems. I note, in that respect, that on 5 January 2013 the public prosecutor at the Tribunale di Milano adopted a decision ordering that the accused be imprisoned in order to serve his custodial sentence in Italy.[83] The Italian Republic has not yet issued a European Arrest Warrant for that purpose.

97. That brings me to the examination of whether the application of the execution condition is *necessary*, within the meaning of Article 52(1) of the Charter.

98. In my view, the objective of preventing impunity does not require the generalised application of the execution condition as provided for in Article 54 CISA, since, as EU law currently stands, the necessity criterion can no longer be considered to be systematically met.

99. In fact, the question posed by the Commission in the abovementioned Green Paper, concerning the justification for the execution condition in the context of cross-border execution based on legal instruments applying mutual recognition,[84] has indeed become more relevant.

82 — See, to that effect, *Gözütok and Brügge* (EU:C:2003:87, paragraph 33); *van Esbroeck* (EU:C:2006:165, paragraphs 28 to 30, 35, 36, 38 and 42); and *Bourquain*, C-297/07, EU:C:2008:708, paragraphs 35, 37 and 40.

83 — Revoca di Decreto di Sospensione di ordine di esecuzione per la carcerazione ex art. 656 c. 8 cpp.

84 — *Green Paper on Conflicts of Jurisdiction and the Principle of ne bis in idem in Criminal Proceedings.*

100. EU law now provides acts of secondary law of a less intrusive nature,[85] which allow the Member States to execute penalties imposed in criminal proceedings if the sentenced person is in another Member State and to exchange related information.[86] Moreover, several acts of secondary law concerning cooperation in the area of criminal law refer to the *ne bis in idem* principle, without it being subject to an execution condition.[87]

101. In that context, systematically subjecting persons that have already been finally convicted and sentenced in one Member State to a risk of further prosecution in another Member State exceeds the limits of what is appropriate and necessary for the purpose of attaining the objective pursued.

102. Furthermore, while I acknowledge that the principle that 'every penalty must be executed' forms part of the rule of law,[88] I believe that the Member States have discretion as regards the means used in order to execute judgments delivered by national courts. In the situation covered by Article 54 CISA, it is possible that the first Member State has not yet wished to execute the judgment, for example in view of national legislation under which a particular procedure must be carried out in order to determine *in concreto* the means of execution, as a result of insufficient prison places, because the person concerned is serving another sentence in another Member State, or as a result of an individual agreement deferring the sentence for family reasons or for reasons relating to the sentenced person's health. EU law cannot therefore, for example, impose on a Member State an obligation to issue a European Arrest Warrant for the purpose of preventing impunity.[89]

103. For all of those reasons, the generalised application of the execution condition does not satisfy the proportionality criterion and cannot be regarded as a justified interference with the right not to be tried or punished twice in criminal proceedings within the meaning of Article 52 of the Charter.

104. In that respect, it must be noted that, in accordance with the case-law, the Member States are required not only to interpret but also to apply an instrument of secondary law in accordance with fundamental rights.[90] That obligation may entail a duty not to apply the instrument in question in all the situations covered by its wording.[91]

85 — See Framework Decision 2008/909/JHA on the application of the principle of mutual recognition to judgments in criminal matters; Framework Decision 2008/675/JHA on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings (OJ 2008 L 220 p. 32), and related instruments such as the Council Act of 29 May 2000 establishing in accordance with Article 34 of the Treaty on the European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (OJ 2000 C 197, p. 1), and Council Framework Decision 2009/315/JHA of 26 February 2009 on the organisation and content of the exchange of information extracted from the criminal record between Member States (OJ 2009 L 93, p. 23).

86 — Council Decision 2009/316/JHA of 6 April 2009 on the establishment of the European Criminal Records Information System (ECRIS), in application of Article 11 of Framework Decision 2009/315/JHA (OJ 2009 L 93, p. 33).

87 — See Article 1 of Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings in relation to cybercrime cases (OJ 2009 L 328, p. 42); Articles 4 and 7 of Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties (OJ 2005 L 76, p. 16); Article 7(1)(c) of Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence (OJ 2003 L 196, p. 45); Article 8(2)(a) of Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders (OJ 2006 L 328, p. 59); Article 9(1)(c) of Framework Decision 2008/909, and Article 11(1)(c) of Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions (OJ 2008 L 337, p. 102). See also the amendments made by Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial (OJ 2009 L 81, p. 24).

88 — As Cesare Beccaria stated, '[t]he certainty of a small punishment will make a stronger impression than the fear of one more severe, if that fear is attended with the hopes of escaping', *Of Crimes and Punishments*, Livourne, 1764.

89 — I note, in that respect, the instruments set out in Framework Decision 2008/909, in Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention (OJ 2009 L 294, p. 20), and Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions (OJ 2008 L 337, p. 102).

90 — See, to that effect, *N. S. and Others*, C-411/10 and C-493/10, EU:C:2011:865, paragraphs 77 and 99.

91 — *N. S. and Others* (EU:C:2011:865, paragraphs 105 and 106).

105. There are still, as EU law stands at present, limited cases in which the application of the execution condition provided for in Article 54 CISA must be considered necessary in order to achieve the objective pursued.

106. That is the case, first, as regards situations that fall within the scope of Article 4(2) of Protocol No 7, as interpreted by the European Court of Human Rights. It seems clear to me that a derogation that is applicable under the ECHR to national situations may also be applicable in cross-border situations which, by virtue of the Charter, fall within the scope of the fundamental right of *ne bis in idem*.

107. Secondly, in my view, perpetrators of crimes which the Member States are required to punish under general international law, such as crimes against humanity, genocide and war crimes, must be prosecuted a second time if the application of the *ne bis in idem* principle would result in their escaping punishment. [92] A Council decision on the investigation and prosecution of genocide, crimes against humanity and war crimes also reflects the need for a strict approach in that regard. [93]

108. Thirdly, in order to prevent impunity, new criminal proceedings and a new sentence would also be necessary in the event of a lasting obstacle to cooperation as regards the execution of judgments. That reflects the possibility that, despite the application or absent the application of the less intrusive instruments available to the authorities of the two Member States concerned, there is a risk that the EU objective of preventing impunity would be undermined.

109. Furthermore, the Commission rightly notes the obligations set out in Articles 10 to 12 of Framework Decision 2009/948, in accordance with which the competent authorities of the two Member States claiming concurrent jurisdiction are to enter into direct consultations in order to avoid the adverse consequences arising from such concurrent proceedings. It is true that, formally, that obligation is extinguished following the adoption of a final decision in either Member State. However, in my view, Article 57(1) CISA, interpreted in accordance with the principle of sincere cooperation and in keeping with the spirit of the protection of fundamental rights, may constitute a source of such an obligation. [94]

110. In the light of all the foregoing considerations, I propose that the Court's answer to the first question referred for a preliminary ruling should be that, as EU law stands at present, the application of the execution condition laid down in Article 54 CISA constitutes a proportional and therefore justified — for the purpose of Article 52 of the Charter — interference with the fundamental right not to be tried or punished twice in criminal proceedings for the same criminal offence enshrined in Article 50 of the Charter in the cases falling within the scope of Article 4(2) of Protocol No 7, where the Member States are required to punish acts under international law or where the measures applicable under EU law are not sufficient to prevent impunity. In the present case, it is for the national court to determine whether the latter situation arises in the present case.

92 — In that respect, in the academic literature on the subject, van Bockel (op. cit. p. 235) advocates the necessity of being able to apply the execution condition laid down in Article 54 CISA to cases of war criminals convicted and sentenced *in absentia* if the penalties imposed were never executed.

93 — Council Decision 2003/335/JHA of 8 May 2003 on the investigation and prosecution of genocide, crimes against humanity and war crimes (OJ 2003 L 118, p. 12).

94 — The criterion 'if they deem it necessary' in that provision refers, in my view, to situations in which the authorities of Member State B are already in possession of relevant information confirming that the prosecuted person's trial in respect of the same acts has been finally disposed of in another Member State. It would be cynical to authorise those authorities not to seek the relevant information even if they '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 Member State.

C – The second question, concerning the interpretation of the execution condition for the purpose of Article 54 CISA

111. By its second question, the referring court asks, in essence, whether, for the purpose of Article 54 CISA, it must be considered that the penalty imposed by a court of a Contracting Party 'has been enforced, is actually in the process of being enforced or can no longer be enforced' where the accused has been sentenced, under the laws of the sentencing Contracting Party, to a penalty composed of two parts, namely a custodial sentence and a fine, and only the fine has been executed.

112. Since Mr Spasic paid the fine of EUR 800, he claims that, following such partial execution, the penalty must be regarded as having been 'enforced' or being 'actually in the process of being enforced' within the meaning of Article 54 CISA. I note that, in its observations, the Commission shared that position, in view of the partial execution of the penalty and the fact that the accused's detention in another Member State makes the immediate execution of the second part of the penalty impossible in practice. Thus, according to the Commission, a second set of criminal proceedings intended to prevent impunity is not necessary.

113. In that respect, as regards the nature of the judgment delivered by the Tribunale di Milano, I note that it can be seen from the file that the judgment in question was delivered 'in the absence' of the accused. The Italian court clearly indicates that, at the time of the trial, Mr Spasic was in prison in Austria. In addition, it can be seen from that judgment that the accused reached an agreement with the public prosecutor in order to obtain a reduction of his sentence under Article 444 of the Italian Criminal Code. That situation therefore does not constitute a classic example of judgment *in absentia*. However, it seems to me that Article 54 CISA is fully applicable in the present case, since the sole condition for the application of that provision is that there has been a final disposal of the trial by a Contracting Party. [95]

114. Furthermore, I note that that the *ne bis in idem* principle laid down in Article 54 CISA has two fundamental roles. First, it is not a procedural rule, but a fundamental safeguard for citizens in legal systems which are based on the acknowledgment that the individual has a series of rights and freedoms in respect of the acts of public bodies. That provision therefore constitutes a restriction on the exercise of the right to prosecute and punish a criminal act. [96] Secondly, that article is intended to ensure legal certainty through respect for decisions of public bodies that have become final, in the absence of harmonisation or approximation of the criminal laws of the Member States. [97]

115. In my view, that aspect relating to the lack of harmonisation is important in order to answer the present question, given the variety of sentencing procedures in the various national legal systems. Accordingly, the interpretation of Article 54 CISA must take into account, on a case-by-case basis, the type of penalty imposed and the specific nature of the criminal law system of the sentencing Member State. [98]

116. The present case concerns a conviction and sentencing for a single offence. Under Article 640 of the Italian Criminal Code, the Italian court imposed two penalties, which, in Italian criminal law, are considered to be 'principal penalties', namely the custodial sentence and the fine. [99] Therefore, as the agent of the Italian Government affirmed at the hearing, the two penalties in question do not constitute a principal penalty and an ancillary penalty under Italian law.

95 — *Bourquain* (EU:C:2008:708, paragraph 37).

96 — See the Opinion in *Gözütok and Brügge* (EU:C:2002:516, point 114).

97 — *van Esbroeck* (EU:C:2006:165, paragraphs 28 to 30, 35, 36, 38 and 42).

98 — In that respect, I note that in *Gözütok and Brügge* (EU:C:2003:87, paragraph 29), the Court held that the obligations imposed on the accused under an agreement proposed be the Netherlands Public Prosecutor constituted a 'penalty' *sui generis*.

99 — See Article 17 of the Italian Criminal Code.

117. As regards the three parts of the execution condition laid down in Article 54 CISA, the following should be noted.

118. First, as regards the condition of a penalty that 'has been enforced', it seems clear that, where two penalties are imposed in respect of the same offence, as in the Italian judgment in the present case, the execution of one of those penalties does not mean that the condition in question is met. It is true that, in the present case, the payment of the fine of EUR 800 must be regarded as a penalty that 'has been enforced'. However, as regards the custodial sentence, it is undisputed that it has not yet been 'enforced' on the accused.

119. A different interpretation would render the *ne bis in idem* principle set out in Article 54 CISA meaningless as regards the two fundamental roles mentioned above. As the Court pointed out in *Gözütok and Brügge*, the interpretation of Article 54 CISA must ensure the effective application of the *ne bis in idem* principle. [100]

120. In any event, as regards in particular the prison sentence, it is undisputed that the penalty imposed on an accused may be altered in the course of its execution, by, for example, a reduction of the sentence, temporary release, or release on parole. The prison sentence must therefore be considered as having 'been enforced' in the event of release on parole, inasmuch as the execution process meets the condition that it be final and exhaustive. Accordingly, it is not necessary that the penalty imposed on the person concerned has been served in its entirety. In such a case, a new penalty cannot be imposed unless a new infringement or a new offence is committed. [101]

121. Secondly, the condition that the penalty must be 'actually in the process of being enforced' also does not seem to be fulfilled in the present case.

122. In that respect, it is clear that the condition is not fulfilled as regards the prison sentence, since Mr Spasic was not placed in an Italian prison in order to serve the sentence imposed by the Tribunale di Milano.

123. In that respect, I note that it can be seen from the judgment of the Tribunale di Milano of 18 June 2012 that the suspension of execution was not requested at the stage of that judgment and, as the agent of the Italian Government affirmed at the hearing, a suspension ordered of the court's own motion in accordance with Italian law is no longer possible in the present case. [102] I note that the Court has held that that, in so far as a suspended custodial sentence penalises the unlawful conduct of a sentenced person, it constitutes a penalty within the meaning of Article 54 CISA. That penalty must be regarded as 'actually in the process of being enforced' as soon as the sentence has become enforceable and during the probation period. Subsequently, once the probation period has come to an end, the penalty must be regarded as 'having been enforced' within the meaning of that provision. [103]

124. Lastly, this is clearly not a situation in which the penalty 'can no longer be enforced' under the laws of the sentencing State. It can be seen from the decision of 5 January 2013 of the public prosecutor at the Tribunale di Milano that the Italian authorities assume that the custodial sentence is enforceable.

100 — EU:C:2003:87, paragraph 35.

101 — For example, by failure to fulfil the conditions of the release on parole.

102 — As can be seen from the explanations provided at the hearing by the agent of the Italian Government, such a suspension ordered of the court's own motion occurred after the Tribunal di Milano's judgment and was revoked by the decision of 5 January 2013 referred to above (Revoca di Decreto di Sospensione di ordine di esecuzione per la carcerazione ex art. 656 c. 8 cpp).

103 — *Kretzinger* (EU:C:2007:441, paragraph 42).

125. Consequently, I propose that the Court's answer to the second question referred should be that the condition laid down in Article 54 CISA is not fulfilled where the accused has been sentenced, in accordance with the law of the Contracting State, to a penalty composed of two independent parts, namely a custodial sentence and a fine, and only the fine has been enforced, whereas the other penalty has neither been enforced nor is actually in the process of being enforced, but may still be enforced under the laws of the sentencing Member State.

V – Conclusion

126. I therefore recommend that the Court answer the questions referred by the Oberlandesgericht Nürnberg as follows:

(1) As EU law stands at present, the application of the execution condition laid down 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 constitutes a proportional and therefore justified — for the purpose of Article 52 of the Charter — interference with the fundamental right not to be tried or punished twice in criminal proceedings for the same criminal offence enshrined in Article 50 of the Charter:

— in cases falling within the scope of Article 4(2) of Protocol No 7 to the European Convention on the Protection of Human Rights and Fundamental Freedoms, signed in Strasbourg on 22 November 1984, as amended by Protocol No 11 since the entry into force of that protocol on 1 November 1998,

— where the Member States are required to punish acts under international law and

— where the measures applicable under EU law are not sufficient to prevent impunity.

It is for the referring court to determine whether the latter situation arises in the present case.

(2) The condition laid down in Article 54 of the Convention Implementing the Schengen Agreement is not fulfilled where the accused has been sentenced, in accordance with the law of the Contracting State, to a penalty composed of two independent parts, namely a custodial sentence and a fine, and only the fine has been enforced, whereas the other penalty has neither been enforced nor is actually in the process of being enforced, but may still be enforced under the laws of the sentencing Member State.