ECLI:EU:C:2023:764

Provisional text

JUDGMENT OF THE COURT (First Chamber)

12 October 2023 (*)

(Reference for a preliminary ruling – Judicial cooperation in criminal matters – Convention implementing the Schengen Agreement – Article 54 – Charter of Fundamental Rights of the European Union – Article 50 – Principle ne bis in idem – Assessment in the light of the facts contained in the grounds of the judgment – Assessment in the light of the facts examined in the context of a preliminary investigation and omitted from the indictment – Meaning of 'the same acts')

In Case C-726/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Županijski sud u Puli-Pola (Pula County Court, Croatia), made by decision of 24 November 2021, received at the Court on 30 November 2021, in the criminal proceedings against

GR,

HS,

IT,

intervening parties:

Županijsko državno odvjetništvo u Puli-Pola,

THE COURT (First Chamber),

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

Advocate General: N. Emiliou,

Registrar: M. Longar, Administrator,

having regard to the written procedure and further to the hearing on 11 January 2023,

after considering the observations submitted on behalf of:

– GR, by J. Grlić, odvjetnik, and B. Wiesinger, Rechtsanwalt,

– HS, by V. Drenški-Lasan, odvjetnica,

– the Županijsko državno odvjetništvo u Puli-Pola, by E. Putigna, odvjetnik,

– the Croatian Government, by G. Vidović Mesarek, acting as Agent,

– the Austrian Government, by A. Posch, J. Schmoll and F. Zeder, acting as Agents,

– the European Commission, by H. Dockry, M. Mataija and M. Wasmeier, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 23 March 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, which entered into force on 26 March 1995 (‘the CISA’), and Article 50 of the Charter of Fundamental Rights of the European Union (‘the Charter’).

2 The application was submitted in the context of criminal proceedings brought against GR, HS and IT on the ground that they committed or instigated, or aided in the commission of, acts classified as offences of breach of trust in commercial transactions in Croatia.

Legal context

European Union law

The CISA

3 The CISA was concluded in order to ensure the implementation of the Agreement 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 14 June 1985 (OJ 2000 L 239, p. 13).

4 Article 54 of the CISA is contained in Chapter 3 thereof, entitled ‘Application of the *ne bis in idem* principle’. That article provides:

‘A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has

been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party.'

5 Under Article 57(1) and (2) of the CISA:

'1. 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.

2. The information requested shall be provided as soon as possible and shall be taken into consideration as regards further action to be taken in the proceedings under way.'

Croatian law

6 Article 31(2) of the Ustav Republike Hrvatske (Constitution of the Republic of Croatia) is worded as follows:

'No person may be tried anew or sentenced in criminal proceedings for an act for which that person has already been acquitted or sentenced by a final court judgment in accordance with the law.'

7 Article 246(1) and (2) of the Kazneni zakon (Criminal Code), in the version applicable to the facts in the main proceedings, makes breach of trust in commercial transactions a criminal offence of an economic nature.

8 Article 12(1) of the Zakon o kaznenom postupku (Code of Criminal Procedure) provides:

'No one is to be liable to be punished a second time in criminal proceedings for an offence for which he or she has already been tried and for which a final court judgment has been given.'

Austrian law

9 Paragraph 190 of the Strafprozessordnung (Code of Criminal Procedure; 'the Austrian Code of Criminal Procedure') provides:

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

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

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

10 Paragraph 193(2) of the Austrian Code of Criminal Procedure provides:

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

1. the defendant was not questioned in respect of this offence (Paragraphs 164 and 165) and no restriction was imposed on him or her in this regard, or

2. new facts or evidence arise or appear which, alone or in combination with other results of the proceedings, appear to justify the conviction of the accused or the action pursuant to Section 11.'

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

11 At the material time in the main proceedings, GR was a member of the management board of Skiper Hoteli d.o.o. and Interco Umag d.o.o., Umag ('Interco'), which later became INTER Consulting d.o.o. She was also a partner at Rezidencija Skiper d.o.o. and owned shares in Alterius d.o.o. HS was the president of Interco's management board and also owned shares in Alterius, while IT carried out valuations of immovable property.

12 On 28 September 2015, the Županijsko državno odvjetništvo u Puli (Pula Public Prosecutor's Office, Croatia) issued an indictment against GR, HS, IT and Interco ('the Croatian indictment'). By that indictment, it accused, first, GR and Interco of breach of trust in commercial transactions within the meaning of Article 246(1) and (2) of the Croatian Criminal Code, in the version applicable to the facts in the main proceedings, and, secondly, HS and IT of having incited and aided the commission of that offence, respectively.

13 It is apparent from the Croatian indictment, as reproduced in the reference for a preliminary ruling, that, between December 2004 and June 2006, GR and HS worked together so that Interco purchased immovable property located on several neighbouring plots of land in the municipality of Savudrija (Croatia), the location envisaged by Skiper Hoteli for a real-estate project for tourist accommodation. It is alleged that those persons subsequently ensured that Skiper Hoteli bought that immovable property at a price significantly above the market price, so that Interco benefited from an unlawful advantage at the expense of Skiper Hoteli.

14 The Croatian indictment further states that, between November 2004 and November 2005, GR and HS also acted with the aim of GR, and other companies represented by her, selling to Skiper Hoteli, at a price significantly higher than their real value, the shares held by GR and those other companies in Alterius, since the latter's initial asset contribution consisted of immovable property built on neighbouring plots of land within the territory of the municipality of Savudrija. To that end, GR and HS, through Rezidencija Skiper and with the complicity of IT, carried out a valuation which overestimated the value of the immovable property concerned.

15 The Croatian indictment was upheld by a decision of 5 May 2016 of the Criminal Chamber of the referring court, the Županijski sud u Puli-Pola (Pula County Court, Croatia).

16 As regards criminal proceedings allegedly brought in respect of the same acts in Austria, the referring court states that the Austrian criminal authorities had indeed brought proceedings against two former members of the management board of Hypo Alpe-Adria-Bank International AG ('Hypo Alpe Adria Bank'), a banking institution situated in Austria, and against GR and HS as accomplices of those two former members of the management board. According to the indictment drawn up by the Staatsanwaltschaft Klagenfurt (Klagenfurt Public Prosecutor's Office, Austria), brought before the Landesgericht Klagenfurt (Regional Court, Klagenfurt, Austria) on 9 January 2015 ('the Austrian indictment'), those former members of the management board were accused of breach of trust within the meaning of the Strafgesetzbuch (Criminal Code) for having approved, between September 2002 and July 2005, the grant of loans to Rezidencija Skiper and Skiper Hoteli, for a total amount of at least EUR 105 million, without having either complied with the requirements

relating to the provision of sufficient own funds and the monitoring of the use of the funds or taken into account, first, the lack of documentation relating to the implementation of the projects justifying the grant of those loans and, secondly, the inadequacy of both the payment guarantee instruments and the repayment capacity of the companies concerned. GR and HS were also accused of having incited, by having sought the grant of those loans, those former members of the management board to commit the alleged breach of trust or of having aided in its commission.

17 Following a request from HS, the Klagenfurt Public Prosecutor's Office further confirmed, by letter of 16 July 2015 addressed to his lawyers, that, as regards the proceedings against GR and HS, the Austrian indictment also covered the sale of immovable property to Skiper Hoteli through Alterius at an excessively high price and the suspicious payment of project management fees.

18 By judgment of the Landesgericht Klagenfurt (Regional Court, Klagenfurt) of 3 November 2016 ('the Austrian final judgment'), the two former members of the management board of Hypo Alpe Adria Bank were found guilty in part of the acts of which they were accused and convicted for having approved one of the loans granted to Skiper Hoteli, for an amount exceeding EUR 70 million ('the loan at issue'). Conversely, GR and HS were acquitted in relation to the charge alleging that they had, respectively, incited or contributed to the commission of the criminal offences of which the former members of the management board of Hypo Alpe Adria Bank were accused. That judgment became final following the dismissal, on 4 March 2019, of the appeal brought against it before the Oberster Gerichtshof (Supreme Court, Austria).

19 In addition, the referring court states that the Pula Public Prosecutor's Office, which was also prosecuting other criminal offences with a connection to Hypo Alpe Adria Bank, had, on several occasions in the course of 2014, asked the Klagenfurt Public Prosecutor's Office to check whether it was conducting proceedings in Austria in parallel with those brought in Croatia. In the light of the information provided by the Klagenfurt Public Prosecutor's Office, which is identical, in essence, to that subsequently set out in the enacting terms of the Austrian indictment, the Pula Public Prosecutor's Office took the view that the facts examined by the Klagenfurt Public Prosecutor's Office and the Landesgericht Klagenfurt (Regional Court, Klagenfurt) were not legally relevant for the purposes of the classification of the criminal offence which is the subject of the criminal action in the main proceedings, had no connection with the facts described in the Croatian indictment and, accordingly, were not to be regarded as having already been adjudicated.

20 The referring court states that, in accordance with Croatian case-law, only facts set out in the enacting terms of procedural documents, such as orders to proceed with the judicial investigation, orders dismissing the proceedings, indictments and judgments, are final. Consequently, in the context of the application of the principle *ne bis in idem*, only the facts cited in the enacting terms of those procedural documents are compared.

21 In that context, the referring court submits that there might be, as regards GR and HS, an 'inextricable link in substance, space and time' between, on the one hand, the facts referred to in the enacting terms of the Croatian indictment and, on the other, the facts referred to in the enacting terms of the Austrian indictment, those referred to in the operative part and grounds of the Austrian final judgment and those in respect of which the preliminary investigation was conducted by the Klagenfurt Public Prosecutor's Office into, inter alia, GR and HS, and which were subsequently omitted from the Austrian indictment.

22 First of all, as regards the substantive identity of those facts, the referring court states that the Austrian final judgment acquitted HS of the charge alleging that, during the period from the beginning of 2002 until early July 2005, by repeatedly seeking loans and submitting loan

documentation, he had encouraged the two former members of the management board of Hypo Alpe Adria Bank to commit certain offences, in particular that of granting the loan at issue, without sufficient project documentation and without a loan repayment capacity forecast, whereas GR was acquitted of the charge alleging that, during the period from 9 August 2003 to the beginning of July 2005, she had contributed to the commission of the offences by those same persons in that, as managing director of Rezidencija Skiper and Skiper Hoteli, she had applied for loans, including the loan at issue, by conducting the negotiations for that purpose, presented the loan documentation and signed the loan agreements, which had given rise to the damage suffered by Hypo Alpe Adria Bank. In that regard, it is apparent from the grounds of the Austrian final judgment that the loan at issue was used by Skiper Hoteli to acquire property and shares at prices significantly higher than market prices.

23 The referring court maintains that those circumstances, set out in the operative part and in the grounds of the Austrian final judgment, should be linked to the investigation conducted by the Klagenfurt Public Prosecutor's Office in respect of GR and HS concerning acts other than those to which the Austrian indictment relates, in respect of which they were acquitted by that judgment. Given that those facts are identical to those set out in the Croatian indictment, the Klagenfurt Public Prosecutor's Office thus examined whether the immovable property and shares in question, which were purchased with the loan at issue, were purchased at too high a price when the real-estate project envisaged by Skiper Hoteli was realised.

24 Consequently, the Klagenfurt Public Prosecutor's Office conducted a preliminary investigation into those circumstances, but terminated that investigation in respect of GR and HS. To that end, the Klagenfurt Public Prosecutor's Office merely informed them, by means of a notification, that the preliminary investigation relating to the 'Skiper case' was brought to an end, as far as they were concerned, on the basis of Paragraph 190(2) of the Austrian Code of Criminal Procedure for the offence of breach of trust referred to in Paragraph 153(1) and (2) of the Austrian Criminal Code, in so far as it was not covered by the Austrian indictment, on the ground of insufficient evidence, in particular as regards the intention to cause harm, or the lack of sufficient concrete evidence of conduct covered by criminal law. Thus, the Klagenfurt Public Prosecutor's Office terminated that investigation on the basis of facts that are not specified in the operative part of the Austrian final judgment.

25 Next, as regards the existence of a temporal link between the acts referred to in paragraph 22 above, the referring court submits that the dates on which the grant of the credit at issue and the acts committed in Croatia took place partially coincide, in so far as, according to the operative part of the Austrian final judgment, the offence, in respect of which GR and HS were acquitted, was committed during the period from 2002 to July 2005, whereas the acts relating to the Croatian indictment concern the years 2004 to 2006. That overlap in time is explained by the fact that the grant of the loan at issue necessarily predated the acts committed in Croatia. Without that loan, the purchase of immovable property and shares by Skiper Hoteli in Croatia would not have been possible.

26 Lastly, the spatial link between those acts is demonstrated by the fact that the Austrian final judgment mentions that the loan at issue was intended for the purchase, in Croatia, of immovable property and shares for the purposes of the real-estate project envisaged by Skiper Hoteli, also in Croatia.

27 In those circumstances, the Županijski sud u Puli-Pola (Pula County Court) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘In assessing whether there has been an infringement of the principle *ne bis in idem*, is it possible to compare only the facts cited in the enacting terms of the [Croatian indictment] with the key facts cited in the enacting terms of the [Austrian indictment], and in the operative part of the [Austrian final judgment],

or is it possible to compare the facts cited in the enacting terms of the [Croatian indictment] with the facts cited in the grounds of the [Austrian final judgment], and which were the subject of the preliminary investigation conducted by the Klagenfurt Public Prosecutor’s Office against several persons, in particular against GR and HS, and which were subsequently omitted from the [Austrian indictment] (and were not cited in those enacting terms)?’

Consideration of the question referred

Admissibility

28 The Austrian Government contends that the reference for a preliminary ruling is inadmissible on the ground that the question referred is irrelevant to the outcome of the main proceedings and hypothetical.

29 That government submits that the criminal proceedings in Austria and those pending before the referring court are not based on ‘the same acts’, within the meaning of Article 54 of the CISA, irrespective of whether or not it was appropriate to compare only the enacting terms of the Austrian indictment or the operative part of the Austrian final judgment or to carry out a more comprehensive examination taking into account the grounds of that judgment and, possibly, the content of the preliminary investigation that led to that judgment.

30 It is apparent from a comparison of the enacting terms of the Austrian indictment, on the one hand, and the enacting terms of the Croatian indictment, on the other, that the criminal proceedings conducted in Austria and Croatia each have different subject matters and that they concern different victims. That finding is also confirmed by comparing the Croatian indictment with the grounds of the Austrian final judgment and the investigations of the Klagenfurt Public Prosecutor’s Office in other criminal proceedings.

31 More specifically, the Austrian Government maintains that the purpose of the criminal proceedings conducted in Austria was to establish the criminal liability of GR and HS in relation to the economic loss suffered by Hypo Alpe Adria Bank by the grant of unsustainable loans, whereas the purpose of the criminal proceedings conducted in Croatia was to establish the criminal liability of GR and HR as regards the economic loss allegedly suffered by Skiper Hoteli through the purchase, at allegedly excessive prices, of immovable property and shares in companies owning immovable property. The criminal proceedings conducted in Austria could not possibly have concerned GR’s potential acts towards Skiper Hoteli, due to the lack of jurisdiction of the Austrian authorities in that respect, given that GR is a Croatian national and resident, and Skiper Hoteli is a company registered in Croatia.

32 In that regard, it must be borne in mind that, according to the Court’s settled case-law, in the context of the cooperation between the Court and the national courts provided for in Article 267 TFEU, it is solely for the national court, before which the dispute has been brought and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where questions submitted concern the interpretation of EU law, the Court is, in principle, bound to give a

ruling (judgment of 4 June 2020, *Kancelaria Medius*, C-495/19, EU:C:2020:431, paragraph 21 and the case-law cited).

33 It follows that questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining, the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of EU law that is sought is unrelated to the actual facts of the main action or its object, where the problem is hypothetical, or where the Court does not have before it the factual and legal material necessary to give a useful answer to the questions submitted to it (judgment of 4 June 2020, *Kancelaria Medius*, C-495/19, EU:C:2020:431, paragraph 22 and the case-law cited).

34 Furthermore, the Court must take into account, under the division of jurisdiction between the Courts of the European Union and the national courts, the factual and legislative context as set out in the order for reference of the questions referred for a preliminary ruling. Therefore, irrespective of the criticisms made by the Austrian Government of the findings of fact made by the referring court, the question referred must be examined on the basis of those findings (see, by analogy, judgment of 7 April 2022, *Caixabank*, C-385/20, EU:C:2022:278, paragraph 38 and the case-law cited).

35 In the present case, the referring court starts from the factual premiss that it cannot be ruled out that there may be an inextricable link in substance, space and time, in the case of GR and HS, between the facts cited in the enacting terms of the Croatian indictment, the facts cited in the enacting terms of the Austrian indictment, those contained in the operative part and the grounds of the Austrian final judgment and those in respect of which the preliminary investigation was conducted by the Klagenfurt Public Prosecutor's Office against, inter alia, GR and HS, and which were subsequently omitted from the Austrian indictment.

36 Furthermore, the referring court maintains that the question whether or not to take into account acts mentioned in the grounds of the Austrian final judgment and those in respect of which the preliminary investigation was conducted by the Klagenfurt Public Prosecutor's Office in respect of GR and HS, which were subsequently omitted from the Austrian indictment, is decisive in the examination of whether there is an 'inextricable link in substance, space and time' for the purposes of the application of Article 54 of the CISA. Therefore, the request for a preliminary ruling does not appear to be hypothetical.

37 It follows from the foregoing that the request for a preliminary ruling is admissible.

Substance

38 It should be recalled at the outset that the principle *ne bis in idem* is a fundamental principle of EU law which is now enshrined in Article 50 of the Charter (judgment of 28 October 2022, *Generalstaatsanwaltschaft München (Extradition and* ne bis in idem*)*, C-435/22 PPU, EU:C:2022:852, paragraph 64 and the case-law cited).

39 Furthermore, that principle, which is also enshrined in Article 54 of the CISA, derives from the constitutional traditions common to the Member States. It is therefore appropriate to interpret that article in the light of Article 50 of the Charter, Article 54 serving to ensure respect for the essence thereof (judgment of 28 October 2022, *Generalstaatsanwaltschaft München (Extradition and* ne bis in idem*)*, C-435/22 PPU, EU:C:2022:852, paragraph 65).

40 Therefore, it must be held that, by its question, the referring court asks, in essence, whether Article 54 of the CISA, read in the light of Article 50 of the Charter, must be interpreted as meaning that, when assessing whether the principle *ne bis in idem* has been complied with, only the facts cited in the enacting terms of the indictment drawn up by the competent authorities of another Member State and in the operative part of the final judgment delivered in that Member State are to be taken into consideration, or whether account must also be taken of all facts cited in the grounds of that judgment, including those that were the subject of the preliminary investigation, but which were not included in the indictment.

41 In the light of the doubts expressed by the referring court and set out in paragraphs 20 to 26 above, it is appropriate first to interpret the conditions laid down in Article 54 of the CISA, before then providing the referring court with guidance for its assessment in the context of the dispute in the main proceedings.

Article 54 of the CISA

42 The request for a preliminary ruling is based on the fact that, according to the referring court, under Croatian judicial practice, in order to assess whether the principle *ne bis in idem* is applicable, the Croatian courts may take into consideration only the facts set out in the enacting terms of procedural documents, such as orders to proceed with the judicial investigation, orders dismissing the proceedings, indictments and judgments. That court maintains that there is a possibility that the facts mentioned in the grounds of the procedural documents from another Member State, in this case the Republic of Austria, including those to which the investigation procedure related, but which were not included in the indictment, could lead it to conclude, in the case at issue in the main proceedings, that 'the same acts', within the meaning of Article 54 of the CISA, were involved.

43 According to the settled case-law of the Court, it is necessary, when interpreting a provision of EU law, to consider not only its wording but also its context and the objectives of the legislation of which it forms part (judgment of 28 October 2022, *Generalstaatsanwaltschaft München (Extradition and* ne bis in idem*)*, C-435/22 PPU, EU:C:2022:852, paragraph 67).

44 As is apparent from the wording of Article 54 of the CISA, no person may be prosecuted in a Member State for the same acts as those in respect of which, as regards that person, final judgment has been passed in another Member State, provided that, if a penalty has been imposed, it has been enforced, it is actually in the process of being enforced or it can no longer be enforced under the laws of the latter State.

45 Thus, 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 22 March 2022, *bpost*, C-117/20, EU:C:2022:202, paragraph 28).

46 In that regard, it should be noted, first of all, that the wording of Article 54 of the CISA does not lay down a condition relating to the factors to be taken into consideration in the examination of the question whether proceedings pending before a court of a Member State concern the same acts as those relating to earlier proceedings closed by a final decision in another Member State.

47 Thus, it cannot be inferred from the wording of that provision that, in the context of the assessment of the '*idem*' condition, account should be taken only of the facts set out in the enacting terms of national procedural documents and that it is not possible to take into consideration, for the

purposes of that assessment, facts mentioned in the grounds of the procedural documents from another Member State.

48 Next, that finding is supported by the context of that provision.

49 First, Article 50 of the Charter, in the light of which Article 54 of the CISA must be interpreted, provides that no one is to 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 European Union in accordance with the law. Therefore, Article 50 of the Charter similarly does not contain any specific indications as to the factors to be taken into account in the examination of the '*idem*' condition, with the result that consideration of the facts mentioned in the grounds of the procedural documents from another Member State cannot, from the outset, be ruled out in the context of such an examination.

50 Secondly, under Article 57(1) of the CISA, where a person is charged with an offence in a Member State and the competent authorities of that State have reason to believe that the accusation relates to the same acts as those in respect of which a final decision has been passed in another Member State, those authorities may, if they deem it necessary, request the relevant information from the competent authorities of the Member State in whose territory the decision was made. Paragraph 2 of that provision provides that the information requested shall be provided as soon as possible and shall be taken into consideration as regards further action to be taken in the proceedings under way.

51 In that regard, Article 57 of the CISA has put in place a cooperation mechanism which allows the competent authorities of the second Member State to request relevant legal information from the authorities of the first Member State, in order to clarify, for example, the precise nature of a decision adopted in the territory of the first Member State or the specific acts to which that decision relates (see, to that effect, judgment of 22 December 2008, *Turanský*, C-491/07, EU:C:2008:768, paragraph 37).

52 It must be held that that provision requires that that information be taken into consideration in the assessment of a possible breach of the principle *ne bis in idem*. As the Advocate General observed in point 42 of his Opinion, a national judicial practice that requires the national court to have regard only to the information provided in specific parts of procedural acts, in the present case in the enacting terms of those acts, to the exclusion of any other information which that court might receive from the authorities of the Member State that was requested in order to obtain relevant information, does not guarantee the effectiveness of Article 57 of the CISA.

53 Therefore, contrary to what Croatian judicial practice appears to provide, a national court, such as the referring court, cannot be required to take into consideration, in the context of the examination of the principle *ne bis in idem* set out in Article 54 of the CISA, only the facts mentioned in the enacting terms of procedural documents from another Member State.

54 Lastly, only an interpretation of Article 54 of the CISA to the effect that the national court of the second Member State must also take account of the facts mentioned in the grounds of those acts and any relevant information concerning the material facts covered by earlier criminal proceedings conducted in the first Member State and concluded by a final decision allows the subject matter and purpose of that provision to prevail over procedural or purely formal matters, which, after all, vary as between the Member States concerned, and to ensure that that article has proper effect (see, by analogy, judgment of 10 March 2005, *Miraglia*, C-469/03, EU:C:2005:156, paragraph 31).

55 That provision is intended to ensure, in the area of freedom, security and justice, that a person whose trial has been finally disposed of is not prosecuted in several Member States for the same acts on account of that person having exercised his or her right to freedom of movement, the aim being to ensure legal certainty – in the absence of harmonisation or approximation of the criminal laws of the Member States – through respect for decisions of public bodies which have become final (judgment of 29 June 2016, *Kossowski*, C-486/14, EU:C:2016:483, paragraph 44).

56 Article 54 of the CISA necessarily implies that the Member States have mutual trust in their respective criminal justice systems and 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 that the relevant competent authorities of the second Member State agree to take into account relevant legal information that they might receive from the first Member State (see, by analogy, judgment of 28 October 2022, *Generalstaatsanwaltschaft München (Extradition and* ne bis in idem*)*, C-435/22 PPU, EU:C:2022:852, paragraph 93).

57 However, that mutual trust can prosper only if the second Member State is in a position to satisfy itself, on the basis of the documents provided by the first Member State, that, first, the decision of the competent authorities of that first State does indeed constitute a final decision and, secondly, that the acts that are the subject of that decision may be characterised as 'the same acts', within the meaning of Article 54 of the CISA (see, by analogy, judgment of 29 June 2016, *Kossowski*, C-486/14, EU:C:2016:483, paragraph 52).

58 Therefore, it must be held that, when assessing whether the principle *ne bis in idem* laid down in Article 54 of the CISA has been complied with, the national court of the second Member State, such as the referring court, is required to take into consideration not only the facts mentioned in the enacting terms of the procedural acts communicated by a first Member State, but also the facts mentioned in the grounds for those acts and all relevant information concerning the material facts covered by earlier criminal proceedings conducted in the first Member State and concluded by a final decision.

*The '*bis*' condition and the '*idem*' condition*

59 In order to provide an answer that will be as useful as possible to the referring court, it is still necessary to assess, on the basis of the file before the Court and subject to the matters to be verified by that court, first, whether, in the context of the application of the principle *ne bis in idem*, there is, in the present case, as is apparent from the case-law referred to in paragraph 45 above, a prior final decision (the '*bis*' condition) and, secondly, whether the earlier decision and the subsequent proceedings or decision relate to the same acts (the '*idem*' condition).

60 As regards the '*bis*' condition, for a person to be regarded as someone whose trial has been 'finally disposed of' within the meaning of Article 54 of the CISA, in relation to the acts which he or she is alleged to have committed, it is necessary, in the first place, that further prosecution has been definitively barred (judgment of 29 June 2016, *Kossowski*, C-486/14, EU:C:2016:483, paragraph 34 and the case-law cited).

61 That first condition must be assessed on the basis of the law of the Member State in which the criminal-law decision in question was taken. A decision that does not, under the law of the Member State which instituted criminal proceedings against a person, definitively bar further prosecution at national level cannot, in principle, constitute a procedural obstacle to the opening or continuation of criminal proceedings in respect of the same acts against that person in another Member State

(judgment of 29 June 2016, *Kossowski*, C-486/14, EU:C:2016:483, paragraph 35 and the case-law cited).

62 In the present case, as regards the Austrian final judgment, according to the referring court, under Austrian law, such a decision has the force of *res judicata* and precludes further proceedings in respect of the same acts, which the Austrian Government did not deny either in its written observations or at the hearing before the Court. It follows that that judgment definitively bars, in that Member State, further prosecution against GR and HS, the latter having been acquitted of the charges that they instigated or contributed to the criminal offences alleged against former members of the management board of Hypo Alpe Adria Bank.

63 It is, however, for the referring court to ascertain, having recourse, if necessary, to the cooperation mechanism provided for in Article 57 of the CISA, whether that is indeed the effect of the Austrian final judgment.

64 As regards the decision of the Klagenfurt Public Prosecutor's Office to close in part, on the basis of Paragraph 190(2) of the Austrian Code of Criminal Procedure, on the ground of insufficient evidence, the investigation of which, in particular, GR and HS were the subject in respect of the prevention of breach of trust, it should be noted, first, that the request for a preliminary ruling does not specify the legal nature of that decision.

65 Secondly, it must be borne in mind that Article 54 of the CISA, the objective of which is to ensure that no one is prosecuted on the same facts in several Member States on account of his or her having exercised the right to freedom of movement, cannot play a useful role in bringing about the full attainment of that objective unless it also applies to decisions definitively discontinuing prosecutions in a Member State, even where such decisions are adopted without the involvement of a court and do not take the form of a judicial decision (judgment of 11 February 2003, *Gözütok and Brügge*, C-187/01 and C-385/01, EU:C:2003:87, paragraph 38).

66 In that regard, it is for the referring court to ascertain whether such a decision of the Klagenfurt Public Prosecutor's Office, adopted on the basis of Paragraph 190(2) of the Austrian Code of Criminal Procedure, definitively bars further prosecution in Austria, by having recourse, if necessary, to the cooperation mechanism provided for in Article 57 of the CISA.

67 In order to determine whether a decision of the public prosecutor's office to close the investigation in part on the ground of insufficient evidence, such as that at issue in the main proceedings, constitutes a decision finally disposing of the case against a person for the purposes of Article 54 of the CISA, it is necessary, in the second place, to be satisfied that that decision was given after a determination had been made as to the merits of the case (see, by analogy, judgment of 29 June 2016, *Kossowski*, C-486/14, EU:C:2016:483, paragraph 42 and the case-law cited).

68 In this respect, the Court has held that a decision of the judicial authorities of a Member State by which an accused person is definitively acquitted because of the inadequacy of the evidence must be considered to be based on such a determination (judgment of 5 June 2014, *M*, C-398/12, EU:C:2014:1057, paragraph 29 and the case-law cited).

69 In the present case, it is apparent from the request for a preliminary ruling that, in Austria, GR and HS were the subject of a preliminary investigation in respect of acts other than those that were ultimately taken into account in the Austrian indictment. In that regard, as is apparent from paragraph 24 above, the Klagenfurt Public Prosecutor's Office merely informed GR and HS that the investigation relating to the 'Skiper case' had been brought to an end, as far as they were concerned,

in accordance with Paragraph 190(2) of the Austrian Code of Criminal Procedure, as regards the offence of breach of trust referred to in Paragraph 153(1) and (2) of the Austrian Criminal Code, and that that offence was therefore not covered by the Austrian indictment, on account of insufficient evidence, in particular as regards the intention to cause harm, or the lack of sufficient concrete evidence of conduct covered by criminal law. Thus, the Klagenfurt Public Prosecutor's Office terminated that investigation on the basis of facts that are not specified in the operative part of the Austrian final judgment.

70 In that regard, in order for a decision of the public prosecutor's office to close in part the investigation due to insufficient evidence, taken following a judicial examination during which various items of evidence were collected and examined, to be considered to have been the subject of a determination as to the merits, that decision must contain a definitive assessment of the inadequacy of that evidence and exclude any possibility that the case might be reopened on the basis of the same body of evidence (see, to that effect, judgment of 5 June 2014, *M*, C-398/12, EU:C:2014:1057, paragraph 30). In the present case, in the light of the lack of information available to the Court in that regard, it is for the referring court to ascertain whether that is the case in the main proceedings.

71 As regards the '*idem*' condition, which must be examined in the light of the case-law referred to in paragraphs 38 and 39 above, it follows from the very wording of Article 50 of the Charter that that provision prohibits the same person from being tried or punished in criminal proceedings more than once for the same offence (judgment of 23 March 2023, *Generalstaatsanwaltschaft Bamberg (Reservation in relation to the principle* ne bis in idem*)*, C-365/21, EU:C:2023:236, paragraph 34 and the case-law cited).

72 In that regard, it must be noted that, according to the Court's settled case-law, the relevant criterion for the purposes of assessing the existence of the same offence, within the meaning of Article 50 of the Charter, is identity of the material facts, understood as the existence of a set of concrete circumstances which are inextricably linked together and which have resulted in the final acquittal or conviction of the person concerned. Therefore, that article prohibits the imposition, with respect to identical facts, of several criminal penalties as a result of different proceedings brought for those purposes (judgment of 23 March 2023, *Generalstaatsanwaltschaft Bamberg (Reservation in relation to the principle* ne bis in idem*)*, C-365/21, EU:C:2023:236, paragraph 35 and the case-law cited).

73 Moreover, it is also apparent from the case-law of the Court that the legal classification under national law of the facts and the legal interest protected are not relevant for the purposes of establishing the existence of the same offence, in so far as the scope of the protection conferred by Article 50 of the Charter cannot vary from one Member State to another (judgment of 23 March 2023, *Generalstaatsanwaltschaft Bamberg (Reservation in relation to the principle* ne bis in idem*)*, C-365/21, EU:C:2023:236, paragraph 36 and the case-law cited).

74 In that regard, it must be stated that the '*idem*' condition requires that the material facts be identical. Consequently, the principle *ne bis in idem* is not intended to be applied where the facts at issue are not identical, but merely similar (judgment of 23 March 2023, *Generalstaatsanwaltschaft Bamberg (Reservation in relation to the principle* ne bis in idem*)*, C-365/21, EU:C:2023:236, paragraph 37 and the case-law cited).

75 Identity of the material facts is understood to mean a set of concrete circumstances stemming from events which are, in essence, the same, in that they involve the same perpetrator and are inextricably linked together in time and space (judgment of 23 March 2023,

Generalstaatsanwaltschaft Bamberg (Reservation in relation to the principle ne bis in idem*)*, C-365/21, EU:C:2023:236, paragraph 38 and the case-law cited).

76 By contrast, if the material facts do not make up such a set, the mere fact that the court before which the second prosecution is brought finds that the alleged perpetrator of those acts acted with the same criminal intention does not suffice to indicate that there is a set of concrete circumstances which are inextricably linked together covered by the notion of 'same acts' within the meaning of Article 54 of the CISA (judgment of 18 July 2007, *Kraaijenbrink*, C-367/05, EU:C:2007:444, paragraph 29).

77 In the present case, first, it is apparent from the order for reference that the Croatian indictment concerns offences allegedly committed by GR and HS between 2004 and 2006. Secondly, the referring court states that the criminal investigation to which GR and HS were subject in Austria, which was closed by the Klagenfurt Public Prosecutor's Office, concerned material facts that took place during the period from 2002 to July 2005 and which are identical to those referred to in the Croatian indictment. Thus, that court submits that that investigation concerned in part acts that are the subject of the Croatian indictment, which is explained by the fact that the grant of the loan at issue in Austria predated the acts committed in Croatia. If that loan had not been obtained, it would not have been possible to purchase the immovable property and shares at issue in the main proceedings in Croatia.

78 The question referred is based on the premiss that the acts referred to in the Croatian indictment are the same as those which were the subject of the Austrian final judgment, in so far as it is also necessary to take into consideration the grounds for the procedural steps taken in Austria.

79 In that regard, it is for the referring court, which alone has jurisdiction to rule on the facts, to determine whether the acts which are the subject of the Croatian indictment are the same as those in respect of which final judgment has been passed in Austria. That being so, the Court may provide that court with elements of interpretation of EU law in the context of the assessment of the identity of those acts (see, by analogy, judgment of 23 March 2023, *Generalstaatsanwaltschaft Bamberg (Reservation in relation to the principle* ne bis in idem*)*, C-365/21, EU:C:2023:236, paragraph 39 and the case-law cited).

80 In that regard, first, it is apparent from paragraph 58 above that the referring court is required to take into consideration, when examining the '*idem*' condition, not only the facts mentioned in the enacting terms of the procedural acts communicated by a first Member State, but also the facts mentioned in the grounds for those acts as well as all relevant information concerning the material facts covered by earlier criminal proceedings conducted in the first Member State and closed by a final decision.

81 Secondly, the principle *ne bis in idem* cannot cover any offences which, although committed during the same period as those which were the subject of a final decision handed down in another Member State, concern material facts other than those which were the subject of that decision (see, by analogy, judgment of 28 October 2022, *Generalstaatsanwaltschaft München (Extradition and* ne bis in idem*)*, C-435/22 PPU, EU:C:2022:852, paragraph 135 and the case-law cited).

82 In that regard, it is for the referring court to ascertain, on the basis of an assessment of all the relevant circumstances, whether the Austrian final judgment and any final decision of the Klagenfurt Public Prosecutor's Office to close the investigation concerning the 'Skiper case' related, first, to acts amounting to economic loss allegedly caused by GR and HS to Skiper Hoteli as

a result of the acquisition of land at increased prices and, secondly, to the same infringement period as that covered by the Croatian indictment.

83 If, following that assessment, that is not the case, that court should find that the proceedings before it do not relate to the same acts as those that gave rise to the Austrian final judgment and to any final decision of the Klagenfurt Public Prosecutor's Office, with the result that the principle *ne bis in idem*, within the meaning of Article 54 of the CISA, read in the light of Article 50 of the Charter, does not preclude further prosecution.

84 Conversely, if the referring court were to consider that the Austrian final judgment and any final decision of the Klagenfurt Public Prosecutor's Office found there to be, and penalised or acquitted GR and HS for, acts identical to those at issue in the Croatian criminal proceedings, that court would have to find that the proceedings before it relate to the same acts as those giving rise to that final judgment and any final decision. Such a duplication of proceedings and, as the case may be, penalties would be contrary to the principle *ne bis in idem*, within the meaning of Article 54 of the CISA, read in the light of Article 50 of the Charter.

85 In the light of the foregoing considerations, the answer to the question referred is that Article 54 of the CISA, read in the light of Article 50 of the Charter, must be interpreted as meaning that, when assessing whether the principle *ne bis in idem* has been complied with, it is necessary to take into consideration not only the facts cited in the enacting terms of the indictment drawn up by the competent authorities of another Member State and in the operative part of the final judgment delivered in that Member State, but also the facts cited in the grounds of that judgment, including those that were the subject of the preliminary investigation, but which were not included in the indictment, and all relevant information concerning the material facts covered by previous criminal proceedings conducted in that other Member State and concluded by a final decision.

Costs

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

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

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, which 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, when assessing whether the principle *ne bis in idem* has been complied with, it is necessary to take into consideration not only the facts cited in the enacting terms of the indictment drawn up by the competent authorities of another Member State and in the operative part of the final judgment delivered in that Member State, but also the facts cited in the grounds of that judgment, including those that were the subject of the preliminary investigation, but which were not included in the indictment, and all relevant information concerning the material facts covered by previous criminal proceedings conducted in that other Member State and concluded by a final decision.

[Signatures]

* Language of the case: Croatian.