Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

27 May 2014*

(Reference for a preliminary ruling — Urgent preliminary ruling procedure — Police and judicial cooperation in criminal matters — Charter of Fundamental Rights of the European Union — Articles 50 and 52 — Ne bis in idem principle — Convention Implementing the Schengen Agreement — Article 54 — Penalty which 'has been enforced' or which is 'actually in the process of being enforced')

In Case C-129/14 PPU,

REQUEST for a preliminary ruling under Article 267 TFEU from the Oberlandesgericht Nürnberg (Germany), made by decision of 19 March 2014, received at the Court on 20 March 2014, in the criminal proceedings against

Zoran Spasic,

THE COURT (Grand Chamber),

composed of V. Skouris, President, K. Lenaerts, Vice-president, R. Silva de Lapuerta, M. Ilešič, L. Bay Larsen, M. Safjan, C.G. Fernlund, Presidents of Chambers, A. Ó Caoimh, C. Toader (Rapporteur), D. Šváby, E. Jarašiūnas, S. Rodin and F. Biltgen, Judges,

Advocate General: N. Jääskinen,

Registrar: I. Illéssy, Administrator,

having regard to the request of the referring court of 19 March 2014, received at the Court on 20 March 2014, that the reference for a preliminary ruling be dealt with under the urgent procedure pursuant to Article 107 of the Rules of Procedure of the Court,

having regard to the decision of 31 March 2014 of the Third Chamber to grant that request,

having regard to the written procedure and further to the hearing on 28 April 2014,

after considering the observations submitted on behalf of:

— Mr Spasic, by A. Schwarzer, Rechtsanwalt,

— the German government, by T. Henze and J. Kemper, acting as Agents,

— the French government, by D. Colas and F.-X. Bréchot, acting as Agents,

— the Italian government, by G. Palmieri, as Agent, and by L. Ventrella, avvocato dello Stato,

* Language of the case: German.

— the Council of the European Union, by P. Plaza and Z. Kupčová, acting as Agents,

— the European Commission, by W. Bogensberger and R. Troosters, acting as Agents,

after hearing the Advocate General,

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, which was signed on 19 June 1990 and came into force on 26 March 1995 (OJ 2000 L 239, p. 19; 'CISA'), in relation to the application of the *ne bis in idem* principle, and the compatibility of that provision with Article 50 of the Charter of Fundamental Rights of the European Union ('the Charter').

2 The request has been made in the context of criminal proceedings brought against Mr Spasic in Germany in relation to fraud offences committed in Italy.

Legal context

EU law

The Charter

3 Article 50 of the Charter, entitled 'Right not to be tried or punished twice in criminal proceedings for the same criminal offence', is contained in Title VI of that Charter, entitled 'Justice'. It provides 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.'

4 Under the third subparagraph of Article 6(1) TEU, the rights, freedoms and principles set out in the Charter are to be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, which set out the sources of those provisions.

5 Article 52 of the Charter, entitled 'Scope … of rights', which is contained in Title VII 'General provisions', 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.

…

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.

…

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.'

6 The explanations relating to the charter of fundamental rights (OJ 2007 C 303, p. 17, 'the explanations relating to the Charter') state, as regards Article 50 of the Charter, that the *ne 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 EU law. Furthermore, those explanations regarding Article 50 of the Charter refer expressly to Articles 54 to 58 CISA, indicating that the very limited exceptions in those articles permitting the Member States to derogate from the *ne bis in idem* rule are covered by the horizontal clause in Article 52(1) of the Charter concerning limitations.

The CISA

7 The CISA was concluded in order to ensure the application 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).

8 Article 54 CISA is contained in Chapter 3 of that convention, 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.'

The Protocol integrating the Schengen *acquis* into the framework of the European Union

9 The CISA was integrated into EU law by the Protocol 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 by the treaty of Amsterdam (OJ 1997 C 340, p. 93, 'the Schengen protocol'), as part of 'the Schengen *acquis*', as defined in the annex to that protocol. That protocol authorised thirteen Member States to establish closer cooperation among themselves within the scope of the Schengen *acquis*.

10 Under Article 1 of the Schengen protocol, the Italian Republic also became a contracting State of the CISA.

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

'…

The Council [of the European Union] … 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 Union] 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.'

12 Council Decision 1999/436/EC of 20 May 1999 determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the Schengen *acquis* (OJ 1999 L 176, p. 17) was adopted under Article 2(1) of the Schengen protocol. It can be seen from Article 2 of Decision 1999/436 and from Annex A thereto that the Council designated Article 34 EU and Article 31 EU as the legal bases for Articles 54 to 58 CISA.

Protocol (No 19) on the Schengen *acquis* integrated into the framework of the European Union

13 Protocol (No 19) on the Schengen *acquis* integrated into the framework of the European Union (OJ 2008 C 115, p. 290), annexed to the TFEU, authorised 25 Member States, within the institutional and legal framework of the European Union, to implement closer cooperation among themselves in areas covered by the Schengen *acquis*. Accordingly, under Article 2 of that protocol:

'The Schengen *acquis* shall apply to the Member States referred to in Article 1, without prejudice to Article 3 of the Act of Accession of 16 April 2003 and Article 4 of the Act of Accession of 25 April 2005. The Council will substitute itself for the Executive Committee established by the Schengen agreements.'

Protocol (No 36) on transitional provisions

14 Article 9 of Protocol (No 36) on transitional provisions (OJ 2008 C 115, p. 322), annexed to the TFEU, reads as follows:

'The legal effects of the acts of the institutions, bodies, offices and agencies of the Union adopted on the basis of the [TEU] prior to the entry into force of the Treaty of Lisbon shall be preserved until those acts are repealed, annulled or amended in implementation of the Treaties. The same shall apply to agreements concluded between Member States on the basis of the [TEU].'

15 Article 10(1) and (3) of that protocol provide:

'1. As a transitional measure, and with respect to acts of the Union in the field of police cooperation and judicial cooperation in criminal matters which have been adopted before the entry into force of the Treaty of Lisbon, the powers of the institutions shall be the following at the date of entry into force of that Treaty: the powers of the Commission under Article 258 [TFEU] shall not be applicable and the powers of the Court of Justice of the European Union under Title VI [TEU], in the version in force before the entry into force of the Treaty of Lisbon, shall remain the same, including where they have been accepted under Article 35(2) [TEU].

…

3. In any case, the transitional measure mentioned in paragraph 1 shall cease to have effect five years after the date of entry into force of the Treaty of Lisbon.

…'

Framework Decision 2002/584/JHA

16 Article 1(1) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1), as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 (OJ 2009 L 81, p. 24; 'Framework Decision 2002/584'), provides:

'The European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.'

17 Under Article 2(1) of Framework Decision 2002/584, a European arrest warrant may be issued, inter alia, where a custodial sentence has been passed or a detention order has been made, for sentences of at least four months.

18 The execution of a European Arrest Warrant may be refused on the grounds set out in Articles 3 and 4 of Framework Decision 2002/584.

Framework Decision 2005/214/JHA

19 Recital 2 in the preamble to 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), as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 (OJ 2009 L 81, p. 24, 'Framework Decision 2005/214'), states that: '[t]he principle of mutual recognition should apply to financial penalties imposed by judicial or administrative authorities for the purpose of facilitating the enforcement of such penalties in a Member State other than the State in which the penalties are imposed'.

Framework Decision 2008/909/JHA

20 Article 3, entitled 'Purpose and scope' of Council Framework Decision 2008/909/JHA of 27 November 2008, on the application of the principle of mutual recognition to judgments 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) provides:

'1. The purpose of this Framework Decision is to establish the rules under which a Member State, with a view to facilitating the social rehabilitation of the sentenced person, is to recognise a judgment and enforce the sentence.

2. This Framework Decision shall apply where the sentenced person is in the issuing State or in the executing State.

...'

Framework Decision 2009/948/JHA

21 Recital 3 in the preamble to Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings (OJ 2009 L 328, p. 42) states:

'The measures provided for in this Framework Decision should aim to prevent situations where the same person is subject to parallel criminal proceedings in different Member States in respect of the same facts, which might lead to the final disposal of those proceedings in two or more Member States. The Framework Decision therefore seeks to prevent an infringement of the principle of '*ne bis in idem*', as set out in Article 54 [CISA] …'

22 Under Article 5(1) of that framework decision, when a competent authority of a Member State has reasonable grounds to believe that parallel proceedings are being conducted in another Member State, it is to contact the competent authority of that other Member State to confirm the existence of such parallel proceedings, with a view to initiating direct consultations.

National law

German law

23 Under Section 7(1) of the German Criminal Code (Strafgesetzbuch), entitled 'Applicability to offences committed abroad in other cases':

'German criminal law shall apply to offences committed abroad against a German, if the act is also a criminal offence at the place of its commission or if that place is not subject to any criminal jurisdiction.'

24 Section 263 of the Criminal Code, entitled 'Fraud', provides as follows:

'(1) Whosoever, with intent to obtain for himself or a third party an unlawful material benefit, damages the assets of another person by inducing or maintaining an error through a representation of facts that are false or a distortion or suppression of facts that are true shall be liable to imprisonment not exceeding five years or a fine.

…

(3) In particularly serious cases the penalty shall be imprisonment from six months to ten years.

1. A particularly serious case typically occurs if the offender acts on a commercial basis or as a member of a gang …'

25 Under Article 1 of the Law on references for a preliminary ruling to the Court of Justice of the European Communities in the area of police and judicial cooperation in criminal matters in accordance with Article 35 EU (Gesetz betreffend die Anrufung des Gerichtshofs der Europäischen Gemeinschaften im Wege des Vorabentscheidungsverfahrens auf dem Gebiet der polizeilichen Zusammenarbeit und der justitiellen Zusammenarbeit in Strafsachen nach Art. 35 des EU-Vertrages) of 6 August 1998 (BGBl. 1998 I, p. 2035), any German court may make a request for a preliminary ruling to the Court in the area referred to in Article 35 EU, concerning either the validity and interpretation of framework decisions, the interpretation of conventions, or the validity and interpretation of the measures implementing conventions in that area.

Italian law

26 Article 640(1) of the Italian Criminal Code, entitled 'Fraud', provides:

'Whosoever, by misleading someone through fraudulent conduct, obtains an unjust profit for himself or a third party to the detriment of another, shall be punished by imprisonment of six months to three years and a fine of between EUR 51 and EUR 1 032.

…'

27 Article 444(1) of the Code of Criminal Procedure provides:

'The accused and the public prosecutor may ask the court to apply an alternative sanction, of a kind and extent appropriate, or a financial penalty, reduced by up to one third, or a sentence of imprisonment which, taking into account the circumstances and reduced by up to one third, does not exceed five years, alone or accompanied by a financial penalty.'

28 Under Article 656(5) of the Code of Criminal Procedure, the public prosecutor's office is to suspend the custodial sentence if it is for a period of less than three years. If the convicted person does not request an alternative sanction to imprisonment, the public prosecutor's office is to revoke the suspension, in accordance with Article 656(8) of that code.

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

29 It can be seen from the order for reference and from the file submitted to the Court that Mr Spasic, a Serbian national, is being prosecuted by the Staatsanwaltschaft Regensburg (public prosecutor's office, Regensburg, Germany) for organised fraud committed on 20 March 2009 in Milan (Italy). The victim, Wolfgang Soller, a German national, after having been contacted by an accomplice of Mr Spasic, delivered the sum of EUR 40 000 in lower denomination banknotes to Mr Spasic in return for EUR 500 banknotes which were subsequently found to be counterfeit.

30 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 other offences perpetrated in the same manner, Mr Spasic was arrested in Hungary on 8 October 2009 and was then surrendered to the Austrian authorities. He was convicted and sentenced in that Member State on 26 August 2010 to a custodial sentence of seven years and six months. That decision has become final.

31 On 25 February 2010, the Amtsgericht Regensburg (Local court, Regensburg, Germany) issued a national arrest warrant concerning the fraud offences committed in Milan, which served as the basis for the issue, by the Staatsanwaltschaft Regensburg (public prosecutor's office, Regensburg), of a European Arrest Warrant on 5 March 2010.

32 The Tribunale ordinario di Milano (Milan District Court, Italy), by a decision of 18 June 2012, which became final on 7 July 2012, sentenced Mr Spasic, in absentia, to a custodial sentence and a fine of EUR 800 euros, for the fraudulent offences committed on 20 March 2009 in Milan. It can be seen from the decision of the Tribunale ordinario di Milano that, since he was detained in Austria, Mr Spasic submitted written confessions, in view of which the national court applied Article 640 of the Criminal Code and Article 444 of the Code of Criminal Procedure. The public prosecutor at the Tribunale ordinario di Milano suspended execution of the sentence under Article 656(5) of the Code of Criminal Procedure.

33 By decision of 5 January 2013, that public prosecutor revoked the suspension of execution of the sentence and ordered the imprisonment of Mr Spasic in order that he serve his custodial sentence and pay the fine of EUR 800.

34 On 20 November 2013, the Amtsgericht Regensburg issued a new and expanded national arrest warrant for Mr Spasic, section I of which refers to the organised fraud offences committed in Milan on 20 March 2009 against Mr Soller, which had already been referred to in the national arrest warrant of 25 February 2010. Section II of the warrant refers to other offences.

35 Mr Spasic has been remanded in custody in Germany since 6 December 2013, on which date, in execution of the European Arrest Warrant of 5 March 2010, the Austrian authorities surrendered Mr Spasic to the German authorities.

36 Mr Spasic brought an action before the Amtsgericht 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 on 20 March 2009, since he had already received a final and binding sentence from the Tribunale ordinario di Milano in respect of those acts.

37 By order of 13 January 2014, the Amtsgericht Regensburg dismissed his action and referred the case to the Landgericht Regensburg (Regional Court, Regensburg). On 23 January 2014, Mr Spasic paid, by bank transfer, the fine of EUR 800 imposed by the Tribunale ordinario di Milano and produced proof of that payment before the Landgericht Regensburg.

38 By decision of 28 January 2014, the Landgericht Regensburg upheld the order of the Amtsgericht Regensburg, holding that Mr Spasic's continued remand in custody could validly be based on the facts described in section I of the arrest warrant of 20 November 2013, namely those committed in Milan on 20 March 2009 and referred to in the decision of the Tribunale ordinario di Milano.

39 Mr Spasic brought an appeal before the Oberlandesgericht Nürnberg (Higher Regional Court, Nuremberg) against the decision of the Landgericht Regensburg. He claims, in essence, that the restrictive provisions of Article 54 CISA cannot lawfully restrict the scope of Article 50 of the Charter and that, since he has paid the fine of EUR 800, he should be released.

40 According to the referring court — which indicates that it refers in that respect to the settled case-law of the Bundesgerichtshof (Federal Supreme Court) — Article 54 CISA constitutes a limitation, within the meaning of Article 52(1) of the Charter. Therefore, the *ne bis in idem* principle, enshrined in Article 50 of the Charter, applies under the conditions set out in Article 54 CISA. The referring court notes, however, that the Court has never ruled on the compatibility of Article 54 CISA with Article 50 of the Charter or on the effect of the performance, by the person sentenced by the same decision to a term of imprisonment and to the payment of a fine, of the latter penalty only.

41 In those circumstances, the Oberlandesgericht Nürnberg decided to stay proceedings and to refer the following questions to the Court of Justice 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?'

The jurisdiction of the Court

42 It can be seen from the order for reference that the request for a preliminary ruling is based on Article 267 TFEU, whereas the questions referred concern the CISA, a convention adopted under Title VI of the EU treaty in the version applicable prior to the entry into force of the Treaty of Lisbon.

43 It is settled case-law, in that respect, that the system laid down in Article 267 TFEU applies to the Court's jurisdiction to give preliminary rulings under Article 35 EU, itself applicable until 1 December 2014, subject to the conditions laid down by that provision (see, to that effect, Case C-296/08 PPU *Santesteban Goicoechea* EU:C:2008:457, paragraph 36).

44 The Federal Republic of Germany made a declaration under Article 35(2) EU accepting the jurisdiction of the Court of Justice to give preliminary rulings in accordance with the arrangements laid down in Article 35(3)(b) EU, as can be seen 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).

45 In those circumstances, the fact that the order for reference does not mention Article 35 EU but rather refers to Article 267 TFEU cannot of itself make the reference for a preliminary ruling inadmissible (see, to that effect, *Santesteban Goicoechea* EU:C:2008:457, paragraph 38).

46 It follows from the foregoing that the Court has jurisdiction to answer the questions referred.

The urgent procedure

47 The Oberlandesgericht Nürnberg requested that the present reference for a preliminary ruling be dealt with under the urgent procedure pursuant to Article 23a of the Statute of the Court of Justice of the European Union and Article 107 of its Rules of Procedure.

48 As a ground for that request, the referring court indicated that whether Mr Spasic's detention is lawful depends on the Court's ruling on the questions referred.

49 By decision of 31 March 2014, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, the Court decided, on the basis of Article 267(4) TFEU and Article 107 of its Rules of Procedure, to grant the referring court's request that the preliminary ruling be dealt with under the urgent procedure.

Consideration of the questions referred

50 As a preliminary, it must be pointed out that although Article 54 CISA makes the application of the *ne bis in idem* principle subject to the condition that the penalty can no longer be executed, that condition is not applicable in the main proceedings, since it can be seen from evidence in the file submitted to the Court and confirmed at the hearing that, under Italian law, the custodial sentence imposed on Mr Spasic in that Member State is still executable.

The first question

51 By its first question, the referring court asks, in essence, whether Article 54 CISA, which subjects the application of the *ne bis in idem* principle to the condition that, upon conviction and sentencing, the penalty imposed 'has been enforced', is 'actually in the process of being enforced' or can no longer be enforced ('the execution condition'), is compatible with Article 50 of the Charter, in which that principle is enshrined.

52 In that respect, it must be noted that the wording of Article 54 CISA differs from that of Article 50 of the Charter in that it makes the application of the *ne bis in idem* principle subject to the execution condition.

53 The Court has recognised that the application of the *ne bis in idem* principle laid down in Article 50 of the Charter to criminal prosecutions such as those which are the subject of the main proceedings presupposes that the measures which have already been adopted against the accused by means of a decision that has become final are of a criminal nature (Case C-617/10 *Åkerberg Fransson* EU:C:2013:105, paragraph 33), which is not disputed in the present case.

54 In that context, in order to reply to the first question referred, it must first of all be noted that the explanations relating to the Charter as regards Article 50 — which, in accordance with the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter, were drawn up in order to provide guidance in the interpretation of the Charter and must be duly taken into consideration both by the Courts of the European Union and by the courts of the Member States — expressly mention Article 54 CISA among the provisions covered by the horizontal clause in Article 52(1) of the Charter.

55 It follows that the additional condition laid down in Article 54 CISA constitutes a limitation of the *ne bis in idem* principle that is compatible with Article 50 of the Charter, since that limitation is covered by the explanations relating to the Charter as regards Article 50 which are directly referred to in the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter. In any event and irrespective of the wording used in the explanations relating to the Charter as regards Article 50, the execution condition which subjects the more extensive protection offered by Article 50 to an additional condition constitutes a limitation of the right enshrined in that article within the meaning of Article 52 of the Charter.

56 In accordance with the first sentence of Article 52(1) of the Charter, any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law and respect the essence of those rights and freedoms. In accordance with the second sentence of that paragraph, subject to the principle of proportionality, limitations may be made to those rights and freedoms 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.

57 In the present case, it is undisputed that the limitation of the *ne bis in idem* principle must be considered as being provided for by law, within the meaning of Article 52(1) of the Charter, since it arises from Article 54 CISA.

58 As regards the essence of that principle, it must be noted that, as the French and German governments pointed out in their observations, the execution condition laid down in Article 54 CISA does not call into question the *ne bis in idem* principle as such. That condition is intended, inter alia, to avoid a situation in which a person definitively convicted and sentenced in one Contracting State can no longer be prosecuted for the same acts in another Contracting State and therefore ultimately remains unpunished if the first State did not execute the sentence imposed (see, to that effect, C-288/05 *Kretzinger* EU:C:2007:441, paragraph 51).

59 It follows that a provision such as Article 54 CISA must be regarded as respecting the essence of the *ne bis in idem* principle enshrined in Article 50 of the Charter.

60 Nevertheless, it must be ascertained whether the restriction entailed by the execution condition referred to in Article 54 CISA is proportionate. It is therefore necessary to examine, first of all, whether that condition can be regarded as fulfilling an objective of general interest, within the meaning of Article 52(1) of the Charter and, if so, whether it respects the principle of proportionality within the meaning of that provision.

61 In that respect, it must first be noted that, according to Article 3(2) TEU, the European Union offers its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, as well as the prevention and combating of crime.

62 As can be seen from Article 67(3) TFEU, in order to achieve its objective of constituting an area of freedom, security and justice, the European Union endeavours to ensure a high level of security through measures to prevent and combat crime, and through measures for coordination and cooperation between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws.

63 The execution condition laid down in Article 54 CISA is to be seen in that context since it is intended, as noted in paragraph 58 of the present judgment, to prevent, in the area of freedom, security and justice, the impunity of persons definitively convicted and sentenced in an EU Member State.

64 It cannot be contested that the execution condition laid down in Article 54 CISA is appropriate for attaining the objective pursued. By allowing, in cases of non-execution of the sentence imposed, the authorities of one Contracting State to prosecute a person definitively convicted and sentenced by another Contracting State on the basis of the same acts, the risk that the person concerned would enjoy impunity by virtue of his leaving the territory of the State in which he was sentenced is avoided.

65 As regards whether the execution condition is necessary to meet the objective of general interest of preventing, in the area of freedom, security and justice, the impunity of persons definitively convicted and sentenced in one EU Member State, it must be noted that, as the Commission pointed out in its written observations and at the hearing, there are numerous instruments at the EU level intended to facilitate cooperation between the Member States in criminal law matters.

66 In that respect, regard must be had to Framework Decision 2009/948, Article 5 of which requires the authorities of different Member States claiming concurrent jurisdiction to bring criminal proceedings in relation to the same acts to initiate direct consultations in order to reach a consensus on effective solutions aimed at avoiding the adverse consequences arising from such parallel proceedings.

67 Where appropriate, such direct consultations may lead, on the basis of Framework Decision 2002/584, to the issue of a European Arrest Warrant by the authorities of the Member State in which the court which delivered a final decision on sentencing is located, for the purpose of execution of the penalties imposed. Alternatively, those consultations may lead, on the basis of the Framework Decisions 2005/214 and 2008/909, to the penalties imposed by a criminal court of one Member State being executed in another Member State (see, on the interpretation of the Framework Decision 2005/214, Case C-60/12 *Baláž* EU:C:2013:733).

68 However, such instruments of mutual assistance do not lay down an execution condition similar to that of Article 54 CISA and, accordingly, are not capable of fully achieving the objective pursued.

69 While it is true that those mechanisms are capable of facilitating the execution of decisions within the European Union, their use is nevertheless subject to various conditions and depends, in the end, on a decision of the Member State in which the court that delivered a decision on a definitive sentence is located, since that Member State is not obliged under EU law to ensure the effective execution of the penalties arising from that sentence. The options made available to that Member State by those Framework decisions cannot ensure that, in the area of freedom, security and justice, persons definitively convicted and sentenced in the European Union will not enjoy impunity if the State which imposed the first sentence does not execute the penalties imposed.

70 Moreover, although Framework Decision 2008/909 envisages the execution of a custodial sentence in a Member State other than that in which the court which imposed the sentence is located, it must be pointed out that, under Article 4 thereof, that option arises only where the sentenced person has consented and the sentencing State has satisfied itself that the execution of the sentence by the executing State will serve the purpose of facilitating the social rehabilitation of the sentenced person. It follows that the main aim of the system established by that framework decision is not to prevent the impunity of persons definitively convicted and sentenced in the European Union and it is not capable of ensuring the full realisation of that aim.

71 Furthermore, it must be pointed out that the execution condition of the CISA implies that, in the event that the particular circumstances of the case and the attitude of the first sentencing State have led to a situation in which the penalty imposed has been enforced or is actually in the process of being enforced — as the case may be through the use of the instruments provided by EU law to facilitate the execution of sentences — a person definitively convicted and sentenced by a Member State can no longer be prosecuted for the same acts in another Member State. Therefore, in the system established by Article 54 CISA, such prosecutions would take place only in cases where the system currently provided by EU law was — for whatever reason — not sufficient to prevent the impunity of persons definitively convicted and sentenced in the European Union.

72 It follows that the execution condition laid down in Article 54 CISA does not go beyond what is necessary to prevent, in a cross-border context, the impunity of persons definitively convicted and sentenced in the European Union.

73 However, in the application *in concreto* of the execution condition laid down in Article 54 CISA in a given case, the national courts may — on the basis of Article 4(3) TEU and the legal instruments of European Union secondary legislation in the area of criminal law referred to by the Commission — contact each other and initiate consultations in order to verify whether the Member State which imposed the first sentence really intends to execute the penalties imposed.

74 Having regard to the foregoing, the answer to the first question is that Article 54 CISA, which makes the application of the *ne bis in idem* principle subject to the condition that, upon conviction and sentencing, the penalty imposed 'has been enforced' or is 'actually in the process of being enforced', is compatible with Article 50 of the Charter, in which that principle is enshrined.

The second question

75 By its second question, the referring court asks, in essence, whether Article 54 CISA must be interpreted as meaning that the mere payment of a fine by a person sentenced by the self-same decision of a court of another Member State to a custodial sentence that has not been served is sufficient to consider that the penalty 'has been enforced' or is 'actually in the process of being enforced' within the meaning of that provision.

76 In order to answer that question, it must first be noted that the substantive and procedural criminal laws of the Member States have not been harmonised at EU level.

77 The *ne bis in idem* principle set out in Article 54 CISA is intended not only to prevent, in the area of freedom, security and justice, the impunity of persons definitively convicted and sentenced in the European Union but also to ensure legal certainty through respect for decisions of public bodies which have become final, in the absence of harmonisation or approximation of the criminal laws of the Member States.

78 In the context of the main proceedings, as the Italian government confirmed at the hearing, Mr Spasic was sentenced to two principal penalties: a custodial sentence and a fine.

79 Even in the absence of harmonisation of the criminal laws of the Member States, the need for uniform application of EU law requires, according to settled case-law, that a provision which does not make reference to the law of the Member States must be given an autonomous and uniform interpretation throughout the European Union, having regard to the context of the provision of which it forms part and the objective pursued (see, to that effect, Case C-436/04 *van Esbroeck* EU:C:2006:165, paragraph 35, Case C-261/09 *Mantello* EU:C:2010:683, paragraph 38, and Case C-60/12 *Baláž* EU:C:2013:733, point 26).

80 Although Article 54 CISA lays down the condition, using the singular, that the 'penalty … has been enforced', that condition clearly covers the situation where two principal punishments have been imposed, such as those at issue in the main proceedings, namely a custodial sentence and a fine.

81 A different interpretation would render the *ne bis in idem* principle set out in Article 54 CISA meaningless and would undermine the effective application of that article.

82 It must be concluded that, since one of the two penalties imposed has not been 'enforced', within the meaning of Article 54 CISA, that condition cannot be regarded as having been fulfilled.

83 As regards the question whether the situation at issue in the main proceedings fulfils the condition, also laid down in Article 54 CISA, that the *ne bis in idem* principle is applicable if the penalty is 'actually in the process of being enforced', it is not disputed that Mr Spasic has not even begun to serve his custodial sentence in Italy (see, to that effect, *Kretzinger* EU:C:2007:441, paragraph 63).

84 As regards the two principal punishments, it also cannot be considered that, as a result of the payment of the fine, the penalty is 'actually in the process of being enforced', within the meaning of Article 54 CISA.

85 In view of the foregoing, the answer to the second question is that Article 54 CISA must be interpreted as meaning that the mere payment of a fine by a person sentenced by the self-same decision of a court of another Member State to a custodial sentence that has not been served is not sufficient to consider that the penalty 'has been enforced' or is 'actually in the process of being enforced' within the meaning of that provision.

Costs

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

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

1. **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 on 19 June 1990 and entered into force on 26 March 1995, which makes the application of the *ne bis in idem* principle subject to the condition that, upon conviction and sentencing, the penalty imposed 'has been enforced' or is 'actually in the process of being enforced', is compatible with Article 50 of the Charter of Fundamental Rights of the European Union, in which that principle is enshrined.

2. **Article 54 of that convention must be interpreted as meaning that the mere payment of a fine by a person sentenced by the self-same decision of a court of another Member State to a custodial sentence that has not been served is not sufficient to consider that the penalty 'has been enforced' or is 'actually in the process of being enforced' within the meaning of that provision.**

[Signatures]