Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 17 June 2021 [1]

Case C-203/20

AB and Others (Revocation of an amnesty)

(Request for a preliminary ruling from the Okresný súd Bratislava III (District Court, Bratislava III, Slovakia))

(Reference for a preliminary ruling – Judicial cooperation in criminal matters – European arrest warrant – Framework Decision 2002/584/JHA – *Ne bis in idem* principle – Discontinuance of proceedings on account of an amnesty – Revocation of the amnesty)

I. Introduction

1. The referring court intends to issue a European arrest warrant in respect of a Slovak national on the basis of Framework Decision 2002/584/JHA. [2] However, the underlying criminal proceedings were initially discontinued on account of an amnesty and were reopened only after that amnesty had been revoked.

2. The key question now is whether the *ne bis in idem* principle under Article 50 of the Charter of Fundamental Rights of the European Union ('the Charter') precludes the issuance of the European arrest warrant.

II. Legal background

A. European Convention on Human Rights

3. Article 4 of Protocol No 7 to the European Convention on Human Rights ('ECHR'), entitled 'Right not to be tried or punished twice', provides as follows:

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

[1] Original language: German.

[2] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1), as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 (OJ 2009 L 81, p. 24).

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

3. No derogation from this article shall be made under Article 15 of the Convention.'

B. EU law

1. The Charter

4. The *ne bis in idem* principle is enshrined in Article 50 of the Charter:

'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.'

5. Article 51 of the Charter governs its field of application:

'1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.

2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.'

2. Framework Decision 2002/584

6. Article 3 of Framework Decision 2002/584 contains grounds for refusing to execute a European arrest warrant:

'The judicial authority of the Member State of execution (hereinafter "executing judicial authority") shall refuse to execute the European arrest warrant in the following cases:

1. if the offence on which the arrest warrant is based is covered by amnesty in the executing Member State, where that State had jurisdiction to prosecute the offence under its own criminal law;

2. if the executing judicial authority is informed that the requested person has been finally judged by a Member State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State;

3. …'

7. Article 8(1) of that framework decision requires certain information to be contained in a European arrest warrant:

'The European arrest warrant shall contain the following information set out in accordance with the form contained in the Annex:

…

(c) evidence of an enforceable judgment, an arrest warrant or any other enforceable judicial decision having the same effect, coming within the scope of Articles 1 and 2;

…'

3. Directive 2012/13/EU

8. The legal basis for Directive 2012/13/EU[3] is Article 82(2) TFEU. Recital 9 states the following in that regard:

'[Article 82(2) TFEU] provides for the establishment of minimum rules applicable in the Member States so as to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension. That Article refers to "the rights of individuals in criminal procedure" as one of the areas in which minimum rules may be established.'

9. Article 1 of Directive 2012/13 describes the subject matter of that directive:

'This Directive lays down rules concerning the right to information of suspects or accused persons, relating to their rights in criminal proceedings and to the accusation against them. It also lays down rules concerning the right to information of persons subject to a European Arrest Warrant relating to their rights.'

10. Article 2 of Directive 2012/13 governs the scope of that directive:

'1. This Directive applies from the time persons are made aware by the competent authorities of a Member State that they are suspected or accused of having committed a criminal offence until the conclusion of the proceedings, which is understood to mean the final determination of the question whether the suspect or accused person has committed the criminal offence, including, where applicable, sentencing and the resolution of any appeal.

2. Where the law of a Member State provides for the imposition of a sanction regarding minor offences by an authority other than a court having jurisdiction in criminal matters, and the imposition of such a sanction may be appealed to such a court, this Directive shall apply only to the proceedings before that court, following such an appeal.'

[3] Directive of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings (OJ 2012 L 142, p. 1).

III. Facts and request for a preliminary ruling

11. The persons charged in the main proceedings ('the defendants') are alleged to have committed several offences as members of Slovak security authorities in 1995, including the abduction of a person to a foreign country, robbery and extortion. The victim of those acts was the son of the President of Slovakia at the time.

12. On 3 March 1998, the Prime Minister of Slovakia at the time, representing the President, issued an amnesty in respect of those allegations.

13. Nevertheless, the Krajská prokuratúra (Regional Prosecutor's Office, Bratislava, Slovakia) brought charges for those allegations before the Okresný súd Bratislava III (District Court, Bratislava III, Slovakia) on 27 November 2000.

14. By order of 29 June 2001, the Okresný súd Bratislava III (District Court, Bratislava III) suspended prosecution of all the defendants on the ground that they were covered by an amnesty of 3 March 1998. The abovementioned order was upheld on 5 June 2002 by the judgment of the Krajský súd v Bratislave (Regional Court, Bratislava, Slovakia) and acquired the force of *res judicata*. According to Slovak law, it is a final decision, which is a decision on the substance and which has the effects of a judgment of acquittal.

15. The Národná rada Slovenskej republiky (National Council of the Slovak Republic) repealed the abovementioned amnesty by Resolution No 570 of 5 April 2017. A judgment of the Ústavný súd Slovenskej republiky (Constitutional Court of the Slovak Republic) of 31 May 2017 found that the resolution of the National Council was in conformity with the Constitution of the Slovak Republic. Therefore, the abovementioned final judicial order on the discontinuance of the criminal prosecution also had to be set aside.

16. The President of the Okresný súd Bratislava III (District Court, Bratislava III) is now contemplating the issuance of a European arrest warrant in respect of one of the accused persons. In those proceedings he has referred the following questions to the Court of Justice:

'(1) Does the *ne bis in idem* principle preclude the issuance of a European arrest warrant within the meaning of Framework Decision 2002/584, and taking into account Article 50 of [the Charter], where the criminal case has been finally closed by a judicial decision to acquit or to discontinue the case, if those decisions have been adopted on the basis of an amnesty that has been revoked by the legislature after the decisions became final and the domestic legal order provides that revocation of such an amnesty entails annulment of decisions of public authorities, where they have been adopted and substantiated on the basis of amnesties or pardons, and the legal obstacles of criminal prosecutions that were based on an amnesty thus revoked have disappeared, without a specific judicial decision or judicial proceedings?

(2) Does a provision of a national law that annuls directly – without a decision of a national court – the decision of a national court discontinuing criminal proceedings, which is, under national law, a final decision entailing acquittal and on the basis of which the criminal proceedings have been finally discontinued following the amnesty granted in accordance with a national law, comply with the right to a fair trial, guaranteed in Article 47 of [the Charter], and the right not to be tried or punished twice in criminal proceedings for the same criminal offence, guaranteed in Article 50 of [the Charter] and in Article 82 [TFEU]?

(3) Does a provision of national law limiting review by the Constitutional Court of the Resolution of the Národná rada Slovenskej republiky (National Council of the Slovak Republic), which revoked an amnesty or individual pardons and was adopted under Article 86(i) of the Constitution of the Slovak Republic, merely to an assessment of the resolution's constitutionality, without taking into account binding acts adopted by the European Union, in particular [the Charter], the Treaty on the Functioning of the European Union and the Treaty on European Union, comply with the principle of sincere cooperation within the meaning of Article 4(3) [TEU], Article 267 [TFEU] and Article 82 [TFEU], the right to a fair trial, guaranteed in Article 47 of [the Charter], and the right not to be tried or punished twice in criminal proceedings for the same criminal offence, guaranteed in Article 50 of [the Charter]?'

17. The Court of Justice rejected the national court's request for this reference for a preliminary ruling to be dealt with under the urgent preliminary ruling procedure, as there was not sufficient urgency.

18. The defendants AB and CD, the Slovak Republic and the European Commission submitted written observations. After the written procedure had been conducted, another defendant, IJ, requested an oral procedure. The Court conducted that procedure on 6 May 2021, in which it heard all of those parties as well as the Krajská prokuratúra Bratislava (Regional Prosecutor's Office, Bratislava).

IV. Legal assessment

19. The Okresný súd Bratislava III (District Court, Bratislava III) seeks to ascertain whether, in the circumstances of the main proceedings, the issuance of a European arrest warrant in respect of one of the defendants and the revocation of the amnesty are compatible with EU law. Its concerns are based, in particular, on the *ne bis in idem* principle, because the proceedings had already been finally concluded.

A. The European arrest warrant

20. The first question seeks clarification as to whether the *ne bis in idem* principle precludes the issuance of a European arrest warrant where the court has discontinued the criminal proceedings due to an amnesty, but where that amnesty was later revoked and the criminal proceedings are reopened as a consequence.

1. The admissibility of the first question

21. Although, according to the Commission and the Slovak Republic, the Court does not have jurisdiction to answer this question because the Charter is not applicable in the main proceedings, that view must be rejected. Doubts as to relevance to the decision to be given are also without foundation.

(a) The jurisdiction of the Court

22. It is correct that the Court does not have jurisdiction to rule on a legal situation that does not come within the scope of EU law. The provisions of the Charter cannot, of themselves, form the basis for such jurisdiction either.[4] This is because Article 51(1) of the Charter states that the fundamental rights guaranteed in the EU legal order apply in all situations governed by EU law.[5]

23. It is true that the Slovak Republic correctly emphasises that the allegations at issue relate to the period prior to its accession and, on that basis alone, do not appear to have any connection to the application of EU law. Nor does EU law contain any rules on the revocation of an amnesty decreed at national level. Moreover, the Commission correctly states that the national criminal proceedings and the offences at issue are not harmonised under EU law.

24. However, the referring court is contemplating the issuance of a European arrest warrant. The issuance of a European arrest warrant per se would necessarily involve the implementation of EU law. It is a legal act provided for under EU law which triggers certain legal consequences determined under EU law – such as the limitation of the possible grounds for non-execution under Articles 3 to 4a of Framework Decision 2002/584 or the time limits for execution under Article 17.

25. The Court therefore has jurisdiction in the present case to interpret the Charter of Fundamental Rights and, in particular, the *ne bis in idem* principle under Article 50 with regard to the issuance of a European arrest warrant.

(b) Relevance to the decision to be given

26. In addition, it is necessary to examine whether the first question referred is relevant to the decision to be given in the main proceedings. In that respect, the Commission and the Slovak Republic rely, in essence, on the fact that the referring court has not yet issued the European arrest warrant, but has so far merely intended to do so.

27. However, a national court cannot reasonably be expected to issue a European arrest warrant – which in its view may be contrary to EU law – in order thereby to open the possibility of making a request for a preliminary ruling. Rather, it is in the very nature of the preliminary ruling procedure that a definitive interpretation is obtained from the Court of Justice *before* such a decision is given. That procedure is ultimately intended to ensure the correct application of EU law by the courts of the Member States.

28. It is true that the Slovak Republic also refers to the assessment of the court of appeal cited by the public prosecutor's office, according to which the question concerning the issuance of a European arrest warrant is hypothetical in nature because the requested person is not in Europe and an international arrest warrant has been issued in respect of him.[6] However, in accordance

4 Judgments of 26 February 2013, *Åkerberg Fransson* (C-617/10, EU:C:2013:105, paragraph 22); of 6 October 2015, *Delvigne* (C-650/13, EU:C:2015:648, paragraph 27); and of 14 January 2021, *Okrazhna prokuratura – Haskovo and Apelativna prokuratura – Plovdiv* (C-393/19, EU:C:2021:8, paragraph 32).

5 Judgments of 26 February 2013, *Åkerberg Fransson* (C-617/10, EU:C:2013:105, paragraph 19); of 17 December 2015, *WebMindLicenses* (C-419/14, EU:C:2015:832, paragraph 66); and of 19 November 2019, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* (C-585/18, C-624/18 and C-625/18, EU:C:2019:982, paragraph 78).

6 Order of the Krajský súd v Bratislave (Regional Court, Bratislava) of 11 February 2020 (2Tos/116/2019, retrievable at http://www.pravnelisty.sk/rozhodnutia/a811-uznesenie-krajskeho-sudu-v-bratislave-vo-vecizavlecenia-michala-kovaca-mlasieho-do-cudziny).

with Article 267 TFEU, the assessment of the relevance and necessity of the question referred for a preliminary ruling is, in principle, the responsibility of the referring court alone, subject to the limited verification made by the Court of Justice. [7]

29. Moreover, AB submitted in the oral procedure, without being contradicted on this point, that a European arrest warrant may also be necessary to ensure the smooth extradition of a defendant from a third country if he or she is transported through other Member States on the way to the requesting Member State.

30. The first question is therefore relevant to the decision to be given and is thus admissible.

2. Answer to the first question

31. It is therefore necessary to clarify whether a European arrest warrant may be issued where the court of the requesting Member State has discontinued the criminal proceedings due to an amnesty, but where that amnesty was later revoked and the criminal proceedings are reopened as a consequence.

32. Point 1 of Article 3 of Framework Decision 2002/584 is of no relevance to this question. According to that provision, the judicial authority of the Member State of execution is to refuse to execute the European arrest warrant if the offence on which the arrest warrant is based is covered by an amnesty in the executing Member State. That provision does not cover an amnesty in the requesting State or the revocation of such an amnesty. [8]

33. On the other hand, an amnesty in the requesting State could play a role in the context of Article 8(1)(c) of Framework Decision 2002/584. According to that provision, the European arrest warrant is to contain evidence of an enforceable judgment, an arrest warrant or any other enforceable judicial decision having the same effect. If the offence is covered by an effective amnesty in the requesting State, it is likely that no such enforceable judicial decision will exist in that State. This would preclude a European arrest warrant. [9] Due to the revocation of the amnesty, however, that hypothesis cannot play a role in the present proceedings.

34. Therefore, the decisive question is in fact whether the *ne bis in idem* principle precludes the European arrest warrant.

35. According to point 2 of Article 3 of Framework Decision 2002/584, the judicial authority of the Member State of execution is to refuse to execute the European arrest warrant if the requested person has been finally judged by a Member State in respect of the same acts. Like point 1 of Article 3, however, that provision does not place the requesting State under any obligation.

7 Judgments of 16 December 2008, *Cartesio* (C-210/06, EU:C:2008:723, paragraph 96), and of 27 February 2014, *Pohotovosť* (C-470/12, EU:C:2014:101, paragraph 31).

8 See judgment of 29 April 2021, *X (European arrest warrant* – Ne bis in idem) (C-665/20 PPU, EU:C:2021:339, paragraph 95).

9 Judgments of 1 June 2016, *Bob-Dogi* (C-241/15, EU:C:2016:385, paragraph 64), and of 13 January 2021, *MM* (C-414/20 PPU, EU:C:2021:4, paragraph 56).

36. The requesting Member State is however bound by Article 50 of the Charter when issuing a European arrest warrant. According to that provision, 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. However, the issuance of a European arrest warrant would amount to prosecution of the person concerned.

37. It is therefore necessary to clarify whether the discontinuance of criminal proceedings due to an amnesty is to be regarded as a final conviction or final acquittal despite the subsequent revocation of the amnesty.

38. In the context of the *ne bis in idem* principle under point 2 of Article 3 of Framework Decision 2002/584 and Article 54 of the Schengen Implementing Convention, the Court has held that such a final decision must fulfil two conditions: *first*, it is necessary to examine whether the decision in question has definitively barred further prosecution.[10] And *second*, the decision must be based on a determination as to the merits of the case.[11] Those conditions must also be applied in the context of Article 50 of the Charter.[12]

(a) Definitive barring of further prosecution

39. According to the request for a preliminary ruling, the defendants were being prosecuted in criminal proceedings, which the competent courts then finally discontinued due to the amnesty.[13]

40. However, the Slovak Republic takes the view that that decision discontinuing the proceedings no longer has the effect of definitively barring further prosecution within the meaning of the first condition, at least since the revocation of the amnesty. Rather, under Slovak law, the revocation of the amnesty is intended precisely to make prosecution possible again.

41. Since the law of the Member State in which the criminal ruling at issue was made is the starting point for the assessment of the definitive barring of further prosecution,[14] it does not appear to be possible at first sight to question that outcome.

42. However, the Court has recognised that extraordinary remedies are not taken into account for the purposes of determining whether further prosecution has been definitively barred.[15]

[10] Judgments of 11 February 2003, *Gözütok and Brügge* (C-187/01 and C-385/01, EU:C:2003:87, paragraphs 27 and 30); of 22 December 2008, *Turansky* (C-491/07, EU:C:2008:768, paragraph 32); of 5 June 2014, *M* (C-398/12, EU:C:2014:1057, paragraphs 31, 32 and 36); and of 29 June 2016, *Kossowski* (C-486/14, EU:C:2016:483, paragraphs 34 and 35).

[11] Judgments of 10 March 2005, *Miraglia* (C-469/03, EU:C:2005:156, paragraph 30); of 5 June 2014, *M* (C-398/12, EU:C:2014:1057, paragraph 28); and of 29 June 2016, *Kossowski* (C-486/14, EU:C:2016:483, paragraph 42). See also judgment of the European Court of Human Rights ('the ECtHR') of 8 July 2019, *Mihalache v. Romania* (54012/10, CE:ECHR:2019:0708JUD005401210, §§ 97 and 98).

[12] See judgments of 5 June 2014, *M* (C-398/12, EU:C:2014:1057, paragraph 35), and of 29 June 2016, *Kossowski* (C-486/14, EU:C:2016:483, paragraph 31).

[13] See paragraph 3 of the request for a preliminary ruling.

[14] Judgments of 5 June 2014, *M* (C-398/12, EU:C:2014:1057, paragraph 36), and of 29 June 2016, *Kossowski* (C-486/14, EU:C:2016:483, paragraph 35).

[15] Judgment of 5 June 2014, *M* (C-398/12, EU:C:2014:1057, paragraphs 39 and 40).

43. The Court based that recognition on the consideration that, in accordance with Article 52(3) of the Charter, in so far as Article 50 thereof contains a right corresponding to that provided for in Article 4 of Protocol No 7 to the ECHR, the interpretation of Article 50 thereof must therefore not disregard the level of protection guaranteed by the ECHR. [16]

44. The ECtHR has ruled that further prosecution is definitively barred within the meaning of the *ne bis in idem* principle under Article 4 of Protocol No 7 to the ECHR when all ordinary remedies have been exhausted. [17] This is already set out in points 22 and 29 of the explanatory report to Protocol No 7 and is ultimately based on the explanatory notes on the concept of a final decision under the European Convention on the International Validity of Criminal Judgments. [18]

45. That interpretation of the *ne bis in idem* principle under Article 50 of the Charter corresponds to its function of ensuring legal certainty in the area of freedom, security and justice. [19] Member States are therefore not free, within the scope of EU law, to determine without restriction when further prosecution is definitive barred and thereby to retry persons who have been finally convicted or acquitted. Rather, when assessing whether further prosecution is definitive barred, they must take into account whether the ordinary remedies of their own legal system have been exhausted. If this is not the case, the *ne bis in idem* principle does not apply, owing to the lack of a final conviction.

46. However, the revocation of an amnesty in such a way that judicial decisions which finally terminated criminal proceedings in implementation of that amnesty are also overturned cannot normally be achieved by way of an ordinary remedy.

47. On the basis of the information available, the situation in the main proceedings is no different under Slovak law. The amnesty at issue was revoked in a special legislative procedure and the Ústavný súd Slovenskej republiky (Constitutional Court of the Slovak Republic) subsequently reviewed that act. [20] This is not an ordinary remedy.

48. In such a case, definitive barring of further prosecution has therefore been brought about by the final discontinuance of the proceedings due to the amnesty. Therefore, the first condition for a final decision within the meaning of Article 50 of the Charter is met.

(b) Determination as to the merits of the case

49. The second condition for a final decision within the meaning of the *ne bis in idem* principle under Article 50 of the Charter, namely a determination as to the merits of the case, is therefore of decisive importance.

16 Judgment of 5 June 2014, *M* (C-398/12, EU:C:2014:1057, paragraph 37). See also judgments of 5 April 2017, *Orsi and Baldetti* (C-217/15 and C-350/15, EU:C:2017:264, paragraph 24), and of 20 March 2018, *Menci* (C-524/15, EU:C:2018:197, paragraph 60).

17 Judgments of the ECtHR of 20 July 2004, *Nikitin v. Russia* (50178/99, CE:ECHR:2004:0720JUD005017899, § 37); of 10 February 2009, *Zolotukhin v. Russia* (14939/03, CE:ECHR:2009:0210JUD001493903, § 107); and of 8 July 2019, *Mihalache v. Romania* (54012/10, CE:ECHR:2019:0708JUD005401210, §§ 103 and 109 to 111).

18 European Treaty Series No 70, see p. 13 of the explanatory report.

19 Judgments of 27 May 2014, *Spasic* (C-129/14 PPU, EU:C:2014:586, paragraph 77); of 29 June 2016; *Kossowski* (C-486/14, EU:C:2016:483, paragraph 44); and of 29 April 2021, *X (European arrest warrant* – Ne bis in idem) (C-665/20 PPU, EU:C:2021:339, paragraph 99).

20 See point 15 above.

50. This condition is based on the fact that that principle is not only intended to ensure legal certainty, but must also take into account the prevention and combating of crime within the area of freedom, security and justice. In accordance with Article 3(2) TEU, within that area, a balance is to be struck between personal freedoms and the necessary measures for preventing and combating crime. [21]

51. The wording of the *ne bis in idem* principle in Article 50 of the Charter confirms such an objective-oriented interpretation because, on the basis of that wording, the principle applies only after the person concerned has been finally acquitted or convicted. The reason for this is that the terms 'acquitted' and 'convicted' imply that the accused person's criminal responsibility has been established following an assessment of the circumstances of the case, in other words that there has been a determination as to the merits of the case. [22]

52. However, a decision discontinuing prosecution on account of an amnesty is not based on an examination of the criminal responsibility of the persons concerned, but only implements the amnesty.

53. The request for a preliminary ruling is contradictory on this point. It is first explained that prosecution was suspended on the ground that it was covered by the amnesty, [23] but it is subsequently stated that the grounds merely included the amnesty. [24] Moreover, according to national law, the order discontinuing the prosecutions was a decision on the substance. [25]

54. Nevertheless, there is no indication of whether the criminal responsibility of the defendants was examined. Even when questioned at the hearing, AB gave only vague references to another judgment.

55. Therefore, the Court can only express a view on whether an order discontinuing prosecution on account of an amnesty involves a determination as to the merits of the case within the meaning of the second condition for a final decision in accordance with the *ne bis in idem* principle under Article 50 of the Charter. This is generally not the case.

(c) Interim conclusion

56. The *ne bis in idem* principle under Article 50 of the Charter therefore does not preclude the issuance of a European arrest warrant under Framework Decision 2002/584 where the criminal proceedings have been discontinued on account of an amnesty without an examination of the criminal responsibility of the persons concerned, but where the decision to discontinue ceased to have effect when the amnesty was revoked.

[21] See, to that effect, judgments of 10 March 2005, *Miraglia* (C-469/03, EU:C:2005:156, paragraph 34), and of 29 June 2016, *Kossowski* (C-486/14, EU:C:2016:483, paragraphs 46, 47 and 49). See also judgment of the ECtHR of 27 May 2014, *Marguš v. Croatia* (4455/10, CE:ECHR:2014:0527JUD000445510, §§ 122 to 141).

[22] Judgment of the ECtHR of 8 July 2019, *Mihalache v. Romania* (54012/10, CE:ECHR:2019:0708JUD005401210, § 97), concerning the identically worded Article 4 of Protocol No 7 to the ECHR.

[23] Paragraph 3 of the request for a preliminary ruling.

[24] Paragraph 46 of the request for a preliminary ruling.

[25] Also paragraph 46 of the request for a preliminary ruling.

B. The second question – revocation of the amnesty

57. According to its wording, the second question seeks to ascertain whether the revocation of the amnesty, which necessarily led to the reopening of the criminal proceedings that had been finally discontinued, is compatible with the EU fundamental right to effective judicial protection under Article 47 of the Charter and the *ne bis in idem* principle under Article 50 of the Charter and Article 82 TFEU.

1. The jurisdiction of the Court

58. At first sight, the Court does not have jurisdiction to answer the question concerning fundamental rights because EU law does not make provision for either the granting of an amnesty or the revocation thereof and, consequently, there is no implementation of EU law.[26] The defendants' substantive considerations regarding the fundamental rights under EU law therefore come to nothing and, at best, could meet with success in that regard in domestic proceedings or before the ECtHR.

59. In so far as the second question refers to the legal basis of Article 82 TFEU, it is not apparent to what extent that provision is applicable as such in the first place.

60. However, it follows from the reasoning in the request for a preliminary ruling that the referring court seeks to ascertain whether Directive 2012/13 on the right to information in criminal proceedings, adopted on the basis of Article 82 TFEU, applies also to particular proceedings, the subject matter of which is the revocation of an amnesty. If the directive were applicable in that respect, the procedural rights provided for therein would necessarily also apply. According to the request for a preliminary ruling, those rights were not guaranteed in the context of the revocation of the amnesty by the National Council and the subsequent proceedings before the Ústavný súd Slovenskej republiky (Constitutional Court of the Slovak Republic).

61. The Court has jurisdiction to rule on a question concerning the scope of Directive 2012/13.

2. Applicability of Directive 2012/13

62. The referring court derives the applicability of Directive 2012/13 from the definition of the scope of that directive in Article 2(1). According to that provision, the directive applies from the time persons are made aware by the competent authorities of a Member State that they are suspected or accused of having committed a criminal offence until the conclusion of the proceedings. This is understood to mean the final determination of the question whether the suspect or accused person has committed the criminal offence, including, where applicable, sentencing and the resolution of any appeal.

63. Given that the defendants were charged in 2000 and that it is only in the future – in the main proceedings – that those charges are to be ruled on, the referring court might lean towards the view that any intervening legal acts relevant to the outcome of the proceedings must comply with the requirements of Directive 2012/13. The revocation of the amnesty would be such a legal act.

64. However, such an assumption would be wrong.

[26] See point 22 above.

65. This is because Article 1 of Directive 2012/13 must also be taken into account when determining the scope of that directive.[27] According to that provision, the subject matter of that directive includes the right to information of suspects or accused persons, relating to their rights in criminal proceedings and to the accusation against them. In addition, the directive also lays down the right to information of persons subject to a European Arrest Warrant relating to their rights. The directive is therefore applicable to criminal proceedings and proceedings relating to the European arrest warrant. By contrast, extra-judicial proceedings concerning the revocation of an amnesty or constitutional proceedings for reviewing such a revocation are not covered by the subject matter of the directive.

66. Article 2(2) of Directive 2012/13 confirms the limitation to judicial criminal proceedings and judicial proceedings relating to the European arrest warrant. In accordance with that provision, the directive does not apply to the imposition of a sanction regarding minor offences by an authority, but applies only to judicial proceedings that may be brought with a view to reviewing such a sanction. However, neither the extra-judicial proceedings concerning the revocation of the amnesty nor the constitutional proceedings are judicial proceedings for determining or reviewing a sanction.

67. An application of Directive 2012/13 to extra-judicial proceedings concerning the revocation of an amnesty or to constitutional proceedings for reviewing such a revocation would not be covered by the legal basis of that directive either. According to recital 9, the directive was based on Article 82(2)(b) TFEU. That provision allows the European Union to establish minimum rules concerning the rights of individuals in criminal procedure. It does not allow the EU to adopt rules on the revocation of an amnesty or on the constitutional review of such a revocation.

68. Moreover, it follows from the request for a preliminary ruling that the criminal proceedings instituted on the basis of the charges brought in 2000 initially ended in 2001 as a result of the discontinuance[28] and were not reopened until 2017 after the revocation of the amnesty and the judgment of the Ústavný súd Slovenskej republiky (Constitutional Court of the Slovak Republic). In the meantime, there have not been any criminal proceedings or proceedings concerning a European arrest warrant in which Directive 2012/13 could have been applicable.

69. Directive 2012/13 on the right to information in criminal proceedings therefore does not apply to proceedings concerning the revocation of an amnesty or to subsequent proceedings conducted before the Constitutional Court of a Member State with a view to reviewing that revocation. Therefore, that directive also cannot justify the application of the Charter in these proceedings.

C. The third question – jurisdiction of the Ústavný súd Slovenskej republiky (Constitutional Court of the Slovak Republic)

70. By its third question, the referring court asks the Court of Justice whether provisions of domestic law which limit examination by the Ústavný súd Slovenskej republiky (Constitutional Court of the Slovak Republic) solely to the question of compliance with domestic law are compatible with the fundamental rights guaranteed by the ECHR and with the Charter, but

[27] Judgment of 13 June 2019, *Moro* (C-646/17, EU:C:2019:489, paragraph 33).

[28] Unlike in the judgment of 12 February 2020, *Kolev and Others* (C-704/18, EU:C:2020:92, paragraph 54).

especially with the principle of sincere cooperation in Article 4(3) TEU. In that respect, the referring court proceeds on the assumption that, under that provision, that obligation is equally applicable to relations between Member States and the European Union.

71. Similarly, the referring court is of the view that the rules on the revocation of an amnesty may potentially conflict with the principle of proportionality and in particular with the principle of effectiveness, which limits the procedural autonomy of Member States when adopting domestic legal provisions.

72. However, it is not apparent that the revocation of the amnesty in the present case is to be regarded as an implementation of EU law. Therefore, it cannot be measured against the Charter or the principles of proportionality and effectiveness under EU law. Nor are there any provisions of EU law that would oblige the Ústavný súd Slovenskej republiky (Constitutional Court of the Slovak Republic) to examine the compliance of the revocation of that amnesty with the fundamental rights guaranteed by the ECHR and the Charter and especially with the principle of sincere cooperation under Article 4(3) TEU.

73. Therefore, the Court does not have jurisdiction to examine that question.

V. Conclusion

74. I therefore propose that the Court give the following ruling:

(1) The *ne bis in idem* principle under Article 50 of the Charter of Fundamental Rights of the European Union does not preclude the issuance of a European arrest warrant under Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009, where the criminal proceedings have been discontinued on account of an amnesty without an examination of the criminal responsibility of the persons concerned, but where the decision to discontinue ceased to have effect when the amnesty was revoked.

(2) Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings does not apply to proceedings concerning the revocation of an amnesty or to subsequent proceedings conducted before the Constitutional Court of a Member State with a view to reviewing that revocation. Therefore, that directive also cannot justify the application of the Charter of Fundamental Rights of the European Union in these proceedings.