Terrorists Cannot be Tried Twice

The CJEU Strengthens Terrorists' Ne Bis in Idem Rights

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In its recent decision *MSIG*, the Court of Justice of the European Union (CJEU) has barred Spain from convicting an ETA terrorist for a terrorist attack in Oviedo. This decision is in line with established CJEU case law on the *ne bis in idem* principle and therefore far from surprising, although it might be hard to accept for the Spanish society.

The ne bis in idem principle in EU law

The *ne bis in idem* principle is one of the cornerstones of EU Criminal Law. It is also probably the EU fundamental right that has been invoked most often, at least in the context of criminal law, and there is much case law on all elements of this principle by the CJEU. The principle has a double legal foundation in EU law, in Art. 54 CISA and Art. 50 CFR. Both guarantees are similar and overlap to some extent, but they are not identical. The CJEU takes the view that the restrictions contained in Art. 54 CISA, notably the so-called enforcement element and the possibility of declarations under Art. 55 CISA, are still applicable in transnational cases (*Spasic*, *MR*).

The EU *ne bis in idem* principle in Art. 54 CISA goes far beyond national *ne bis in idem* principles (such as Art. 103 para. 3 Grundgesetz) and can potentially undermine a Member State's extraterritorial jurisdiction in a specific case. The principle basically means that a person who has been convicted (or acquitted) in one Member State and paid the fine and/or done the time cannot be prosecuted in another Member State *for the same acts.*

What exactly "for the same acts" means is not always easy to grasp and was, in fact, the key legal issue in *MSIG*, but it certainly includes the same criminal offence committed by the same offender. So, if a German person kills a Dutch person in France, this person can only be prosecuted once for the unlawful killing. Moreover, the place of prosecution is not selected by objective criteria, but only by speed: the first final decision invokes the *ne bis in idem* principle and bars all criminal proceedings in other Member States. Well-advised defendants can use this effect to their benefit by appealing decisions dislike in one Member State and accepting others they prefer in another Member State (see the CJEU's *Volkswagen* case).

The MSIG case

This is also true for Spain in the *MSIG* case that was decided by the CJEU on 11th September 2025. The defendant in this case was a leader of ETA, a Basque terrorist organisation. From her residence in France, she coordinated terrorist attacks in Spain. The French authorities sentenced her to 20 years of imprisonment for "involvement in a criminal association with a view to preparing a terrorist act". After she had served the sentence, she was surrendered to Spain where the Spanish authorities accused her of "having committed terrorism offences consisting in damage to property, attempted murder and actual bodily harm". Both states had jurisdiction for the terrorist offences under the law implementing Art. 19 of Directive 2017/541/EU on combating terrorism. The terrorist offences were those that had occurred in Spain while the defendant was living in France. A conviction in Spain would have led to a further imprisonment of 30 years, the maximum penalty under Spanish law. The question posed by the Spanish court was, among others, whether the final conviction in France for involvement in a terrorist association was *the same act* as committing terrorism offences under Art. 54 CISA.

The question of idem

The CJEU has, since its leading case *Van Esbroeck* in 2006, defined "the same act" by referring to the "identity of the material acts, understood in the sense of the existence of a set of concrete circumstances which are inextricably linked together" (*Van Esbroeck* para. 36). The legal classification of the material acts is not important. In *MSIG*, the Court reiterates its settled case-law and clarifies that identical material acts are "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" (*MSIG* para. 38). The Court then "provide[s] the referring courts with elements of interpretation of EU law" (*MSIG* para. 42) that can help with this assessment. According to the CJEU, the different classification of the offences in France (involvement in a criminal organisation) and Spain (perpetration of terrorist acts) is irrelevant. Instead, the question is whether the elements refer to "the same conduct on the part of the same person and within the same frame of time" (*MSIG* para. 44).

At first glance, one might think that organising terrorist commandos and actually committing terrorist acts are two different types of conduct. However, both criminal offences refer to the same time frame and the defendant was in both cases living in France. Moreover, both proceedings seem to refer to leading the commandos and giving assignments, i.e. the same conduct. What is different is the assessment of participation: while French law looked at the defendant's participation in the organisation responsible for terrorist acts, Spanish law focusses on participation in a specific terrorist act. The same conduct by the defendant has been interpreted differently *(MSIG* para. 51*)*. This is a normative assessment and thus legal interpretation.

The CJEU's decision is not surprising considering that the Court has always refused to allow the legal classification in one Member State to shape the ne bis in idem principle. The legal differences between single perpetration, aiding and abetting, co-perpetration, conspiracy to commit a criminal offence vary from jurisdiction to jurisdiction. Although the Court in *MSIG* does not refer to a mode of participation to an individual crime, the same conduct – giving orders to commandos – is used to prove the defendant's involvement in the terrorist organisation. Furthermore, both crimes – participation in a terrorist organisation and participation in a terrorist act – are clearly related, as they stem from Directive 2017/541/EU. Criminalizing the participation in an organisation is often used for cases in which participation in a certain terrorist offence is difficult to prove. Therefore, it makes sense to view the former as a lower step on the ladder of responsibility for terrorist offences and group these elements together as one act, considering that the same conduct was referred to in both countries.

This factual approach also means that conduct that was not evaluated in the first trial is not part of the act. If, for instance, it later comes out that the defendant participated in a different terrorist attack which was not assessed in the first trial, these events would probably not be regarded as *inextricably linked* to the other conduct referred to in the first trial and thus could still be prosecuted. This is at least the opinion of the German Supreme Court for the German ne bis in idem principle (BGH, judgement of 14th November 2024, 3 StR 189/24 mn. 49), and it is likely that the CJEU will follow the same reasoning because the new terrorist attack would be different conduct.

Consequences for Spain

The application of the ne bis in idem principle means that Spain cannot prosecute MSIG for the terrorist attack in Oviedo, although the attack itself took place on Spanish territory and was directed against Spanish citizens. This might be hard to accept for the Spanish society. However, there are ways in EU Criminal Law to prevent such an outcome. Member States can in advance consult each other and decide which State should continue criminal proceedings and which State halts them. Moreover, Art. 55 CISA allows the Member States to declare that they are not bound by Art. 54 CISA, i.e. the transnational *ne bis in idem* principle, in certain cases. In terrorist cases, Art. 55(1) lit. b CISA would apply, which allows the States not to apply ne

bis in idem to acts against national security or other essential interests. Accordingly, Spain could have retained the right to prosecute if they had at one point in time made a declaration under Art. 55 CISA. But they did not. If there had been new proceedings, the sentence served in France would have to have been deducted from the new sentence (Art. 56 CISA), which would have solved the issue that the French sentence could not be taken into account at all in the Spanish trial in MSIG.

Conclusion

The CJEU has convincingly applied its definition of "the same acts" to participation in a terrorist organisation and participating in terrorist attacks. Member States that do not agree with this outcome can use the exceptions laid down in Art. 55 CISA in order to retain the right to prosecute, but must make sure to deduct prison time already served from their final sentence.

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