Case C-802/23

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

28 December 2023

Referring court:

Audiencia Nacional (Spain)

Date of the decision to refer:

4 December 2023

Criminal proceedings against:

MSIG

Subject matter of the main proceedings

Leader of a Spanish terrorist organisation – Clandestine activities in France – Planning of terrorist campaigns and facilitating the resources for carrying them out in Spain – Direct perpetration of terrorist attacks in Spain by other members of the organisation – Arrest of the leader in France – Prosecution and deprivation of liberty in France for such activities – Surrender to Spain – Prosecution in Spain for those attacks – Acquittal with a declaration of *ne bis in idem* covering those activities and some of those attacks – Setting aside of the judgment by the Tribunal Supremo (Supreme Court, Spain)

Subject matter and legal basis of the request for a preliminary ruling

Request for a preliminary ruling for interpretation – Article 267 TFEU – International *ne bis in idem* principle – Concept of 'the same acts' and related acts – Cumulation of criminal judgments of several Member States – Compatibility of national legislation with the Charter of Fundamental Rights and the CISA – Proportionality of the penalties

Questions referred

A question is referred to the Court of Justice of the European Union ('the Court of Justice') for a preliminary ruling, pursuant to Article 19(3)(b) of the Treaty on European Union ('TEU'), Article 267 of the Treaty on the Functioning of the European Union ('TFEU') and Article 4a of the Ley Orgánica del Poder Judicial (Spanish Organic Law on the Judiciary, 'the LOPJ'); for this court (the Sección Segunda de la Sala de lo Penal de la Audiencia Nacional [Second Criminal Chamber of the National High Court, Spain]) takes the view that the Court of Justice should interpret the scope of Article 50 of the Charter of Fundamental Rights of the European Union ('the Charter') and of Article 54 of the Convention implementing the Schengen Agreement ('the CISA'), as regards the question of whether the '*ne bis in idem*' principle applies for the acts and offences being tried in Spain and those which were tried in France in relation to MSIG. Otherwise, interpretation is also sought of the scope of Article 49(3) of the Charter, in conjunction with fully established Community principles developed, *inter alia*, in Council Framework Decision 2008/675/JHA of 24 July 2008, concerning the mutual recognition of judicial decisions and their effects on proceedings in other States, and the absence in Spanish law of any corrective measures aimed at avoiding the lack of proportionality of penalties in the punishment of offences, where there are concurrent foreign judgments which form factual or legal unity with other (related) judgments handed down by Spanish courts, in particular because they cannot be taken into account in Spain for any purpose; this is due to the express exclusion of that possibility in Articles 14(2)(b) and 14(2)(c) and the single additional provision of Organic Law 7/2014 of 12 November 2014 on the exchange of criminal record information and the taking into account of criminal-court decisions in the European Union, transposing Council Framework Decision 2008/675/JHA of 24 July 2008, the compatibility of those legal provisions with EU law also being subject to assessment by the Court of Justice. That legislation completely prevents any final conviction handed down previously by the courts of another Member State, including in relation to the same acts, from being taken into account, which also renders the provisions of Article 50 of the Charter and Article 54 of the CISA inapplicable in the latter case.

The aforementioned ruling is requested in the form of the following questions:

1. In the present case, according to the factual circumstances described and the legal reasons taken into account in the criminal case against MSIG in Spain, and in view of the various convictions previously handed down in France in relation to her, does the '*ne bis in idem*' principle apply under Article 50 of the Charter and Article 54 of the CISA, in relation to the charge brought against MSIG in Spain, in that it concerns 'the same acts', in accordance with the scope given to that concept in European case-law?

2. In any event, is the lack of a regulatory provision in Spanish law allowing the recognition of effects of final convictions previously handed down by the courts of other Member States, for the possible assessment in the case under

examination of the applicability of the *ne bis in idem* principle, on the ground of identical acts, compatible with Article 50 of the Charter and Article 54 of the CISA, and also with Articles 1(3), 3(2), 4(3) and 4(5) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States?

3. In the present case, or generally speaking, is the absence of any legislative, practical or, ultimately, legal mechanism or procedure in Spanish law allowing recognition of effects of final convictions previously handed down by the courts of the Member States, (i) with a view to determining the sentence, cumulating, adapting or limiting the maximum execution of sentences, either at trial and judgment stage or at the later stage of enforcement of the sentence and (ii) in order to, in the alternative, in the event of a failure to find that the *ne bis in idem* principle applies on the ground of identical acts, ensure the proportionality of the criminal penalty – where, as in the proceedings under examination, a prior conviction has been handed down by the courts of another Member State for serious penalties, which have already been completed, due to concomitant acts (concurrent in time, which are closely related or connected or have a criminal or similar connection) with those being tried in Spain – contrary to Articles 45 and 49(3) of the Charter, or to recitals 7, 8, 9, 13 and 14 and Articles 3(1), 3(2), 3(4) and 3(5) of Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings, and recital 12 and Article 1(3) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States?

4. In the light of the circumstances of the present case and, generally speaking, is the total exclusion of the effects of earlier final judgments delivered in other EU Member States – as expressly provided for in Article 14(2)(b) on convictions to be imposed in Spain, Article 14(2)(c) on judgment execution orders and the single additional provision (in both cases prior to 15 August 2010) of Organic Law 7/2014 of 12 November 2014 on the exchange of criminal record information and the taking into account of criminal-court decisions in the European Union, transposing European Union law – compatible with:

(1) Article 50 of the Charter and Article 54 of the CISA, both relating to the international *ne bis in idem* principle;

(2) and recitals 7, 8, 9, 13 and 14 and Articles 3(1), 3(2), 3(4) and 3(5) of Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings, as well as with Articles 45 and 49(3) of the Charter and the principle of mutual recognition of legal judgments within the European Union?

International law and case-law relied on

Judgment of the European Court of Human Rights of 9 July 2013, *Vinter and Others v. the United Kingdom*, CE:ECHR:2013:0709JUD006606909

Judgment of the European Court of Human Rights of 20 May 2014, *Magyar v. Hungary*, CE:ECHR:2014:0520JUD007359310

Judgment of the European Court of Human Rights of 28 October 2021, *Bancsók and Magyar v. Hungary*, CE:ECHR:2021:1028JUD005237415

Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950

Provisions of European Union law and case-law relied on

Judgment of the Court of Justice of 9 March 2006, *Van Esbroeck*, C-436/04, EU:C:2006:165

Judgment of the Court of Justice of 28 September 2006, *Van Straaten*, C-150/05, EU:C:2006:614

Judgment of the Court of Justice of 18 July 2007, *Kretzinger*, C-288/05, EU:C:2007:441

TEU; in particular Article 19(3)(b)

TFEU; in particular Article 267

Charter of Fundamental Rights of the European Union; in particular Articles 45, 49(3) and 50

Convention implementing the Schengen Agreement; in particular Article 54

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); in particular recital 12 and Article 1(3), Article 3(2) and Article 4(3) and (5)

Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings (OJ 2008 L 220, p. 32); in particular recitals 7, 8, 9, 13 and 14 and Article 3(1), (2), (4) and (5)

The case-law and provisions of Spanish law relied on

Judgment No 18/2016 of the Tribunal Supremo (Supreme Court) (Chamber II), 26 January 2016

Judgment No 238/2023 of the Supreme Court (Chamber II), 30 March 2023

Judgment No 53/1998 of the Audiencia Nacional (National High Court) (Criminal Chamber) of 28 December 1998

Judgment No 32/2014 of the National High Court (Criminal Chamber) of 11 December 2014

Judgment No 1/2021 of the National High Court (Criminal Chamber) of 21 January 2021

Royal Decree of 14 September 1882 adopting the Law of Criminal Procedure; in particular Articles 17 and 988

Organic Law 6/1985 of 1 July 1985 (LOPJ) (*Official State Gazette* No 157 of 2 July 1985, p. 20632)

Organic Law 10/1995 of 23 November 1995 on the Criminal Code (*Official State Gazette* No 281 of 24 November 1995, p. 33987); in particular Articles 28, 73, 74, 76, 77, 78, 571 and 572

Organic Law 7/2003 of 30 June 2003 on reform measures for the full and effective enforcement of sentences (Official State Gazette No 156 of 1 July 2003, p. 25274)

Organic Law 7/2014 of 12 November 2014 on the exchange of criminal record information and the taking into account of criminal-court decisions in the European Union (Official State Gazette No 275 of 13 November 2014, p. 93204); in particular Article 14(2)(b) and (c) and Single Additional Provision

The provisions of French law relied on

Code pénal (French Criminal Code); in particular Article 421-1

Succinct presentation of the facts and procedure in the main proceedings

1 MSIG is, in general terms, classed as having been a leader of the terrorist organisation ETA for the duration of her stay in France, from an unspecified date until her detention in France in October 2004. She was responsible for transmitting the instructions drawn up in France by the senior leadership of the terrorist organisation and for setting the course of action of the terrorist commands operating in Spain, sending them both the information and the material resources for their terrorist campaigns, normally through third parties, from France. In

general, it was the members of the commands who, following the general instructions, decided what specific terrorist action was to be taken, planned that action and reported the outcome to the terrorist leadership.

2 This request for a preliminary ruling concerns, more specifically, the ordinary procedure followed by the Criminal Chamber of the Audiencia Nacional (National High Court) against MSIG for offences of attempted terrorist assassination, terrorist injuries and terrorist destruction committed in Spain: MSIG is accused of having participated in certain terrorist acts committed directly by two other members of ETA.

3 At the time, those two terrorists were 'legals' (that is, not known to police) and were members of the 'Katu' command. Assisted by other unknown persons, and acting under the general instructions they had received, they decided to attack the Oviedo police station. To that end, using armaments received from ETA, they manufactured an automated device to launch anti-tank grenades and a booby-trap bomb, which they placed in position on 21 July 1997. Only three grenades worked, exploding at random in various locations close to the intended target and causing only property damage and injuries to one person who was nearby. The booby-trap bomb was located and deactivated by the police.

4 Those two terrorists have already been convicted for those acts in earlier trials before the referring court in 1998 and 2014.

5 The prosecutor maintains that MSIG is the actual perpetrator of those offences committed in Oviedo, in her capacity as the person responsible at that time for the 'legal' commands of the terrorist organisation ETA, and for the supply that she carried out, from France and to the specific command of the two terrorists mentioned above, of various armaments, including grenades.

6 The total sentence requested by the prosecutor for those acts is a term of imprisonment of 71 years, the execution of which was to be limited, by operation of law, to a maximum term of imprisonment of 30 years.

7 Irrespective of those criminal proceedings before the referring court, MSIG had already been prosecuted in France.

8 After several years of living clandestinely in France, MSIG was arrested by the French police in 2004. She was sentenced and deprived of her liberty in France until she was surrendered to Spain in 2019 pursuant to several European arrest warrants.

9 In total, MSIG served a total cumulative sentence of 20 years in France, handed down in various sets of judicial proceedings, which gave rise to convictions, from which some passages of text are reproduced by the referring court:

10 Conviction *in absentia*, sentenced to a term of imprisonment of 5 years, by judgment of the Tribunal Correctionnel de Paris (Criminal Court, Paris) of

21 February 2000, for ‘participation à une association de malfaiteurs en vue de la préparation d’un acte de terrorisme’ (participation in a conspiracy to prepare a terrorist act), in 1996 and on French territory, within the meaning of Article 421-1 of the French Criminal Code.

11 According to the French judgment, MSIG appears with one of her terrorist aliases (‘Amboto’) in certain documents intercepted from another individual, who met with MSIG and instructed her, using coded language, to create explosives. A document intercepted from another individual mentions a vehicle licence plate which was expressly intended for MSIG.

12 That French judgment also described ETA as a hierarchical organisation which, with the aim of ensuring the independence of the Spanish Basque Country and the French Basque Country, was preparing and committing assassinations and damage to buildings and cars using explosives. It stated that those actions were part of an overall strategy and were financed through extortion. The organisation provided its members with weapons, training in how to use them, falsified documents and clandestine accommodation, and it facilitated their travel.

13 Conviction *in absentia*, sentenced to a term of imprisonment of 5 years, by judgment of the Criminal Court, Paris, of 23 February 2000, for ‘participation à une association de malfaiteurs en vue de la préparation d’un acte de terrorisme’ (participation in a conspiracy to prepare a terrorist act), in 1996 and 1997 and on French territory, also within the meaning of Article 421-1 of the French Criminal Code.

14 According to the French judgment, MSIG appears with one of her terrorist aliases (‘Tomasa’) in certain documents intercepted in France from another individual, concerning a sum of money; MSIG is mentioned as the recipient of explosives and training materials on how to use them. A document intercepted in France from another individual is signed by MSIG; that other individual was to carry the document to Spain. Other documents intercepted in France from other members of ETA are also signed by ‘Tomasa’.

15 That French judgment also stated that, according to the information received by the French authorities from the Spanish authorities, MSIG had belonged to the terrorist commands ‘Araba’ and ‘Madrid’.

16 Conviction *in absentia*, sentenced to a term of imprisonment of 5 years and a permanent ban on entering France, by judgment of the Criminal Court, Paris, of 13 February 2003, also for ‘participation à une association de malfaiteurs en vue de la préparation d’un acte de terrorisme’ (participation in a conspiracy to prepare a terrorist act), in 1997 and on French territory, also within the meaning of Article 421-1 of the French Criminal Code.

17 That French judgment reiterated that MSIG had belonged to the ‘Araba’ and ‘Madrid’ commands. It stated that she was assumed to have been responsible for ETA’s ‘legal’ commands since 1993 and that she had been pursued in France for

two arrest warrants issued by a French investigating judge and three international arrest warrants from judges in Madrid.

18 It added that MSIG appeared on a list of ETA members which was intercepted in France in 1987. In 1996, another terrorist admitted that MSIG, using her 'Marisol' and 'Amboto' aliases, organised a training session in Bordeaux (France). Her 'Amboto' alias appears in a document intercepted in France from another individual. Another typewritten document, signed by 'Amboto', was intercepted in France in 1998. In 1999, MSIG's fingerprints were identified on two vehicle licence plates intercepted in France from another individual. Another terrorist extradited from Mexico to Spain in 2000 admitted that MSIG was present in France in 1997 at an organisation meeting.

19 That French judgment therefore held it to have been established that MSIG had participated in a group dedicated to the preparation of terrorist acts. It also mentioned previous convictions handed down in France against MSIG for similar acts.

20 The three previous conviction judgments handed down *in absentia* became final in 2013.

21 Conviction, sentenced to a term of imprisonment of 20 years by judgment of the Cour d'Appel de Paris (Court of Appeal, Paris) of 17 December 2010, upheld on appeal by judgment of 22 November 2012 of the Paris criminal court.

22 The decision concerned acts which were not time-barred, were not covered by the earlier judgments and occurred on French territory up to March 2004. Those acts consist of participation in ETA's political apparatus for the preparation of terrorist acts under Article 421-1 of the French Criminal Code, including the possession of weapons, ammunition and falsified documents, receiving stolen goods and extortion.

23 Sentences to run concurrently, such that the previous French convictions are cumulated into a single sentence of a term of imprisonment of 20 years, by judgment of the Court of Appeal, Paris, of 13 February 2014. MSIG served that sentence in France before her surrender to Spain.

24 Next, the referring court refers generally to investigations carried out into criminal acts committed in France by MSIG.

25 It points out that the police, the public prosecutor's office and the French courts carried out in-depth investigations concerning MSIG, even before her arrest in France, and that they had precise knowledge of her criminal activities linked to ETA's terrorism in Spain and France. In particular, they gathered a large amount of information from the physical documents and digital media found in the search of the residence that MSIG was sharing with another leader of ETA, alias 'Sergio', at the time of her arrest.

26 Similarly, through investigations carried out by the Brigade de Recherches de Bayonne (Bayonne Investigation Unit) (France) and the 14th section of the Parquet de Paris (Public Prosecutor's Office, Paris), the French investigators had acquired extensive knowledge of MSIG's role in the terrorist organisation ETA, to whom they attributed the aliases of 'Amboto' and 'Tomasa', due to the fortuitous discovery, in 1998, in the service area of a petrol station near Bidart (France), of a word-processed letter signed by 'Amboto', addressed to the 'Katu' command (which actually committed the Oviedo attack which is the subject of the criminal proceedings before the referring court).

27 In the letter that was found, it appears that the individual whose alias was 'Tomasa' organised communications with that command (which operated within Spain at the time), determined the manner in which meetings were arranged with the members of the command, established deliveries of materials for that command, provided the relevant technical instructions concerning the use of those materials and was involved, as a leader of ETA, in directing terrorist activities and marking their potential targets.

28 The referring court points out that all the information gathered by the French investigators was indeed dealt with in the criminal proceedings brought against MSIG in France and that the extensive information available to the French courts on the activities carried out by MSIG in France is reflected in the judgments delivered against her in France, both *in absentia* and after her arrest. The referring court infers from this that the French courts have ruled in various proceedings on all the criminal activities carried out by MSIG in France in relation to the terrorist commands of ETA operating in Spain, including the 'Katu' command.

29 Much of the information obtained and prepared by the French police was also forwarded to the Spanish police so that it could use it to complete its investigations.

30 As regards the proceedings which took place in Spain, after MSIG was surrendered by France in 2019, having served the cumulative sentence handed down in France, she was tried in several sets of criminal proceedings, some of which related to acts committed entirely in Spain as a member of ETA before going to France and others related to her participation in France, as a leader of ETA, in terrorist acts conducted in Spain. One of the latter is the subject of the present request for a preliminary ruling.

31 It should be noted that, by order of 2023 of the referring court, the sentences imposed on MSIG in Spain were cumulated into eight final judgments. Their cumulation set a cumulative term limit of 30 years, in accordance with the Spanish Criminal Code and the Law of Criminal Procedure, on the ground that they are related offences.

32 However, despite the legal link between the French convictions and the Spanish convictions, it is not legally possible to cumulate them together. As a result, after

having served the cumulative sentence imposed in France (20 years), MSIG will have to serve the cumulative sentence imposed in Spain (at least 30 years), that is to say, a minimum total term of imprisonment of 50 years.

33 Furthermore, sentences imposed in Spain for terrorist offences are subject to a special enforcement regime which limits the possibility of obtaining prison leave, prison transfer to more favourable conditions and obtaining release on licence, which introduces additional extraordinary hardship compared to the ordinary prison system.

Succinct presentation of the reasoning in the request for a preliminary ruling

34 In the abovementioned French judgments, the French courts investigated and judged all MSIG's criminal activities in France as a leading member of ETA.

35 Those activities consisted of being in charge of ETA's 'legal' commands operating in Spain, in this case the 'Katu' command (design of ETA's operations and provision of resources to carry out the attacks), with participation in various periods in the preparation of terrorist attacks which were carried out in Spain in the same time span as covered by the French judgments. The members of the commands were free to decide on the targets, using the materials received and reporting the outcome of the attack to ETA's leadership afterwards.

36 Those judgments gave rise to sentences totalling a term of 35 years of imprisonment, which were cumulated in 2014 into a single sentence of 20 years, with the four judgments having been regarded as penalising the same criminal activity.

37 In handing down those judgments, the French courts had access to all of the ETA materials intercepted in France, which were used to accurately determine MSIG's role in the terrorist organisation. Those investigation materials were then forwarded to the Spanish police in order to complete investigations into acts which had not yet been clarified, in which various members of ETA could have been involved.

38 It is assumed that both the activities of the accused ruled on in the French judgments and the activities being tried in the present Spanish proceedings were carried out entirely in France, without MSIG having travelled to Spain at any time.

39 Although the French judgments, due to their specific drafting technique, do not contain a list of the specific proven acts in the manner of the Spanish judgments, but refer to activities, they do rule on all the acts committed by MSIG in France, as a leader of ETA, carrying out activities with a view to the preparation, through various material actions, of a number of terrorist acts referred to in Article 421-1 of the French Criminal Code.

40 In particular, according to the referring court, the judgment of the Tribunal de Grande Instance de Paris (Regional Court, Paris) of 13 February 2003 states that ‘the accused participated, in 1997 and for a non-time-barred period, in a group formed or in an entity established for the purpose of preparing terrorist acts, within ETA-MILITAR’, and relates to her conduct during the time span in which the Oviedo attack took place.

41 The referring court has already delivered, in 2021, a judgment on the Oviedo attack, in which it found that there was an international dimension to the *res judicata* principle, on the ground that the *ne bis in idem* principle applied across the various French convictions handed down against MSIG for her activities in France as a leader of ETA and her involvement in the preparation of attacks that overlap in time with the acts of the present case.

42 However, the judgment of the referring court was overturned in 2023 by judgment No 238/2023 of the Second Chamber of the Tribunal Supremo (Supreme Court).

43 The Supreme Court has essentially adopted the arguments of the public prosecutor, who maintains that ‘[France’s] conviction does not even cover, in a general or indeterminate manner, participation in specific terrorist acts’ and that, as a result, the *ne bis in idem* principle does not apply. The Supreme Court noted that it was not possible to hold that ‘that which was not dealt with by the courts has been ruled on’, held that the judgment of the referring court was vitiated by a failure to state reasons and ordered the referring court to deliver a new judgment.

44 In its own words, the referring court is currently conducting criminal proceedings in order to deliver that new judgment.

45 Although the majority of the Criminal Chamber of the referring court is convinced that the international *ne bis in idem* principle applies, that view is not shared by the Supreme Court, leading the referring court to have the doubts brought to the attention of the Court of Justice, in the light of the independent and European nature of the *ne bis in idem* principle and the usefulness in the present case of the viewpoint of what it calls European law.

46 The referring court finds that the conceptual debate relating to the *ne bis in idem* principle at European level entails taking into account the identity of the material acts, which is understood to be the existence of a set of acts or factual circumstances which are inextricably linked together, irrespective of their legal classification or the legal interest protected. It refers to the judgments of the Court of Justice in *Van Esbroeck* (C-436/04), *Van Straaten* (C-150/05) and *Kretzinger* (C-288/05).

47 However, the referring court finds that the problem before it is not easily resolved, due to the difficulties entailed in the very concept of an ‘act’ for the purposes of the assessment of applicability of the *ne bis in idem* principle in the different systems and the different way of setting out the ‘acts’ in the judicial decisions of the different Member States.

48 For the referring court, in the first place, two possible interpretations have traditionally been accepted in Comparative Law: on the one hand, it can be understood that 'act' refers to the historical event that occurred, disconnected from its legal qualification (naturalistic theory or 'factual idem'), which is applicable in, for example, German law. On the other hand, 'act' can be understood as an expression of legal content, one that refers not to the historical natural act but to its inclusion in one of the existing types of crime (normative theory, 'legal idem' or 'crime idem'), which is the interpretation applied in Spanish practice (Judgment No 18/2016 of the Supreme Court of 26 January 2016) and, seemingly to an even greater extent, in French practice.

49 This conceptual divergence is important in this case: focusing more on 'legal idem' rather than 'factual idem' does not readily support the finding that the French judgments analysed include the act that is being tried in Spain.

50 In the second place, there is a further difficulty, as mentioned, in that, in French practice, judgments often do not contain a narrative of the acts the way they do in Spanish practice, with the acts being described in a more general manner in French practice, by referring to the descriptions contained in criminal offence definitions. This does not allow for an easy comparison of material acts, even when dealing with all or some of the same acts.

51 In the present case, it is clear that there is no alignment in the legal classifications of the same acts. French justice refers to the activities of MSIG as a leader of a terrorist organisation, with a view to preparing (multiple) terrorist acts, through one or more acts (although the terrorist acts were directly carried out by others). In contrast, the accusation relating to the same act in the Spanish courts attributes to MSIG a form of criminal participation equivalent to direct perpetration, while taking the view that the act was actually carried out by others.

52 According to the referring court, despite that divergence in legal treatment, the two cases refer to the same acts. However, as regards a possible application of the international *ne bis in idem* principle and the application of EU law that poses the difficulties expressed, the referring court finds it necessary to submit its doubts to the Court of Justice.

53 The referring court raises another issue which it considers to be equally relevant: even if it were to be confirmed that the *ne bis in idem* principle does apply due to the identity of the acts covered by the French judgments and the acts being tried in Spain, it has serious doubts as to whether that application of the *ne bis in idem* principle can be taken into account in its judgment, on account of the Spanish legislation.

54 Similarly, another related difficulty may arise. The Court of Justice may find that there is no absolute identity of the acts in the present case. However, even if that were the case, the referring court considers that these are at least closely linked acts; therefore, the French judgments already delivered should be able to be taken

into account (for the purpose of determining the sentence to be imposed or in order to be able to assess, in the Spanish judgment, a legal situation in which the acts already ruled on may have an impact on those being ruled on, or on the limitation of the cumulative sentences to be effected at the judgment enforcement stage). However, the referring court has raised serious doubts about whether it would be possible for it to take into account, in such a case, the principle of proportionality of penalties.

55 According to the information provided by the referring court, this is due to the fact that there is no provision in the Spanish legal system that allows other previous judgments in other Member States to be taken into account, regarding either identical acts or related or connected acts.

56 Moreover, Organic Law 7/2014 (which transposes, *inter alia*, Council Framework Decision 2008/675/JHA) provides as follows:

57 Article 14(2): '… final convictions handed down in other Member States shall have no effect on the following decisions and may not lead to their revocation or review: […]

58 (b) convictions handed down in subsequent proceedings in Spain in connection with offences committed before the court of the other Member State handed down a conviction;

59 (c) orders made or to be made pursuant to the third paragraph of Article 988 of the Ley de Enjuiciamiento Criminal (Law of Criminal Procedure) which sets limits on the execution of sentences, including those referred to in point (b).'

60 Single Additional Provision: 'Convictions handed down by a court of a Member State of the European Union before 15 August 2010 shall in no circumstances be taken into account […].'

61 The referring court infers from the foregoing that the absolute nature of the wording of that provision:

62 (1) Expressly prevents the French final judgments mentioned (for which the sentence has already been served) from being taken into account in judgments relating to the same acts that are to be handed down in Spain. That even prevents any assessment of the applicability of the *ne bis in idem* principle. The latter is also prevented, in relation to judgments delivered before 15 August 2010, by the Single Additional Provision of Organic Law 7/2014.

63 (2) Of course, where it is found that the *ne bis in idem* principle is not applicable but that there is deemed to be overlapping conduct (because there is unity, a close relationship, a connection, and so forth, between the acts), it also prevents earlier French judgments from being recognised as having effect at the trial stage, for the purposes of the handing down of the judgment.

64 (3) It also prevents earlier French judgments from being recognised as having any effect in relation to the subsequent enforcement of the judgment, since such French judgments are expressly excluded from the cumulation and fixing of a limit for the enforcement of sentences.

65 As regards the matter of enforcement of the judgment, the referring court also points out that, as the aforementioned Spanish legislation currently stands, the consequence of double prosecution in France and Spain would be that MSIG, if she is ultimately convicted in Spain, in addition to serving the 20-year sentence in its entirety in France, would have to serve the 30-year sentence which would most probably be imposed on her in Spain, following its cumulation with other sentences imposed in Spain. This would mean a total minimum sentence to be executed of 50 years of actual imprisonment, as it is not possible to set a single cumulative sentence that is limited in time for cumulative convictions in France and cumulative convictions in Spain. For the referring court, such a situation would be seriously punitively disproportionate, which discriminates against MSIG as compared with persons convicted in a single country (for example, the direct perpetrators of the acts in Oviedo).

66 In addition to that long period, the full and effective execution of the sentence imposed in Spain is ensured by the existence of special legislation in relation to terrorism, Organic Law 7/2003, which establishes conditions for and makes more unlikely the possibility of obtaining release on licence and transfer to a category three prison, as compared with the ordinary execution system, by introducing additional extraordinary hardship.

67 Moreover, the sentence imposed on MSIG in Spain would also not be eligible for application of the review mechanisms that would be applicable to her if she were sentenced to life imprisonment subject to review. It follows that, *de facto*, the execution of MSIG's sentences is even more onerous than life imprisonment subject to review.

68 The referring court holds that such a prison situation exceeds any acceptable and civilised constitutional standard for the enforcement of custodial sentences and that it is in direct contradiction with the case-law of the European Court of Human Rights regarding custodial sentences and Article 3 of the European Convention on Human Rights. Such a prison situation would even considerably exceed the standards for reviewing prison sentences established by the judgments of the European Court of Human Rights in *Vinter v. the United Kingdom*, *Magyar v. Hungary* and *Bancsók and Magyar v. Hungary*.