

**Case C-701/23****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:**

14 November 2023

**Referring court:**

Tribunal Judiciaire de Paris (France)

**Date of the decision to refer:**

4 July 2023

**Applicant:**

Procureur de la République

**Defendant:**

SWIFTAIR (a company)

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**1. Subject matter and facts of the case:**

- 1 On 24 July 2014, a McDonnell-Douglas 83 aircraft with Spanish registration ECLTV, belonging to the Spanish company Swiftair, took off from Ouagadougou in Burkina Faso for Algiers under flight number AH 5107, carrying six crew members and 110 passengers, including 54 French nationals.
- 2 About thirty minutes after take-off, it encountered adverse weather conditions over Mali, changed course to the north to avoid cumulonimbus clouds and crashed in the desert in northern Mali, where the wreckage was discovered on the evening of 24 July 2014. All of the occupants of the aircraft were dead.
- 3 On the same day, the Procureur de la République de Paris (public prosecutor, Paris, France) instructed the commandement de la gendarmerie des transports aériens (air transport gendarmerie command, France) to conduct an investigation under a procedure for offences which are ongoing or very recent and require a rapid response.

- 4 Parallel proceedings were opened by a Spanish court of preliminary investigations under an order of 24 July 2014 made by the Juzgado Central de Instrucción nº 6 (Central Court of Preliminary Investigation, No 6, Spain), which stated that a ‘diligencias previas’ (preliminary investigation) was opened in accordance with Article 774 of the Real decreto por el que se aprueba la Ley de Enjuiciamiento Criminal (Royal Decree approving the criminal procedure code) of 14 September 1882 (‘the Spanish criminal procedure code’) in order to determine the nature and circumstances of a suspected offence. The Spanish public prosecutor stated in recommendations of 25 July 2014 that ‘it [was] appropriate to accept provisional jurisdiction pending clarification of the causes of the disaster, given that acts may have been committed which constitute terrorist offences subject to the jurisdiction of the Audiencia Nacional (National High Court, Spain)’.
- 5 In a subsequent order of 23 September 2014, the Juzgado Central de Instrucción nº 6 (Central Court of Preliminary Investigation, No 6) stated that ‘the possibility of a terrorist attack having been ruled out, it remains to be investigated and determined whether the events were caused by inexperience or lack of care on the part of the pilots’.
- 6 By a bill instituting proceedings of 29 July 2014, a pre-trial judicial investigation was also opened in France, against ‘X’, for involuntary homicide caused by lack of skill, care or attention, negligence or failure to comply with a duty of care or safety obligation imposed by law or regulations.
- 7 The French and Spanish investigating judges cooperated through letters rogatory, requests for international mutual assistance in criminal matters, hearings of experts and exchanges of documents relating to the proceedings. An inventory of the Spanish proceedings, produced by the French investigators, shows that many of the documents in those proceedings had become available by virtue of the numerous and specific requests for documents made by the French judges by way of international letters rogatory.
- 8 The inventory includes a letter contained in Volume 1 of the Spanish proceedings, in which the advocate F.J.S.M. wrote to the National High Court informing the judge that he would be representing Swiftair in the proceedings.
- 9 On 18 July 2016, the Juzgado Central de Instrucción nº 6 (Central Court of Preliminary Investigation, No 6) made an order for provisional dismissal and closed the proceedings, on recommendations to that effect from the office of the public prosecutor. That order states: ‘In due course the possibility of a terrorist act was dismissed. The investigation ... continued with a view to determining whether the events might have been caused by a lack of care or competence on the part of the Spanish pilots Mr C.M.A and Ms G.C.I. To that end, a series of expert reports concluded that, having regard to the documents which had been considered, in relation to the personal and professional qualities of the crew members, and the condition of the aircraft ECLTV, we have found no proof of the commission by Swiftair of any irregularities potentially relating to the aviation

accident involving flight AH5017 which occurred on 24 July in Mali. For their part, the experts ... conclude that the flight simulator used by Swiftair was suitable for all the training required by the authority, at the various different stages of training and verification. It was perfect for the training of pilots of the MD-83 aircraft and also had digital instrumentation matching the instrumentation of the aircraft involved in the accident. Accordingly, no infringement of the objective duty of care or attention imposed on aircraft pilots was identified’.

- 10 That order for provisional dismissal and closure of the proceedings was made in Spain after the filing, in the Spanish proceedings, of an expert report from EASA (European Aviation Safety Agency) officials, which identified irregularities in the recording of the refresher training received by the pilots, carried out at the same time as proficiency checks, but did not find that these were related to the accident, and concluded that no irregularity was apparent in the proficiency checks to which the pilots had been subject.
- 11 It was also made after the filing of the report of the international security investigation conducted in accordance with Annex 13 to the Convention on International Civil Aviation under the responsibility of the Minister of Transport of Mali, the State in which the accident occurred. In the conclusion of that report, the investigators recommended that: the manufacturer should study the feasibility of installing a permanent anti-icing system; reference should be made in the FCOM (Flight Crew Operating Manual) procedures to the difficulties involved in detecting ice crystals; the manufacturer should integrate the specific features of a stall in cruise into the documentation and training; the maintenance check procedure for CVRs (Cockpit Voice Recorders) should be modified pending the discontinuation of the use of magnetic tape CVRs in accordance with ICAO (International Civil Aviation Organisation) Annex 6; the national authorities of Niger, Burkina Faso and Mali should improve coordination between their air traffic control centres. None of the recommendations related to the airline Swiftair.
- 12 In France, the technical investigations had been entrusted to a panel of three experts, appointed on 2 September 2014. The final report was filed on 23 December 2016. The panel of experts found that the following factors had contributed to the occurrence of the accident:
  - the fact that the pilots worked on a seasonal basis, their activity being concentrated over a few months with long periods of interruption – this contributed to a reduction in their capacity to deal with unusual situations;
  - the fact that ground and flight simulator training was insufficient in volume and incomplete in content – this contributed to the failure to detect the external flight conditions;
  - the fact that means of protecting the engines from icing were not used; the failure to detect the deterioration of the engine parameters; the failure to detect

the significant drop in speed and the consequent indications of attitude; the lack of an appropriate response to stalling; the reduction in capacity to deal with heavy workloads;

- the change of route; the presence of the intertropical front and difficulties in communicating by radio – these factors increased the workload and reduced the availability of the crew;
- the fact that two pilots who worked on a seasonal basis and had not flown for almost 8 months had been assigned to the same crew.

13 On 29 June 2017, Swiftair SA, a legal person represented by its Vice-President, S.L.F., was placed under investigation by the French investigating judges for involuntary homicide, on the basis that it had, ‘by lack of skill, care or attention, negligence or failure to comply with a duty of care or safety obligation imposed by law or regulations, in the present case by failing to ensure that the crew of flight AH5017 had received sufficient training, which contributed to their failure to identify the external flight conditions, their awareness of the deterioration in the engine parameters; their failure to use means of protection of the aircraft and their failure to respond appropriately to stalling, involuntarily caused the death of all those on board, some of whom were French, such acts constituting an offence under Articles 221-6, 221-7, 221-8 and 221-10 of the criminal code’.

14 Swiftair challenged its placement under investigation on the basis that the Spanish judicial authorities had made an order dismissing proceedings concerning the same facts. It submitted that that order was a final disposal which was binding in France under the principle *ne bis in idem* contained in Article 54 of the Convention implementing the Schengen Agreement (‘the CISA’).

15 The investigating judge rejected Swiftair’s objection that a public prosecution was barred, stating:

‘The principle *ne bis in idem* enshrined in Article 54 of the CISA does not fall to be applied to a decision by which an authority of a State, after examining the merits of the case brought before it, makes an order, at a stage before the charging of a person suspected of a crime, suspending the criminal proceedings, where the suspension decision does not, under the national law of that State, definitively bar further prosecution and therefore does not preclude new criminal proceedings, in respect of the same acts, in that State’ (judgments of 29 June 2016, *Kossowski*, C-486/14, EU:C:2016:483, and of 22 December 2008, *Turanský*, C-491/07, EU:C:2008:768, paragraph 45).

‘Under Articles 637 and 641 of the Spanish criminal procedure code, the closing or dismissal of criminal proceedings before the trial stage may take two forms: a so-called ‘pure and simple’ dismissal where there are no compelling indications that the act on which the proceedings are based was committed, that that act does not constitute an offence, or that it is apparent from the proceedings that those under investigation are exempt from criminal responsibility, as primary offenders,

accomplices or handlers, or a so-called ‘free’ or ‘provisional’ dismissal where the commission of the offence on which the proceedings are based does not appear to be duly established or where it is apparent from the investigation that, although an offence was committed, there are no sufficient grounds to accuse one or more specific persons as primary offenders, accomplices or handlers. This form of provisional closure, which has no equivalent in French law, does not preclude the reopening of the proceedings where justified by new evidence which comes to light, and such reopening does not require a fresh complaint or supplementary bill.

Spanish case-law establishes that *res judicata* status is conferred only by orders for ‘pure and simple’ closure or dismissal of the proceedings, which definitively terminate criminal proceedings. According to the case-law of the criminal chamber of the Tribunal Supremo (Supreme Court, Spain), it is only an order for ‘pure and simple’ dismissal that has the same consequences, in terms of *res judicata*, as a final decision. It would therefore be contrary to the principle *non bis in idem* to open fresh criminal proceedings against the same person and in respect of the same facts on the basis of which an order for pure and simple dismissal had been made. Accordingly, orders for provisional closure or dismissal, made where the commission of the offence at issue does not appear to have been duly established, or where there are no sufficient grounds to accuse a specific person of the commission of that offence, do not confer *res judicata* status. In such circumstances the closure is ‘provisional’ and thus does not preclude reopening of the proceedings where this is justified by new evidence which comes to light.

In the present case, the order for dismissal made by the Juzgado Central de Instrucción nº 6 (Central Court of Preliminary Investigation, No 6) on 18 July 2016 is an order for “sobreseimiento provisional” (provisional dismissal) and thus does not confer *res judicata* status. Swiftair’s argument that that order is a final disposal which is binding in France under the principle ‘*non bis in idem*’ must therefore be rejected’.

- 16 By order of 18 May 2021, the case against the defendant Swiftair SA was remitted to the Court of Paris.

## 2. Legal framework:

### A. *EU law*

#### *Charter of Fundamental Rights of the European Union*

- 17 Article 50, which is headed ‘Right not to be tried or punished twice in criminal proceedings for the same criminal offence’, provides:

‘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.’

*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 at Schengen \**

- 18 Under the heading ‘Application of the ne bis in idem principle’, Article 54 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’.

**B. National law**

*French legislation*

*Criminal procedure code*

- 19 Article 695-9-54 provides:

‘With respect to the implementation of Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings, where parallel criminal proceedings, conducted in two or more Member States and concerning the same persons in respect of the same facts, might lead to final disposals, the competent authorities of the Member States concerned shall provide each other with information concerning the criminal proceedings and shall jointly consider how they could limit the adverse consequences arising from the existence of such parallel proceedings’.

*Spanish legislation*

*Real Decreto por el que se aprueba la Ley de Enjuiciamiento Criminal (Royal decree approving the criminal procedure code) of 14 September 1882 (Spanish criminal procedure code)*

- 20 Article 637 provides:

‘pure and simple dismissal:

\* Extended to Spain as from the Agreement on the Accession of the Kingdom of Spain to the Convention implementing the Schengen Agreement ..., signed at Bonn on 25 June 1991 (JO 2000 L 239, p. 69).

1. where there are no compelling indications that the act on which the proceedings are based was committed
2. where the act does not constitute an offence
3. where it is apparent from the proceedings that those under judicial investigation are exempt from criminal responsibility, as primary offenders, accomplices or handlers’.

21 Article 641 provides:

‘provisional dismissal:

1. where the commission of the offence on which the proceedings are based does not appear to be duly established
2. where it is apparent from the investigation that, although an offence was committed, there are no sufficient grounds to accuse one or more specific persons as primary offenders, accomplices or handlers’.

*Código penal (Spanish criminal code)*

22 Article 31A provides:

‘1. In the cases specified in this code, legal persons have criminal responsibility for offences committed in their name or on their behalf, and to their benefit, by their legal representatives and de facto or de jure directors.

In those cases, legal persons also have criminal responsibility for offences committed, in the exercise of company activities and in the interests and to the benefit of such activities, by any person who, being subject to the authority of the natural persons referred to in the preceding subparagraph, was able to carry out the acts because he or she was not subject to the control which would have been proper, having regard to the factual circumstances.

2. The criminal responsibility of legal persons arises as soon as a finding is made of an offence which must have been committed by a person exercising the mandates or functions referred to in the preceding paragraph, even if the specific natural person responsible has not been individually identified or if it has not been possible to bring the proceedings against that person. Where, following the same factual events, both are punished by way of a fine, the court shall adjust the respective amounts such that the resulting sum is not disproportionate to the seriousness of those events’.

### 3. Positions of the parties:

#### *The defendant (Swiftair)*

- 23 Swiftair submits principally that the Spanish investigation proceedings, which run to 11 volumes and were conducted by a renowned Spanish judge, must be regarded as a detailed investigation at the conclusion of which the judge was able to find, on the basis of a robust investigation relating in particular to any irregularities committed by Swiftair with regard to pilot training, that it was not appropriate for the proceedings to continue. It submits that the order for dismissal, although described as provisional, ought to have been described, in circumstances where no offence had clearly been made out, as an order for pure and simple dismissal, and that in any event, that order for provisional dismissal was open to appeal but no appeal was pursued, and the order did not permit the proceedings to be reopened in the absence of fresh charges; it must therefore be characterised as a final disposal within the meaning of Article 54 of the CISA and of the case-law of the Court, and Swiftair, as the only person – apart from the pilots – named by that order, is entitled to rely on it as engaging the principle *ne bis in idem*.
- 24 Swiftair adds that in the event of new evidence coming to light, the French judges clearly have no jurisdiction to investigate because, under the case-law of the Court of Justice (judgment of 5 June 2014, *M*, C-398/12, EU:C:2014:1057, paragraph 41), it is only the Spanish investigating judge who can reopen the investigation.
- 25 Swiftair also submits that the limitation period has now expired in Spain, and that the investigation could no longer be reopened in that jurisdiction, even in the event of new evidence coming to light. The order for dismissal has thus acquired substantive *res judicata* effect by virtue of the expiry of the limitation period, and is therefore ‘doubly’ final, according to Swiftair.
- 26 Lastly, Swiftair submits that while the responsibility of legal persons was undeniably restricted under the Spanish law of the time, it was possible to impose responsibility on natural persons representing the legal person, and it was to that end that the investigating judge observed in the order for dismissal that no irregularity on the part of Swiftair had been identified.

#### *The public prosecution service*

- 27 The public prosecution service considers that the various different legal opinions expressed in the course of the investigation by the French liaison judges in Spain or the academics heard as witnesses on the *ne bis in idem* issue cannot be regarded as providing sufficient clarification for the court, as only the Court of Justice is empowered to interpret the meaning of Article 54 of the CISA with regard to the two legal issues arising in the present case: the effect of the Spanish order for provisional dismissal and the issue of identity of persons as between a natural person and a legal person.

*The civil parties*

- 28 The civil parties submit that the Spanish order for provisional dismissal corresponds, in legal systems without investigating judges, to a decision of the public prosecution service to close the file without bringing a prosecution, and that the case-law of the French Court of Cassation and of the Court of Justice consistently holds that such a decision is not final. They state that the case-law of the Spanish courts is itself very clear in holding that orders for provisional dismissal do not have *res judicata* effect, unlike orders for pure and simple dismissal.
- 29 The civil parties also state that the Spanish investigating judge did not carry out a serious or detailed investigation, and that all the hearings of Swiftair management took place within the French investigatory proceedings, in order to enable the experts to analyse the steps taken by the company.
- 30 Lastly, they state that in any event, in order for a decision made in one case to have *res judicata* effect in another, there must be identity of parties, cause of action and subject matter; in the present case, the civil parties submit that, first, there is no identity of parties, because the Spanish proceedings did not relate to Swiftair and legal persons bore no responsibility in Spain for air accidents, and secondly, that there is no identity of legal characterisation, because the French investigation related to involuntary homicide, whereas the Spanish investigation was opened in relation to a terrorist attack and went on to investigate infringements of air navigation law committed by the pilots. They conclude that as no criminal proceedings were opened in Spain in relation to Swiftair, which could not in any case have been subject to a judicial investigation in that jurisdiction, it cannot rely on the rule *ne bis in idem*.

**4. Assessment of the court:***Analysis of the applicable legislation*

- 31 The court will first outline the legal framework in terms of EU law, French law and Spanish law.
- 32 In terms of EU law, the court will focus its examination of the principle *ne bis in idem* on Article 54 of the CISA. Dealing first of all with the ‘bis’, it would identify the judgments delivered by the Court of Justice with particular reference to the nature of a final disposal within the meaning of Article 54 of the CISA (judgments of 11 February 2003, *Gözütok and Brügge*, C-187/01 and C-385/01, EU:C:2003:87; of 10 March 2005, *Miraglia*, C-469/03, EU:C:2005:156; of 22 December 2008, *Turanský*, C-491/07, EU:C:2008:768; of 5 June 2014, *M*, C-398/12, EU:C:2014:1057, and of 29 June 2016, *Kossowski*, C-486/14, EU:C:2016:483). The court would summarise the points established by that case-law as follows: a final disposal need not be a decision of a court; it must however

definitively bar prosecution in the contracting State; the decision must be made following a substantive investigation of the case; it is permissible for the prosecution to be revived against the same person in respect of the same facts only where there is new evidence.

- 33 To address, next, the ‘idem’, the court would refer to the judgments of 9 March 2006, *Van Esbroeck*, C-436/04, EU:C:2006:165, and of 28 September 2006, *Gasparini and Others*, C-467/04, EU:C:2006:610, adding that the latter judgment does not explicitly resolve the issue of whether an order for dismissal made in favour of natural persons in one State party to the agreement can have ne bis in idem effect in favour of legal persons pursued in respect of the same facts in another State party to the agreement.
- 34 As regards French law, the court would make passing reference to Article 695-9-54 of the criminal procedure code, which refers to Council Framework Decision 2009/948/JHA of 30 November 2009, providing in particular for referral to Eurojust where a consensus on the competing jurisdictions cannot be reached, but only to observe that the consultations which took place between the Spanish and French judicial authorities in the course of the investigation, although fruitful in terms of the investigation itself, did not lead to any advance decision being taken as to what should be done in the event of conflicting decisions being made at the conclusion of the parallel investigations.
- 35 As regards Spanish law, the court will provide a brief summary of the rules on orders for dismissal contained in Articles 637 and 641 of the Spanish criminal procedure code, as cited above, and of the rules on criminal responsibility of legal persons.

*The rules on orders for dismissal*

- 36 In contrast to French law, Spanish law does not lay down, in legislation, the conditions for reopening proceedings which have been closed by an order for provisional dismissal. The conditions for such proceedings to be reopened have therefore been defined by the case-law of the Spanish courts, which have established the principle that new evidence is required (decision of the Tribunal Supremo (Supreme Court) of 30 June 1997, subsequently affirmed), which does not permit the criminal proceedings to be reopened on the basis of the same evidence and accords a certain authority to the order for provisional dismissal, in relation in particular to ‘whether the evidence which has been filed is sufficient for the proceedings to continue’.
- 37 The referring court would summarise the case-law cited by the defendant and the civil parties, concluding from that case-law that the decisions cited by the parties are not incompatible and tend to demonstrate: that the Spanish courts have established specific criteria which must be met if proceedings are to be reopened after an order for provisional dismissal has been made, those criteria requiring that new evidence has come to light; that, since it is possible for the proceedings to

continue after an order for provisional dismissal has been made, such an order cannot be equated with a final disposal conferring full and complete *res judicata* status; that, having regard to the questionable practice of the Spanish judges to make orders for provisional dismissal for reasons of convenience, the courts examine the contents of the file on a case-by-case basis in order to determine what effect the order for provisional dismissal should have.

*The rules on criminal responsibility of legal persons*

- 38 Criminal responsibility of legal persons was introduced in Spain by the Ley Orgánica 1/2015, de 30 de marzo, por la que se modifica la Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal (Organic Law 1/2015 of 30 March 2015, amending Organic Law 10/1995 of 23 November 1995, laying down the criminal code).
- 39 On the date of the accident, it was governed by Article 31a of the Código penal (Spanish criminal code) (referred to in paragraph 22 of this summary) which provides in particular: ‘1. In the cases specified in this code, legal persons have criminal responsibility ...’.
- 40 It is apparent from that code that, in Spain, legal persons bear criminal responsibility only in respect of an exhaustive list of offences which does not include Article 65 of Ley 209/1964, de 24 de diciembre, Penal y Procesal de la Navegación Aérea (Criminal and Procedural Law 209/1964 on air navigation of 24 December 1964), creating the offence of serious incompetence or negligence in air navigation, or Article 142 of the Código penal (Spanish criminal code), concerning the offence of homicide by negligence.
- 41 The court will proceed to examine the objection that the prosecution is barred, under Article 54 CISA, by reason of the order for provisional dismissal made by the Juzgado Central de Instrucción nº 6 (Central Court of Preliminary Investigation, No 6) on 18 July 2016.
- 42 To that end, that court considers it necessary to examine:
1. whether the Spanish decision is a ‘final disposal’ within the meaning of EU law,
  2. whether it can be said that Swiftair’s trial has been ‘finally disposed of’ by the Spanish decision, which requires a determination as to the limits of the concept of ‘a person whose trial has been finally disposed of’ in Article 54 of the CISA, such a person being entitled to rely on the principle *ne bis in idem*, in the context of a judicial investigation which was closed without progressing beyond the investigation stage, with no person having been heard in any other capacity than as a mere witness,
  3. whether Swiftair is entitled to rely on the effects of a decision taken in a legal system under which it was only the natural persons representing it who could

bear criminal responsibility for the events under investigation, which requires a determination as to whether, by virtue of a broad interpretation of the concept of ‘a person’, the benefit of the principle *ne bis in idem*, as contained in Article 54 of the CISA, is, where the proceedings only relate or can only relate to natural persons, automatically available to the legal person represented in law by those natural persons, on the basis that they are to be equated with one another.

*Application to the present case*

*1. Was there a ‘final disposal’?*

- 43 The argument at the hearing of 8 June 2023 was mainly devoted to the effect of the Spanish order for provisional dismissal, one side submitting that since the decision did not have *res judicata* effect in Spain, the order for provisional dismissal cannot be regarded as a final disposal, the other that the case-law of the Court of Justice on the concept of a final disposal requires only that the decision in question terminates the public prosecution, subject to any new evidence which may come to light or any exceptional review procedures which may be exercised.
- 44 Spanish law has the particularity of distinguishing, as regards the orders for dismissal which can be made by an investigating judge to close the investigation, between those which leave open the possibility of reopening the investigation in the event of new evidence coming to light (orders for provisional dismissal) and those which close the investigation definitively and have *res judicata* effect, because there has been no offence, there is no offender, or there is no offender with criminal responsibility (orders for pure and simple dismissal). Both types of order are judicial decisions, from which an appeal lies, and their effects differ essentially with regard to the rights of the person investigated or detained (such as the right to judicial protection of honour and reputation attaching to acquittals, the right to compensation in respect of time spent on remand during the investigation, or certain causes of action).
- 45 With a view to correcting possible misuse of orders for provisional dismissal by investigating judges who may overuse them for reasons of convenience, the Spanish courts may, on a case-by-case basis, attach to an order for provisional dismissal the same effect as attaches to an order for pure and simple dismissal, where they can make a finding that the case before the investigating judge would have justified the making of a order for pure and simple dismissal.
- 46 The Spanish case-law is clear, nonetheless: orders for provisional dismissal do not have substantive *res judicata* effect. It is only orders for pure and simple dismissal that have that effect. In its decision of 14 January 2019 (ATC 3/2019), however, the Tribunal Constitucional (Constitutional Court, Spain) nuances that distinction and moves towards a concrete assessment of the proceedings which led to the dismissal, as the means of determining its effects. It held in that decision that: ‘the potential substantive *res judicata* effect of a decision to dismiss does not depend on whether the closure of the proceedings is classified as definitive or

provisional – and therefore on whether it is absolutely impossible to reopen the proceedings – but on the specific circumstances of the case and on whether (1) the decision was taken at the conclusion of criminal proceedings in which the person concerned was subjected with the seriousness and gravity that that implies (2) all necessary and reasonable measures of investigation were taken by the body conducting the criminal proceedings in order to determine whether the events constituted an offence and what part the person concerned had in those events, and (3) as a consequence of the final nature of the decision to close, any reopening of the proceedings is dependent on consideration of the emergence of new and relevant evidence relating to the characterisation of the events as a criminal offence or the participation of the person concerned in those events’.

- 47 Article 54 of the CISA employs the concept of final disposal, and seems to make implicit reference to that of the *res judicata* effect of such a decision, to which the principle *ne bis in idem* is a counterpart, given that a criminal decision with *res judicata* effect prevents fresh proceedings being brought against the same defendant in respect of the same facts.
- 48 In accordance with the case-law of the Court of Justice, however, it is possible to regard an order for dismissal which terminates the criminal proceedings after a thorough investigation has been conducted, but which can be reopened in the event that new evidence subsequently comes to light, as a final disposal within the meaning of Article 54 of the CISA. The decisions of the Court of Justice which make rulings to that effect do not refer to the concept of *res judicata*.
- 49 At the same time, the Court of Justice affirms that the status of a decision must be assessed on the basis of the domestic law of the Contracting State. It was on the basis of that proviso that the French investigating judge remitted the case, having taken the view that since the Spanish courts did not attach *res judicata* effect to the order for provisional dismissal, it could not be regarded as a final disposal engaging the principle *ne bis in idem*.
- 50 It therefore seems that there is a contradiction between these two imperatives in the case of the Spanish decision of 18 July 2016, in that while that order for provisional dismissal appears to meet the requirements identified by the Court in its judgment of 5 June 2014, *M* (C 398/12, EU:C:2014:1057), the Spanish courts have clearly indicated that it does not have substantive *res judicata* effect, as a final judgment or order for pure and simple dismissal would, and that, in principle, it does not entitle the person in whose favour it was made to claim rights equivalent to those of an accused who has been acquitted of all charges.
- 51 It is therefore necessary to determine whether, for the Court of Justice, the concept of a ‘final disposal’ employed in Article 54 of the CISA requires that, under the domestic law of the State concerned, the decision confers full and complete *res judicata* status, or merely ‘relative’ *res judicata* status, simply preventing fresh proceedings from being brought on the basis of the same evidence, without

entitling the person concerned to all the other rights which would flow from an acquittal.

52 In that connection, the court will refer the first question set out below for a preliminary ruling.

2. *Is there a ‘person whose trial has been finally disposed of’?*

53 When the Spanish judicial investigation commenced, the judge was initially seeking to identify any terrorist acts that might have caused the air accident. No terrorist acts were identified, and the Spanish judge continued the investigation with a view to determining whether the accident had been caused by the inexperience or negligence of the pilots, concluding on completion of the investigation that no infringement of the ‘objective duty of care or attention imposed on aircraft pilots’ had been identified.

54 In the Spanish investigation file, the only hearings of Swiftair personnel conducted in November 2014 were those requested by the French investigating judges by means of letters rogatory. Those various members of Swiftair’s management personnel were heard as mere witnesses by Spanish police officers, in the presence of French gendarmes.

55 No hearing of either Swiftair or its legal representative was conducted by the Spanish investigating judge, as was subsequently done by the French judge when the company was placed under investigation.

56 Thus, while the training received by Swiftair pilots was investigated as part of the Spanish proceedings, with a view to determining whether the pilots might have been negligent or were lacking in experience, Swiftair was never formally named, either by the Spanish public prosecutor or by the Spanish investigating judge, in a notice of criminal proceedings officially notifying it that it was subject to an investigation which might lead to a trial.

57 The statement of reasons in the order for dismissal simply states that ‘we have found no proof of the commission by Swiftair of any irregularities potentially relating to the aviation accident involving flight AH5017 which occurred on 24 July in Mali’.

58 There is no case-law of the Court clarifying the scope of the concept of ‘a person whose trial has been finally disposed of’ in EU law, in the specific situation of proceedings ending in an order for dismissal. Does this concept cover all persons treated, directly or indirectly, as possible offenders in the course of the investigation, even where there is no document issued by the judge or the public prosecutor specifically identifying and naming the persons under investigation and suspected of having committed an offence?

59 In relation to the concept of ‘a person whose trial has been finally disposed of’, in Article 54 of the CISA, the court will refer the second question set out below.

3. *The concept of a 'person' and the issue of identity of persons as between the legal person and the natural persons who are legal representatives*

- 60 Swiftair has not disputed that it could not itself have been charged, in Spain, with the offence of involuntary homicide – an offence which might have been pursued by the Spanish judges, if they had considered that the pilots were incompetent or inexperienced – because of the restrictive nature of the rules on the criminal responsibility of legal persons in that country.
- 61 Swiftair submits however that if the investigations had demonstrated compliance failures on the part of the company in relation to the initial and refresher training received by the pilots, the legal representatives of Swiftair (natural persons) would have been prosecuted for involuntary homicide, and the company would thus have been indirectly prosecuted.
- 62 According to Swiftair, it follows that the order for dismissal, which embodies the fact that there was insufficient evidence to charge the legal representatives of the company with the offence of involuntary homicide, enables both the legal representatives and Swiftair itself, as a legal person, to rely on the principle non bis in idem in all EU Member States.
- 63 That reasoning – which, if valid, would mean that Swiftair was shielded from direct criminal prosecution both in its country of origin and in the other Member States – gives rise to a difficulty which in turn gives rise to a second, neither of which can be resolved by reference to the existing case-law of the Court:
- The judgment of 28 September 2006, *Gasparini and Others* (C-467/04, EU:C:2006:610, paragraph 2 of the operative part) states that the ne bis in idem principle, enshrined in Article 54 of the CISA, does not apply 'to persons other than those whose trial has been finally disposed of in a Contracting State'. On that concept of a 'person', does the Court consider that there is identity of persons as between, on the one hand, the natural persons who are the legal representatives of the legal person, and have acted on its behalf in the exercise of their functions, and the legal person itself? If that question were to be answered in the affirmative, it would be impossible to prosecute a company or any other type of legal person in a Contracting State, if its legal representatives had been convicted on the basis of the same facts in another Contracting State. The converse would also follow.

Such a decision could have a significant effect on a country like France, where the criminal responsibility of a legal person is general in nature and can be invoked simultaneously and in parallel with that of the natural persons who are its legal representatives, for any offence in the criminal code.

- If the proposition that there is identity of persons in such a case is correct, does it also apply where the investigation of the events which has been conducted in one Member State related solely to an offence with which the legal person could not be charged in that State?

127. In order to resolve those difficulties in interpreting the scope of the terms employed by Article 54 of the CISA, and determine whether Swiftair can be prosecuted in France in respect of events for which it could never have been held criminally responsible, as a legal person, in Spain, but in respect of which the Spanish judge did not consider that its legal representatives should be prosecuted, the court will refer the last two questions set out below for a preliminary ruling.

## 5. Questions referred

64 The court refers the following questions:

1. Is Article 54 of the CISA, read in the light of Article 50 of the Charter, to be interpreted as meaning that an order for provisional dismissal made in a Contracting State by a judicial body, from which an appeal lies, which follows a detailed investigation of the case, and prevents continuation of the proceedings unless there is new evidence, is to be regarded as a final disposal within the meaning of that article, even if, in the Contracting State in which that order for provisional dismissal was made, it does not have all the effects of a decision conferring full and complete *res judicata* status?

2. Is Article 54 of the CISA, read in the light of Article 50 of the Charter, to be interpreted as meaning that, in the case of an order for dismissal which constitutes a final disposal, and is capable of conferring the *ne bis in idem* protection provided for by that text, the ‘person whose trial has been finally disposed of’ is to be understood as referring to any person who was considered as a potential offender in the course of the investigation, and whose acts or omissions were investigated, even if no formal notice of proceedings or summons was issued in relation to that person?

3(a). Is Article 54 of the CISA, read in the light of Article 50 of the Charter, to be interpreted as meaning that there is identity of persons between, on the one hand, natural persons who acted in the exercise of their company functions, on behalf and for the benefit of the legal person which they represent, and, on the other hand, the legal person itself, preventing any prosecution of a legal person in a Contracting State, if a trial of its legal representatives has been ‘finally disposed of’, within the meaning of EU law, in another Contracting State, even if the legal person was never prosecuted, in its own name, in that State?

3(b). If the preceding question is answered in the affirmative, is Article 54 of the CISA, read in the light of Article 50 of the Charter, to be interpreted, in such a case, as meaning that *ne bis in idem* protection must be available to the legal person, even if the legal person could not in any circumstances have been prosecuted in the Contracting State of final disposal, either because legal persons do not have direct criminal responsibility in that State, or because legal persons have criminal responsibility only in respect of offences which could not be constituted by the facts to which the proceedings relate?