

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF MIHALACHE v. ROMANIA

(Application no. 54012/10)

JUDGMENT

STRASBOURG

8 July 2019

This judgment is final but it may be subject to editorial revision.



In the case of Mihalache v. Romania,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Guido Raimondi, *President,*
Angelika Nußberger,
Linos-Alexandre Sicilianos,
Robert Spano,
Vincent A. De Gaetano,
Ganna Yudkivska,
Paulo Pinto de Albuquerque,
Helen Keller,
Egidijus Kūris,
Iulia Antoanella Motoc,
Branko Lubarda,
Stéphanie Mourou-Vikström,
Georges Ravarani,
Georgios A. Serghides,
Marko Bošnjak,
Péter Paczolay,
María Elósegui, *judges,*

and Søren Prebensen, *Deputy Grand Chamber Registrar,*

Having deliberated in private on 3 October 2018 and 29 April 2019,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 54012/10) against Romania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Romanian national, Mr Aurelian-Erik Mihalache ("the applicant"), on 10 September 2010.

2. The applicant, who had been granted legal aid, was represented by Mr M. Bratu, a lawyer practising in Focşani. The Romanian Government ("the Government") were represented by their Agent, Ms C. Brumar, of the Ministry of Foreign Affairs.

3. The applicant alleged that he had been tried and convicted twice for the same offence and that there had been a violation of Article 4 of Protocol No. 7 to the Convention on that account.

4. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). On 19 June 2013 notice of the complaint under Article 4 of Protocol No. 7 to the Convention was given to the Government and the remainder of the application was declared

inadmissible pursuant to Rule 54 § 3. Subsequently, the application was allocated to the Fourth Section of the Court. On 27 March 2018 a Chamber of that Section, composed of Ganna Yudkivska, President, Paulo Pinto de Albuquerque, Egidijus Kūris, Iulia Antoanella Motoc, Georges Ravarani, Marko Bošnjak and Péter Paczolay, judges, and also Marialena Tsirli, Section Registrar, decided to relinquish jurisdiction in favour of the Grand Chamber, none of the parties having objected (Article 30 of the Convention and Rule 72).

5. The composition of the Grand Chamber was determined in accordance with the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24.

6. The applicant and the Government each filed a memorial on the admissibility and merits of the case.

7. A hearing took place in public in the Human Rights Building, Strasbourg, on 3 October 2018 (Rule 71 and Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*
Ms C. BRUMAR, Ministry of Foreign Affairs, *Agent*,
Ms S.D. POPA, Deputy to the Permanent Representative of Romania to the Council of Europe, *Adviser*;

(b) *for the applicant*
Mr M. BRATU, lawyer, *Counsel*.

The Court heard addresses by Ms Brumar, Ms Popa and Mr Bratu, and their replies to questions from judges.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant was born in 1975 and lives in Tulnici.

9. During the night of 2 to 3 May 2008 the applicant was stopped by the police while driving on the public highway, as a preventive control measure. He underwent a breath test. As the test appeared to be positive, the police officers asked the applicant to accompany them to a hospital to give a biological sample in order to establish his blood alcohol level. The applicant refused.

1. Opening of criminal proceedings against the applicant

10. In a decision (*rezoluţie*) of 17 July 2008 the public prosecutor's office at the Focşani District Court instituted criminal proceedings against the applicant for refusing to give a biological sample in order to determine his blood alcohol level, an offence provided for and punishable under Article 87 § 5 of Government Emergency Ordinance no. 195/2002 on road traffic ("Ordinance no. 195/2002").

11. After being questioned by the public prosecutor, the applicant admitted that he had consumed alcohol and had refused to give a biological sample.

12. Evidence was also heard from a witness, G.D.

2. Discontinuance of criminal proceedings against the applicant and imposition of an administrative penalty

13. In an order of 7 August 2008 based on Article 10 (b^1) and Article 11 of the Code of Criminal Procedure ("the CCP") in conjunction with Article 91 of the Criminal Code, as in force at the material time, the public prosecutor's office discontinued the criminal proceedings against the applicant (*scoaterea de sub urmărire penală*). In accordance with the aforementioned legal provisions, a prosecution could not be brought unless the act committed was serious enough to constitute a criminal offence (see paragraph 33 below). The prosecutor stated the following:

> "Given that it appears from the criminal case file that in the present case the provisions of Article 10 (b^1) of the CCP are applicable, since the act committed does not attain the [degree of] danger to society of a criminal offence, and that the infringement of social values protected by the law was minimal;
>
> Having regard to the honesty of the perpetrator (*făptuitor*), to the fact that he was driving on a day when there was little road traffic, to the short distance driven and to the fact that [he] was being prosecuted for the first time;
>
> [I HEREBY] ORDER:
>
> The discontinuance of the criminal proceedings (*scoaterea de sub urmărire penală*) against the suspect for the acts set out in Article 87 § 5 of Government Emergency Ordinance no. 195/2002 ... and the imposition of an administrative penalty consisting of a fine of 1,000 Romanian lei (RON) [approximately 250 euros (EUR)], to be enforced pursuant to the provisions of Article 441^1 of the CCP in conjunction with Article 442 of the CCP.
>
> Court fees of RON 20 [approximately EUR 5] ... are payable by the suspect and will be levied in accordance with [the provisions] of Article 443 CCP.
>
> The suspect shall be notified of the decision."

14. The order issued by the public prosecutor's office on 7 August 2008 (see paragraph 13 above) was not challenged by means of a remedy such as an appeal under Article $249^1$of the CCP (see paragraph 34 below).

15. There is no indication in the case file of the precise date on which the applicant was notified of the order of 7 August 2008. In any event, he took cognisance of its contents and on 15 August 2008 paid the fine and the court fees. He submitted the receipts confirming payment of those sums as evidence in the criminal proceedings.

3. Setting aside by the higher-ranking prosecutor's office of the order discontinuing the criminal proceedings

16. In an order of 7 January 2009, relying on Article 270 § 1 and Article 273 § 2 of the CCP as in force at the material time (see paragraph 34 below), the public prosecutor's office at the Vrancea County Court, as the higher-ranking prosecutor's office in relation to the public prosecutor's office at the Focşani District Court, set aside the order of 7 August 2008 (see paragraph 13 above) of its own motion.

17. In the order of 7 January 2009 the public prosecutor's office at the Vrancea County Court gave the following reasons:

> "Following an examination of the evidence on file, it must be concluded that in view of the degree of general and specific danger to society associated with the acts committed, the type of the social values disregarded by the suspect and the specific circumstances in which he committed the acts, the administrative penalty imposed was not justified.
>
> The suspect justified his firm refusal to give a biological sample in order to determine his blood alcohol level by the fact that before being stopped by the police he had consumed alcoholic beverages. The statement written by the suspect himself indicated that he had acted in this manner [refusing to give the sample] 'because of his intoxicated state', a circumstance that emphasises the danger posed to society by the acts and by the suspect himself, who nevertheless was not appropriately punished.
>
> The act committed by the suspect entails a high degree of danger to society, which the law itself intended to penalise more severely than other road traffic offences, with the aim of preventing the commission of more serious acts causing physical injury or material damage; because the real reason for refusing to give biological samples is, precisely, the sometimes excessive consumption of alcoholic beverages which may also give rise to criminal liability for other, more serious consequences.
>
> The high upper limits and the nature of the criminal penalty (exclusively imprisonment, excluding any kind of fine) highlight the intention of the law to severely punish anyone committing such reprehensible acts. That being the case, the administrative fine imposed on the suspect Erik Aurelian Mihalache does not fulfil the preventive aim pursued by the law.
>
> It should be borne in mind that the suspect, who was in a manifestly intoxicated state while driving a motor vehicle, was about to go to a discothèque in the village of Lepsa (a place where alcohol is frequently consumed), and the consequences of his acts could have been even worse than he realises.
>
> Having regard to all those circumstances, the imposition of an administrative penalty was unjustified (*nejustificată*). Accordingly, the decision to discontinue proceedings in the case is set aside, and the criminal proceedings [are to be] reopened in order to continue the investigation and prepare the case for trial.

Having regard also to the provisions of Article 273 § 2 and Article 270 § 1 (c) of the CCP,

[I HEREBY] ORDER

1. the setting aside of the decision taken in the present case ...;

2. the quashing of the administrative penalty of a 1,000 lei fine imposed on the suspect Erik Aurelian Mihalache for having committed the offence defined in Article 87 § 5 of Ordinance no. 195/2002, as well as the order for him to pay court fees of 20 lei to the State;

3. the reopening of the criminal proceedings against the suspect Erik Aurelian Mihalache for having committed the offence defined in Article 87 § 5 of Ordinance no. 195/2002 and the continuation of the investigation in accordance with this order;

4. the return of the case file to the public prosecutor's office at the Focşani District Court in order to execute [the present order]."

18. The case file was sent back to the public prosecutor's office with a view to continuing the criminal investigation in respect of the applicant.

4. The applicant's committal for trial and criminal conviction

19. On 18 February 2009 the applicant was informed of the reopening of the criminal proceedings and questioned about the charges against him. On 19 February 2009 the public prosecutor presented the applicant with the criminal file. The applicant confessed to having committed the acts of which he stood accused, and did not seek to adduce any further evidence.

20. The witness G.D. gave a statement.

21. In an indictment of 24 March 2009 the public prosecutor's office committed the applicant for trial on charges of refusing to give a biological sample for determining his blood alcohol level. The indictment stated that during the night of 2 to 3 May 2008, at around 1 a.m., the applicant had been stopped by the police while driving on the public highway, as a preventive control measure. As the breath test had appeared to be positive the police officers had asked the applicant to accompany them to a hospital to give a biological sample in order to establish his blood alcohol level, but the applicant had refused to do so. The indictment cited in evidence the report of the discovery of the offence, the applicant's confession, G.D.'s witness statement, and the document informing the applicant of the accusations against him and his defence rights.

22. In a judgment of 18 November 2009, having assessed the evidence in the file, the Focşani District Court sentenced the applicant to one year's imprisonment, suspended, on the charges set out in the indictment. Analysing the factual circumstances of the case, it held that a shorter sentence than the statutory minimum was sufficient.

23. In a judgment of 10 February 2010 the Vrancea County Court dismissed an appeal by the applicant against the aforementioned judgment.

24. The applicant lodged an appeal on points of law (*recurs*) against that judgment. He submitted, *inter alia*, that the referral of his case to the District Court had been incurably null and void because it was in breach of the *ne bis in idem* principle. He argued that in its order of 7 August 2008 the public prosecutor's office had discontinued the criminal proceedings against him and imposed an administrative fine on him, thus terminating the criminal investigation. Subsequently, the public prosecutor's office at the Vrancea County Court had wrongfully set aside the discontinuance order of its own motion, and no appeal had been lodged against the order of 7 August 2008 under Article 249[1] § 3 of the CCP (see paragraph 14 above and paragraph 34 below).

25. In a final judgment of 14 June 2010 the Galați Court of Appeal dismissed the applicant's appeal on points of law against the judgment delivered on appeal and confirmed that it was well-founded. As regards the applicant's plea alleging non-compliance with the *ne bis in idem* principle, the Court of Appeal held:

> "Pursuant to Article 4 § 1 of Protocol No. 7 to the European Convention on Human Rights, no one may 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.
>
> This principle is also set out in the Romanian Code of Criminal Procedure, Article 10 § 1 (j) of which provides that criminal proceedings cannot be instituted or continued where there has been a decision constituting *res judicata*.
>
> Therefore, in order for the defendant to be entitled to rely on a breach of the *ne bis in idem* principle, a previous set of proceedings must have been concluded with a final judgment entailing a conviction or acquittal.
>
> However, the order of 7 August 2008 by which the public prosecutor closed the criminal proceedings cannot be characterised as a judicial decision constituting *res judicata*, since this is not equivalent to a final judgment (*hotărâre judecătorească*).
>
> The public prosecutor's right to resume criminal proceedings where they have been reopened, pursuant to Article 270 § 1 (c) and Article 273 § 1 of the Code of Criminal Procedure, is not subject to any time-limit or to the absence of a complaint against the discontinuance order, such that the reopening of the criminal proceedings against the defendant Erik Aurelian Mihalache on the basis of the order of 7 January 2009 complied with the relevant legal provisions.
>
> Noting, on the one hand, that the *ne bis in idem* principle is immaterial to the present case, and on the other, that the criminal proceedings were resumed and conducted in compliance with the [statutory provisions], the court rejects the defendant's arguments to the effect that the referral of the case to the District Court was incurably null and void."

26. With regard to the applicant's criminal responsibility, the Court of Appeal held that, according to the evidence in the file, the lower courts had correctly determined the facts, their legal classification and the corresponding sentence.

5. Other factual information relevant to the case

(a) Survey on the application of Article 18[1] of the Criminal Code

27. On 17 January 2013 the Prosecutor General of Romania issued a memorandum to all public prosecutors' offices across the country asking them to investigate how the provisions of Article 18[1] of the Criminal Code were applied, *inter alia*, to road traffic offences. The memorandum sought to identify the criteria used by the courts and public prosecutors' offices to assess the degree of danger to society associated with a particular act, and referred specifically to the offences set out in Ordinance no. 195/2002. The Prosecutor General also invited the lower-level public prosecutors' offices to send him the results of the reviews which they had carried out in 2011 and 2012 and the measures ordered following the reviews. According to the memorandum, the aim of the exercise was to identify the criteria used to justify the application of Article 18[1] of the Criminal Code by the courts and public prosecutors' offices.

(b) Steps required to be taken by the applicant to secure reimbursement of sums paid by way of execution of the order of 7 August 2008

28. On 10 March 2013 the Chief Prosecutor of the Focşani public prosecutor's office requested the tax authorities to reimburse the fine paid by the applicant pursuant to the order of 7 August 2008 (see paragraph 15 above).

29. On 3 October 2013 the public prosecutor's office informed the Vrancea Directorate General of Public Finance ("DGFP") that the amounts paid by the applicant pursuant to the order of 7 August 2008 were to be reimbursed to him. On 4 October 2013 a police officer went to the applicant's home to inform him that he had to submit a request to the Vrancea DGFP in order to secure reimbursement of the amounts paid in respect of the administrative fine and the court fees. The applicant signed the record drawn up on that occasion.

30. According to the documents in the file, the applicant has not asked to be reimbursed the sums paid.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Constitution

31. Article 132 § 1 of the Constitution, on the status of public prosecutors, reads as follows:

> "Public prosecutors shall carry out their activity in accordance with the principles of legality, impartiality, and hierarchical supervision under the authority of the Minister of Justice."

B. Government Emergency Ordinance no. 195/2002

32. The relevant provisions of Government Emergency Ordinance no. 195/2002 on road traffic ("Ordinance no. 195/2002") read as follows:

Chapter I
General provisions
Article 1

"1. Road traffic involving vehicles, pedestrians and other categories of [road] users, the rights, obligations and responsibilities of natural and legal persons, and the powers of certain public authorities, institutions and organisations, are governed by the provisions of the present emergency ordinance.

2. The provisions of this emergency ordinance are designed to ensure a safe traffic flow on public roads, and to protect the lives, physical integrity and health of [road] users or anyone in the vicinity of public roads, [and] to protect the legitimate rights and interests of those persons, of public and private property and of the environment.

...

5. The provisions of the present emergency ordinance shall be applicable to all [road] users, and to the authorities vested with powers in the spheres of road traffic and safety and environmental protection."

Chapter VI
Offences and penalties
Article 84

"A failure to comply with road traffic provisions that entails all the constituent elements of a criminal offence shall give rise to criminal responsibility and be punished in accordance with this emergency ordinance."

Article 87 § 5

"The refusal ... by a driver of a motor vehicle ... to give a biological sample or to submit to a test of exhaled air in order to establish blood alcohol level or the presence of narcotic products or substances or drugs with similar effects, shall be punished by a sentence of between two and seven years' imprisonment."

C. The Criminal Code

33. The provisions of the Criminal Code in force at the material time which are relevant to the present case were worded as follows:

Article 17

"A criminal offence is an act which poses a danger to society, is committed with culpable intent (*vinovăţie*) and is provided for by criminal law.

Only a criminal offence may constitute grounds for criminal liability."

Article 18

"An act posing a danger to society for the purposes of the criminal law shall be understood as any action or inaction which undermines one of the values mentioned in Article 1 and which requires the imposition of a penalty."

Article 18[1]

"1. An act punishable by criminal law shall not constitute a criminal offence if, in view of its minimal interference with one of the values safeguarded by criminal law and the manifestly insignificant nature of its specific content, it does not attain the degree of danger to society associated with a criminal offence.

2. In determining the degree of danger to society, account must be taken of the manner and means by which the act was committed, the aim pursued, the circumstances in which the act was committed, the result which was produced or could have been produced, and the person and conduct of the perpetrator, if known.

3. In the case of such an act, the public prosecutor or the court shall impose one of the administrative penalties provided for in Article 91."

Article 91

"Where a court has recourse to [another form of liability] instead of criminal liability, it shall order one of the following administrative penalties:

...

(c) a fine of between 10 lei and 1,000 lei."

Article 141

"'Criminal law' shall be understood as referring to any criminal provision set forth in laws or decrees."

D. The Code of Criminal Procedure

34. The relevant provisions of the CCP as in force at the material time were as follows:

Article 10

"1. Criminal proceedings cannot be instituted or continued if:

...

(b^1) the act did not attain the degree of danger required to be classified as a criminal offence; ...

(g) the offence is statute-barred ...;

...

(j) [a prior decision] has become *res judicata* ..."

Article 11

"Where one of the cases set out in Article 10 is observed:

1. during the criminal proceedings, the public prosecutor, on an application by the prosecuting authority or *proprio motu*, shall order: ...

(b) the discontinuance of the proceedings (*scoaterea de sub urmărire*) in favour of the suspect or accused in the cases set out in Article 10 (a) to (e).

..."

Article 22 § 1

"The final decision given by the criminal court shall constitute *res judicata* before the civil court adjudicating the civil claim, as regards the existence of the facts, the perpetrator and the latter's guilt."

Article 229
The suspect

"The suspect is a person who is the subject of a criminal investigation, until such time as a prosecution is brought."

Article 246

"1. A copy of the discontinuance order ... shall be transmitted to the ... suspect or accused ...."

Article 249

"1. Criminal proceedings shall be discontinued (*scoaterea de sub urmărirea penală*) where one of the cases listed in Article 10 (a) to (e) is observed and where there is a suspect or accused person in the case.

...

3. In the case mentioned in Article 10 (b^1), the public prosecutor shall decide by means of an order."

Article 249[1]

"...

3. An order concerning the discontinuance of proceedings on the basis of Article 10 (b^1) may be the subject of an appeal (*plîngere*) within twenty days of the date on which the notification provided for in Article 246 has taken place.

4. An order imposing an administrative fine shall be enforced on expiry of the term specified in paragraph 3 above or, where an appeal (*plîngere*) has been lodged and dismissed, after the dismissal of that appeal."

Article 262

"Where the public prosecutor finds that the statutory provisions ensuring the discovery of the truth have been complied with, that the criminal proceedings have been completed and that the necessary evidence has been lawfully examined, he or she shall, as appropriate:

...

2. issue an order by which:

(a) the criminal proceedings are closed (*clasează*), discontinued (*scoate de sub urmărire*) or terminated (*încetează*) in accordance with the provisions of Article 11.

Where the public prosecutor discontinues the proceedings on the basis of Article 10 (b^1), he or she shall apply Article 18^1 § 3 of the Criminal Code; ...”

Article 270

“1. Criminal proceedings shall be resumed in the event that:

...

(c) the criminal proceedings have been reopened...”

Article 273

“1. The public prosecutor may order the reopening of criminal proceedings if, following [a decision] discontinuing the proceedings (*scoaterea de sub urmărirea penală*), it is established that the grounds on which the previous decision was based did not actually exist or no longer exist. ...

2. Proceedings shall be reopened following an order by the public prosecutor to that effect.”

Article 275

“Any person may lodge a complaint in respect of measures and decisions taken during criminal investigation proceedings, if these have harmed his or her legitimate interests ...”

Article 278

“Complaints against measures or decisions taken by a prosecutor or implemented at the latter’s request shall be examined by ... the chief prosecutor in the relevant department ....”

Article 278^1

“1. Following the dismissal by the prosecutor of a complaint lodged in accordance with Articles 275 to 278 in respect of the discontinuation of a criminal investigation ... through a decision not to prosecute (*neurmărire penală*) ..., the injured party, or any other person whose legitimate interests have been harmed, may complain within twenty days following notification of the impugned decision, to the judge of the court that would normally have jurisdiction to deal with the case at first instance ...”

Article 415

“1. Judgments of criminal courts (*hotărîrile instanţelor*) shall be enforceable on the date on which they become final.

2. Non-final judgments shall be enforceable [where explicitly provided for by law].”

Article 441^1

“... [T]he penalty of a fine shall be imposed as laid down in Articles 442 and 443.”

Article 442

"The judicial body imposing a fine shall ensure that it is enforced.

Judicial fines shall be enforced by sending a copy of the relevant section of the operative part of the judgment imposing the fine to the authority responsible by law for enforcing criminal fines.

Judicial fines shall be enforced by the authority mentioned in the previous paragraph."

Article 443

"... Where the obligation to pay court fees advanced by the State is imposed by order, it shall be enforced by the public prosecutor, in accordance with ... the provisions of Article 442 § 2."

35. The Government produced examples of case-law to the effect that only court judgments constitute *res judicata*, and not decisions taken by the public prosecutor before the case is referred to a court, such as, for instance, an order discontinuing criminal proceedings (judgment no. 346 of 30 January 2015 of the High Court of Cassation and Justice and a decision given on 14 November 2017 by the Bucharest Court of Appeal).

III. EXPLANATORY REPORT ON PROTOCOL No. 7 TO THE CONVENTION

36. The Explanatory Report on Protocol No. 7 was prepared by the Steering Committee for Human Rights and submitted to the Committee of Ministers of the Council of Europe. It explains from the outset that the text of the report itself "does not constitute an instrument providing an authoritative interpretation of the Protocol, although it might be of such a nature as to facilitate the application of the provisions contained therein".

37. The parts of the report of relevance to the present case read as follows:

"22. ... According to the definition contained in the explanatory report of the European Convention on the International Validity of Criminal Judgments, a decision is final "if, according to the traditional expression, it has acquired the force of *res judicata*. This is the case when it is irrevocable, that is to say when no further ordinary remedies are available or when the parties have exhausted such remedies or have permitted the time-limit to expire without availing themselves of them.

...

Article 4

...

27. The words 'under the jurisdiction of the same State' limit the application of the article to the national level. Several other Council of Europe conventions, including the European Convention on Extradition (1957), the European Convention on the International Validity of Criminal Judgments (1970) and the European Convention on

the Transfer of Proceedings in Criminal Matters (1972), govern the application of the principle at international level.

...

29. The principle established in this provision applies only after the person has been finally acquitted or convicted in accordance with the law and penal procedure of the State concerned. This means that there must have been a final decision as defined above, in paragraph 22.

30. A case may, however, be reopened in accordance with the law of the State concerned if there is evidence of new or newly discovered facts, or if it appears that there has been a fundamental defect in the proceedings, which could affect the outcome of the case either in favour of the person or to his detriment.

31. The term 'new or newly discovered facts' includes new means of proof relating to previously existing facts. Furthermore, this article does not prevent a reopening of the proceedings in favour of the convicted person and any other changing of the judgment to the benefit of the convicted person."

IV. RELEVANT INTERNATIONAL-LAW MATERIAL

38. Article 14 § 7 of the United Nations Covenant on Civil and Political Rights is worded as follows:

"No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country."

39. The 1969 Vienna Convention on the Law of Treaties provides:

Article 31
General rule of interpretation

"1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(*a*) Any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(*b*) Any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(*a*) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(*b*) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(*c*) Any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended."

Article 32
Supplementary means of interpretation

"Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(*a*) Leaves the meaning ambiguous or obscure; or

(*b*) Leads to a result which is manifestly absurd or unreasonable."

Article 33
Interpretation of treaties authenticated in two or more languages

"1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.

3. The terms of the treaty are presumed to have the same meaning in each authentic text.

4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted."

V. EUROPEAN UNION LAW AND CASE-LAW OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

40. Article 50 of the Charter of Fundamental Rights of the European Union as adopted on 12 December 2007 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."

41. Article 54 of the Convention implementing the Schengen Agreement (CISA) of 14 June 1985 provides as follows:

"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."

42. The judgment delivered by the Court of Justice of the European Communities on 11 February 2003 in *Hüseyin Gözütok and Klaus Brügge* (joined cases C-187/01 and C-385/01, EU:C:2003:87, § 31) states that

"(t)he fact that no court is involved in such a procedure and that the decision in which the procedure culminates does not take the form of a judicial decision does not cast doubt on that interpretation", that is to say does not prevent the application of the *ne bis in idem* principle.

43. In its judgment in *Piotr Kossowski v. Generalstaatsanwaltschaft Hamburg* of 29 June 2016, the Court of Justice of the European Union (CJEU; (Grand Chamber), ECLI:EU:C:2016:483) explained the concept of a person whose trial has been "finally disposed of" as follows:

> "34. For a person to be regarded as someone whose trial has been 'finally disposed of' within the meaning of Article 54 of the CISA, in relation to the acts which he is alleged to have committed, it is necessary, in the first place, that further prosecution has been definitively barred (see, to that effect, judgment of 5 June 2014 in *M*, C-398/12, EU:C:2014:1057, paragraph 31 and the case-law cited).
>
> 35. That first condition must be assessed on the basis of the law of the Contracting State in which the criminal-law decision in question has been taken. A decision which does not, under the law of the Contracting State which instituted criminal proceedings against a person, definitively bar further prosecution at national level cannot, in principle, constitute a procedural obstacle to the opening or continuation of criminal proceedings in respect of the same acts against that person in another Contracting State (see, to that effect, judgments of 22 December 2008 in *Turanský*, C-491/07, EU:C:2008:768, paragraph 36, and 5 June 2014 in *M*, C-398/12, EU:C:2014:1057, paragraphs 32 and 36).
>
> 36. The order for reference indicates that, in the case in the main proceedings, under Polish law the decision of the Kołobrzeg District Public Prosecutor's Office terminating the criminal proceedings precludes any further prosecution in Poland.
>
> ...
>
> 38. As regards the fact that (i) the decision at issue in the main proceedings was taken by the Kołobrzeg District Public Prosecutor's Office in its capacity as a prosecuting authority and (ii) no penalty was enforced, neither of those factors is decisive for the purpose of ascertaining whether that decision definitively bars prosecution.
>
> 39. Article 54 of the CISA is also applicable where an authority responsible for administering criminal justice in the national legal system concerned, such as the Kołobrzeg District Public Prosecutor's Office, issues decisions definitively discontinuing criminal proceedings in a Member State, although such decisions are adopted without the involvement of a court and do not take the form of a judicial decision (see, to that effect, judgment of 11 February 2003 in *Gözütok and Brügge*, C-187/01 and C-385/01, EU:C:2003:87, paragraphs 28 and 38).
>
> 40. As regards the absence of a penalty, the Court observes that it is only where a penalty has been imposed that Article 54 of the CISA lays down the condition that the penalty has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the Contracting State of origin.
>
> 41. The reference to a penalty cannot therefore be interpreted in such a way that the application of Article 54 of the CISA is – other than in a case in which a penalty has been imposed – subject to an additional condition.
>
> 42. In order to determine whether a decision such as that at issue in the main proceedings constitutes a decision finally disposing of the case against a person for

the purposes of Article 54 of the CISA, it is necessary, in the second place, to be satisfied that that decision was given after a determination had been made as to the merits of the case (see, to that effect, judgments of 10 March 2005 in *Miraglia*, C-469/03, EU:C:2005:156, paragraph 30, and 5 June 2014 in *M*, C-398/12, EU:C:2014:1057, paragraph 28).

43. It is necessary, for that purpose, to take into account both the objective of the rules of which Article 54 of the CISA forms part and the context in which it occurs (see, to that effect, judgment of 16 October 2014 in *Welmory*, C-605/12, EU:C:2014:2298, paragraph 41 and the case-law cited).

...

47. Therefore, the interpretation of the final nature, for the purposes of Article 54 of the CISA, of a decision in criminal proceedings in a Member State must be undertaken in the light not only of the need to ensure the free movement of persons but also of the need to promote the prevention and combating of crime within the area of freedom, security and justice.

48. In view of the foregoing considerations, a decision terminating criminal proceedings, such as the decision in issue before the referring court – which was adopted in a situation in which the prosecuting authority, without a more detailed investigation having been undertaken for the purpose of gathering and examining evidence, did not proceed with the prosecution solely because the accused had refused to give a statement and the victim and a hearsay witness were living in Germany, so that it had not been possible to interview them in the course of the investigation and had therefore not been possible to verify statements made by the victim – does not constitute a decision given after a determination has been made as to the merits of the case.

..."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 4 OF PROTOCOL No. 7 TO THE CONVENTION

44. The applicant complained that he had been tried and convicted twice in criminal proceedings for the same offence, in breach of Article 4 § 1 of Protocol No. 7. He also submitted that the reopening of the proceedings against him had not been in conformity with the criteria set out in Article 4 § 2. Article 4 of Protocol No. 7 to the Convention provides:

"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.

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."

45. The Government contested that argument.

A. Admissibility

46. In the Court's view, the application raises complex issues of fact and Convention law, such that it cannot be rejected on the ground of being manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds, and must therefore be declared admissible.

B. Merits

47. The Court reiterates that the guarantee enshrined in Article 4 of Protocol No. 7 occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible under Article 15 of the Convention in time of war or other public emergency.

48. The protection against duplication of criminal proceedings is one of the specific safeguards associated with the general guarantee of a fair hearing in criminal proceedings. Article 4 of Protocol No. 7 to the Convention enshrines a fundamental right guaranteeing that no one is to be tried or punished in criminal proceedings for an offence of which he or she has already been finally convicted or acquitted (see *Marguš v. Croatia* [GC], no. 4455/10, § 114, ECHR 2014 (extracts); *Sergey Zolotukhin v. Russia* [GC], no. 14939/03, § 58, ECHR 2009; *Nikitin v. Russia*, no. 50178/99, § 35, ECHR 2004-VIII; and *Kadušić v. Switzerland*, no. 43977/13, § 82, 9 January 2018). The repetitive aspect of trial or punishment is central to the legal problem addressed by Article 4 of Protocol No. 7 (see *Nikitin*, cited above, § 35).

49. The Court observes that the wording of the first paragraph of Article 4 of Protocol No. 7 sets out the three components of the *ne bis in idem* principle: the two sets of proceedings must be "criminal" in nature (1); they must concern the same facts (2); and there must be duplication of the proceedings (3). It will assess each of those components in turn.

1. Whether the proceedings giving rise to the order of 7 August 2008 were criminal in nature

50. It should be pointed out that by order of 7 August 2008 the public prosecutor's office discontinued the criminal proceedings brought against the applicant for having refused to give a biological sample to establish his blood alcohol level, finding that the acts committed did not constitute an

offence under criminal law. However, in the same order, the prosecutor's office imposed on the applicant a penalty designated as "administrative" in the Criminal Code. Thus, in order to determine whether the applicant was "finally acquitted or convicted in accordance with the law and penal procedure of [the] State", the first issue to be decided is whether those proceedings concerned a "criminal" matter within the meaning of Article 4 of Protocol No. 7.

(a) The parties' submissions

(i) The Government

51. The Government pointed out that Article 87 § 5 of Ordinance no. 194/2002 came under Romanian criminal law in view of the aim pursued by that provision, the classification of the acts as a criminal offence and the penalty imposed. They submitted that the imposition of an administrative penalty on the applicant had not altered the nature of the proceedings, which had remained criminal in nature, only "borrowing" the penalty from the administrative sphere.

(ii) The applicant

52. The applicant submitted that the fine imposed by the order of the public prosecutor's office of 7 August 2008 had been "criminal" within the meaning of Article 4 of Protocol No. 7.

(b) The Court's assessment

53. The Court reiterates that the legal characterisation of the procedure under national law cannot be the sole criterion of relevance for the applicability of the *ne bis in idem* principle under Article 4 § 1 of Protocol No. 7.

54. The Court reiterates that the concept of a "criminal charge" within the meaning of Article 6 § 1 is an autonomous one. Its established case-law sets out three criteria, commonly known as the "*Engel* criteria", to be considered in determining whether or not there was a "criminal charge" (see *Engel and Others v. the Netherlands*, 8 June 1976, § 82, Series A no. 22; *A and B v. Norway* [GC], nos. 24130/11 and 29758/11, § 107, 15 November 2016; and *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], nos. 55391/13 and 2 others, § 122, 6 November 2018). The first criterion is the legal classification of the offence under national law, the second is the very nature of the offence, and the third is the degree of severity of the penalty that the person concerned risks incurring. The second and third criteria are alternative and not necessarily cumulative. This does not preclude a cumulative approach where separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a criminal charge (see *Sergey Zolotukhin*, cited above, § 53, and *A and B v. Norway*,

cited above, § 105; see also *Escoubet v. Belgium* [GC], no. 26780/95, § 32, ECHR 1999-VII).

55. The Court will examine below whether, in accordance with the aforementioned *Engel* criteria, the imposition of an administrative fine on the applicant for the offence of which he was accused is covered by the concept of "penal procedure".

(i) Legal characterisation of the offence under national law

56. The Court notes that the offence for which the applicant was prosecuted, that is, his refusal to give a biological sample to establish his blood alcohol level, was punishable under Article 87 § 5 of Ordinance no. 195/2002, as set out in the section on "offences and penalties", and that they could give rise to a prison sentence. Both parties accepted that these legal provisions formed part of Romanian criminal law.

57. The Court further notes the application in the present case of Article 18^1 of the Criminal Code, providing that an act falling under the criminal law did not constitute a criminal offence if it did not attain the requisite level of seriousness, on account of the minimal interference with one of the values safeguarded by criminal law, and its specific content (see paragraph 33 above). In such circumstances, the public prosecutor could decide to discontinue the prosecution and, instead of imposing the criminal penalty provided for in the definition of the offence of which the person had been accused, impose another penalty that was likewise provided for in the Criminal Code but was designated therein as "administrative".

58. In the instant case, by order of 7 August 2008, the public prosecutor's office discontinued the proceedings against the applicant, noting that although his acts fell under the criminal law, they did not amount to a criminal offence, and it imposed an administrative penalty on him. Be that as it may, the characterisation under domestic law is merely a starting-point, and the indications so afforded have only a formal and relative value (see, among many other authorities, *Engel and Others*, cited above, § 82, and *Sergey Zolotukhin*, cited above, § 53). The Court will therefore undertake a more detailed analysis of the actual nature of the domestic provision forming the legal basis of the penalty imposed on the applicant and its severity.

(ii) Actual nature of the applicable legal provision

59. By its very nature, the inclusion in Ordinance no. 195/2002 of the offence of refusing to give a biological sample for determining blood alcohol level pursued aims, as specified in Article 1 § 2 of the Ordinance, such as protecting the life, physical integrity, health and legitimate rights and interests of road users, and protecting public and private property and the environment – values falling within the sphere of protection of the criminal law. The provisions of the Ordinance were applicable, in

accordance with Article 1 § 5, to all road users rather than to a group possessing a special status. The penalty laid down for commission of the offence defined in Article 87 § 5 of Ordinance no. 195/2002 was severe – between two and seven years' imprisonment – and was aimed at punishing and deterring behaviours liable to undermine the social values safeguarded by law (see paragraph 32 above).

60. The Court also considers it important to note that although the acts of which the applicant was accused were not deemed to constitute a criminal offence in the order of 7 August 2008, they nevertheless fell within the scope of a provision of criminal law. The fact that the criminal acts of which the applicant was accused were initially regarded as manifestly insignificant on account of their minimal interference with one of the values safeguarded by criminal law and their specific content does not in itself preclude their classification as "criminal" within the autonomous Convention meaning of the term, as there is nothing in the Convention to suggest that the criminal nature of an offence, within the meaning of the "*Engel* criteria", necessarily requires a certain degree of seriousness (see *Ezeh and Connors v. the United Kingdom* [GC], nos. 39665/98 and 40086/98, § 104, ECHR 2003-X). Moreover, in the second set of proceedings, the same acts were found to constitute a criminal offence. The Court accepts that the legal provision on the basis of which the prosecutor's office prosecuted and punished the applicant by means of the order of 7 August 2008 was criminal in nature.

(iii) Degree of severity of the penalty

61. As to the degree of severity of the penalty, it is determined by reference to the maximum penalty for which the relevant law provides. The actual penalty imposed is relevant to the determination but it cannot diminish the importance of what was initially at stake (see *Sergey Zolotukhin*, cited above, § 56; *Grecu v. Romania*, no. 75101/01, § 54, 30 November 2006; and *Tomasović v. Croatia*, no. 53785/09, § 23, 18 October 2011).

62. In the present case, Article 87 § 5 of Ordinance no. 195/2002 provided that acts constituting the offence of refusing to give a biological sample for determining blood alcohol level were punishable by a sentence of two to seven years' imprisonment. Even though the public prosecutor's office did not consider that the acts in issue constituted an offence for the purposes of criminal law, it was required by law to impose a penalty where the legal basis for discontinuing the proceedings was Article 18^1 of the Criminal Code (see paragraph 33 above). The applicant was fined 1,000 Romanian lei (RON – approximately 250 euros (EUR) at the time) for the acts of which he was accused. That sum corresponded to the maximum fine that could be imposed under Article 91 of the Criminal Code. Although the Criminal Code designates this penalty as "administrative", the purpose of the fine was not to repair the damage caused by the applicant but to punish

him and deter him from committing further criminal acts (compare *Ioan Pop v. Romania* (dec.), no. 40301/04, § 25, 28 June 2011, where the Court found that an administrative fine of approximately EUR 50 imposed on the applicant under Ordinance no. 195/2002 for failing to stop and give way to an official vehicle was "criminal" for the purposes of Article 6 of the Convention; and *Sancaklı v. Turkey*, no. 1385/07, § 30, 15 May 2018, where the Court found that a fine classified as administrative in Turkish law, amounting to approximately EUR 62, was "criminal" for the purposes of Article 6). Accordingly, although domestic law classifies the fine imposed on the applicant as "administrative", it has a punitive and deterrent purpose and is therefore akin to a criminal penalty.

(iv) Conclusion concerning the nature of the proceedings leading to the order of 7 August 2008

63. Having regard to the foregoing, the Court concludes that the nature of the offence for which the applicant was prosecuted and the penalty imposed on him link the proceedings leading to the order of 7 August 2008 to the concept of "penal procedure" for the purposes of Article 4 of Protocol No. 7.

64. Moreover, it is beyond doubt that the applicant's suspended sentence of one year's imprisonment, imposed by the Galați Court of Appeal's judgment of 14 June 2010, was a criminal penalty (see paragraph 25 above). Since the proceedings described by the applicant were criminal in nature, the first criterion for the applicability of Article 4 of Protocol No. 7 is fulfilled.

*2. Whether the applicant was prosecuted twice for the same offence (*idem*)*

(a) The parties' submissions

(i) The Government

65. The Government did not deny that the offence of which the applicant had been convicted by the Focșani District Court in its judgment of 18 November 2009 entailed the same facts on the basis of which he had been fined in the order of 7 August 2008.

(ii) The applicant

66. The applicant submitted that the offence of which he had been convicted by the Focşani District Court in its judgment of 18 November 2009 entailed the same facts on the basis of which he had been fined by the public prosecutor's office in its order of 7 August 2008.

(b) The Court's assessment

67. In *Sergey Zolotukhin* (cited above, § 82) the Court found that Article 4 of Protocol No. 7 had to be understood as prohibiting prosecution or trial for a second "offence" in so far as it arose from identical facts or facts which were substantially the same. This factual approach has been explicitly reiterated by the Court in subsequent cases (see, for example, *Marguš*, cited above, § 114; *A and B v. Norway*, cited above, § 108; and *Ramda v. France*, no. 78477/11, § 81, 19 December 2017).

68. In the present case, the Court notes that, on the basis of the order of 7 August 2008 and the final judgment delivered by the Galați Court of Appeal on 14 June 2010, the applicant was found guilty of having refused to undergo a blood alcohol test during the night of 2 to 3 May 2008, following a preventive control carried out by the traffic police, and was penalised for that offence. That being so, in so far as the two above-mentioned decisions concerned the same facts and the same accusations, the applicant was indeed tried and punished twice for the same offence.

*3. Whether there was a duplication of proceedings (*bis*)*

(a) The parties' submissions

(i) The Government

69. The Government submitted that the present case concerned a "single" set of proceedings which had been finally determined by the judgment delivered by the Galați Court of Appeal on 14 June 2010, and not two separate sets of proceedings combining to form a coherent whole.

70. In the Government's submission, the prosecutor's order of 7 August 2008 had amounted to a discontinuance of the proceedings and had not been final. Although the order could have been challenged within twenty days of the date on which the applicant had been notified of it, that fact was insufficient to establish whether the order in question had become final. Referring to the decisions given by the Court in the cases of *Horciag v. Romania* ((dec.), no. 70982/01, 15 March 2005), and *Sundqvist v. Finland* ((dec.), no. 75602/01, 22 November 2005), the Government contended that regard should also be had to the option available under domestic law whereby the higher-ranking prosecutor could order the reopening of the criminal proceedings, an option they regarded as an ordinary remedy within the meaning of the Court's relevant case-law.

71. On that subject, the Government submitted first of all that, according to information from certain domestic courts, decisions to discontinue or terminate criminal proceedings were very seldom set aside by either prosecutors or judges. They emphasised that the number of cases in which the prosecutor set aside a decision *proprio motu* was comparable to the number in which the judge did so acting on a complaint by the interested

party against the prosecutor's decision. The similar frequency of the use of both these options indicated that the possibility for the higher-ranking prosecutor to reopen proceedings had to be recognised as having the same legal status as an appeal lodged by the injured party against the prosecutor's decision, namely that of an ordinary remedy. Referring to statistics provided by various domestic public prosecutors' offices, the Government explained that the proportion of cases where decisions to discontinue or terminate criminal proceedings were set aside by the public prosecutor or judge was very low, approximately 1%. In the case of intervention by the public prosecutor leading to this outcome, the percentage was even lower, less than 0.5%.

72. In the Government's submission, the limited number of cases where the public prosecutor intervened *proprio motu* could be explained, firstly, by the need to avoid undermining public trust in the quality of the work performed by public prosecutors and, secondly, by the requirement to strike a balance between the aim pursued by setting aside the initial decision and the stability of the legal situations created as a result of the decision. In the instant case the higher-ranking prosecutor had intervened promptly, about five months after the order of 7 August 2008.

73. Relying on the Court's case-law (citing *Smirnova and Smirnova v. Russia* (dec.), nos. 46133/99 and 48183/99, 3 October 2002, and *Harutyunyan v. Armenia* (dec.), no. 34334/04, 7 December 2006), the Government submitted that only decisions determining the merits of a case could constitute *res judicata*, and that the discontinuance of criminal proceedings by a public prosecutor did not amount to either a conviction or an acquittal. Under domestic law, only court decisions, and not prosecutors' orders, were deemed to constitute *res judicata* (see paragraphs 34 and 35 above).

74. The Government also explained that the enforcement – whether voluntary or not – of a penalty imposed by a prosecutor's order had no bearing on the nature of that order: domestic law did not prescribe that the enforcement of such a penalty precluded the reopening of criminal proceedings. By setting aside an order of that kind, the higher-ranking prosecutor also set aside the penalty.

75. The Government submitted that even from the perspective of the case-law of the CJEU, the order of 7 August 2008 did not constitute a "final" decision. Referring to judgments delivered by the CJEU (for example, those delivered on 29 June 2016 and 22 December 2008 respectively in the cases of *Kossowski v. Generalstaatwaltschaft Hamburg* (C-486/14, EU:C:2016:483), and *Vladimir Turanský* (C-491/07, EU:C:2008:768)), they explained that for a person to be regarded as someone whose trial had been "finally disposed of", it was necessary, in the first place, that further prosecution had been "definitively barred", a question which had to be assessed on the basis of the law of the Contracting

State in which the criminal-law decision in issue had been taken. Next, referring to the judgments delivered by the CJEU in *Filomeno Mario Miraglia* (10 March 2005, C-469/03, EU:C:2005:156); *M.* (5 June 2014, C-398/12, EU:C:2014:1057); and *Kossowski* (cited above), the Government noted that the CJEU had ruled that even where, under domestic law, further prosecution had been definitively barred by a decision, that decision only qualified as "final" if it was given after a determination had been made as to the merits of the case. In the present case, the possibility for the public prosecutor's office to issue an order under Article 10 (b^1) of the CCP without determining all the aspects of the criminal proceedings (see paragraph 33 above) argued in favour of regarding the prosecutor's order of 7 August 2008 as "not final". Furthermore, Article 273 § 1 of the CCP had not restricted the reopening of proceedings to exceptional circumstances or made it subject to the discovery of new evidence: reopening could be ordered wherever the higher-ranking prosecutor found that the proceedings had been discontinued on non-existent factual or legal grounds.

76. Finally, the Government submitted that even supposing that the public prosecutor's office's order of 7 August 2008 constituted a final decision, the order given by the higher-ranking prosecutor's office on 7 January 2009 had led not to the resumption of the prosecution, but to the reopening of the case for the purposes of Article 4 § 2 of Protocol No. 7. The reopening had been justified by a fundamental defect in the order previously issued. With reference to the Prosecutor General's memorandum of 17 January 2013 (see paragraph 27 above), they explained that the higher-ranking prosecutor's oversight of decisions taken by public prosecutors under his or her authority pursued the aim, *inter alia*, of standardising the practice of public prosecutors' offices, particularly as regards the assessment of the degree of danger to society posed by a road traffic offence. Even though the memorandum in question had been issued after the facts of the present case, it proved that the standardisation of judicial practice had been a constant concern of the judicial authorities. Furthermore, for offences of this kind there was generally no other party with an interest in challenging the prosecutor's decision to discontinue the proceedings. Had the higher-ranking prosecutor not intervened, a decision based on an erroneous assessment could not have been amended.

(ii) The applicant

77. The applicant submitted that the order of 7 August 2008 by the public prosecutor's office had amounted to a final decision for the purposes of Article 4 of Protocol No. 7. He first of all observed that in his case, unlike in *A and B v. Norway* (cited above), there had not been two complementary sets of proceedings pursuing different social purposes. In support of that contention he pointed out that in both sets of proceedings he had been prosecuted for the same offence punishable under the same

legislation, and that the evidence produced had been the same. The second set of proceedings had unforeseeably overturned the first set after a considerable period of time, thus demonstrating that there had not been two complementary sets of proceedings.

78. The applicant further submitted that the prosecutor's order of 7 August 2008 had become final in so far as it had not been challenged within the time-limit set out in Articles 249[1], 278 and 278[1] of the CCP for lodging an appeal, and the fine had consequently been paid. Under domestic law, both the courts and the public prosecutors' offices had had jurisdiction to apply Articles 18[1] and 91 of the Criminal Code as in force at the material time. In order to apply those provisions, and above all to impose one of the penalties laid down in Article 91 of the Criminal Code, the authority with jurisdiction had been required to carry out a thorough investigation of the facts of the case and to assess the behaviour of the person concerned. Referring to the judgment delivered by the CJEU in *Kossowski v. Generalstaatwaltschaft Hamburg* (cited above), the applicant stated that in the present case, in issuing the order of 7 August 2008, the public prosecutor's office had conducted an in-depth investigation: it had interviewed the suspect and a witness and had made its own assessment of the circumstances surrounding the commission of the acts, before deciding on the most appropriate penalty to be imposed in this case. The detailed nature of the investigation meant that the order of 7 August 2008 should be characterised as "final".

79. The applicant added that pursuant to Article 249[1] of the CCP, the fine imposed had been enforceable on expiry of the twenty-day time-limit within which he could, under the CCP, have challenged the order in question. The enforceability – as required by law – of the order on expiry of the time-limit for appeal had rendered the order final, such that after its enforcement the proceedings could no longer have been reopened by the public prosecutor's office on the basis of Article 273 of the CCP.

80. Finally, in the applicant's submission, the fact that Article 273 of the CCP as in force at the material time had allowed the higher-ranking public prosecutor's office to reopen criminal proceedings had not constituted an extraordinary remedy for the purposes of the case-law of the Court, but rather a reopening of the case, to be assessed under Article 4 § 2 of Protocol No. 7. The higher-ranking prosecutor's decision of 7 January 2009 had been contrary both to domestic law and to Article 4 § 2 of Protocol No. 7. The applicant argued, in that connection, that the reopening had been based on a different assessment of the circumstances surrounding the commission of the offence and of the appropriateness of the penalty imposed, and not on the finding that the grounds forming the basis of the previous decision had never actually existed or no longer existed – as required by Article 273 of the CCP as in force at the material time – or on the emergence of new facts

or a fundamental defect in the previous proceedings, as required by Article 4 § 2 of Protocol No. 7.

(b) The Court's assessment

81. The Court reiterates that the aim of Article 4 of Protocol No. 7 is to prohibit the repetition of criminal proceedings that have been concluded by a final decision (see *Sergey Zolotukhin,* cited above, § 107, with further references).

(i) Preliminary observations on whether the two sets of proceedings were complementary

82. The Court considers it useful first of all to consider whether the facts of the present case point to "dual" sets of proceedings with a sufficiently close connection, given that the issue as to whether a decision is "final" or not is devoid of relevance when there is no real duplication of proceedings but rather a combination of proceedings considered to constitute an integrated whole (see *A and B v. Norway*, cited above, § 142).

83. It observes that in the case of *A and B v. Norway* (cited above, §§ 126 and 130-34) it reiterated and developed the principle of a "sufficiently close connection in substance and in time" between proceedings: where this connection allows the two sets of proceedings to be treated as forming part of an integrated scheme of sanctions under the domestic law in question, there is no duplication of proceedings but rather a combination of proceedings compatible with Article 4 of Protocol No. 7.

84. In the present case, the applicant was prosecuted in "both" sets of proceedings for a single offence punishable by a single legal provision, namely Article 87 § 5 of Ordinance no. 195/2002. The proceedings and the two penalties imposed on the applicant pursued the same general purpose of deterring conduct posing a risk to road safety. The "first" set of proceedings as a whole and the initial part of the "second" set of proceedings were conducted by the same authority, that is to say the public prosecutor's office at the Focşani District Court, and in "both" sets of proceedings the same evidence was produced. In the present case the two penalties imposed on the applicant were not combined: either of the two penalties should have been imposed depending on whether the investigating authorities characterised the facts as constituting a criminal offence. The "two" sets of proceedings took place one after the other and were not conducted simultaneously at any time.

85. Having regard to those factors, the Court agrees with the parties and finds that the two sets of proceedings were not combined in an integrated manner such as to form a coherent whole, connecting dual proceedings "sufficiently closely in substance and in time" to be compatible with the "*bis*" criterion under Article 4 of Protocol No. 7 (compare *A and B*

v. Norway, cited above, §§ 112-34, and *Jóhannesson and Others v. Iceland*, no. 22007/11, §§ 48-49, 18 May 2017).

86. In order to determine further whether, in the instant case, there was duplication of proceedings ("*bis*") for the purposes of Article 4 of Protocol No. 7, the Court will examine whether the prosecutor's order of 7 August 2008 constituted a "final" decision "acquitting or convicting" the applicant. In the affirmative, the Court must establish whether the decision given by the higher-ranking prosecutor on 7 January 2009 was covered by the exception set out in Article 4 § 2 of Protocol No. 7 and therefore amounted to a reopening of the case compatible with Article 4 of Protocol No. 7.

(ii) Whether the order of 7 August 2008 constituted a final acquittal or conviction

87. The Court notes that the parties disagreed on this point: the Government submitted that the order of 7 August 2008 had merely entailed the discontinuance of the proceedings by the public prosecutor's office, whereas the applicant contended that it had entailed his conviction. Likewise, the applicant argued that the order of 7 August 2008 was a final decision, but the Government disputed this.

88. The Court notes that Article 4 of Protocol No. 7 states that the *ne bis in idem* principle is intended to protect persons who have already been "finally acquitted or convicted". The explanatory report on Protocol No. 7 states, as regards Article 4, that "[t]he principle established in this provision applies only after the person has been finally acquitted or convicted in accordance with the law and penal procedure of the State concerned" (see paragraph 29 of the explanatory report, cited in paragraph 37 above). For a person to qualify for protection under this Article, a final decision is therefore not sufficient; the final decision must also involve the person's acquittal or conviction.

89. In the present case, the Court must first of all determine whether the order of 7 August 2008 did indeed constitute an acquittal or conviction. If so, it must ascertain whether the order was a "final" decision for the purposes of Article 4 of Protocol No. 7. In order to answer those questions, it must conduct a broader analysis of Article 4 of Protocol No. 7 in the light of its relevant case-law.

90. To that end, it reiterates that as an international treaty, the Convention must be interpreted in the light of the rules of interpretation provided for in Articles 31 to 33 of the Vienna Convention of 23 May 1969 on the Law of Treaties (see *Golder v. the United Kingdom*, 21 February 1975, § 29, Series A no. 18, and *Magyar Helsinki Bizottság v. Hungary* [GC], no. 18030/11, § 118, 8 November 2016). Thus, in accordance with the Vienna Convention, the Court is required to ascertain the ordinary meaning to be given to the words in their context and in the light of the object and purpose of the provision from which they are drawn (see

Johnston and Others v. Ireland, 18 December 1986, § 51, Series A no. 112, and Article 31 § 1 of the Vienna Convention, cited in paragraph 39 above).

91. Furthermore, in order to interpret the provisions of the Convention and the Protocols thereto in the light of their object and purpose, the Court has developed additional means of interpretation through its case-law, namely the principles of autonomous interpretation and evolutive interpretation, and that of the margin of appreciation. These principles require the provisions of the Convention and the Protocols thereto to be interpreted and applied in a manner which renders their safeguards practical and effective, not theoretical and illusory (see *Soering v. the United Kingdom*, 7 July 1989, § 87, Series A no. 161).

92. Regard must also be had to the fact that the context of the provision in question is a treaty for the effective protection of individual human rights and that the Convention must be read as a whole, and interpreted in such a way as to promote internal consistency and harmony between its various provisions (see *Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, §§ 47-48, ECHR 2005-X, and *Magyar Helsinki Bizottság*, cited above, § 120).

(α) Concerning the scope of the concepts of "acquittal" and "conviction"

93. Before detailing the content of those concepts, the Court deems it useful to consider whether judicial intervention in the proceedings is necessary for a decision to be regarded as an "acquittal" or a "conviction".

– *Whether judicial intervention is necessary*

94. From a study of the two authentic versions – English and French – of Article 4 of Protocol No. 7, the Court notes a difference in the wording of the two texts: the French version of Article 4 of Protocol No. 7 provides that the person concerned must have been "*acquitté ou condamné par un jugement*", whereas the English version of the same provision states that the person must have been "finally acquitted or convicted". The French version thus indicates that the acquittal or conviction must stem from a "*jugement*", whereas the English version does not specify what form the acquittal or conviction should take. Thus confronted with versions of a law-making treaty which are equally authentic but not exactly the same, the Court must interpret them in a way that reconciles them as far as possible and is most appropriate in order to realise the aim and achieve the object of the treaty (see *The Sunday Times v. the United Kingdom (no. 1)*, 26 April 1979, § 48, Series A no. 30, and Article 33 § 4 of the Vienna Convention on the Law of Treaties).

95. In view of the crucial role played by Article 4 of Protocol No. 7 in the Convention system and the aim of the right which it secures, the use of the word "*jugement*" in the French version of this Article cannot justify a restrictive approach to the concept of a person who has been "acquitted or

convicted". What matters in any given case is that the decision in question has been given by an authority participating in the administration of justice in the national legal system concerned, and that that authority is competent under domestic law to establish and, as appropriate, punish the unlawful behaviour of which the person has been accused. The fact that the decision does not take the form of a judgment cannot call into question the person's acquittal or conviction, since such a procedural and formal aspect cannot have a bearing on the effects of the decision. Indeed, the English version of Article 4 of Protocol No. 7 supports this broad interpretation of the concept. Moreover, the Court has consistently adopted a similar approach in determining the effects of a legal situation, for example in ascertaining whether proceedings defined as administrative under domestic law produced effects requiring them to be classified as "criminal" within the autonomous Convention meaning of the term (see, among many other authorities, *A and B v. Norway*, cited above, §§ 139 and 148, and *Sergey Zolotukhin*, cited above, §§ 54-57; see also *Tsonyo Tsonev v. Bulgaria (no. 2)*, no. 2376/03, § 54, 14 January 2010, where the Court proceeded from the finding that the mayor's decision to impose an administrative fine on the applicant, which had not been challenged in the courts and was enforceable, had constituted a final decision for the purposes of Article 4 of Protocol No. 7).

Accordingly, the Court considers that judicial intervention is unnecessary for the existence of a decision.

– *The content of the concepts of "acquittal" and "conviction"*

96. To date, the Court has never defined in its case-law the scope of the expression "acquitted or convicted" or set out any general criteria in that regard. Nonetheless, it has held on many occasions that the discontinuance of criminal proceedings by a public prosecutor does not amount to either a conviction or an acquittal, and that Article 4 of Protocol No. 7 is therefore not applicable in such a situation (see, to that effect, *Marguš*, cited above, § 120, and *Smirnova and Smirnova* and *Harutyunyan,* both cited above). In *Horciag* (cited above) the Court stated that "a decision confirming provisional psychiatric detention cannot be treated as an acquittal for the purposes of Article 4 of Protocol No. 7, but concerns a preventive measure not entailing any examination or finding as to the applicant's guilt (see, *mutatis mutandis*, *Escoubet v. Belgium* (cited above), and *Mulot v. France* (dec.), no. 37211/97, 14 December 1999)".

97. In order to determine whether a particular decision constitutes an "acquittal" or a "conviction", the Court has therefore considered the actual content of the decision in issue and assessed its effects on the applicant's situation. Referring to the text of Article 4 of Protocol No. 7, it considers that the deliberate choice of the words "acquitted or convicted" implies that the accused'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. In order for such an assessment to take place, it is vital that the authority giving the decision is vested by domestic law with decision-making power enabling it to examine the merits of a case. The authority must then study or evaluate the evidence in the case file and assess the applicant's involvement in one or all of the events prompting the intervention of the investigative bodies, for the purposes of determining whether "criminal" responsibility has been established (see, *mutatis mutandis*, *Allen v. the United Kingdom* [GC], no. 25424/09, § 127, ECHR 2013, a case concerning the scope of the presumption of innocence under Article 6 § 2 of the Convention, in which the content, and not the form, of the decision, was the decisive factor for the Court).

98. Thus, the finding that there has been an assessment of the circumstances of the case and of the accused's guilt or innocence may be supported by the progress of the proceedings in a given case. Where a criminal investigation has been initiated after an accusation has been brought against the person in question, the victim has been interviewed, the evidence has been gathered and examined by the competent authority, and a reasoned decision has been given on the basis of that evidence, such factors are likely to lead to a finding that there has been a determination as to the merits of the case. Where a penalty has been ordered by the competent authority as a result of the behaviour attributed to the person concerned, it can reasonably be considered that the competent authority had conducted a prior assessment of the circumstances of the case and whether or not the behaviour of the person concerned was lawful.

– *Considerations specific to the present case*

99. As regards the circumstances of the present case, the Court observes first of all that in its order of 7 August 2008 the public prosecutor's office at the Focşani District Court discontinued the criminal proceedings against the applicant, while also imposing an administrative penalty on him for the acts he had committed. This was therefore not a simple discontinuance order, in which case Article 4 of Protocol No. 7 to the Convention would no doubt have been inapplicable (see, to that effect, *Marguš*, cited above, § 120, and *Smirnova and Smirnova* and *Harutyunyan*, both cited above).

100. In the instant case, under domestic law the public prosecutor's office was called upon to participate in the administration of criminal justice. The prosecutor had jurisdiction to investigate the applicant's alleged actions, questioning a witness and the suspect to that end. Subsequently, he applied the relevant substantive rules laid down in domestic law; he had to assess whether the requirements were fulfilled for characterising the applicant's alleged acts as a criminal offence. On the basis of the evidence produced, the prosecutor carried out his own assessment of all the circumstances of the case, relating both to the applicant individually and to

the specific factual situation. After carrying out that assessment, again in accordance with the powers conferred on him under domestic law, the prosecutor decided to discontinue the prosecution, while imposing a penalty on the applicant that had a punitive and deterrent purpose (see paragraphs 11 to 15 above). The penalty imposed became enforceable on the expiry of the time-limit for an appeal by the applicant under domestic law.

101. Having regard to the investigation conducted by the prosecutor and to the powers conferred on him under domestic law to determine the case before him, the Court considers that in the present case the prosecutor's assessment concerned both the circumstances and the establishment of the applicant's "criminal" responsibility. Having regard also to the fact that a deterrent and punitive penalty was imposed on the applicant, the order of 7 August 2008 entailed his "conviction", within the substantive meaning of the term. In view of the effects of the conviction on the applicant's situation, the fact that no court had intervened in his case cannot alter that conclusion.

(β) Concerning the "final" nature of the prosecutor's order of 7 August 2008 entailing the applicant's "criminal conviction"

– The Court's approach in comparable previous cases and its elaboration for the purposes of the present case

102. The Court observes that according to the text of Article 4 of Protocol No. 7, to be afforded the benefit of the *ne bis in idem* principle the person concerned must have "already been finally acquitted or convicted in accordance with the law and penal procedure of that State". This Article therefore includes an explicit reference to the law of the State which gave the decision in question.

103. The Court further notes that its case-law indicates (see, for example, *Nikitin*, cited above, § 37; *Storbråten*, (dec.), no. 12277/04, 1 February 2007; *Horciag* and *Sundqvist*, all cited above; and *Sergey Zolotukhin*, cited above, § 107) that in determining what was the "final" decision in cases before it, it has invariably referred to the criterion set forth in the explanatory report on Protocol No. 7, finding that a decision was "final", whatever its characterisation under domestic law, after the exhaustion of "ordinary" remedies or the expiry of the time-limit laid down in domestic law for their use. Remedies which the Court has designated as "extraordinary" are not taken into account in determining what was the "final" decision for the purposes of Article 4 of Protocol No. 7 (see *Nikitin*, cited above, §§ 37-39; *Sergey Zolotukhin*, cited above, § 108; *Sismanidis and Sitaridis v. Greece*, nos. 66602/09 and 71879/12, § 42, 9 June 2016; and *Šimkus v. Lithuania*, no. 41788/11, § 47, 13 June 2017). In other words, in performing its scrutiny, the Court has not automatically taken into account the classification used in domestic law in determining whether or not a decision was "final": it has conducted its own assessment of the

"final" nature of a decision with reference to the "ordinary" remedies available to the parties.

104. Nevertheless, a reading of certain decisions given by the Court prior to the *Sergey Zolotukhin* and *Marguš* judgments (cited above), and more especially the *Horciag*, *Sundqvist* and *Storbråten* decisions (all cited above), might give the impression that the question of the final nature of a decision is exclusively governed by the domestic law of the State concerned (for an assessment of the same Romanian legal framework from the standpoint of Article 6 § 1 of the Convention, concerning length of proceedings, see also *Stoianova and Nedelcu v. Romania*, nos. 77517/01 and 77722/01, ECHR 2005-VIII). However, the references to domestic law in those decisions should be interpreted in a more qualified manner and be viewed in their context.

105. In *Storbråten* (cited above) the Court pointed out that regard should be had to domestic law in order to ascertain the "time" when a decision became final. The Court itself determined, in the light of the criterion set out in the explanatory report, what had been the "final" domestic decision, taking into account the procedures existing in domestic law. In that case, domestic law and the application of the criteria set out in the explanatory report led to the same outcome: the decision delivered by the Probate and Bankruptcy Court had become final in the absence of an appeal by the applicant, and thus after the expiry of the time-limit laid down in domestic law for making use of an "ordinary" remedy.

106. The cases of *Horciag*, *Sundqvist* and *Stoianova and Nedelcu* (all cited above) differ from the present case. In *Horciag* the applicant had been the subject of a decision to discontinue proceedings accompanied by a detention order – a preventive measure – and not a penalty. The cases of *Sundqvist* and *Stoianova and Nedelcu* centred on simple discontinuance orders, rather than decisions entailing "acquittal" or "conviction". As previously mentioned (see paragraph 96 above), the discontinuance of criminal proceedings by a public prosecutor does not amount to a conviction or an acquittal.

107. At all events, even in *Horciag* (cited above) the Court sought to establish whether the judgment upholding a provisional psychiatric detention order constituted a final decision, by referring to the rules of domestic law governing that concept. It held, in particular, that "in view of the provisional nature of the detention and of its confirmation by a court, the resumption of the proceedings by the prosecutor's office in accordance with Article 273 of the Code of Criminal Procedure was not precluded, even though the prosecution had previously been discontinued". Accordingly, in determining whether the judgment confirming the applicant's detention had been final, the Court examined the various concepts laid down in substantive law governing the nature of psychiatric detention and the domestic procedure for ordering such a measure.

108. Accordingly, the Court considers that the decisions in *Storbråten, Horciag* and *Sundqvist* (all cited above) cannot be construed as requiring the designation of a "final" decision, in cases of acquittals or convictions, exclusively with reference to domestic law. It further notes a common denominator emerging from its case-law in this area as a whole: in each case the Court itself has determined what the "final" domestic decision was with reference to the explanatory report and to various concepts laid down in domestic law.

109. The Court reiterates that it consistently relies on the text of the explanatory report on Protocol No. 7 to identify the "final" decision in a particular case (see paragraph 103 above). A reading not only of Article 4 § 1 of Protocol No. 7 but also of paragraph 27 of the explanatory report indicates that the successive use of the expressions "the same State" and "that State" is intended to limit the application of the Article exclusively to the national level and thus to prevent any cross-border application. As regards the word "final", the report itself provides the "definition" to be used in determining whether a decision is to be considered "final" within the meaning of Article 4 of the Protocol, with reference to an international convention, namely the European Convention on the International Validity of Criminal Judgments (see paragraphs 22 and 29 of the explanatory report, cited in paragraph 37 above). In order to determine whether the decision in question is "final", the Court must therefore ascertain, as indicated in the explanatory report, whether ordinary remedies were available against the decision or whether the parties have permitted the time-limit to expire without availing themselves of those remedies.

110. Consequently, where domestic law required a particular remedy to be used for a decision to be designated as final, the Court has drawn a distinction between "ordinary" and "extraordinary" remedies. In making that distinction, having regard to the specific circumstances of the individual case, the Court has considered such factors as the accessibility of a remedy to parties or the discretion afforded to authorised officials under domestic law as regards the use of a remedy (see, for example, *Nikitin*, cited above, § 39). Reaffirming the need to ensure observance of the principle of legal certainty, and referring to the difficulties which might arise under Article 4 of Protocol No. 7 where a judicial decision was set aside as a result of an "extraordinary" remedy, the Court has only taken into account "ordinary remedies" in determining the "final" nature of a decision for the purposes of Article 4 of Protocol No. 7 (see *Nikitin*, cited above, § 39), in the *autonomous* Convention meaning of the term (see *Sergey Zolotukhin*, cited above, § 109).

111. The Court would therefore highlight the importance it attached more recently, in the case of *A and B v. Norway* (cited above), to the criterion of the foreseeability of the application of the law as a whole as a condition for accepting that "dual" proceedings form part of an integrated

scheme of sanctions under domestic law without giving rise to any duplication of proceedings ("*bis*") for the purposes of Article 4 of Protocol No. 7 (ibid., §§ 122, 130, 132, 146 and 152). This criterion is likewise wholly relevant to the "final" nature of a decision, as the condition for triggering the application of the safeguard provided for in that Article.

112. In that context, the Court is obliged to note that under its well-established case-law, the "lawfulness" requirement set forth in other provisions of the Convention – including the expressions "in accordance with the law", "prescribed by law" and "provided for by law" appearing in the second paragraph of Articles 8 to 11 of the Convention and in Article 1 of Protocol No. 1, and the expression "under *national* [emphasis added] or international law" contained in Article 7 – concerns not only the existence of a legal basis in domestic law but also a quality requirement inherent in the autonomous concept of lawfulness; this concept entails conditions regarding the accessibility and foreseeability of the "law", as well as the requirement to afford a measure of protection against arbitrary interferences by the public authorities with the rights safeguarded by the Convention (see, for example, *Rohlena v. the Czech Republic* [GC], no. 59552/08, §§ 50 and 64, ECHR 2015, as regards Article 7; *Rotaru v. Romania* [GC], no. 28341/95, §§ 52-56, ECHR 2000-V; *Bernh Larsen Holding AS and Others v. Norway*, no. 24117/08, §§ 123-24 and 134, 14 March 2013; and *Roman Zakharov v. Russia* [GC], no. 47143/06, §§ 228-229, ECHR 2015, as regards Article 8; *Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], no. 38433/09, § 143, ECHR 2012, as regards Article 10; *Navalnyy v. Russia* [GC], nos. 29580/12 and 4 others, §§ 114-15 and 118, 15 November 2018, as regards Article 11; and *Lekić v. Slovenia* [GC], no. 36480/07, § 95, 11 December 2018, as regards Article 1 of Protocol No. 1; furthermore, as regards Article 5 § 1 of the Convention, see *S., V. and A. v. Denmark* [GC], nos. 35553/12 and 2 others, § 74, 22 October 2018, and *Hilda Hafsteinsdóttir v. Iceland*, no. 40905/98, § 51, 8 June 2004).

113. As noted above, the Convention must be read as a whole, and interpreted in such a way as to promote internal consistency and harmony between its various provisions (see *Klass and Others v. Germany*, 6 September 1978, § 68, Series A no. 28; see also *Maaouia v. France* [GC], no. 39652/98, § 36, ECHR 2000-X; *Kudła v. Poland* [GC], no. 30210/96, § 152, ECHR 2000-XI; and *Stec and Others*, cited above, § 48).

114. In the light of those considerations, the Court considers that it must, to some extent, interpret the term "final" autonomously where this is justified by sound reasons, as indeed it does when establishing whether the legal characterisation of the offence is covered by the notion of "penal procedure" (see paragraphs 54 et seq. above).

115. In order to decide whether a decision is "final" within the meaning of Article 4 of Protocol No. 7, it must be ascertained whether it is subject to an "ordinary remedy". In establishing the "ordinary" remedies in a

particular case, the Court will take domestic law and procedure as its starting-point. Domestic law – both substantive and procedural – must satisfy the principle of legal certainty, which requires both that the scope of a remedy for the purposes of Article 4 of Protocol No. 7 be clearly circumscribed in time and that the procedure for its use be clear for those parties that are permitted to avail themselves of the remedy in question. In other words, for the principle of legal certainty to be satisfied, a principle which is inherent in the right not to be tried or punished twice for the same offence (see *Nikitin*, cited above, § 39), a remedy must operate in a manner bringing clarity to the point in time when a decision becomes final. In particular, the Court observes in this context that the requirement of a time-limit in order for a remedy to be regarded as "ordinary" is implicit in the wording of the explanatory report itself, which states that a decision is irrevocable where the parties have permitted the "time-limit" to expire without availing themselves of such a remedy. A law conferring an unlimited discretion on one of the parties to make use of a specific remedy or subjecting such a remedy to conditions disclosing a major imbalance between the parties in their ability to avail themselves of it would run counter to the principle of legal certainty (see, *mutatis mutandis*, *Gacon v. France*, no. 1092/04, § 34 *in fine*, 22 May 2008).

116. The Convention undoubtedly allows States, in the performance of their function as administrators of justice and guardians of the public interest, to define what, under their domestic law, constitutes a decision by which criminal proceedings are terminated with final effect. Nevertheless, if the Contracting States could determine as they saw fit when a decision was "final" for the purposes of Article 4 of Protocol No. 7, without scrutiny by the Court, the application of that Article would be left to their discretion. A latitude extending so far might lead to results incompatible with the purpose and object of the Convention (see, *mutatis mutandis*, *Engel and Others*, cited above, § 81; *Öztürk v. Germany*, 21 February 1984, § 49, Series A no. 73; and *Storbråten*, cited above), namely to ensure that no one is tried or punished twice for the same offence. If that right were not accompanied by a safeguard permitting the determination of the "final" decision in a particular case on the basis of objective criteria, it would be very limited in scope. However, the provisions of Article 4 of Protocol No. 7 must be interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory (see *Artico v. Italy*, 13 May 1980, § 33, Series A no. 37, and *Sergey Zolotukhin*, cited above, § 80).

– *Application of the above principles in the present case*

117. As regards the facts of the present case, the Court notes first of all that under Romanian legislation, the prosecutor's order of 7 August 2008 imposing a penalty on the applicant while also discontinuing the criminal proceedings could not have constituted *res judicata*, since that concept only

applies to judicial decisions. Similarly, as the order was subject to review by the higher-ranking prosecutor's office, it was not final under domestic law.

118. Firstly, at the material time Article 249[1] of the CCP provided that an order by which the public prosecutor's office applied Article 10 (b[1]) of the CCP and thus imposed a penalty could be challenged within twenty days of the date on which the person concerned was notified of the order. The Court observes that this remedy had a legal basis in domestic law. As regards the quality of the law governing the remedy in question, it should be noted that the text of Article 249[1] was accessible to the applicant, given that it was part of the CCP, which was itself published in the Official Gazette. Article 249[1] clearly stated that where an order discontinuing the proceedings was based on Article 10 (b[1]) of the CCP, the individual concerned could challenge it by means of an appeal, which had to be lodged within a time-limit established by law. If no appeal had been lodged on expiry of that time-limit, the order became enforceable.

119. The Court also notes that the remedy provided for in Article 249[1] of the CCP was directly accessible to the applicant, who could have challenged the penalty within a clearly defined time-limit. If the applicant had seen fit to avail himself of the remedy, it could have led to the reconsideration of the merits of the order and the sanction imposed. Accordingly, the Court considers that this means of challenging the prosecutor's order is akin to an "ordinary" remedy within the meaning of its case-law and that it must be taken into account in determining the "final" decision in the present case.

120. Secondly, at the material time, the higher-ranking prosecutor's office had the option of ordering the resumption of proceedings, pursuant to Articles 270 and 273 of the CCP as then in force, after the proceedings had been discontinued, even where the discontinuance order had been based on Article 10 (b[1]) of the CCP and a penalty had been imposed. Before a decision could be taken to resume the proceedings in the latter scenario, the penalty imposed had to be set aside. This remedy also had a legal basis in domestic law, and Articles 270 and 273 of the CCP were accessible to the applicant, since they were published in the Official Gazette.

121. It remains to be determined whether that remedy, whereby the higher-ranking prosecutor's office could set aside the penalty imposed and reopen the proceedings, may be regarded as an "ordinary" remedy satisfying the requirements of legal certainty (see *Nikitin*, cited above, § 39).

122. In this connection, the Court cannot overlook the very specific context of the present case, which relates to a stage in the criminal proceedings prior to the referral of the case to a court. Bearing in mind the principles governing the work of prosecutors' offices and their role in the initial stages of criminal proceedings, it is not unreasonable for a higher-ranking prosecutor's office to examine of its own motion, in the context of hierarchical supervision, the merits of decisions taken by a lower-level prosecutor's office.

123. The option available to the higher-ranking prosecutor's office involved the re-examination of a particular case on the basis of the same facts and the same evidence as those underlying the initial prosecutor's decision to terminate the criminal proceedings after an assessment of the degree of danger to society posed by the offence, and to impose a penalty classified as administrative under domestic law.

124. In the present case, the remedy available to the interested parties and the one available to the higher-ranking prosecutor's office under Articles 270 and 273 of the CCP shared the same aim of challenging the validity of the penalty imposed on the applicant by the initial prosecutor's office on 7 August 2008. As regards the use of remedies pursuing the same aim, the law at the material time laid down different conditions according to their potential users: while the applicant had to avail himself of his remedy within twenty days, the higher-ranking prosecutor's office was not bound by any time-limit for reconsidering the merits of a decision. The Court acknowledges that on account of its powers and role in the proper administration of criminal justice, the prosecutor's office may have been entitled to different conditions in performing its review. Nevertheless, the fact remains that on account of the lack of a time-limit, Romanian law did not regulate with sufficient clarity the manner in which that remedy was to be used, thus creating genuine uncertainty as to the applicant's legal situation (see paragraph 112 above), and that this discrepancy resulted in a major imbalance between the parties in their ability to make use of the remedies in question, of such a nature as to place the applicant in a situation of legal uncertainty (see paragraph 115 *in fine* above).

125. Therefore, the option available under Articles 270 and 273 of the CCP as in force at the material time did not constitute an "ordinary remedy" to be taken into account in determining whether the applicant's conviction on the basis of the order issued by the lower-level prosecutor's office on 7 August 2008 was final "in accordance with the law and penal procedure of [the] State" in question.

126. Having regard to the foregoing, the Court considers that only the option set out in Article 249[1] of the CCP as in force at the material time constituted an "ordinary" remedy to be taken into consideration in determining the "final" decision. In the instant case, the prosecutor's order of 7 August 2008 fining the applicant was subject to appeal within twenty days from the date on which the applicant was notified of it. However, the applicant did not see fit to avail himself of the remedy provided for in Article 249[1] of the CCP. Although the date on which he was notified of the order of 7 August 2008 is unknown, he nonetheless took cognisance of it, allowed the twenty-day time-limit laid down in Article 249[1] of the CCP to expire and paid the fine imposed. The applicant had no other ordinary remedy available. Consequently, the order of 7 August 2008 in which a fine was imposed on the applicant had become "final", within the autonomous

Convention meaning of the term, on the expiry of the twenty-day time-limit laid down in Article 249[1] of the CCP, by the time when the higher-ranking prosecutor's office exercised its discretion to reopen the criminal proceedings.

(iii) Whether the duplication of the proceedings was contrary to Article 4 of Protocol No. 7

127. The Court has found that the applicant was convicted in a final decision based on the order of 7 August 2008. In its order of 7 January 2009 the higher-ranking prosecutor's office set aside the initial prosecutor's order of 7 August 2008 and the penalty imposed. Although the applicant was not punished twice for the same facts – since the initial penalty imposed on him had been set aside and he had the opportunity to secure the reimbursement of the fine – the case nevertheless involved two successive sets of criminal proceedings which concerned the same facts and were thus incompatible, on the face of it, with the first paragraph of Article 4 of Protocol No. 7. Even so, such a duplication of proceedings may be compatible with Article 4 of Protocol No. 7 if the second set of proceedings involves the reopening of a case where this satisfies the requirements linked to the exception provided for in Article 4 § 2 of Protocol No. 7.

128. Article 4 of Protocol No. 7 to the Convention draws a clear distinction between a second prosecution or trial, which is prohibited by the first paragraph of that Article, and the resumption of a trial in exceptional circumstances, a situation referred to in its second paragraph. Article 4 § 2 of Protocol No. 7 expressly envisages the possibility that an individual may have to accept prosecution on the same charges, in accordance with domestic law, where a case is reopened following the emergence of new evidence or the discovery of a fundamental defect in the previous proceedings (see *Nikitin*, cited above, § 45, and *Kadušić*, cited above, § 84). The Committee of Ministers of the Council of Europe has also considered that the possibility of re-examining or reopening a case provides a guarantee of redress, particularly in the context of the execution of the Court's judgments. In its Recommendation No. R (2000) 2 on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights, it urged member States to ensure that their national legal systems provided for appropriate procedures for re-examining or reopening cases (see *Nikitin*, cited above, § 56).

129. Article 4 § 2 of Protocol No. 7 sets a limit on the application of the principle of legal certainty in criminal matters. As the Court has stated on many occasions, the requirements of legal certainty are not absolute, and in criminal cases, they must be assessed in the light of Article 4 § 2 of Protocol No. 7, which expressly permits Contracting States to reopen a case where new facts emerge, or where a fundamental defect is detected in the proceedings (ibid.).

(α) Conditions permitting the reopening of a case within the meaning of the exception set out in Article 4 § 2 of Protocol No. 7

130. As previously noted (see paragraph 128 above), the reopening of proceedings is possible but is subject to strict conditions: the decision to reopen the case must be justified by the emergence of new or newly discovered facts or the discovery of a fundamental defect in the previous proceedings which could affect the outcome of the case. Those conditions are alternative and not cumulative.

131. The Court has already explained that circumstances relating to the case which exist during the trial, but remain hidden from the judge, and become known only after the trial, are "newly discovered". Circumstances which concern the case but arise only after the trial are "new" (see *Bulgakova v. Russia*, no. 69524/01, § 39, 18 January 2007, and *Vedernikova v. Russia*, no. 25580/02, § 30, 12 July 2007 – as regards Article 6). The Court also considers, as is moreover noted in the explanatory report on Protocol No. 7, that the term "new or newly discovered facts" includes new evidence relating to previously existing facts (see paragraph 31 of the explanatory report, cited in paragraph 37 above).

132. In some cases, the Court has also found the exception set out in Article 4 § 2 of Protocol No. 7 to be applicable in the event of the reopening of proceedings on account of a "fundamental defect in the previous proceedings". In the case of *Fadin v. Russia* (no. 58079/00, § 32, 27 July 2006), for example, it held that the reopening of proceedings on the grounds that the lower-level court had not followed the instructions given to it by the Supreme Court as regards the investigative measures to be carried out had been justified by a fundamental defect in the previous proceedings and was therefore compatible with Article 4 § 2 of Protocol No. 7 (see also *Bratyakin v. Russia* (dec.), no. 72776/01, 9 March 2006, and *Goncharovy v. Russia,* no. 77989/01, 27 November 2008).

133. The case-law referred to above thus indicates that the Court assesses on a case-by-case basis whether the circumstances relied upon by a higher-level authority to reopen proceedings amount to new or newly discovered facts or a fundamental defect in the previous proceedings. The concept of "fundamental defect" within the meaning of Article 4 § 2 of Protocol No. 7 suggests that only a serious violation of a procedural rule severely undermining the integrity of the previous proceedings can serve as the basis for reopening the latter to the detriment of the accused, where he or she has been acquitted of an offence or punished for an offence less serious than that provided for by the applicable law. Consequently, in such cases, a mere reassessment of the evidence on file by the public prosecutor or the higher-level court would not fulfil that criterion. However, as regards situations where an accused has been found guilty and a reopening of proceedings might work to his advantage, the Court points out that paragraph 31 of the explanatory report to Protocol No. 7 (see paragraph 37

above) emphasises that "this article does not prevent a reopening of the proceedings in favour of the convicted person and any other changing of the judgment to the benefit of the convicted person". In such situations, therefore, the nature of the defect must be assessed primarily in order to ascertain whether there has been a violation of the defence rights and therefore an impediment to the proper administration of justice. Lastly, in all cases, the grounds justifying the reopening of proceedings must, according to Article 4 § 2 of Protocol No. 7 *in fine*, be such as to "affect the outcome of the case" either in favour of the person or to his or her detriment (see, to that effect, paragraph 30 of the explanatory report to Protocol No. 7, cited in paragraph 37 above).

(β) Considerations specific to the present case

134. Turning to the circumstances of the case, the Court notes that the higher-ranking prosecutor's order and the subsequent proceedings concerned the same accusations as those that had given rise to the proceedings resulting in the order of 7 August 2008, and that their purpose was to review whether that order was well-founded. The higher-ranking prosecutor's order of 7 January 2009 had the effect of entirely setting aside the previous order of 7 August 2008. This was necessary to enable the case file to be returned to the same prosecutor's office, which could then continue the investigation in compliance with the orders issued, that is to say instituting criminal proceedings against the applicant and committing him for trial. Following the institution of fresh proceedings, the applicant stood trial, in the course of which the criminal charges against him were determined in a new, single decision. The present case therefore involves a system permitting the resumption of proceedings, which may be regarded as a special form of reopening for the purposes of Article 4 § 2 of Protocol No. 7 (see *Nikitin*, cited above, § 46, and *Fadin*, cited above, § 31).

135. It is clear from the order of 7 January 2009 that the reopening concerned the same facts as those forming the subject of the order of 7 August 2008. The higher-ranking prosecutor gave his decision on the basis of the same case file as the initial prosecutor, no new evidence having been adduced and examined. The reopening of the case was therefore not justified by the emergence of new or newly discovered facts, a finding which, moreover, does not appear to be in dispute.

136. Conversely, the Government argued that the reopening of the criminal proceedings had been justified by a fundamental defect in the previous proceedings and had been necessary in order to ensure the standardisation of practice concerning the assessment of the seriousness of certain offences (see paragraph 76 above). However, the Court observes that that aspect was not mentioned in the order of 7 January 2009. The Prosecutor General's memorandum, which was published long after the facts, contained no clear indications on how Article 18^1 of the Criminal

Code should be interpreted in the context of road traffic offences. In any event, the reason put forward by the Government – the need to harmonise practice in this area – is not covered by the exceptional circumstances referred to in Article 4 § 2 of Protocol No. 7, that is to say, the emergence of new or newly discovered facts or the discovery of a fundamental defect in the previous proceedings.

137. Nevertheless, according to the same order of 7 January 2009, the reopening of the proceedings in the present case was justified by the higher-ranking prosecutor's different assessment of the circumstances, which in his view should have given rise to criminal rather than "administrative" liability on the applicant's part. The higher-ranking prosecutor also referred to the inadequacy of the penalty imposed. A fresh assessment was conducted of the seriousness of the accusations against the applicant and of the penalty imposed; no mention was made of any need to remedy a breach of a procedural rule or a serious omission in the proceedings or in the investigation conducted by the initial public prosecutor's office. But as pointed out above, a [mere] reassessment of the facts in the light of the applicable law does not constitute a "fundamental defect" in the previous proceedings (contrast *Fadin*, cited above, § 32; *Bratyakin*, cited above; and *Goncharovy*, cited above; and see, *mutatis mutandis*, *Savinskiy v. Ukraine*, no. 6965/02, § 25, 28 February 2006, and *Bujniţa v. Moldova*, no. 36492/02, § 23, 16 January 2007).

138. Having regard to the foregoing, the Court considers that the reasons given by the higher-ranking prosecutor's office to justify the reopening of the proceedings on the basis of the order of 7 January 2009 are at variance with the strict conditions imposed by Article 4 § 2 of Protocol No. 7. Therefore, the reopening of the proceedings in the instant case was not justified by the exception set out in that provision.

4. General conclusion

139. The Court finds that the applicant was convicted on the basis of the order of 7 August 2008, which had become final when a further prosecution was triggered by the order of 7 January 2009. Given that none of the situations permitting the combination or reopening of proceedings has been observed in the present case, the Court concludes that the applicant was tried twice for the same offence, in breach of the *ne bis in idem* principle.

There has accordingly been a violation of Article 4 of Protocol No. 7 to the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

140. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

141. In his claim for just satisfaction submitted to the Chamber the applicant sought 15,000 (EUR) in respect of non-pecuniary damage. The Government submitted that any finding of a violation could in itself constitute sufficient redress. In the alternative, they submitted that the amount claimed was speculative and excessive.

142. Following the Chamber's relinquishment of jurisdiction to the Grand Chamber, in order to avoid complicated references to the observations previously submitted to the Chamber, the parties were invited to submit fresh observations on the admissibility and the merits of the application by 14 June 2018. Furthermore, the applicant was invited to resubmit his claim for just satisfaction.

143. In his observations of 14 June 2018 before the Grand Chamber, the applicant did not make any specific claims for just satisfaction. At the hearing before the Grand Chamber, his representative nevertheless concluded his address by requesting that the applicant "be awarded the sum previously claimed in respect of just satisfaction."

144. Further to those indications, the Government made no comments on the issue of just satisfaction.

145. The Court reiterates that that Article 41 empowers it to afford the injured party such satisfaction as appears to be appropriate (see *Karácsony and Others v. Hungary* [GC], nos. 42461/13 and 44357/13, § 179, 17 May 2016, and *Lopes de Sousa Fernandes v. Portugal* [GC], no. 56080/13, § 245, 19 December 2017).

146. It observes in this connection that it is beyond doubt that a claim for just satisfaction was duly submitted to the Chamber, within the time allowed, in the course of the procedure following notification of the application (contrast *Schatschaschwili v. Germany* [GC], no. 9154/10, § 167, ECHR 2015, and *Nagmetov v. Russia* [GC], no. 35589/08, § 62, 30 March 2017). The Court further notes that although the applicant did not make any fresh claim for just satisfaction within the time allowed in the proceedings before the Grand Chamber, he subsequently referred to his claim before the Chamber. The Government, who had the opportunity to respond to this claim at the hearing, did not object.

147. In view of the above, the Court is satisfied that a "claim" for just satisfaction has been made before it in the present case.

148. The Court considers in this regard that a mere finding of a violation is insufficient to compensate the applicant for the sense of injustice and frustration which he must have felt on account of the reopening of the

proceedings (see, to similar effect, *Jóhannesson and Others*, cited above, § 61). Given the nature of the violation found and making its assessment on an equitable basis, the Court awards the applicant EUR 5,000 in respect of non-pecuniary damage.

B. Costs and expenses

149. The applicant, who was granted legal aid for the proceedings before the Grand Chamber, had claimed EUR 570 before the Chamber in respect of the costs and expenses incurred before the domestic courts and the Court.

150. The Government argued before the Chamber that the costs incurred before the domestic courts had no causal link with the violation of the Convention alleged by the applicant. As regards the costs incurred during the proceedings before the Court, they submitted that they had not been substantiated by relevant documents.

151. The Court observes that the applicant was granted legal aid for the costs and expenses incurred in the proceedings before the Grand Chamber. Nonetheless, having regard to the claim submitted to the Chamber, the documents in its possession, its case-law and the fact that the applicant was forced to mount a defence in criminal proceedings which had been instituted and reopened in breach of Article 4 of Protocol No. 7 to the Convention (see *Grande Stevens and Others v. Italy*, nos. 18640/10 and 4 others, § 244, 4 March 2014), the Court considers it reasonable to award the applicant the sum of EUR 470 to cover costs under all heads.

C. Default interest

152. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 4 of Protocol No. 7 of the Convention;

3. *Holds*
   (a) that the respondent State is to pay the applicant, within three months, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:

(i) EUR 5,000 (five thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
(ii) EUR 470 (four hundred and seventy euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses*, unanimously, the remainder of the applicant's claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 8 July 2019.

Søren Prebensen	Guido Raimondi
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) joint concurring opinion of judges Raimondi, Nussberger, Sicilianos, Spano, Yudkivska, Motoc and Ravarani;
(b) concurring opinion of Judge Pinto de Albuquerque;
(c) concurring opinion of Judge Serghides;
(d) concurring opinion of Judge Bošnjak joined by Judge Serghides.

G.R.
S.C.P.

JOINT CONCURRING OPINION OF JUDGES RAIMONDI, NUSSBERGER, SICILIANOS, SPANO, YUDKIVSKA, MOTOC AND RAVARANI

(Translation)

Although we, like all our esteemed colleagues, voted for a finding of a violation of Article 4 of Protocol No. 7, we cannot subscribe to some of the reasoning set out in the judgment, and in particular paragraphs 110 et seq. thereof.

1. ***Necessity of a "final" decision for the applicability of the*** **"ne bis in idem"** ***principle.*** The paragraphs in question appear under the heading "β. Concerning the 'final' nature of the prosecutor's order of 7 August 2008 entailing the applicant's 'criminal conviction'" (see paragraphs 102 et seq.). Indeed, for the application of the *ne bis in idem* principle, it is important to identify, in the framework of the *bis* aspect of the principle, whether a first decision has become final; it is only where the decision has become final that there can be a repeat conviction or fresh proceedings. Otherwise, it is a question merely of a continuation or a reopening of the same proceedings, and the *ne bis in idem* principle is neither relevant nor breached.

Article 4 § 1 of Protocol No. 7 accordingly provides that in order to benefit from the rule in question, a person must have been "finally" "acquitted or convicted", as explicitly mentioned in paragraph 102 of the judgment. The judgment emphasises – and rightly so, given that it transpires from the very wording of Article 4 of Protocol No. 7 – how the final nature of a judgment should be identified. Although attention should be paid in this context to the legislation and the criminal procedure of the State in question, in performing its scrutiny the Court does not automatically take into account the classification used in domestic law in determining whether or not a decision was "final" (see paragraph 103 *in fine*).

2. ***Criterion of the ordinary or extraordinary nature of a remedy.*** It transpires from Court's case-law, as explicitly mentioned in paragraph 103 of the judgment, that a decision is final within the meaning of the Convention, and however it is classified in domestic law, after exhaustion of all "ordinary remedies" or after the expiry of the time-limit set by domestic law on their exercise. That having been said, new proceedings seeking to challenge a final decision are not in themselves "unlawful" in the sense of being contrary to the requirements of the Convention, but they are considered as extraordinary. And indeed, pursuant to Article 4 § 2 of Protocol No. 7, even a final decision can still be challenged, albeit on very precise and restrictive conditions (that is to say if there are new or newly

discovered facts or there was a fundamental defect in the previous proceedings which could affect the outcome of the case).

Consequently, the whole aim of the arguments set forth in paragraphs 102 et seq. is to ascertain whether the order which is the subject of the application against Romania should be considered final or not, which is tantamount to asking whether the order was subject to ordinary or extraordinary remedies.

The fact, which cannot be emphasised strongly enough in the context of the ensuing considerations, that a remedy is classified as extraordinary in no way renders it "unlawful".

3. *Introduction of the erroneous "foreseeability" criterion. Consequence.* Paragraph 111 of the judgment introduces the concept of the foreseeability of the application of the law, with specific reference to the Grand Chamber judgment in the case of *A. and B. v. Norway*[1]. Paragraph 112 goes so far as to refer to the lawfulness concept, emphasising that it "entails conditions regarding the accessibility and foreseeability of the 'law', as well as the requirement to afford a measure of protection against arbitrary interferences by the public authorities with the rights safeguarded by the Convention".

This general reasoning, which is continued in the ensuing paragraphs, prepares the way for the special conclusion set out in paragraphs 124-125, to the effect that the provisions of the Romanian Code of Criminal Procedure were not sufficiently clear and foreseeable to constitute an ordinary remedy.

Under that approach, all the arguments set out in the draft should lead to a finding, not of the extraordinary nature of the remedy, but of its unlawfulness. The logical conclusion of the reasoning of the text, inasmuch as it concerns a problem of foreseeability and clarity, would be a finding of a violation of Article 6. If the higher-ranking prosecutor's decision is to be considered unlawful because it did not comply with the requirements of legal certainty, then the applicant's problem is not that he was tried twice for the same offence: it is that he was the victim of an unfair trial. And yet

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[1] It is true that the judgment introduces the foreseeability criterion in § 111, with reference to the Grand Chamber judgment in the case of *A. and B. v. Norway*. However, the issue at stake in *Mihalache* is very different from the approach, deemed acceptable, of mixing or combining criminal proceedings with administrative proceedings: in the present case there is basically a single set of criminal proceedings, which was interrupted and then resumed, without combining sanctions but with a criminal penalty replacing an administrative sanction.

the judgment does not reach the conclusion ineluctably flowing from the introduction of the criteria of foreseeability and legal certainty, that is to say the unlawfulness of the remedy provided for the higher-ranking prosecutor.

In a word, the introduction of the foreseeability criterion creates confusion between the concepts of an extraordinary remedy and illegality[2].

4. ***The case of review.*** In criminal law, review is the typical example of an extraordinary remedy. Although the conditions for exercising this remedy may vary from one country to the next, it is a constant that those conditions entail the extraordinary, but not the unlawful, nature of this type of remedy: in the event of new circumstances capable of demonstrating the convicted person's innocence, the criminal proceedings may be reopened, without any time-limit on the possibility of so doing (or else within a period starting when all the conditions for its application are fulfilled, rather than on the date of the initial decision). The availability of such a remedy does indeed create a form of unforeseeability, in the sense that no one can foresee whether and when the "final" decision will be reviewed, the review possibly taking place decades later. This leads to a kind of legal uncertainty in the sense that everyone knows that even though the initial decision is final, it is not immutable – the occurrence or discovery of new facts may justify challenging it. Such a remedy therefore is not ordinary: these forms of uncertainty and unforeseeability which it engenders justify considering it as extraordinary. However, it does not render the remedy unlawful.

5. ***Two types of "uncertainty".*** A distinction must therefore be drawn between two different types of "uncertainty":

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[2] It should be noted that the imbalanced nature of the conditions for exercising the remedy is not an appropriate criterion either. The judgment further mentions that the discrepancy between the time-limits afforded to the parties (20 days for the applicant an no time-limit for the prosecutor's office) "resulted in a major imbalance between the parties in their ability to make use of the remedies in question, such as to place the applicant in a situation of legal uncertainty" (see paragraph 124 *in fine*). However, it seems inappropriate to introduce this imbalance concept, for two reasons:
– first of all, it is true that the applicant could not have finally known his fate for as long as the remedy was available to the prosecutor's office. However, that applies to all remedies unaccompanied by time-limits, and the wording of paragraph 124 suggests that the prosecutor's office's remedy was not extraordinary but unlawful;
– secondly, going even further, one might wonder whether imbalance in the accessibility of a remedy is a criterion enabling that remedy to be designated as extraordinary. One might imagine that for a given remedy – and that is, or has been, the case in a number of countries – the convicted person had a certain period of time for appealing and the prosecution had a longer period, sometimes much longer (whereby the convicted person was deprived of the opportunity to lodge a cross-appeal). That might have meant that the remedy in question was unlawful, but it certainly did not render it extraordinary (see *Ben Naceur v. France*, no. 63879/00, 3 October 2006, §§ 34 to 40).

– the unproblematic uncertainty created by the possibility, which is always present in the criminal-law sphere, of reviewing a judgment despite its being considered final. Such uncertainty is correlated to a *de facto* unforeseeability, in that the *exercise of the remedy in the present case* is not foreseeable. From this type of uncertainty we can deduce neither the non-final nature of the said judgment nor the unlawfulness of the remedy (for the purposes of Article 6 of the Convention), but only the extraordinary nature of the remedy;

– the problematic uncertainty created by a lack of foreseeability on account of a defective law. What is at issue here is a *de lege* unforeseeability, to the extent that the *conditions for exercising the remedy in general* are not sufficiently precise. This type of uncertainty renders the remedy unlawful (for the purposes of Article 6), but not extraordinary.

6. ***The only operational criterion: whether or not there is a time-limit.*** In fact, as mentioned in paragraph 113 of the judgment, there is only one real criterion (or at least one essential and dominant criterion) for identifying the ordinary or extraordinary nature of a remedy, and that is whether or not there is a period within which is it possible to exercise it. The important thing, which is also the object of Article 4 § 1 of Protocol No. 7, is to define a final judgment (as explicitly mentioned in Article 4 § 1 of Protocol No. 7). A judgment is final if it has become *res judicata*. A judgment becomes *res judicata* when all the ordinary remedies have been exercised, or else where they have not been exercised but the *time-limit* for their exercise has expired. On the other hand, the very fact that a remedy has no time-limit means that it must be designated as extraordinary.

7. ***Conclusion:*** The conclusion was foreseeable: neither foreseeability nor legal certainty, of which the former is one aspect, amounts to a criterion for establishing the ordinary or extraordinary nature of a remedy for the purposes of Article 4 of Protocol No. 7. On the other hand, the fact that the remedy available to the prosecutor in the present case is not accompanied by a time-limit is sufficient to establish its extraordinary nature, and therefore the "final" nature of the decision, which could still have been challenged by means of that remedy. We take the view that the present judgment should have used the above reasoning to find, as it in fact did by other means, a violation of the *ne bis in idem* principle – with which finding we in fact wholeheartedly agree.

CONCURRING OPINION OF JUDGE PINTO DE ALBUQUERQUE

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Introduction (paragraphs 1 and 2)

1. I agree with the finding that there has been a violation of Article 4 of Additional Protocol No. 7 to the European Convention on Human Rights ("Protocol No. 7"), but not with the bulk of the Grand Chamber's reasoning. I regret that the Court missed the opportunity to define the concepts of "acquittal" and "conviction" for the purposes of Protocol No. 7 in order to determine the scope of the *ne bis in idem* principle when applied to decisions to discontinue criminal proceedings and to set the limits of the power of public prosecutors to reopen discontinued criminal proceedings. That omission is particularly critical in the context of the contemporary criminal policy choices in favour of alternatives to prosecution (e.g. a compromise settlement, mediation, a caution or warning or the imposition

of conditions)[1], like the one that led to the present case. But this is not my main criticism of this odd judgment. Indeed, this is a sadly notorious judgment for another reason.

2. Although the judgment is unanimous, the European Court of Human Rights ("the Court") is deeply divided with regard to its reasoning. As a matter of fact, only a minority of judges ("the minority") adopted the reasoning of the Grand Chamber judgment. It is telling that there are ten judges who are unsatisfied with the reasoning of the judgment, and who wrote separately, criticising crucial parts of the argumentation of the judgment. Other than giving ammunition to those who criticise the disordered *cuisine interne* of some Grand Chamber judgments, this oddity would merit the attention of the entire Court.

Part I – On *res judicata* of prosecutorial decisions (paragraphs 3-34)

1. In Romanian Law (paragraphs 3-9)

3. Under Romanian law, the force of *res judicata* is conferred solely on judicial decisions determining the merits of a case. Indeed, Article 22 of the Code of Criminal Procedure provides that "the final decision given by the criminal court constitutes *res judicata* before the civil court adjudicating the civil action, as regards the existence of the facts, the perpetrator and the latter's guilt". By contrast, a prosecutor's order has no such effect and cannot be relied on for that purpose. Although no provision of domestic law expressly defines *res judicata* in criminal cases, it is established case-law that only judgments delivered by courts and not decisions taken by the prosecutor before the case has been brought before a court – such as an order discontinuing the proceedings and imposing an administrative fine – may constitute *res judicata*[2].

4. Articles 416, 416[1] and 417 of the Code of Criminal Procedure as in force at the material time listed the circumstances in which judgments delivered at first instance, on appeal or following an appeal on points of law became final, that is to say, in general, once all ordinary remedies had been exhausted or on the expiry of the time-limit for their use if the parties had

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[1] See among many other sources, Consultative Council of European Prosecutors (CCPE) Opinion No. 2 (2008) on "Alternatives to prosecution"; Opinion No. 9 (2014) on European norms and principles concerning prosecutors, XVII, Explanatory note, §§ 28-32; and 21 Principles for the 21st Century Prosecutor, Brennan Center for Justice, 2018, p. 4: "Well-designed programs that divert people from jail or prison, or from the justice system entirely, can conserve resources, reduce reoffending, and diminish the collateral harms of criminal prosecution."

[2] See, for example, judgment no. 1898 delivered on 16 March 2012 by the High Court of Cassation and Justice and judgment no. 314/R delivered on 24 February 2009 by the Vâlcea County Court.

not availed themselves of them. The voluntary execution of a judgment by the person concerned was not mentioned as a circumstance rendering the judgment final.

5. In Romania, an order in which the prosecutor decides not to prosecute or not to examine the case cannot be considered final unless a court confirms it under the procedure governed by Article 278[1] of the Code of Criminal Procedure (Article 340 of the New Code of Criminal Procedure). Confirmation by a court is not automatic but must follow from a complaint by the injured party or the accused. However, it should be pointed out that the court's confirmation of the order can only relate to the circumstances that have been submitted to its scrutiny. If new or hitherto unknown evidence emerges, the prosecutor may order the reopening of the criminal proceedings without being hindered by the fact that the initial order has been reviewed by a court[3].

6. Under Articles 270 and 273 of the Code of Criminal Procedure as in force at the material time, the reopening of criminal proceedings could be ordered if, subsequently to a decision discontinuing them, it was established that the ground on which the earlier decision had been based had not actually existed or no longer existed. This possibility of reopening the proceedings was available to the higher-level prosecutor's office, on his or her own motion or at the request of interested parties. The parties against whom the proceedings had been brought or any other interested parties (for example, the injured party) could not lodge an ordinary appeal; instead, they were able to challenge the prosecutor's decision by means of a complaint to the chief prosecutor, and subsequently to the competent court (Articles 249[1], 275, 278 and 278[1] of the Code of Criminal Procedure as in force at the material time).

7. According to the Court's case-law, a prosecutor's decision to discontinue the prosecution does not constitute a final decision, on account of the fact that domestic law affords the higher-level prosecutor's office the possibility of reopening the proceedings. Examining a length of proceedings' case, the Court found that "the order discontinuing the proceedings made by the prosecutor N.O. on 11 November 1997 cannot be regarded as having terminated the proceedings against the applicants because it was not a final decision ... It has to be said in that connection that, under Article 270 of the Code of Criminal Procedure, the prosecution had the power to set aside an order discontinuing the proceedings and reopen a criminal investigation without being bound by any time-limit." [4]

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[3] Since 1 February 2014 any decision to reopen criminal proceedings is subject to judicial scrutiny. The prosecutor must submit the order for the reopening of the proceedings for confirmation by a court within three days of the decision, failing which the reopening will be null and void (Article 335 (4 of the New Code of Criminal Procedure).

[4] See *Stoianova and Nedelcu v. Romania*, nos. 77517/01 and 77722/01, § 21, ECHR 2005-VIII.

8. In another case, the Court held: "As regards the discontinuance order of 16 August 1994, the Court considers that the applicant cannot rely on it as a basis for arguing that the proceedings had been terminated with final effect, given that as it could still be overturned by the higher prosecutor, it had not become *res judicata*."[5] The measure of detention imposed on the applicant was a security measure provided for in Article 112 of the Criminal Code, under the heading "Security measures", with the aim of dispelling a potential danger and preventing the commission of other acts covered by criminal law, and distinct from criminal penalties, which were defined under a separate heading in Article 53 of the Criminal Code. Nonetheless, security measures were imposed on individuals who had committed an act punishable by criminal law (Article 111 § 2 of the Criminal Code). To apply such a measure, the public prosecutor's office would examine the circumstances of the case, establish that the person concerned had perpetrated acts punishable by criminal law and suggest to the court what would be the most appropriate measure to restore order in society.

9. Hence, the *Horciag* and *Mihalache* cases are quite similar[6]: in both cases, the prosecutor empowered to intervene under domestic law examined the specific factual circumstances and expressed an opinion on the most appropriate measure to be imposed on the applicant. Furthermore, in both cases, the same provisions of domestic law – Articles 270 and 273 of the Code of Criminal Procedure – entitled the higher-level prosecutor's office to reopen the proceedings. These considerations lead to two conclusions: first, the present judgment represents a silent departure from the Court's existing case-law as set out in the aforementioned *Horciag* case[7]; second, the interpretation that, in the present case, the prosecutor's order of 7 August 2008 could be deemed to have definitively barred further prosecution is not compatible with domestic law taken as a whole[8].

Had the Court considered the "finality" of a decision only "in accordance with the law and penal procedure of that State"[9] in question, this would have settled the case in favour of the respondent State. But that is not the Court's choice in the present judgment, which establishes an autonomous Convention meaning of the term "finally" in Article 4 § 1 of Protocol No. 7 and accords the Court the competence to rule on the ordinary or extraordinary nature of the remedy provided by Articles 270 and 273 of the Code of Criminal Procedure accordingly.

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5 See *Horciag v. Romania* (dec.), no. 70982/01, 15 March 2005.

6 Contrary to the assumption in paragraphs 96 and 107 of the judgment.

7 Contrary to the opinion expressed in paragraph 106 of the judgment.

8 That is why the minority make such a strenuous effort to affirm that the final character of a decision in a given case does not depend exclusively on domestic law (paragraphs 104-108 and 126 of the judgment).

9 See Article 4 § 1 of Protocol 7.

2. In Comparative Law (paragraphs 10-19)

10. The minority refer repeatedly to the "various concepts laid down in domestic law"[10] and ultimately affirm the need to determine the concept of final decision in a particular case on the "basis of objective criteria"[11]. Yet there is no effort to analyse the Contracting Parties' domestic law on the European Convention on Human Rights (the Convention")[12]. That comparative law research would have enlightened the discussion on the powers of public prosecutors in criminal investigations, namely the powers to close and reopen them, and the interaction of those powers with the guarantee of *ne bis in idem*. That is what I propose to do next.

11. In 32 European States, the Codes of Criminal Procedure contain a list of grounds for a public prosecutor to discontinue criminal proceedings. These member States are: Albania[13], Armenia[14], Austria[15], Azerbaijan[16], Belgium[17], Bosnia and Herzegovina[18], Croatia[19], Czech Republic[20], Estonia[21], Finland[22], France[23], Georgia[24], Germany[25], Hungary[26], Latvia[27], Liechtenstein[28], Lithuania[29], Luxembourg[30], North Macedonia"[31],

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10 See paragraph 108 of the judgment.

11 See paragraph 116 of the judgment.

12 It is to be noted that in *A and B v. Norway (GC)*, nos. 24130/11 and 29758/11, 15 November 2016, the Court also neglected the comparative law information and in *Sergey Zolothukin v. Russia* [GC], no. 14939/03, ECHR 2009, only referred to the double-jeopardy rule under the Fifth Amendment to the United States Constitution. It is true that Article 4 of Protocol 7 is a provision from which no derogation is permissible, and therefore there is no margin of appreciation for Contracting Parties to the Convention based on the lack of a European consensus on issues regarding *ne bis in idem* (see my opinion in *A and B v. Norway*, cited above, § 22). But this does not mean that the comparative-law information on the legal situation prevailing in the Contracting Parties to the Convention should be entirely neglected, as it was in the present case.

13. Art. 290 CCP.

14. Art. 35 CCP.

15. Arts. 190-192 CCP.

16. Art. 39 CCP.

17. Art. 28 quater (1) combined with Annex 1 of Circular no. COL 12/98.

18. Art. 224(1) CCP.

19. Art. 206(1) CCP.

20. Arts. 171-173 CCP.

21. Art. 199 CCP.

22. Art. 6 CCP.

23. Art. 40 CCP.

24. Art. 105 CCP.

25. Arts. 153-154f and 170(2) of the CCP.

26. Art. 398 CCP.

27. Arts. 377 and 379 CCP.

28. Art. 158(2) CCP.

29. Art. 212 CCP.

30. There is no article presenting the reasons. The principle of "*opportunité des poursuites*" guides the prosecutor in taking his decision.

Moldova[32], Montenegro[33], Norway[34], Poland[35], Portugal[36], Russian Federation[37], San Marino[38], Serbia[39], Slovakia[40], Slovenia[41], Spain[42], Switzerland[43] and Ukraine[44]. The most common reasons that can be given by a public prosecutor to justify a decision to discontinue criminal proceedings belong to two main groups: in mandatory prosecution systems, they include lack of elements of crime (32 States), lack of evidence (28 States), statute of limitation (21 States), amnesty or immunity (17 member States), lack of criminal responsibility/criminal liability age (17 States), adjudication by a final court decision for the same act (13 States), death of the suspect (13 States), lack of complaint by the victim (10 States); and in discretionary prosecution systems they include lack of sufficient seriousness (10 States), the accused is already charged with several (more serious) criminal acts (7 States), and, finally, lack of public interest (6 States). In 5 States[45], no specific grounds are mentioned in the CCPs but in practice the same applies.

12. As to a decision to discontinue on the basis of a proposal by the body that carried out the preliminary investigation, in 23 States[46] the public prosecutor makes the decision to discontinue independently, but the body that carried out the preliminary investigation can make proposals. In 8 States[47] the criminal investigative body can make the decision on its own with or without the public prosecutor's approval. Finally, in 3 States[48] the public prosecutor makes the decision independently and the body that carried out the preliminary investigation is not entitled to make any proposals.

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31. Art. 304 CCP.
32. Art. 275 CCP.
33. Art. 294 CCP.
34. Art.224 CCP, *inter alia*.
35. Art. 17(1) CCP.
36. Art. 277 CCP.
37. Arts. 25-28 CCP.
38. Art. 135 CPP.
39. Art. 284 CCP.
40. Arts. 215, 216 and 218 CCP.
41. Art. 161 of the CCP.
42. Art. 637 and 641 CPP
43. Arts. 310 and 319 CCP.
44. Art. 284 CCP.
45. Ireland, Monaco, the Netherlands, Sweden and the United Kingdom (England and Wales).
46. These States are Austria, Belgium, Croatia, Czech Republic, Finland, France, Georgia, Liechtenstein, Lithuania, Luxembourg, Germany, Monaco, Montenegro, the Netherlands, Norway, Portugal, Russian Federation, San Marino, Slovakia, Slovenia, Spain, Switzerland and the United Kingdom (England and Wales).
47. Armenia, Azerbaijan, Estonia, Ireland, Hungary, Moldova, Poland and Sweden.
48. Bosnia and Herzegovina, North Macedonia and Serbia.

13. In 26 States[49] a decision to discontinue criminal proceedings can be challenged both by hierarchical appeal and by judicial review. In five member States[50], there is no hierarchical system and so there is no possibility of a hierarchical appeal in case of a discontinuance decision. However, the discontinuance decision made by the public prosecutor can be challenged by means of judicial review. In four further States[51], although there is a hierarchical system, the discontinuance decision made by the public prosecutor can only be challenged by means of judicial review. Finally, in three member States[52], there is no judicial control of the discontinuance decision, but only hierarchical review.

14. In most member States (28 States[53]), the victim is entitled to challenge the discontinuance decision. In 14 States[54], the suspect is entitled as well to challenge the decision. In 15 States[55], the discontinuance decision can be challenged by "interested parties". In 4 States also by the person who reported the crime has that power[56].

15. As to a later revocation of the discontinuance decision by higher-level prosecution authorities at their own initiative, this is not possible in 16 States[57]. In other 17 States[58], a later revocation by higher-level prosecution authorities on their own motion is possible without any time-limit[59]. Finally, in 6 States[60] certain time-limits apply for a later revocation

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49. Albania, Armenia, Austria, Azerbaijan, Bosnia and Herzegovina, Croatia, Czech Republic, Estonia, Finland, France, Georgia, Germany, Hungary, Latvia, Lithuania, Luxembourg, Moldova, Montenegro, Poland, Portugal, Serbia, Slovakia, Slovenia, Sweden, Switzerland and Ukraine.

50. The United Kingdom (England and Wales), Ireland, Liechtenstein, Monaco and San Marino.

51. Netherlands, Russian Federation, Spain and Turkey.

52. Belgium, North Macedonia and Norway.

53. Austria, Azerbaijan, Bosnia and Herzegovina, Croatia, Estonia, Finland, France, Georgia, Germany, Hungary, Ireland, Lithuania, Luxembourg, North Macedonia, Moldova, Montenegro, Norway, Poland, Portugal, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Turkey, Ukraine and the United Kingdom (England and Wales).

54. Czech Republic, Finland, Georgia, Hungary, Latvia, Lithuania, Moldova, Montenegro, Norway, Poland, San Marino, Slovakia, Sweden and Ukraine.

55. Albania, Armenia, Bosnia and Herzegovina, Finland, France, Hungary, Latvia, Lithuania, Moldova, Monaco, the Netherlands (the directly interested party), Norway, Russian Federation, Switzerland, and United Kingdom (England and Wales).

56. Bosnia and Herzegovina, France and Lithuania (in certain cases) and Poland.

57. Albania, Austria, Azerbaijan, Bosnia and Herzegovina, Croatia, France, Ireland, Liechtenstein, Lithuania, North Macedonia, Monaco, Montenegro, the Netherlands, San Marino, Serbia and Spain.

58. Armenia, Belgium (only in case of new evidence), Estonia , Finland, Georgia, Germany, Latvia, Hungary, Luxembourg, Moldova, Norway (if no one has been charged before), Poland (only in case of new evidence), Portugal, Slovenia (only very exceptionally), Sweden, Turkey and Ukraine.

59. The only obstacle being the limitation period of criminal liability for the act.

60. Czech Republic, Norway, Poland, Russian Federation, Slovakia and the United Kingdom (England and Wales).

by higher-level prosecution authorities at their own initiative (three months / six months / one year).

16. As regards the grounds for a later revocation of the discontinuance decision by higher-level prosecution authorities at their own initiative, in 21 States[61] the main grounds for a later revocation are new evidence or new circumstances, in 13 States[62] the control of lawfulness/well-foundedness, and in 4 States[63] a different view on law or fact. Finally, only in 2 States (Germany and Sweden) are no grounds needed, but the rule-of-law principle must be adhered to.

17. It is clear from the above that there is a European consensus on limiting the discretion of public prosecutors in disposing of criminal cases, including as regards the reasons which they may invoke. Discretionary prosecution systems are in a clear minority, and lack of public interest can rarely justify the discontinuance of a criminal investigation by the public prosecutor. In the vast majority of States, the public prosecutor takes the decision to discontinue on the basis of proposals presented by the agency that carried out the preliminary investigation. In most States a decision to discontinue criminal proceedings can be impugned both by hierarchical appeal and by judicial review. Although the power of the higher-level prosecution authorities to review these decisions on their own motion is safeguarded in the majority of States, that power is significantly limited by time and substantive constraints.

18. This European consensus is reinforced by Council of Europe soft law, namely Recommendation Rec (2000) 19 on the role of public prosecution in the criminal justice system[64], and Opinion No. 12 (2009) of the Consultative Council of European Judges (CCJE), Opinion No. 4 (2009) of the Consultative Council of European Prosecutors (CCPE) for the attention of the Committee of Ministers of the Council of Europe on the relations between judges and prosecutors in a democratic society[65], and Opinion No. 9 (2014) of the Consultative Council of European Prosecutors to the Committee of Ministers of the Council of Europe on European norms and principles concerning prosecutors[66].

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61. Armenia, Belgium, Croatia (for reopening of the proceedings by the court), Estonia , Georgia, Hungary, Latvia, Luxembourg, Moldova, Montenegro (for reopening of the proceedings by the court), the Netherlands (for reopening of the proceedings by the court), Norway, Poland, Portugal, San Marino (for reopening of the proceedings by the same investigative judge), Slovakia, Slovenia, Spain (for reopening of the proceedings by the same investigative judge), Sweden, Switzerland and Turkey.

62. Armenia, Croatia, Czech Republic, Estonia, Georgia, Hungary, Latvia, Moldova, Portugal, the Russian Federation, Slovakia, Slovenia and United Kingdom.

63. Hungary, Luxembourg, Poland and Portugal.

64. See §§ 13 (f) and 34.

65. See §§ 9, 52-54.

66. See §§ 13 and 18.

19. By ignoring these comparative-law and soft-law materials, the minority have failed to gain a clear overview of the powers of public prosecutors in criminal investigations in Europe and how they correlate with the *ne bis in idem* guarantee. On the other hand, the minority do not overlook European Union law, but the analysis of the relevant case-law is incomplete and hasty conclusions are drawn from it.

3. In European Union Law (paragraphs 20-34)

20. The question arising in the present case is whether the public prosecutor's order of 7 August 2008 amounts to a "final" decision rendering Article 4 of Protocol No. 7 applicable. This question is not new and has been raised in the Court of Justice of the European Union ("CJEU"). This court examines the *ne bis in idem* principle under Article 50 of the EU Charter of Fundamental Rights ("the Charter") and Article 54 of the Convention implementing the Schengen Agreement ("CISA"), read in the light of Article 50 of the Charter, and taking into account Article 4 of Protocol No. 7 to the Convention[67].

21. The *ne bis in idem* principle is considered as one of the general principles of European Union law. Developed by the Court of Justice of the European Communities (CJEC), which became the Court of Justice of the European Union (CJEU), the principle was enshrined in Article 50 of the Charter of Fundamental Rights of the European Union ("the Charter")[68]. However, many of the cases brought before the CJEU concern the CISA. The *ne bis in idem* principle is set out in Article 54 CISA.

22. An analysis of the case-law on Article 54 CISA and Article 50 of the Charter highlights three criteria which must all be fulfilled if a decision is to be deemed "final": the decision must "finally bar" the prosecution; it must have been preceded by a "thorough investigation"; and it must be based on an assessment of the merits of the case. Furthermore, in cases of convictions, a fourth criterion is required: the penalty must have been "enforced" or be "in the process of enforcement", or "can no longer be enforced".

23. The CJEU first of all scrutinises whether the decision in question qualifies as a "decision of an authority required to play a part in the administration of criminal justice in the national legal system concerned"[69].

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[67] In *Piotr Kossowski v. Generalstaatsanwaltschaft Hamburg* [GC], Case C-486/14, 29 June 2016, it is stated that the CJEU relies on Article 54 CISA "read in the light of Article 50 of the Charter". There is therefore no need to consider those provisions separately.

[68] Furthermore, according to Article 52 of the Charter and the case-law of the CJEU, Article 50 of the Charter must be interpreted in conformity with Article 4 of Protocol No. 7 to the Convention as adopted on 22 November 1984.

This concept covers not only judgments, but also prosecution and police decisions. Indeed, according to the CJEC, "the fact that no court is involved in such a procedure and that the decision in which the procedure culminates does not take the form of a judicial decision does not cast doubt on that interpretation", that is to say, that it does not prevent the application of the *ne bis in idem* principle[70]. The CJEC's decisive argument is the object of Article 54 CISA. The *Hüseyin Gözütok and Klaus Brügge* judgment states the following:

> "Article 54 of the CISA, the objective of which is to ensure that no one is prosecuted on the same facts in several Member States on account of his having exercised his right to freedom of movement, cannot play a useful role in bringing about the full attainment of that objective unless it also applies to decisions definitively discontinuing prosecutions in a Member State, even where such decisions are adopted without the involvement of a court and do not take the form of a judicial decision"[71].

24. The decisions to which the CJEU has had regard in examining the application of the *ne bis in idem* principle have included:

– a prosecution decision discontinuing criminal proceedings following the accused's fulfilment of certain obligations (such as mediation or other forms of plea bargaining)[72];

– a conviction *in absentia* which was never imposed on the convicted person[73];

– a decision taken by a police authority, at a stage prior to the charging of the person concerned, to suspend the criminal proceedings[74];

– a "*non-lieu*" decision based on the finding that there were no grounds to refer the case to a trial court because of insufficient evidence, issued by the pre-trial chamber of a court[75];

– a prosecution decision terminating the criminal proceedings against the accused for lack of sufficient evidence[76].

25. In order for a decision to be final, the prosecution must be "finally barred". The judgment in the case of *Vladimir Turanský,* which concerned a police order suspending the criminal proceedings, consolidated that principle:

> "It is clear from the very wording of Article 54 of the CISA that no one may be prosecuted in a Contracting State for the same acts as those in respect of which his trial has been 'finally disposed of' in another Contracting State. With regard to the

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69. CJEC, 11 February 2003, *Hüseyin Gözütok and Klaus Brügge*, joined cases C-187/01 and C-385/01, § 28.
70. Ibid, § 31.
71. Ibid., § 38.
72. Ibid., § 27 et seq.
73. CJEU, 11 December 2008, *Bourquain,* C-297/07, § 34.
74. CJEC, 22 December 2008, *Vladimir Turanský*, C-491/07, § 30.
75. CJEU, 5 June 2014, M., C-398/12, § 17.
76. *Piotr Kossowski v. Generalstaatsanwaltschaft Hamburg*, cited above, § 15.

> concept of 'finally disposed of', the Court has already declared ... that when, following criminal proceedings, further prosecution is definitively barred, the person concerned must be regarded as someone whose trial has been 'finally disposed of' for the purposes of Article 54 of the CISA in relation to the acts which he is alleged to have committed. It follows that, in principle, a decision must, in order to be considered as a final disposal for the purposes of Article 54 of the CISA, bring the criminal proceedings to an end and definitively bar further prosecution. In order to assess whether a decision is 'final' for the purposes of Article 54 of the CISA, it is necessary first of all to ascertain ... that the decision in question is considered under the law of the Contracting State which adopted it to be final and binding, and to verify that it leads, in that State, to the protection granted by the ne bis in idem principle"[77].

26. Furthermore, in order for a decision to be final, a "thorough investigation" must have previously been conducted by the authority giving the decision. In justifying that criterion, the CJEU has regard to the purpose of Article 54 CISA, which must be read in the light of Article 3 § 2 of the Treaty on European Union. It thus balances the free movement of persons against the need to prevent and combat crime. This principle is fleshed out in the *Kossowski* judgment cited above:

> "Therefore, the interpretation of the final nature, for the purposes of Article 54 of the CISA, of a decision in criminal proceedings in a Member State must be undertaken in the light not only of the need to ensure the free movement of persons but also of the need to promote the prevention and combating of crime within the area of freedom, security and justice"[78].

27. Under the CJEU's case-law, the failure to interview a victim or a possible witness is an indication that no thorough investigation took place[79]. The CJEU often links this criterion with that of an assessment of the merits of the case, because the lack of a thorough investigation impedes proper assessment of the merits of the case. The difference between these two criteria would appear to be that the criminal investigation concerns the pre-trial stage, whereas the assessment of the merits – although also a procedural criterion – is more relevant to the post-investigation processing of the case.

28. In its *Miraglia* judgment[80], the CJEC explicitly required an assessment to be conducted of the merits of the case:

> "Now, a judicial decision ... taken after the public prosecutor has decided not to pursue the prosecution on the sole ground that criminal proceedings have been initiated in another Member State against the same defendant and in respect of the same acts, but where no determination has been made as to the merits of the case,

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77. See *Vladimir Turanský*, cited above, §§ 31-32 and §§ 34-35; *Hüseyin Gözütok and Klaus Brügge*, cited above, § 30; and CJEC, 28 September 2006, *Van Straaten*, C-150/05, § 61.
78. See *Piotr Kossowski v. Generalstaatsanwaltschaft Hamburg*, cited above, § 47.
79. Ibid., § 54.
80. CJEC, 10 March 2005, *Miraglia*, Case C-469/03.

cannot constitute a decision finally disposing of the case against that person within the meaning of Article 54 of the CISA"[81].

In order to justify the application of this criterion, the CJEC emphasised the purpose of Article 54, which should not have the effect of:

"making it more difficult, indeed impossible, actually to penalise in the Member States concerned the unlawful conduct with which the defendant is charged"[82].

Were this criterion not to be applied:

"the bringing of criminal proceedings in another Member State in respect of the same facts would be jeopardised even when it was the very bringing of those proceedings that justified the discontinuance of the prosecution by the Public Prosecutor in the first Member State"[83].

29. Moreover, in its *Van Straaten* judgment the CJEC decided that an acquittal on the grounds of insufficient evidence had been based on an assessment of the merits of the case[84]. The CJEU also found in the *M.* judgment:

"that an order making a finding of 'non-lieu' at the end of an investigation during which various items of evidence were collected and examined must be considered to have been the subject of a determination as to the merits, within the meaning of *Miraglia* EU:C:2005:156, in so far as it is a definitive decision on the inadequacy of that evidence and excludes any possibility that the case might be reopened on the basis of the same body of evidence"[85].

30. Article 54 CISA provides that once all the criteria have been fulfilled, the *ne bis in idem* principle is applicable:

"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".

In the *Spasic* judgment[86], the CJEU stipulated that this additional condition was compatible with Article 50 of the Charter. In addition, the CJEU decided that the concept of an "enforced" penalty called for an autonomous and uniform interpretation in EU law[87]. It thus stated that:

"... the mere payment of a fine by a person sentenced by the self-same decision of a court of another Member State to a custodial sentence that has not been served is not sufficient to consider that the penalty 'has been enforced' or is 'actually in the process of being enforced' within the meaning of that provision"[88].

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81. Ibid., § 30.
82. Ibid., § 33.
83. Ibid., § 34.
84. *Van Straaten*, cited above, § 60.
85. *M.*, cited above, § 30.
86. CJEU, 27 May 2014, *Spasic*, C-129/14, § 74.
87. Ibid., § 79.
88. Ibid., § 85.

31. This additional enforcement condition thus only applies where a penalty has been imposed. The *Kossowski* judgment states that the reference to a penalty cannot be interpreted in such a way that the application of Article 54 of the CISA is — other than in a case in which a penalty has been imposed — subject to an additional condition[89]. Similarly, in the *Bourquain* judgment, the CJEU established the final nature of the impugned judgment *in absentia* without any reference to a penalty or the enforcement thereof. Concerning the additional condition set out in Article 54 CISA, the CJEU decided that even though the judgment had never been enforced, owing to the specific features of proceedings in the Contracting State in question, it could no longer have been enforced at the time of initiation of the second set of proceedings. Therefore, the *ne bis in idem* principle was applicable.

32. On the other hand, the CJEU accepted that a suspended penalty was "in the process of being enforced", and should be considered as "having been enforced" once the probation period had come to an end[90]. Adhering to the precise wording of Article 54 CISA, the CJEU decided that that condition did not require the penalty to have been enforced directly. In the *Bourquain* judgment, it held that that condition had been fulfilled:

> "... when it is established that, at the time when the second criminal proceedings were instituted against the same person in respect of the same acts as those which led to a conviction in the first Contracting State, the penalty imposed in that first State can no longer be enforced according to the laws of that State[91]".

33. The Court has stated that the difference between EU law and the Convention lies in the fact that the Convention "does not prevent a person from being prosecuted or penalised by the courts of a State Party to the Convention for an offence of which he or she had been acquitted or convicted under a final judgment in another State Party"[92]. Having regard to the intrinsic logic of EU law, the two Courts used different lines of reasoning in the past. Unlike the Strasbourg Court[93], the CJEU relied, in its reasoning, on the objective of free movement of persons, mutual trust and the principles of legal certainty and legitimate confidence, even though it also mentions, in its more recent judgments – especially those delivered in the framework of Article 50 of the Charter – the protection of the fundamental rights of the person in question. In accordance with the principle of freedom of movement, European citizens must not have to fear prosecution for the same offence after a final decision if they move around within the Schengen area. To attain that purpose, the CJEU sought to maintain a balance between the necessity to guarantee free movement of

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89. *Piotr Kossowski v. Generalstaatsanwaltschaft Hamburg*, cited above, § 41.
90. CJEU, 18 July 2007, *Kretzinger*, C-288-05, § 42.
91. *Bourquain,* cited above, § 48.
92. *Krombach v. France* (dec.), no. 67521/14, § 40, 20 February 2018.
93. The traditional position of the Court is described in paragraph 110 of the present judgment.

people and the need to promote the prevention and combat of crime within the area of freedom, security and justice, that is to say the prevention of impunity. Article 54 CISA must therefore not have the effect of "making it more difficult, indeed impossible, actually to penalise in the Member States concerned the unlawful conduct with which the defendant is charged" 94 (*Miraglia* and *Van Straaten* judgments, cited above).

34. In conclusion, there was a significant difference between the two Courts as regards the determination of the "final" nature of a decision. This difference stemmed from the specific role played by the CJEU as the guardian not only of the fundamental rights of the Charter but also of the free movement of persons and the concurrent need to prevent impunity. Such enhanced punitive approach of the Luxembourg Court is used in the present judgment by the Strasbourg Court as a source of legitimisation for its *A and B*-inspired, efficiency-oriented case-law on *ne bis in idem*, which has abandoned its classical *pro persona* philosophy in favour of a strict *pro auctoritate* stance[95].

Part II – Again the *A and B* nonsensical logic (paragraphs 35-39)

1. *Johannesson and Others*: confirming the worst fears (paragraphs 35 and 36)

35. The minority reaffirm the *A and B* test of "sufficiently close connection in substance and in time"[96]. I have expressed my opinion on this test elsewhere[97]. Unfortunately, more recent case-law has only confirmed my worst expectations. In *Johannesson and Others*[98], the Court found that even if the two criminal and tax proceedings pursued complementary purposes in addressing the issue of taxpayers' failure to comply with the legal requirements relating to the filing of tax returns, there was no sufficiently close connection between them, due to "the limited overlap in time and the largely independent collection and assessment of evidence"[99]. While performing the allegedly decisive proportionality test, the Court considered that the Supreme Court had sentenced the applicants to a suspended sentence of respectively 12 and 18 months and ordered them to pay fines and that, in fixing the fines, the Supreme Court had had regard to the excessive length of proceedings and tax surcharges that had already been imposed on the applicants, albeit without providing any details on the calculation in this respect. However, in determining the prison sentence the

94. *Miraglia*, cited above, §§ 32-33.
95. See my opinion in *A and B v. Norway*, cited above, § 79.
96. See paragraph 83 of the judgment.
97. See my opinion in *A and B v. Norway*.
98. *Johannesson and Others v. Iceland*, no. 22007/11, 18 May 2017.
99. Ibid., § 55.

Supreme Court had only considered the excessive length of the proceedings. Nevertheless, the Court concluded that, given that the tax surcharges were offset against the fines, the sanctions already imposed in the tax proceedings had been sufficiently taken into account in the sentencing in the criminal proceedings.

36. It is beyond my understanding that the Chamber neglected its own fundamental substantive finding that the sanctions applied in both criminal and tax procedures were proportionate overall, giving more weight to less important, strictly procedural circumstances, namely "the limited overlap in time and the largely independent collection and assessment of evidence". Even assuming that these procedural circumstances had effectively impacted the way the two proceedings were conducted, which the Chamber could have but did not ascertain, the said circumstances did not, in any event, imperil the proportional outcome of both proceedings, still according to the Chamber itself. Consequently, the finding that the applicants suffered disproportionate prejudice as a result of having been tried and punished for the same or substantially the same conduct by different authorities in two different proceedings which lacked the required connection is more the result of the judges' whim than of any principled approach[100].

2. The illusion of duplication of proceedings in the present case (paragraphs 37-39)

37. The present case proves again how artificial the *A and B* test is. It is true that the minority acknowledge that "[t]he proceedings and the two penalties imposed on the applicant pursued the same general purpose of deterring conduct posing a risk to road safety."[101] They also recognise that "The "first" set of proceedings as a whole and the initial part of the "second" set of proceedings were conducted by the same authority ... and in "both" sets of proceedings the same evidence was produced."[102]

38. In spite of all the above mentioned "factors"[103] pointing to no duplication of proceedings according to the *A and B* test itself, the minority conclude that there was such duplication. There are two reasons given to sustain this conclusion. None of them convinces. The first one is that "[i]n the present case the two penalties imposed on the applicant were not combined"[104]. This argument does not stand, for the simple reason that the

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100. As in *A and B v. Norway*, cited above, §§ 126 and 142, the Chamber in the Icelandic case did not find it necessary to determine whether and when the first set of proceedings – the tax proceedings – became "final" as this circumstance did not affect the assessment of the relationship between the tax and the criminal proceedings. See the critique to this erroneous approach in my separate opinion in *A and B v. Norway*, cited above.

101. See paragraph 84 of the judgment.

102. Ibid.

103. See paragraph 85 of the judgment.

public prosecutor ordered the reimbursement of the fine paid by the applicant pursuant to the order of 7 August 2008[105] and he had not asked for that reimbursement[106]. Logically, there could not have been any combination possible since the State acknowledged the inappropriateness of the administrative penalty and made the amount already paid available to the fined person[107].

39. The minority add one second argument that "[t]he "two" sets of proceedings took place one after the other and were not conducted simultaneously at any time."[108] The patent artificiality of this argument is underlined by the fact that the minority themselves put the "two" between inverted commas. Worse still, the minority do not even apply the *A and B* criterion regarding the close connection in time[109]. Had they applied the criterion, they would have to conclude that there was a close connection in time between the prosecutor's order of 7 August 2008 and the higher-ranking prosecutor's decision of 7 January 2009[110]. The unfortunate impact of *A and B v. Norway* does not end here, as will be demonstrated below.

Part III - The dual personality of *Mihalache* (paragraphs 40-53)

1. The liberal judgment (paragraphs 40-43)

a. The broad interpretation of "competent authority" to acquit or convict (paragraphs 40 and 41)

40. The minority purport a "broad interpretation"[111] of the concepts of "acquittal" and "conviction" in the English text of Protocol No. 7, which does not refer to the word "*jugement*" used in the French version. On that basis, the minority go so far as to establish that the sole formal requirement of the *ne bis in idem* guarantee is that the final decision ("finally acquitted or convicted") must be given by "an authority participating in the

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104. See paragraph 84 of the judgment.
105. See paragraph 28 of the judgment.
106. See paragraph 30 of the judgment.
107. This is accepted by the minority in paragraph 127 of the judgment.
108. See paragraph 84 of the judgment.
109. See *A and B v. Norway*, cited above, § 134 "where the connection in substance is sufficiently strong, the requirement of a connection in time nonetheless remains and must be satisfied. This does not mean, however, that the two sets of proceedings have to be conducted simultaneously from beginning to end. It should be open to States to opt for conducting the proceedings progressively in instances where doing so is motivated by interests of efficiency and the proper administration of justice, pursued for different social purposes, and has not caused the applicant to suffer disproportionate prejudice."
110. In previous cases the Court found that there was sufficient connection in time with longer periods. I have already demonstrated that the "sufficient connection in time" criterion is arbitrary (my opinion in *A and B v. Norway*, cited above, §§ 40-46).
111. See paragraph 95 of the judgment.

administration of justice"[112]. Hence, a prosecutorial discontinuance decision imposing an administrative penalty may be equated to a "conviction" for the purposes of Article 4 Protocol No. 7. This "'preventive' application of the principle *ne bis in idem*"[113] represents the added value of the present judgment and a step forward in the protection of defendants in criminal procedure.

41. In sum, the minority qualify and restrict the principle stated by the Court in *Marguš v. Croatia*[114] that "the discontinuance of criminal proceedings by a public prosecutor does not amount to either a conviction or an acquittal, and that Article 4 of Protocol No. 7 is therefore not applicable in such a situation"[115].

b. The strict reading of the possibility of reopening the case *contra reum* (paragraphs 42-43)

42. The minority interpret the conditions for reopening a case as set out in Article 4 § 2 of Protocol No. 7 (the emergence of new or newly discovered facts or the discovery of a fundamental defect in the previous proceedings which could affect the outcome of the case) on the basis of the explanatory report[116].

43. The first condition includes new evidence relating to previously existing facts, as well as new facts. The second condition is more strictly conceptualised: "only a serious violation of a procedural rule severely undermining the integrity of the previous proceedings can serve as the basis for reopening the latter to the detriment of the accused, where he or she has been acquitted of an offence or punished for an offence less serious than that provided for by the applicable law"[117]. It is correct to conclude that a mere reassessment of the evidence on file by the public prosecutor or the higher-level court does not fulfil that criterion. Nor can a reopening be determined in order to standardise practice in assessing the seriousness of certain offences.

2. The illiberal judgment (paragraphs 44-53)

a. The narrow content of the "determination as to the merits" (paragraphs 44-51)

44. On the contrary, the present judgment presents a fragile theoretical foundation for the concepts of acquittal and conviction in Protocol No. 7. Indeed, paragraphs 96 to 98 are the most disappointing part of the judgment.

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112. Ibid.
113. To use the CJEU's expression in *Miraglia*, cited above, § 23.
114. *Marguš v. Croatia* (GC), 4455/10, 27 May 2014.
115. See paragraphs 96 and 99 of the judgment.
116. See paragraph 131 of the judgment.
117. See paragraph 133 of the judgment.

The minority do not advance a definition of acquittal and conviction and do not elaborate on the distinctive features of these two concepts. If they ultimately conclude that the prosecutor's order of 7 August 2008 was a "conviction" for the purposes of Article 4 of Protocol No. 7[118], this conclusion is reached by means of a casuistic approach, as if the minority were sailing by sight. In other words, the Court is at sea without a compass.

45. The minority's sole attempt to put forward a definition is the following: "the words "acquitted or convicted" imply that the accused'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."[119] The "determination as to the merits of the case", which is the core of the minority's concepts of "acquittal" and "conviction", is addressed in the crucial paragraph 98 of the judgment in dubious terms.

46. Firstly, the "factors"[120] that constitute such "determination as to the merits" are enunciated as probable features of the concept ("are likely to lead"[121]), which means that they are not necessary, *sine qua non* requirements. In other words, the presence of these "factors" does not imply that there is necessarily a "determination as to the merits" (and therefore an acquittal or conviction). Conversely, there may be a "determination as to the merits" (and therefore an acquittal or conviction) even when these factors are not present. The minority do not clarify when this may occur.

47. Secondly, the minority present the "factor" that "the victim has been interviewed" as one that is likely to lead to a finding that there has been a "determination as to the merits"[122]. This correlation is simply unfounded. There may be a "determination as to the merits" of the case without the victim having been interviewed. Consequently, the concept of *ne bis in idem* is not dependent on the random fact that the victim has been interviewed. This correlation imports the unfortunate *Kossowski* case-law[123], which is cited in paragraph 43 of the judgment, without taking into account the specificities of the CJEU case-law on *ne bis in idem*. As a matter of law, the minority ignore the fact that the background of CJEU case-law is determined by "the need to ensure the free movement of persons" and geared by "the need to promote the prevention and combating of crime within the area of freedom, security and justice"[124]. This latter aim is unrelated to, indeed even contradicts, the aims of the international

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118. See paragraph 101 of the judgment.
119. See paragraph 97 of the judgment.
120. Ibid.
121. Ibid.
122. Ibid.
123. See *Piotr Kossowski v. Generalstaatsanwaltschaft Hamburg*, cited above, and *Vladimir Turanský*, cited above.
124. See *Piotr Kossowski v. Generalstaatsanwaltschaft Hamburg*, cited above, § 47, cited in paragraph 43 of the present judgment.

customary law principle of *ne bis in idem* in its form of the exhaustion-of-procedure principle (*Erledigungsprinzip)*[125]. A "vicious cycle" of troublesome jurisprudence multiplied through mutual encouragement started recently with *A and B v. Norway* influencing *Menci*[126]. Now it is the turn of *Kossowski* and company leaving their mark in the Court's present judgment.

48. Thirdly, the minority mention the factor that "the evidence has been gathered and examined by the competent authority". This factor reflects the *Miraglia* case-law, in so far that the latter judgment requires "any determination whatsoever as to the merits of the case"[127] in order to fulfil the requirements of a "final judgment" in Article 54 CISA. In the *Miraglia* case, the decision to discontinue the prosecution contained "no assessment whatsoever of the unlawful conduct with which the defendant was charged"[128].

49. Yet the minority do not take into account that there are numerous examples of a "final decision" which becomes *res judicata* without any prior collection and examination of evidence, such as a decision terminating the proceedings on the basis of the passing away of the suspected or accused person, the extinction of the suspected or accused corporation, the expiry of the statute of limitations, the application of an amnesty or a pardon or the withdrawal of the complaint in private prosecution cases. As decided in the *Gasparini* case[129], a decision of acquittal, because the prosecution of the offence is time barred, does not examine the evidence, but merits nonetheless the protection of *ne bis in idem*. The problem with the Grand Chamber´s approach lies in their assumption that "the finding that there has been an assessment of the circumstances of the case and of the accused's guilt or innocence may be supported by the progress of proceedings in a given case"[130]. This assumption is doubly wrong when connected with the determination as to the merits of the case and the concept of *ne bis in idem*. If there is anything two thousand years of European legal history teaches us, it is that the guarantee of *ne bis in idem* does not depend on the quantity and quality of items of evidence collected or examined[131]. An approach that would downgrade the guarantee of *ne bis in idem* to a casuistic, easy-to-manipulate concept, dependent on thoroughness of the investigation, would afford no legal certainty. Furthermore, it would more often than not benefit

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125. See my opinion in *A and B v. Norway*., cited above, § 15.
126. CJEU, 20 March 2018, *Luca Menci* [GC], Case C-524/15. On this type of "negative cross-fertilisation", see my article with Hyun-Soo Lim, "The Cross-fertilisation between the Court of Justice of the European Union and the European Court of Human Rights: Reframing the Discussion on Brexit" [2018] *European Human Rights Law Review*, Issue 6, 575.
127. *Miraglia*, cited above, § 35.
128. Ibid, § 34.
129. CJEU, 28 September 2006, *Gasparini,* Case C-467/04.
130. See paragraph 98 of the judgment.
131. See my separate opinion in *A and B v. Norway*, cited above.

the prosecutorial and investigative authorities when they for one reason or another did not do a thorough investigation. This benefit would be particularly inacceptable when the reasons for not having a thorough investigation were attributable to those authorities.

50. Fourthly, the minority refer to the factor that "a reasoned decision has been given on the basis of that evidence"[132]. It would be stating the obvious to say that the obligation to motivate decisions in criminal procedure has nothing to do with the prohibition of *ne bis in idem*. The confusion between the two principles is simply inadmissible, since the force of *res judicata* covers the factual *idem*, not the "reasons" used in order to assess the evidence.

51. Finally, the minority identify another factor: "Where a penalty has been ordered by the competent authority as a result of the behaviour attributed to the person concerned"[133]. They further qualify this statement by adding that the penalty has to be "deterrent and punitive"[134]. Contrary to Article 54 of the CISA[135], they do not require the enforcement or the beginning of enforcement of the penalty in order to trigger the applicability of the *ne bis in idem* guarantee. The ratio is, once again, that the *res judicata* force of a conviction and the resulting *ne bis in idem* guarantee cannot be dependent on the aleatory circumstance of enforcement or non-enforcement of the penalty, which is so many times due to the State's fault and not to the sentenced person's.

b. The imprecise "finality" of the decision (paragraphs 52 and 53)

52. The minority assert quite correctly that a "final decision" for the purposes of Article 4 of Protocol No. 7 is an autonomous concept[136] and depends on "whether ordinary remedies were available against the decision or whether the parties have permitted the time-limit to expire without availing themselves of those remedies", according to the European Convention on the International Validity of Criminal Judgments and paragraphs 22 and 29 of its explanatory report[137]. This clear concept of "finality" would suffice to find that the order of 7 August 2008 had become final, within the autonomous meaning of the Convention, on the expiry of

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132. See paragraph 97 of the judgment.
133. Ibid.
134. See paragraph 101 of the judgment.
135. The inference can be made that, according to the Grand Chamber, while it requires the enforcement or beginning of enforcement of the penalty, Article 54 of the CISA contradicts Article 4 of Protocol 7.
136. See paragraphs 110 and 126 of the judgment.
137. See paragraphs 109-110 of the judgment, referring among others to *Sergey Zolotukhin*, cited above. I find it strange that the minority devotes six long paragraphs (§§ 104 to 109) to the autonomous character of the concept of final decision in Protocol 7 when *Sergey Zolotukhin* had already addressed that issue. There was therefore no need to discuss case-law delivered prior to the Grand Chamber's judgment in *Sergey Zolotukhin*.

the time limit set out in Article 249[1] of the Code of Criminal Procedure as in force at the material time.

53. Unfortunately the minority do not stop there in their analysis of the concept of a "final decision". They refer to the *A and B* criterion of the "foreseeability of the application of the law" as "the condition for triggering the application of the safeguard provided for"[138] in Article 4 of Protocol No. 7. Such a line of argumentation masterfully shows the symbiotic unity of wrong legal thinking and arbitrary practice. The connection made between the foreseeability of the law and the guarantee of *ne bis in idem* contradicts the clear-cut objective definition of the "finality" concept provided by the European Convention on the International Validity of Criminal Judgments and adopted in previous case-law of the Court[139], which is founded on the expiry of the lapse of time to use ordinary remedies. Worse still, that contradiction is compounded by the fact that the foreseeability of the law is understood by the minority in a subjective manner, as the foreseeability of the law for the individual defendant (cf. "was accessible to the applicant"[140]). The astonishing thing is that the watering down of the "finality" concept by a subjectively framed reference to the "foreseeability of the application of the law" is, quite contradictorily, accomplished in spite of the fact that the minority acknowledge the need of "objective criteria"[141] for the determination of a "final" decision in a particular case.

Conclusion (paragraphs 54 and 55)

54. *Mihalache* is a weak judgment. And not only because it displays a motivation subscribed to by a minority of the judges of the composition of the Grand Chamber. But also and more importantly because it sends out a confused and confusing message, on the one hand purporting to present a liberal, expansive interpretation of the scope of decisions which constitute a "conviction" for the purposes of Article 4 of Protocol No. 7, and on the other hand putting forward an *A and B*-inspired, efficiency-oriented, restrictive and illiberal interpretation of the concept of a "final decision" for the same purposes. The "determination as to the merits" criterion adopted by the minority is not geared to impeding any practical possibility of penalising twice the unlawful conduct with which the defendant is charged. On the contrary, it is designed to maximise State repression, even when the prosecution is at fault for having failed to conduct a thorough investigation. Such a repressive strategy is the result of the Grand Chamber's acritical and

138. See paragraph 111 of the judgment.
139. The minority also refers to this case-law in paragraph 103 of the judgment.
140. See paragraph 118 of the judgment.
141. See paragraph 116 of the judgment.

precipitate absorption of the Luxembourg case-law on Article 54 CISA, especially *Kossowski*.

55. The dual personality of the present judgment is patent in the contrast (and contradiction) between the broad concept of the "authority participating in the administration of justice", which includes public prosecutors[142], and the narrow concept of "determination as to the merits"[143], which excludes less thorough investigations. The same contradiction is to be seen between the strict concept of "fundamental defect in the proceedings" justifying reopening[144] and the unprecise concept of "final decision", dependent on the *A and B* criterion of "foreseeability of the application of the law as a whole" [145], whatever that may mean.

142. See paragraph 95 of the judgment.
143. See paragraph 98 of the judgment.
144. See paragraph 133 of the judgment.
145. See paragraph 111 of the judgment.

CONCURRING OPINION OF JUDGE SERGHIDES

"Judicial intervention" (Article 4 of Protocol No. 7) in the light of the principle of effectiveness

1. I seek to emphasise, through this concurring opinion, the eminent importance of the principle of effectiveness or effective protection of human rights (hereafter referred to as "the principle") in deciding the question as to whether a "judicial intervention" is necessary for the purposes of Article 4 of Protocol No. 7 to the European Convention on Human Rights (hereafter referred to as the "Convention"), in view of the discrepancy between the French and English versions on this: the former considers the judicial intervention necessary, while the English version does not.

2. The above question is decided in the negative in the judgment (see paragraph 95), thus following the English version of Article 4 of Protocol No. 7, namely, that "judicial intervention is unnecessary for the existence of a decision". I fully subscribe to this view.

3. However, the principle, which is inherent in all Convention provisions, has a prominent role in the Convention, and it is not accidental that its name, role and function, are identical to the primary object and purpose of the Convention, namely, the effective protection of human rights. Furthermore, the principle is the only one identical in nature to the role and mission of the Court, which is to effectively protect human rights. Consequently, the immense importance of the principle cannot adequately be stressed, if the Court does not refer to it nominally (thus, by its name) and directly when dealing with the above question, as it did for example in *Mamatkulov and Askarov v. Turkey*.[1] It would not be considered as giving enough credit or value to the principle, if one were not to name it as such, while so designating all the other Convention principles.

4. The Court, however, in paragraph 91 of its judgment in the present case only indirectly and implicitly refers to the principle[2], and in paragraphs 92, 94 and 95 of the judgment it refers to what I consider as aspects or requirements or capacities of the principle.

5. In interpreting and applying the Convention provisions, the Court usually makes the following interpretative choices, as it somehow does in the present case (see paragraphs 92, 94-95), which are, in my humble view, requirements or aspects or capacities of the principle[3]: a broad interpretation

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[1] [GC], nos. 46827/99 and 46951/99, § 123, ECHR 2005-I.

[2] The requirement that the provisions of the Convention should be interpreted and applied in a manner which renders their safeguards practical and effective, not theoretical and illusory, is, in my view, an indirect and non-nominal formulation of the principle.

[3] For an article on the different "dimensions" of the principle of effectiveness, see Rietiker, Daniel, "The principle of 'effectiveness' in the recent jurisprudence of the European Court of Human Rights: its different dimensions and its consistency with public

highly conducive to the essence of the right and favourable to the complainant, an interpretation which reconciles the two different versions of the Convention provision in question in the light of its object and purpose, and an interpretation reading the Convention as a whole and leading to internal and external harmonisation of the Convention provisions. All of these, which may appear as rules of interpretation, are interconnected and integrated with each other under the broader umbrella of the principle, which has a harmonising and controlling effect on them. Hence, the functioning and role of these rules of interpretation are better understood and become more important if they can be seen as aspects or requirements or capacities of the principle falling under the general umbrella of its scope, thus "the effective protection of human rights".

6. It is my strong belief that a judge must be constantly and simultaneously mindful when interpreting and applying a Convention provision of what I consider as a "whole" and its "parts": the "whole" being the principle which is the root and the substratum on which the Convention system is based and which points to the primary object and purpose of the Convention provision, and its "parts", being its different aspects, or requirements or capacities, some of which are referred to above. This approach, which I consider complete and holistic, will help prevent the judge's attention being distracted from the need to protect the core of the right and from the central issues surrounding it. It will also help him or her to offer to the complainant a practical and effective and not a theoretical or illusory protection of his or her human rights. That would be my proposed approach also to the present case.

7. It is my humble view that the Court's reasoning in the present case would become clearer, stronger, and more coherent and convincing if it were to be seen in the context of the principle together with the principle of good faith. I also refer to the latter principle because this is an important element of interpretation under Article 31 § 1 of the Vienna Convention on the Law of Treaties (VCLT) which overlaps with the principle of effectiveness.[4]

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international law – no need for the concept of treaty *sui generis*", *Nordic Journal of International Law*, 79 (2010), pp. 245 et seq.

[4] The International Law Commission (ILC) which drafted the VCLT took the view that:

> "(8) … in so far as the maxim *Ut res magis valeat quam pereat* reflects a true general rule of interpretation, it is embodied in article 69, paragraph 1 [current Article 31 § 1 of the VCLT], which requires that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in the context of the treaty and in the light of its objects and purposes. When a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted …"

(See Yearbook of the International Law Commission, 1964, II, at p. 201, § (8)).

8. The holistic approach followed in my opinion under the guidance of the principle is also supported, *a fortiori*, by what it is stated in paragraph 91 of the judgment, namely that "the principles of autonomous interpretation and evolutive interpretation, and that of margin of appreciation ... require the provisions of the Convention and the Protocols thereto to be interpreted and applied in a manner which renders their safeguards practical and effective, not theoretical and illusory" (this is what I describe in footnote 2 of my present opinion as an indirect and non-nominal formulation of the principle). Hence, if the operation of these other Convention principles can be seen within the context of the principle and the primary object and purpose of the Convention, that should apply even more so to what I consider in this opinion as aspects or requirements or capacities of the principle.

9. Like Article 31 § 1, also Article 33 of VCLT, refers to the object and purpose of the treaty concerned. Moreover, like the former, which is based on the idea that all elements of interpretation contained therein should be reconciled and treated as one unit,[5] also Article 33 § 4 of the VCLT, is based on the idea that for the interpretation of treaties authenticated in two or more languages, "the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted." This provision, which is pertinent in the present case, is also based, in my view, on the principle of effectiveness. More precisely, it consists of an aspect or a requirement or a capacity of the principle. It can be said that it is this principle's harmonising ability which makes the choice stipulated in Article 33 § 4 head in the right direction, as it does, in my view, in the present case, by showing preference to the English version of Article 4 of Protocol No. 7 as being the one which is consistent with the object and purpose of the said provision.

10. The above analysis under the broader umbrella of the principle strengthens my conviction that the Court was right in the present case in deciding that judicial intervention is not necessary for the purposes of Article 4 of Protocol No. 7.

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[5] See *Golder v. the United Kingdom,* no. 4451/70, § 30, 21 February 1975 (Plenary), where the Court dealing with Article 31 § 1 of the VCLT, said that "the process of interpretation of a treaty is a unity, a single combined operation". That, however, was first said by the International Law Commission, who drafted the VCLT:

> "The Commission, by heading the article 'General rule of Interpretation' in the singular and by underlining the connexion between paragraphs 1 and 2 and again between paragraph 3 and the two previous paragraphs, intended to indicate that the application of the means of interpretation in the article would be a single combined operation. All the various elements, as they were present in any given case, would be thrown into the crucible, and their interaction would give the legally relevant interpretation."

(See Yearbook of the International Law Commission,1966, vol. II, pp. 219-220, § (8)).

CONCURRING OPINION OF JUDGE BOŠNJAK, JOINED BY JUDGE SERGHIDES

1. I agree with my colleagues that in the present case there has been a violation of Article 4 of Protocol No. 7 of the Convention. In this concurring opinion, I wish to raise two particular points. The first one has not been addressed by the Grand Chamber, while on the other point my views differ slightly from the majority of the other judges in the composition.

2. Firstly, I have seen the present case as an opportunity for the Court to provide some guidance on the emerging consensual model in criminal proceedings, where the outcome of a criminal case is determined by the parties, possibly without any involvement by a court. The first act of this case at the domestic level could be understood as an example (perhaps not the most representative one) of such a consensual model, where, on one hand, the prosecutor decided to discontinue the criminal proceedings against the applicant and imposed an administrative sanction instead, while, on the other hand, the applicant renounced challenging this discontinuance decision and paid the fine and the fees imposed (see paragraphs 13-15 of the judgment). There is nowadays an abundance of such "alternative dispute resolutions" in modern criminal proceedings. Their primary function is to finally close a criminal case. The effect of such closure must, by its very nature, be equated with the effect of an adjudication on a criminal charge by a court. It would be illogical to allow a criminal case previously terminated on the basis of a transaction/settlement between the prosecutor and the suspect or on the basis of victim-offender mediation to be "reopened" at the unilateral discretion of the prosecutor, having decided that the content of the initial resolution was inadequate for any reason.

3. Alternative dispute resolutions in criminal proceedings were addressed long ago by the case-law of our Court, notably in the context of a waiver of access to a court (see *Deweer v. Belgium*, 27 February 1980, Series A no. 35). The Court has acknowledged the undeniable advantages of such resolutions for the individual concerned as well as for the administration of justice. Consequently, it has ruled that they do not in principle run counter to the Convention. If a party is considered to be entitled to waive the right of access to a court by resorting to a settlement or to another form of alternative dispute resolution of a criminal case, I believe the time has come to afford "*ne bis in idem*" effect to such *de facto* settlements.

4. On numerous occasions the Court has stated that the Convention is a living instrument (see, among many other authorities, *Selmouni v. France* [GC], no. 25803/94, ECHR 1999-V, and *Rantsev v. Cyprus and Russia*, no. 25965/04, ECHR 2010 (extracts)), and has therefore adopted an

autonomous interpretation of specific provisions. Accordingly, I believe it would be appropriate to equate the outcomes of consensual alternative dispute resolutions, like settlements, transactions and compositions in criminal cases with a "final acquittal or conviction" within the meaning of Article 4 of Protocol No. 7 of the Convention.

5. The Grand Chamber did not address this issue in the present case. Therefore, I find it necessary to point out that the second sentence of paragraph 99 of the judgment (stating that Article 4 of Protocol No. 7 of the Convention is not applicable to simple discontinuance orders) should be interpreted without prejudice to alternative dispute resolutions in criminal proceedings. While these resolutions often result in discontinuance orders, such prosecutorial decisions are regularly made conditional upon a specific action to be undertaken by the suspect/accused (for example, repaying or compensating for damage caused by the offence, performing community service, effecting payments of various types, or undergoing treatment or training). Consequently, such discontinuance orders may not be considered as "simple discontinuance orders" within the meaning of § 99 of the judgment in the present case. In other words, the Court has yet to decide whether alternative dispute resolutions in criminal cases have any bearing on the interpretation of the "final acquittal or conviction" concept and the consequent applicability of Article 4 of Protocol No. 7 of the Convention.

6. The other issue I wish to raise in this concurring opinion is the majority's understanding of the notion of "remedy". The judgment considers the setting aside of the initial order by the higher-ranking prosecutor (see paragraph 16 of the judgment) to be a remedy designed to challenge the sanction imposed upon the applicant by the initial prosecutor's order (see, for example, paragraphs §§ 124 and 134 of the judgment). With all due respect, I disagree with such a view. In particular, I do not believe that the higher-ranking prosecutor's setting aside of the initial order can be considered a remedy.

7. There are many definitions of the term "remedy"; in the context of the present case or criminal procedure in general, a legal remedy would normally mean a legal avenue for a party to the proceedings to challenge a decision or a judgment which that party considers unlawful or wrongful. This does not seem to be the case here. The party to the initial proceedings, namely the prosecution, unilaterally set aside its own discontinuance order. This setting aside did not have the nature of a challenge to the initial order before the court or before any other third authority. Nor did the fact that the prosecutor subsequently brought charges in court against the applicant on the same facts constitute a challenge to the initial order. Contrary to paragraphs 124 and 134 of the judgment, the applicant's trial in Focşani District Court was geared not to reviewing whether the initial discontinuance order was well-founded but to adjudicating whether the charges as subsequently filed against the applicant were well-founded.

8. Therefore, I tend to think that the only legal remedy available against the initial order was that provided under Article 249-1 of the Code of Criminal Procedure (see paragraph 34 of the judgment). When the deadline for it has expired, the decision to discontinue the proceedings became final. The analysis as to whether the subsequent setting aside by the higher-ranking prosecutor is to be considered as an "ordinary" or "extraordinary" legal remedy seems to me rather redundant, as does the discussion of its foreseeability, time-limits and any inequality between the parties.