

THE “NE BIS IN IDEM” PRINCIPLE IN THE CASE-LAW OF THE EUROPEAN COURT OF JUSTICE (I). THE ‘IDEM’ ISSUE

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Abstract

Two major events occurred in the recent years have triggered a series of cases in the field of criminal law, having transnational dimension and requiring an identical interpretation of the European law in the Member States. The first one is the “communitarisation” of the Schengen Aquis. The second one is the extension of the jurisdiction of the European Court of Justice over the (former) third pillar (Police and Judicial Cooperation in Criminal Matters). As a result, several cases were referred to the European Court of Justice for the interpretation, inter alia, of the dispositions of the Schengen Convention dealing with criminal matters. This article gives a general overview of the case-law of the European Court of Justice in the field of “ne bis in idem” principle, shortly presenting the legal framework, the facts, the questions addressed to the Court by the national jurisdictions, the findings of the Court, as well as some conclusions on the interpretation of the principle. In the first study we will deal with the notion of ‘idem’.

Keywords: case-law, European Court of Justice, ‘idem’ issue.

1. Introduction

1.1. The Schengen Aquis

In the context of the European integration process, “Schengen” stands for the realisation of the concept of free movement of persons and the creation of a citizens’ Europe. In 1985, five European countries – Belgium, France, Germany, Luxembourg, and the Netherlands – signed an agreement “on the gradual abolition of checks at their common borders” in Schengen – a small village in Luxembourg at the geographical nexus of these countries.

The agreement aims at establishing a common travel area without internal borders and with common external borders. This became known as the “Schengen area”. Schengen countries normally do not require citizens to show their passports when crossing borders between one Schengen country and another. A common “Schengen visa” allows tourist or visitor access to the area as a whole. In 1990, the countries signed in Schengen the Convention Implementing the Schengen Agreement of 1985 (in short: the Schengen Implementing Convention, CISA). The Convention lays down detailed rules and measures necessary for the lifting of checks at internal borders (i.e. land, sea, and air borders) between the Schengen states and sets out measures which should compensate the perceived loss of security after the removal of such barriers.

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It should be mentioned that the Schengen Agreement and the Schengen Convention were concluded outside the structure of the European Union/European Communities. Although linked closely with the policy of the European Union, they originally represent conventional multilateral treaties concluded under the rules of international public law. Later however, in 1999, the Schengen rules were incorporated into the EU framework.¹

Today, the Schengen Agreement, the Schengen Convention, and the subsequent decisions and measures thereupon are implemented by 29 European countries, leading to the abolition of systematic border controls between these participating countries. Among these countries are also countries which are not members of the European Union.²

Of interest for criminal law is that the CISA also contains detailed rules on enhanced *police and judicial cooperation*. It foresees, for instance, that the police may cooperate through central bodies or, in case of urgency, also directly with each other. Likewise, a direct exchange of rogatory letters between the judicial authorities is possible, thus avoiding the use of diplomatic channels. Articles 54-58 contain the renowned conditions which prohibit citizens from being sentenced twice in the Schengen area. These rules can be regarded as the birth of a *European-wide ne bis in idem principle*.

1.2. ECJ's Jurisdiction

On the other hand, the Treaty of Amsterdam has extended the jurisdiction of the Court of Justice to give preliminary rulings to the (former) third pillar (justice and home affairs) and opened the way for the Court, at the request of the national courts, to give rulings on the validity and

¹ The *Schengen acquis* comprises all the acts which were adopted in the framework of the Schengen cooperation till the incorporation of the rules governing the Schengen cooperation into the EU framework by the Treaty of Amsterdam. Accordingly, it is composed of: (1) the Schengen Agreement, signed on 14 June 1985, between Belgium, France, Germany, Luxembourg, and the Netherlands on the gradual abolition of checks at their common borders; (2) the Schengen Convention, signed on 19 June 1990, between Belgium, France, Germany, Luxembourg, and the Netherlands, implementing the 1985 Agreement (CISA) with related Final Acts and declarations; (3) the Accession Protocols and Agreements to the 1985 Agreement and the 1990 implementing Convention with Italy (signed in Paris on 27 November 1990), Spain and Portugal (signed in Bonn on 25 June 1991), Greece (signed in Madrid on 6 November 1992), Austria (signed in Brussels on 28 April 1995) as well as Denmark, Finland and Sweden (signed in Luxembourg on 19 December 1996), with related Final Acts and declarations; (4) decisions and declarations of the Schengen Executive Committee which was the administrative body of the Schengen cooperation and generally mandated by the CISA "to ensure that this Convention [CISA] is implemented correctly"; (5) further implementing acts and decisions taken by subgroups to which respective powers were conferred by the Executive Committee. The latter two Paragraphs regarding the Schengen acquis refer to further decisions and declarations, which were made in order to implement the 1990 Implementing Convention itself. The Schengen acquis was published in the Official Journal L 239 of 22 September 2000. In order to reconcile the overlap between the Schengen cooperation and Justice and Home Affairs cooperation as introduced by the 1992 Maastricht Treaty, the Member States decided to integrate the Schengen acquis into the legal framework of the European Union. This was achieved in 1997 by means of a Protocol attached to the Treaty of Amsterdam. The Council allocated each provision or measure taken to date under the Schengen cooperation to the corresponding legal basis in the EC Treaty and EU Treaty as amended by the Treaty of Amsterdam (COUNCIL DECISION of 20 May 1999 determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the Schengen acquis, 1999/436/EC, L 176/17, 10.7.1999). As a further result of the incorporation, the Schengen acquis is binding on and applicable in the new Member States from the date of accession onwards (Article 3 Act of Accession, OJ L 236 of 23 September 2003, p. 33).

² Thomas Wahl & Sarah Schultz, *The Enlargement of the Schengen Area*, Eucrim 3-4/2007, 66-67.

interpretation of framework decisions and decisions, on the interpretation of conventions adopted for police and judicial cooperation in criminal matters and on the validity and interpretation of the measures implementing them.³

Under the Protocol and Council Decisions 1999/435 and 1999/436, Article 54 of the CISA may be interpreted in a preliminary ruling given by the Court of Justice, whose jurisdiction on this point is contingent since, in order to be effective, it must be accepted by the Member States in accordance with the provisions of Article 35(2) TEU.

A Member State which accepts that new jurisdiction of the Court of Justice may choose between granting the power to refer questions for a preliminary ruling either to any of its courts or tribunals or only to those courts or tribunals which give a final decision against which there is no further 'judicial remedy'.⁴

1.3. The "ne bis in idem" principle

In the struggle against the forms of criminality, which affect the whole of European society, it is for the States to keep them in check by means of national legislation. Each is responsible for internal law and order, but also, within the Union, for European law and order. Thus situations may arise which may be inconsistent with the *ne bis in idem* principle⁵ and in which the same criminal act is prosecuted by the criminal authorities which have territorial jurisdiction and by those of another Member State, which punish it on the basis of other criteria for conferring jurisdiction.⁶

Article 54 of the Convention is a legislative provision in a dynamic process of European integration through the development of a common area of freedom and justice. The gradual abolition of common border controls is a necessary step on the path to achieving that objective. However, the removal of administrative obstacles lifts the barriers for everybody, including those who take advantage of the reduction in security in order to expand their unlawful activities.

For that reason, the abolition of controls must be matched by increased cooperation between the States, particularly with regard to policing and security. Articles 54 to 58 of the Convention, which govern the application of the *ne bis in idem* principle in the sphere of the Schengen *acquis*, are situated within that framework, which seeks greater efficiency in judicial and policing responses without compromising the safeguards afforded to citizens in a society which, by law, is democratic.

Article 54 is the expression of that safeguard for persons who are subject to the exercise of the *ius puniendi*. A person whose trial has been finally disposed of in one State which is party to the Convention may not be prosecuted again, on the same facts, by another contracting Party, irrespective of whether he has been acquitted or convicted, provided that, in the latter case, the

³ Article 35(1) TEU (before Lisbon Treaty). After Lisbon Treaty, the Court of Justice of the European Union has jurisdiction over the area of freedom, security and justice, with a five years transitional period where Member States may still ask to be subject to former jurisdiction.

⁴ [Article 35(3)] TEU (before amendments by the Lisbon Treaty).

⁵ According to Article 54 CISA, "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."

⁶ For an in depth analysis of the *ne bis in idem* principle, see **Anne Weyembergh**, *Le principe "ne bis in idem"*: *Pierre d'achoppement de l'espace penal europeen?*, Cahiers de droit europeen 2004, v.40, n.3-4, 337-375.

penalty has been enforced, is in the process of being enforced or cannot be enforced under the laws of the sentencing State.

The aforementioned provision is a genuine expression of the safeguard in question, which operates not only within the same legal system but also takes effect when the prosecution is repeated in different legal systems.

Currently, the Member States and the European Union itself are bound by the *ne bis in idem* principle, which is a fundamental safeguard for Citizens.⁷

I will further present the main points of the Court's decisions in cases referred to the Court in past years. I will adopt a structure similar to that of the Court's ruling, establishing, where necessary, the legislative framework, a short presentation of the facts of the case, the questions raised by the national judge, the findings and the conclusions of the Court.

2. The Notion of "Idem" in Judgement from 9 March 2006 in Case C-436/04 Leopold Henri Van Esbroeck

The reference for a preliminary ruling was raised in the context of criminal proceedings initiated in Belgium against Mr Van Esbroeck for the trafficking of narcotic drugs.⁸

2.1. Legal Framework

According to Article 54 CISA, "*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.*"⁹

The United Nations Conventions on Narcotic Drugs and Psychotropic Substances

Under Article 36 of the 1961 Single Convention on Narcotic Drugs, as amended by the 1972 Protocol ('the Single Convention'):

'Penal provisions

1. (a) Subject to its constitutional limitations, each Party shall adopt such measures as will ensure that cultivation, production, manufacture, extraction, preparation, possession, offering, offering for sale, distribution, purchase, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation and exportation of drugs contrary to the provisions of this Convention, and any other action which in the opinion of such Party may be

⁷ See Article 4 of Protocol No 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms and Article 5 of the Charter of fundamental rights of the European Union (OJ 2000 C 364, p. 1). **R. Koering-Joulin** has pointed out that the *ne bis in idem* principle is so fundamental a safeguard for the person that Article 4(3) of the abovementioned Protocol does not authorise any derogation, even in the case of war or other public danger which threatens the life of the nation; it is an absolute right (*La Convention européenne des droits de l'homme. Commentaire article par article*, Popular edition, 2nd edition, p. 1094).

⁸ For an analysis of this case and its influence in the national law, see **Christine Guillain**, *L'application du principe "non bis in idem" au trafic de drogues: analyse de l'arrêt de la Cour de Justice des Communautés européennes du 9 mars 2006*, 126(6257) *Journal des tribunaux* 2007, 144-149.

⁹ Article 54 CISA constitutes the principal legal basis for all cases analysed below. For operative reasons, I will not repeat this article further in the study.

contrary to the provisions of this Convention, shall be punishable offences when committed intentionally, and that serious offences shall be liable to adequate punishment particularly by imprisonment or other penalties of deprivation of liberty.

(b) ...

2. Subject to the constitutional limitations of a Party, its legal system and domestic law,

(a)(i) Each of the offences enumerated in paragraph 1, if committed in different countries, shall be considered as a distinct offence.'

2.2. Facts

Mr Van Esbroeck, a Belgian national, was sentenced, by judgment of 2 October 2000 of the Court of First Instance of Bergen (Norway), to five years' imprisonment for illegally importing, on 1 June 1999, narcotic drugs (amphetamines, cannabis, MDMA and diazepam) into Norway. After having served part of his sentence, Mr Van Esbroeck was released conditionally on 8 February 2002 and escorted back to Belgium.

On 27 November 2002, a prosecution was brought against Mr Van Esbroeck in Belgium, as a result of which he was sentenced, by judgment of 19 March 2003 of the Correctionele Rechtbank te Antwerpen (Antwerp Criminal Court, Belgium), to one year's imprisonment, in particular for illegally exporting the above listed products from Belgium on 31 May 1999. That judgment was upheld by judgment of 9 January 2004 of the Hof van Beroep te Antwerpen (Antwerp Court of Appeal). Both of those courts applied Article 36(2)(a) of the Single Convention, according to which each of the offences enumerated in that article, which include the import and export of narcotic drugs, are to be regarded as a distinct offence if committed in different countries.

The defendant lodged an appeal on a point of law against that judgment and pleaded infringement of the *ne bis in idem* principle, enshrined in Article 54 of the CISA.¹⁰

2.3. Questions

In those circumstances, the Hof van Cassatie (Court of Cassation) decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

1. Article 54 of the CISA can be applied even if it was not implemented and enforced in Norway at the date the defendant was tried and sentenced by a Norwegian court, but was implemented and enforced afterwards by both Belgium and Norway at the date of Belgian Court ruling?

If the reply to Question 1 is in the affirmative:

2. The facts punishable by detention for export and the import on the same narcotic drugs and psychotropic substances of any kind, cannabis included, and which continued in various states must be regarded as the "same facts" within the meaning of Article 54 CISA?

2.4. Findings

On the first question, the Court concluded that the *ne bis in idem* principle, enshrined in Article 54 of the CISA, must be applied to criminal proceedings brought in a Contracting State for acts for which a person has already been convicted in another Contracting State even though the

¹⁰ Case C-436/04 *Leopold Henri Van Esbroeck* [2006] ECR I-2333, paragraphs 14-16 (hereforth, *Van Esbroeck*).

CISA was not yet in force in the latter State at the time at which that person was convicted, in so far as the CISA was in force in the Contracting States in question at the time of the assessment, by the court before which the second proceedings were brought, of the conditions of applicability of the *ne bis in idem* principle.

By the second question the national court is effectively asking what the relevant criterion is for the purposes of the application of the concept of ‘the same acts’ within the meaning of Article 54 of the CISA and, more precisely, whether the unlawful acts of exporting from one Contracting State and importing into another the same narcotic drugs as those which gave rise to the criminal proceedings in the two States concerned are covered by that concept.

The wording of Article 54 of the CISA, ‘the same acts’, shows that that provision refers only to the nature of the acts in dispute and not to their legal classification. The terms used in that article differ from those used in other international treaties, which enshrine the *ne bis in idem* principle. Unlike Article 54 of the CISA, Article 14(7) of the International Covenant on Civil and Political Rights and Article 4 of Protocol No 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms use the term ‘offence’, which implies that the criterion of the legal classification of the acts is relevant as a prerequisite for the applicability of the *ne bis in idem* principle which is enshrined in those treaties.

Using the same argumentation as in *Gozutok and Brüge* (the absence of obligation of harmonisation and the mutual trust in the criminal justice system of another Member State),¹¹ the Court concluded that the possibility of divergent legal classifications of the same acts in two different Contracting States is no obstacle to the application of Article 54 of the CISA.

For the same reasons, the criterion of the identity of the protected legal interest cannot be applicable since that criterion is likely to vary from one Contracting State to another. These conclusions are further reinforced by the objective of Article 54 of the CISA, which is to ensure that no one is prosecuted for the same acts in several Contracting States on account of his having exercised his right to freedom of movement.¹²

The right to freedom of movement is effectively guaranteed only if the perpetrator of an act knows that, once he has been found guilty and served his sentence, or, where applicable, been acquitted by a final judgment in a Member State, he may travel within the Schengen territory without fear of prosecution in another Member State on the basis that the legal system of that Member State treats the act concerned as a separate offence.¹³

Because there is no harmonisation of national criminal laws, a criterion based on the legal classification of the acts or on the protected legal interest might create as many barriers to freedom of movement within the Schengen territory as there are penal systems in the Contracting States.

In those circumstances, the only relevant criterion for the application of Article 54 of the CISA is identity of the material acts, understood in the sense of the existence of a set of concrete circumstances, which are inextricably linked together.

The Court concluded that the facts in the main proceedings may, in principle, constitute a set of facts which, by their very nature, are inextricably linked, underlying that the definitive

¹¹ As the Court found in Joined Cases C-187/01 and C-385/01 *Hüseyin Gözütok and Klaus Brügge*, [2003] ECR I-1345, paragraph 32-33.

¹² *Gözütok and Brügge*, paragraph 38, and Case C-469/03 *Filomeno Mario Miraglia*, [2005] ECR I-2009, paragraph 32.

¹³ As pointed out by the Advocate General in point 45 of his Opinion delivered on 20 October 2005 in *Van Esbroeck*.

assessment in that regard belongs to the competent national courts which are charged with the task of determining whether the material acts at issue constitute a set of facts which are inextricably linked together in time, in space and by their subject-matter.

Stating that the *ne bis in idem* principle is recognised in the case-law as a fundamental principle of Community law¹⁴, the Court concluded that:

- the relevant criterion for the purposes of the application of that article of the CISA is identity of the material acts, understood as the existence of a set of facts which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected;
- punishable acts consisting of exporting and importing the same narcotic drugs and which are prosecuted in different Contracting States to the CISA are, in principle, to be regarded as ‘the same acts’ for the purposes of Article 54 of the Convention, the definitive assessment in that respect being the task of the competent national courts.¹⁵

3. Same Acts in Judgement from 28 September 2006 in Case C-150/06 Jean Leon Van Straaten

The reference was made in proceedings between, first, Mr Van Straaten and, second, the Staat der Nederlanden (the Netherlands State) and the Republik Italië (the Italian Republic) relating to the alert concerning Mr Van Straaten’s conviction in Italy for drug trafficking which the Italian authorities had entered in the Schengen Information System (‘the SIS’) for the purpose of his extradition.¹⁶

3.1. Legal Framework

Article 95(1) and (3) of the CISA are worded as follows:

‘1. Data on persons wanted for arrest for extradition purposes shall be entered at the request of the judicial authority of the requesting Contracting Party.

3. A requested Contracting Party may add to the alert in the data file of its national section of the Schengen Information System a flag prohibiting arrest on the basis of the alert until the flag is deleted. The flag must be deleted no later than 24 hours after the alert has been entered, unless the Contracting Party refuses to make the requested arrest on legal grounds or for special reasons of expediency. In particularly exceptional cases where this is justified by the complex nature of the facts behind the alert, the above time-limit may be extended to one week. Without prejudice to a flag or a decision to refuse the arrest, the other Contracting Parties may make the arrest requested in the alert.’

Article 106(1) of the CISA states:

‘Only the Contracting Party issuing the alert shall be authorised to modify, add to, correct or delete data which it has entered.’

¹⁴ See, to that effect, Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others v Commission* [2002] ECR I-8375, paragraph 59.

¹⁵ *Van Esbroeck*, paragraphs 24-42.

¹⁶ For an analysis of the Court’s rulings in *ne bis in idem* cases see **Ariane Wiedmann**, *The principle of “ne bis in idem” according to Article 54 of the Convention implementing the Schengen Agreement: the beginning of a “corpus juris criminalis”?*, *The European legal forum: Forum iuris communis Europae* 2007, v.7, n.5, 230-252.

Article 111 of the CISA provides:

‘1. Any person may, in the territory of each Contracting Party, bring before the courts or the authority competent under national law an action to correct, delete or obtain information or to obtain compensation in connection with an alert involving them.’

3.2. Facts

On or about 27 March 1983 Mr Van Straaten was in possession of a consignment of approximately 5 kilograms of heroin in Italy, which was transported from Italy to the Netherlands. Mr Van Straaten also had a quantity of 1 000 grams of that consignment of heroin at his disposal during the period from 27 to 30 March 1983.

Mr Van Straaten was prosecuted in the Netherlands for importing a quantity of approximately 5 500 grams of heroin from Italy into the Netherlands on or about 26 March 1983, together with A. Yilmaz, for having a quantity of approximately 1 000 grams of heroin at his disposal in the Netherlands during or around the period from 27 to 30 March 1983 and for possessing firearms and ammunition in the Netherlands in March 1983. By judgment of 23 June 1983, the Rechtbank 's-Hertogenbosch ('s-Hertogenbosch District Court, Netherlands) acquitted Mr Van Straaten on the charge of importing heroin, finding it not to have been legally and satisfactorily proved, and convicted him on the other two charges, sentencing him to a term of imprisonment of 20 months.

In Italy, Mr Van Straaten was prosecuted along with other persons, for possessing on or about 27 March 1983, and exporting to the Netherlands on several occasions together with Mr Karakus Coskun, a significant quantity of heroin, totalling approximately 5 kilograms. By judgment delivered *in absentia* on 22 November 1999 by the Tribunale ordinario di Milano (District Court, Milan, Italy), Mr Van Straaten and two other persons were, upon conviction on the charges, sentenced to a term of imprisonment of 10 years, fined ITL 50 000 000 and ordered to pay the costs.

The main proceedings are between, first, Mr Van Straaten and, second, the Netherlands State and the Italian Republic. The national court refers to an alert regarding Mr Van Straaten the legality of which is at issue in those proceedings, and which the national court examines in the light of the CISA. By order made on 16 July 2004, the Italian Republic was summoned to appear in the proceedings.

Before the national court, the Italian Republic rejected Mr Van Straaten's claims that, by virtue of Article 54 of the CISA, he should not have been prosecuted by or on behalf of the Italian State and that all acts connected with that prosecution were unlawful. According to the Italian Republic, no decision was given on Mr Van Straaten's guilt by the judgment of 23 June 1983, in so far as it concerns the charge of importing heroin, since he was acquitted on that charge. Mr Van Straaten's trial had not been disposed of, within the meaning of Article 54 of the CISA, as regards that charge. The Italian Republic further submitted that, as a result of the declaration as referred to in Article 55(1)(a) of the CISA which it had made, it was not bound by Article 54 of the CISA, a plea which was rejected by the national court.

No further information on the nature of the proceedings is given in the order for reference.

According to the Netherlands Government, the judgment of the Rechtbank 's-Hertogenbosch of 23 June 1983 was upheld by a judgment of the Gerechtshof te 's-Hertogenbosch (Regional Court of Appeal, 's-Hertogenbosch) of 3 January 1984, which amended the terms of the second charge against Mr Van Straaten. The Gerechtshof te 's-Hertogenbosch described the act as 'voluntary possession of a quantity of approximately 1 000 grams of heroin in the Netherlands

during or around the period from 27 to 30 March 1983'. The appeal on a point of law brought by Mr Van Straaten against that judgment was dismissed by judgment of the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) of 26 February 1985. That judgment became final. Mr Van Straaten served the sentence imposed upon him.

The Netherlands Government then states that in 2002, at the request of the Italian judicial authorities, an alert was entered in the SIS for the arrest of Mr Van Straaten with a view to his extradition, on the basis of an arrest warrant of the Milan Public Prosecutor's Office of 11 September 2001. The Kingdom of the Netherlands added to that alert a flag as referred to in Article 95(3) of the CISA, so that he could not be arrested in the Netherlands.

After Mr Van Straaten had been informed in 2003 of that alert and, therefore, of his conviction in Italy, he requested, in vain, from the Italian judicial authorities the deletion of the data in the SIS concerning him. The Korps Landelijke Politiediensten (Netherlands National Police Services; 'the KLPD') stated to him by letter of 16 April 2004 that, since the KLPD was not the authority that issued the alert, under Article 106 of the CISA it was not authorised to delete it from the SIS.

The Netherlands Government further states that Mr Van Straaten then applied to the Rechtbank 's-Hertogenbosch for an order requiring the minister concerned and/or the KLPD to delete his personal data from the police register. The national court found in an order of 16 July 2004 that, by virtue of Article 106(1) of the CISA, only the Italian Republic was authorised to delete the data as requested by Mr Van Straaten. In light of that fact, the court treated the application as an application for an order requiring the Italian Republic to delete the data. The Italian Republic was consequently joined as a party to the main proceedings.

According to the Netherlands Government, the national court then found that, under Article 111(1) of the CISA, Mr Van Straaten had the right to bring an action before the competent court under national law challenging the entry by the Italian Republic in the SIS of data concerning him. Pursuant to Article 111(2), the Italian Republic would be required to enforce a final decision of the Netherlands court on such an action.¹⁷

3.3. Questions

It was in those circumstances that the Rechtbank 's-Hertogenbosch decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

1. What is to be understood by "the same acts" within the meaning of Article 54 of the [CISA]?
2. Is a person's trial disposed of, for the purposes of Article 54 of the CISA, if the charge brought against that person has been declared not to have been legally and satisfactorily proved and that person has been acquitted on that charge by way of a judgment?

3.4. Findings

The Court stated that in the case of offences relating to narcotic drugs, the quantities of the drug that are at issue in the two Contracting States concerned or the persons alleged to have been party to the acts in the two States are not required to be identical. Therefore, it is possible that a situation in which such identity is lacking involves a set of facts which, by their very nature, are inextricably linked.

¹⁷ Case C-150/05 *Van Straaten* [2006] ECR I-9327, paragraphs 19-29 (hereforth, *Van Straaten*).

It is settled case-law that Article 54 of the CISA has the objective of ensuring that no one is prosecuted for the same acts in several Contracting States on account of the fact that he exercises his right to freedom of movement.¹⁸ Not to apply that article to a final decision acquitting the accused for lack of evidence would have the effect of jeopardising exercise of the right to freedom of movement.¹⁹

The Court ruled that:

- the relevant criterion for the purposes of the application of article 54 CISA is identity of the material acts, understood as the existence of a set of facts which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected;
- in the case of offences relating to narcotic drugs, the quantities of the drug that are at issue in the two Contracting States concerned or the persons alleged to have been party to the acts in the two States are not required to be identical;
- punishable acts consisting of exporting and of importing the same narcotic drugs and which are prosecuted in different Contracting States party to that Convention are, in principle, to be regarded as ‘the same acts’ for the purposes of Article 54 of the Convention, the definitive assessment in that respect being the task of the competent national courts.

Also, the *ne bis in idem* principle, enshrined in Article 54 of that Convention, falls to be applied in respect of a decision of the judicial authorities of a Contracting State by which the accused is acquitted finally for lack of evidence.

4. Same Acts and Enforced Penalty in Judgement from July 18, 2007 in Case C-288/05 Jurgen Kretzinger

The reference was made in the context of criminal proceedings brought in Germany, in which Mr Kretzinger was charged with receiving goods on a commercial basis on which duty had not been paid.

4.1. Legal Framework

Article 56 CISA states that "If a further prosecution is brought in a Contracting Party against a person whose trial, in respect of the same acts, has been finally disposed of in another Contracting Party, any period of deprivation of liberty served in the latter Contracting Party arising from those acts shall be deducted from any penalty imposed. To the extent permitted by national law, penalties not involving deprivation of liberty shall also be taken into account."

*The Framework Decision*²⁰

Article 3 sets out grounds on which the judicial authority of the Member State of execution must refuse to execute the European arrest warrant, including cases in which it ‘is informed that the requested person has been finally judged by a Member State in respect of the same acts

¹⁸ See *Gözütok and Brügger*, paragraph 38.

¹⁹ See, to this effect, *Van Esbroeck*, paragraph 34.

²⁰ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ 2002 L 190, p. 1.

provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State’.

Article 4 sets out grounds on which the executing judicial authority may refuse to execute a European arrest warrant. A refusal to execute is permitted, inter alia, in the following cases:

– where the person who is the subject of the European arrest warrant is being prosecuted in the Member State of execution for the same act as that on which the European arrest warrant is based (Article 4(2));

– where the judicial authorities of the Member State of execution have decided either not to prosecute for the offence on which the European arrest warrant is based or to halt proceedings, or where a final judgment has been passed upon the requested person in a Member State, in respect of the same acts, which prevents further proceedings (Article 4(3));

– if the executing judicial authority is informed that the requested person has been finally judged by a third State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing country (Article 4(5)).

4.2. Facts

On two occasions, in May 1999 and April 2000, Mr Kretzinger transported cigarettes from countries that were not members of the European Union, which had previously been smuggled into Greece by third parties, by lorry through Italy and Germany, bound for the United Kingdom. They were not presented for customs clearance at any point.

The lorry containing the first consignment, consisting of 34 500 cartons of cigarettes, was seized by officers of the Italian Guardia di Finanza on 3 May 1999. Mr Kretzinger was released after questioning on 4 May 1999.

By judgment of 22 February 2001 the Corte d’appello di Venezia (Court of Appeal, Venice (Italy)), allowing the appeal brought by the Public Prosecutor against the decision of acquittal at first instance, imposed on Mr Kretzinger *in absentia* a suspended custodial sentence of one year and eight months. It found him guilty of an offence of importing into Italy and being in possession of 6 900 kilograms of contraband foreign tobacco and an offence of failing to pay the customs duty relating to that tobacco. That judgment has become final under Italian law. The sentence was entered in the defendant’s criminal record.

The lorry transporting a second consignment was carrying 14 927 cartons of contraband cigarettes when Mr Kretzinger was again stopped by the Italian Guardia di Finanza on 12 April 2000. He was held briefly in Italian police custody and/or on remand pending trial, following which he returned to Germany.

By judgment of 25 January 2001 the Tribunale di Ancona (Italy) imposed, again *in absentia* and applying the same provisions of Italian law, a custodial sentence of two years which was not suspended. That judgment has also become final. The custodial sentence, which has not been executed, was also entered in the defendant’s criminal record.

The referring court notes that, despite several attempts to obtain clarification of those judgments, it has been unable to establish with certainty precisely which import duties they applied to, and in particular whether at least one of them encompassed any charges relating to, or sentence imposed for, customs fraud.

Aware of those judgments by the Italian courts, the Landgericht Augsburg sentenced Mr Kretzinger to one year and ten months’ imprisonment in respect of the first consignment and one

year's imprisonment in respect of the second. In so doing, the Landgericht Augsburg found Mr Kretzinger guilty of evasion of the customs duties which had arisen on the importation of the smuggled goods into Greece, an offence under Paragraph 374 of the German Tax Code.

Whilst indicating that the two final sentences imposed in Italy had not yet been enforced, the Landgericht Augsburg rejected the notion that there was any procedural impediment under Article 54 of the CISA. According to that court, although the same two smuggled consignments of cigarettes formed the factual basis of the two convictions in Italy and of its own decisions, that article was not applicable.

Mr Kretzinger lodged an appeal before the Bundesgerichtshof, which expressed doubts as to whether the reasoning adopted by the Landgericht Augsburg was compatible with Article 54 of the CISA.

First, the Bundesgerichtshof has doubts as to how it should interpret the notion of 'same acts' within the meaning of Article 54 of the CISA.

Next, as regards the notion of 'enforcement', the Bundesgerichtshof, which, in principle, is of the view that a custodial sentence such as that relating to the first consignment, the enforcement of which was suspended, is covered by Article 54 of the CISA, wishes to ascertain whether a brief period of remand pending trial is sufficient to bar further prosecutions.

Finally, as regards the existence of a procedural impediment under Article 54 of the CISA, the Bundesgerichtshof, whilst observing that the Italian authorities took no steps under the Framework Decision to enforce Mr Kretzinger's sentence in respect of the second consignment, wonders whether and to what extent the interpretation of that article is affected by the provisions of the Framework Decision.²¹

4.3. Questions

The referring court therefore asked the Court to give a preliminary ruling on the following questions:

1. Is it a criminal prosecution of "the same acts" within the meaning of Article 54 of the CISA if a defendant has been convicted by an Italian court of importing contraband foreign tobacco into Italy and of being in possession of it there, as well as of failing to pay duty at the border on importing the tobacco, and is subsequently convicted by a German court – in connection with his earlier receipt of the same goods in Greece – of being party to evasion in relation to the (technically) Greek import duty that arose when the goods were previously imported by third parties, in so far as the defendant had intended from the outset to transport the goods to the United Kingdom via Italy, after taking delivery of them in Greece?

2. Has a penalty "been enforced" or is it "actually in the process of being enforced" within the meaning of Article 54 of the CISA

a) if the defendant was given a custodial sentence, the enforcement of which was suspended in accordance with the law of the State in which judgment was given;

b) if the defendant was for a short time taken into police custody and/or held on remand pending trial, and that detention would count towards any subsequent enforcement of the penalty of imprisonment under the law of the State in which judgment was given?

3. Is the interpretation of the notion of enforcement for the purposes of Article 54 of the CISA affected by

²¹ Case C-288/05 *Kretzinger* [2007] ECR I-06441, paragraphs 14-25 (hereforth, *Kretzinger*).

a) the fact that, having transposed the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1) into national law, the (first) State in which judgment was given is in a position at any time to enforce its judgment which, under national law, is final and binding;

b) the fact that a request for judicial assistance by the State in which judgment was given, with a view to extraditing the convicted person or enforcing judgment within that State, might not automatically be complied with because judgment was given *in absentia*?

4.4. Findings

By the first question, the Bundesgerichtshof essentially wishes to ascertain the relevant criterion for the purposes of the application of the notion of ‘same acts’ within the meaning of Article 54 of the CISA and, more specifically, whether the unlawful acts of receiving contraband foreign tobacco in one Contracting State and of importing that tobacco into another Contracting State and being in possession of it there are covered by that notion, in so far as the defendant, who has been prosecuted in two Contracting States, had intended from the outset to transport the tobacco, after first taking possession of it, to a final destination, passing through several Contracting States in the process.

The Court recalled its previous arguments relating to the relevant criterion for the purposes of the application of Article 54 of the CISA (identity of the material acts, understood as the existence of a set of facts which are inextricably linked together)²², applying irrespective of the legal classification given to those acts or the legal interest protected²³, and the lack of harmonisation of criminal law obligation.²⁴

Consequently, the Court confirmed that the competent national courts which are called upon to determine whether there is identity of the material acts must confine themselves to examining whether those acts constitute a set of facts which are inextricably linked together in time, in space and by their subject-matter,²⁵ and considerations based on the legal interest protected are not to be deemed relevant.

Also the Court has already held that punishable acts consisting of exporting and importing the same illegal goods and which are prosecuted in different CISA Contracting States constitute conduct which may be covered by the notion of ‘same acts’ within the meaning of Article 54 of the CISA.²⁶

The Court concluded that the answer to the first question must be that Article 54 of the CISA must be interpreted as meaning that:

- the relevant criterion for the purposes of the application of that article is identity of the material acts, understood as the existence of a set of facts which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected;
- acts consisting in receiving contraband foreign tobacco in one Contracting State and of importing that tobacco into another Contracting State and being in possession of it there, characterised by the fact that the defendant, who was prosecuted in two Contracting States, had

²² *Van Esbroeck*, paragraph 36.

²³ See also *Van Straaten*, paragraphs 48 and 53.

²⁴ See *Van Esbroeck*, paragraph 35.

²⁵ See, to that effect, *Van Esbroeck*, paragraph 38.

²⁶ See, to that effect, *Van Esbroeck*, paragraph 42, *Van Straaten*, paragraph 51, and Case C-467/04 *Gasparini and Others* [2006] ECR I-9199, paragraph 57.

intended from the outset to transport the tobacco, after first taking possession of it, to a final destination, passing through several Contracting States in the process, constitute conduct which may be covered by the notion of ‘same acts’ within the meaning of Article 54. It is for the competent national courts to make the final assessment in that respect.²⁷

By the second question, the referring court essentially asks whether, for the purposes of Article 54 of the CISA, it is necessary to consider that a penalty imposed by a court of a Contracting State ‘has been enforced’ or is ‘actually in the process of being enforced’ if a defendant has been given a suspended custodial sentence in accordance with the law of that Contracting State.

In accordance with Article 54 of the CISA, the prohibition on criminal prosecutions for the same acts applies, in the case of a penalty such as that at issue in the main proceedings, only if ‘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’ (‘the enforcement condition’).

In so far as a suspended custodial sentence penalises the unlawful conduct of a convicted person, it constitutes a penalty within the meaning of Article 54 of the CISA. That penalty must be regarded as ‘actually in the process of being enforced’ as soon as the sentence has become enforceable and during the probation period. Subsequently, once the probation period has come to an end, the penalty must be regarded as ‘having been enforced’ within the meaning of that provision.

It would be inconsistent, on the one hand, to regard any deprivation of liberty actually suffered as enforcement for the purposes of Article 54 of the CISA and, on the other hand, to rule out the possibility of suspended sentences, which are normally passed for less serious offences, satisfying the enforcement condition in that article, thus allowing further prosecutions.

The Court concluded that the answer to question 2(a) must be that, for the purposes of Article 54 of the CISA, it is necessary to consider that a penalty imposed by a court of a Contracting State ‘has been enforced’ or ‘is actually in the process of being enforced’ if the defendant has been given a suspended custodial sentence in accordance with the law of that Contracting State.

By question 2(b), the referring court essentially asks whether, for the purposes of Article 54 of the CISA, a penalty imposed by a court of a Contracting State must be regarded as ‘having been enforced’ or ‘actually in the process of being enforced’ where the defendant was for a short time taken into police custody and/or held on remand pending trial and that detention would count towards any subsequent enforcement of the penalty of imprisonment under the law of the State in which judgment was given.

In that respect, it is necessary to examine whether, if the other conditions imposed by Article 54 of the CISA were fulfilled, a brief period of deprivation of liberty, such as police custody and/or detention on remand pending trial, before the conviction in a first Contracting State had become final, the length of that period counting towards that of the sentence finally passed, could have the effect of satisfying the enforcement condition in advance and therefore preclude further prosecutions in a second Contracting State.

The Court concluded that Article 54 of the CISA cannot apply to such periods of deprivation of liberty, even if they are, by virtue of national law, to be taken into account in the subsequent enforcement of any custodial sentence. The purpose of detention on remand pending trial is very different from that underlying the enforcement condition laid down in Article 54 of the CISA.

²⁷ *Kretzinger*, paragraph 37.

Although the purpose of the first is of a preventative nature, that of the second is to avoid a situation in which a person whose trial has been finally disposed of in the first State can no longer be prosecuted for the same acts and therefore ultimately remains unpunished if the State in which sentence was first passed did not enforce the sentence imposed.

Consequently, the answer to question 2(b) must be that, for the purposes of Article 54 of the CISA, a penalty imposed by a court of a Contracting State is not to be regarded as ‘having been enforced’ or ‘actually in the process of being enforced’ where the defendant was for a short time taken into police custody and/or held on remand pending trial and that detention would count towards any subsequent enforcement of the custodial sentence under the law of the State in which judgment was given.²⁸

By its third question, the referring court essentially asks whether, and to what extent, the provisions of the Framework Decision have an effect on the interpretation of the notion of ‘enforcement’ within the meaning of Article 54 of the CISA.

The interpretation of Article 54 of the CISA, apart from the existence of a final and binding conviction in respect of the same acts, expressly requires the enforcement condition to be satisfied. That enforcement condition could not, by definition, be satisfied where, in a case such as that in the main proceedings, a European arrest warrant were to be issued after trial and conviction in a first Member State precisely in order to ensure the execution of a custodial sentence which had not yet been enforced within the meaning of Article 54 of the CISA.²⁹

The interpretation of Article 54 of the CISA cannot depend on the provisions of the Framework Decision without giving rise to legal uncertainty that would result, first, from the fact that the Member States bound by the Framework Decision are not all bound by the CISA which, moreover, applies to certain non-Member States and, second, from the fact that the scope of the European arrest warrant is limited, which is not case in respect of Article 54 of the CISA, which applies to all offences punished by the States which have acceded to that agreement.

The Court concluded that the fact that a Member State in which a person has been sentenced by a final and binding judgment under its national law may issue a European arrest warrant for the arrest of that person in order to enforce the sentence under the Framework Decision cannot affect the interpretation of the notion of ‘enforcement’ within the meaning of Article 54 of the CISA.

By its question 3(b), the referring court essentially asks whether, under the set of rules put in place by Article 5(1) of the Framework Decision, the fact that the executing Member State is not automatically required to execute a European arrest warrant issued in order to enforce a judgment given *in absentia* has an effect on the interpretation of the notion of ‘enforcement’ within the meaning of Article 54 of the CISA.

The Court answered that the option open to a Member State to issue a European arrest warrant has no effect on the interpretation of the notion of ‘enforcement’ within the meaning of Article 54 of the CISA. The fact that the judgment relied on in support of a European arrest warrant was given *in absentia* does not undermine that finding.

²⁸ *Kretzinger*, paragraphs 50-52.

²⁹ That is confirmed by the Framework Decision itself which, in Article 3(2), requires the Member State addressed to refuse to execute a European arrest warrant if the executing judicial authority is informed that the requested person has been finally judged by a Member State in respect of the same acts and that, where there has been sentence, the enforcement condition has been satisfied.

5. Same Acts in Judgement from July 18, 2007 in Case C-367/05 Norma Kraaijenbrink

5.1. Legal Framework

National law

Article 65 of the Belgian Criminal Code provides:

‘Where several offences are founded on the same conduct, or where several offences simultaneously before the same court demonstrate successive and continuous criminal intention, sentence shall be passed only in respect of the most serious offence.

When a court finds that offences considered in an earlier final judgment and other conduct – assuming it is factually proven – which is currently before it both predates that judgment and, together with those offences, demonstrates successive and continuous criminal intention, the sentence already imposed shall be taken into account in determining the sentence to be imposed. If the sentence already imposed seems adequate as a penalty for the whole course of criminal conduct, the court shall make a finding of guilt and shall refer in its judgment to the sentence already imposed. The total sentence imposed under this article may not exceed the maximum sentence for the most serious offence.’

5.2. Facts

Ms Kraaijenbrink, a Dutch national, was sentenced by judgment of 11 December 1998 of the Arrondissementsrechtbank te Middelburg (Middelburg District Court, Netherlands) to a suspended six month term of imprisonment for several offences under Article 416 of the Wetboek van Strafrecht (Netherlands Penal Code) of receiving and handling the proceeds of drug trafficking between October 1994 and May 1995 in the Netherlands.

By judgment of 20 April 2001, the rechtbank van eerste aanleg te Gent (Court of First Instance, Ghent, Belgium) sentenced Ms Kraaijenbrink to two years’ imprisonment for committing several offences under Article 505 of the Belgian Criminal Code by exchanging in Belgium between November 1994 and February 1996 the proceeds of drug trafficking operations in the Netherlands. That judgment was confirmed by a judgment of 15 March 2005 of the hof van beroep te Gent, correctionele Kamer (Appeal Court of Ghent, Criminal Chamber).

Referring to Article 71 of the CISA and Article 36(2)(a)(i) and (ii) of the Single Convention, both those courts considered that Ms Kraaijenbrink could not rely on Article 54 of the CISA. They considered that the offences of receiving and handling the proceeds of drug trafficking committed in the Netherlands and the money laundering offences in Belgium resulting from that trafficking must be regarded in that State as separate offences. That was so notwithstanding the common intention underlying the offences of receiving and handling in the Netherlands and those of money laundering in Belgium.

Ms Kraaijenbrink then appealed on a point of law and pleaded, in particular, infringement of the *ne bis in idem* principle in Article 54 of the CISA.

The Hof van Cassatie observes first of all that, contrary to Ms Kraaijenbrink’s contention, the finding that there was a ‘common intention’ underlying the unlawful conduct in the Netherlands and the money laundering offence committed in Belgium does not necessarily entail a finding that the sums of money involved in the money laundering operations in Belgium were the proceeds of the trafficking of drugs in respect of the receipt and handling of which Ms Kraaijenbrink had already been sentenced in the Netherlands.

On the other hand, it follows from the judgment of the hof van beroep te Gent of 15 March 2005, against which the appeal on the point of law was lodged, that different acts are involved in the two Contracting States which none the less constitute the successive and continuous implementation of the same criminal intention with the result that, if they had all been carried out in Belgium, they would be regarded as a single legal act which would have been dealt with under Article 65 of the Belgian Criminal Code.

Accordingly, the Hof van Cassatie considered that the question arose as to whether the notion of ‘same acts’ within the meaning of Article 54 of the CISA must be interpreted as covering different acts consisting, first, in holding in one Contracting State the proceeds of drug trafficking and, second, in the exchanging at exchange bureaux in another Contracting State of sums of money having the same origin.³⁰

5.3. Questions

It was in those circumstances that the Hof van Cassatie decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

1. Must Article 54 of the [CISA], read with Article 71 of that agreement be construed as meaning that the criminal offences of acquiring or having available in the Netherlands or transferring from there sums of money in foreign currencies originating from the trade in narcotics (offences which were prosecuted and in respect of which a conviction was obtained in the Netherlands for receiving and handling in breach of Article 416 of the Criminal Code), which differ from the criminal offences consisting in the exchanging at exchange bureaux in Belgium of the relevant sums of money from the trade in narcotics received in the Netherlands (prosecuted in Belgium as the offence of receiving and handling and performing other acts in regard to goods resulting from crime, in breach of Article 505 of the Criminal Code), are to be regarded as the “same acts” for the purposes of Article 54 aforesaid where the courts establish that they share a common intention and thus legally constitute a single act?

2. If Question 1 is answered affirmatively:

Must the expression “may not be prosecuted ... for the same acts” in Article 54 of the [CISA] be interpreted as meaning that the ‘same acts’ may also be constituted by different acts sharing the same intention, and thus constituting a single act, which would mean that a defendant can no longer be prosecuted for the offence of money-laundering in Belgium once he has been duly convicted in the Netherlands of other offences committed with the same intention, regardless of any other offences committed during the same period but which became known or in respect of which prosecutions were brought in Belgium only after the date of the definitive foreign judgment or, in such a case, must that expression be interpreted as meaning that the court determining the merits may enter a conviction in respect of these other acts on a subsidiary basis, taking into account the sentences already imposed, unless it considers that those other sentences in its view constitute sufficient punishment of all the offences, and ensuring that the totality of the penalties imposed may not exceed the maximum of the severest penalty?

³⁰ Case C-367/05 *Kraaijenbrink* [2007] ECR I-06619, paragraphs 13-19 (hereforth, *Kraaijenbrink*).

5.4. Findings

Recalling the criterion for the application of Article 54 of the CISA³¹, the starting point for assessing the notion of ‘same acts’ within the meaning of Article 54 of the CISA is to consider the specific unlawful conduct which gave rise to the criminal proceedings before the courts of the two Contracting States as a whole. Thus, Article 54 of the CISA can become applicable only where the court dealing with the second criminal prosecution finds that the material acts, by being linked in time, in space and by their subject-matter, make up an inseparable whole.

If the material acts do not make up such an inseparable whole, the mere fact that the court before which the second prosecution is brought finds that the alleged perpetrator of those acts acted with the same criminal intention does not suffice to indicate that there is a set of concrete circumstances which are inextricably linked together covered by the notion of ‘same acts’ within the meaning of Article 54 of the CISA.

A subjective link between acts which gave rise to criminal proceedings in two different Contracting States does not necessarily mean that there is an objective link between the material acts in question which, consequently, could be distinguished in time and space and by their nature.³²

In the case at hand, the Court concluded that it has not been clearly established to what extent it is the same financial gains derived from the drug trafficking that underlie, in whole or in part, the unlawful conduct in the two Contracting States concerned. Consequently, in principle, such a situation can be covered by the notion of ‘same acts’ within the meaning of Article 54 of the CISA only if an objective link can be established between the sums of money in the two sets of proceedings.

The Court answered to the first question that:

- the relevant criterion for the purposes of the application of that article is identity of the material acts, understood as the existence of a set of facts which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected;
- different acts consisting, in particular, first, in holding in one Contracting State the proceeds of drug trafficking and, second, in the exchanging at exchange bureaux in another Contracting State of sums of money also originating from such trafficking should not be regarded as ‘the same acts’ within the meaning of Article 54 of the CISA merely because the competent national court finds that those acts are linked together by the same criminal intention;
- it is for that national court to assess whether the degree of identity and connection between all the facts to be compared is such that it is possible, in the light of the said relevant criterion, to find that they are ‘the same acts’ within the meaning of Article 54 of the CISA.

The second question was referred only if the response to the first question confirmed that a common criminal intention is a sufficient condition in itself, which if satisfied, enables different acts to be regarded as ‘the same acts’ within the meaning of Article 54 of the CISA, that has not been confirmed by the Court in its reply to the first question.

³¹ See *Van Esbroeck*, paragraph 36; *Gasparini*, paragraph 54, and *Van Straaten*, paragraph 48.

³² *Kraaijenbrink*, paragraph 30.

6. Conclusions

The *ne bis in idem* principle raises a lot of questions. Do we consider the legal definition of the offences or the set of facts (*idem factum*) as the basis for the definition of the same/*idem*? Does it depend on the scope of and the legal values to be protected by the legal provisions? What does an enforced final judgement mean? Does it also concern final settlements by prosecuting or other judicial authorities out of court? Does the respect for the *ne bis in idem* principle require a bar on further prosecution or punishment (*Elrledigungsprinzip*), or can the authority imposing the second punishment take into account the first punishment (*Anrechnungsprinzip*)?³³

I will try to answer some of these questions by giving a synthesis of the Court's rulings as regards principle *ne bis in idem* enshrined in Article 54 of the CISA, focusing on the main point that need clarification: which are the interests protected and the general rules guiding the application of Article 54 CISA and the notion of 'the same acts'?

6.1. Arguments used

In dealing with the cases before it, the Court tried to emphasize the legal interests protected by the *ne bis in idem* principle, trying to balance the conflicting aspects of the objective of free movement of persons on the one hand and of repression of crime on the other and thus creating a true area of freedom, security and justice.

In *Van Esbroeck* the Court appears to have chosen a broad interpretation of Article 54 of the CISA, giving priority to free movement of persons objectives over those relating to the repression of crime and the protection of public safety. In *Miraglia*, however, the Court applied a narrower interpretation; and gave priority to preventing and combating crime over free movement of persons.³⁴

The Court relied on the 'pro-free movement' and 'mutual trust' reasoning. It recalled that none of the relevant provisions subjected the application of the principle in Article 54 of the CISA to prior harmonisation or, at least, the approximation of national criminal laws. Rather, the *ne bis in idem* principle necessarily implies the existence of mutual trust between the Contracting Parties in each others' criminal justice systems. For that reason, the fact that different legal classifications may be applied to the same facts in two different Contracting Parties should not be an obstacle to the application of Article 54 of the CISA.

The Court, referred to the aim of Article 54 of the CISA, stating that the right of free movement would be fully guaranteed only if the perpetrator of an act knew that, once he had been found guilty and served his sentence, or had been acquitted by a final judgment in a Member State, he could freely move within the Schengen area without fearing new criminal proceedings merely because the act in question was classified differently in the legal order of another Member State.

The Court concluded that, owing to the absence of harmonisation of national criminal laws, applying a criterion based on the legal classification of the acts or on the protected legal interest might create as many barriers to freedom of movement in the Schengen territory as there are penal systems in the Contracting States.

³³ John A.E. Vervaele, *Joined cases C-187/01 and C-385/01, "Criminal proceedings against Hüseyin Gözütok and Klaus Brügge"*, *Judgement of the Court of Justice of 11 February 2003, Full Court [2003] ECR I-5689*, *Common Market Law Review* 2004, v.41, n.3, 795-812.

³⁴ Advocate General's Opinion in Case C-467/04, delivered on 15 June 2006, paragraphs 61-63.

6.2. 'The same acts'

One of the crucial points in the Court's rulings as regards the *ne bis in idem* principle is the notion of 'the same acts'.

In *Van Esbroeck*, the Court was requested to clarify, inter alia, the scope of the notion of 'the same acts' in Article 54 of the CISA. The preliminary question was whether 'the same acts' required merely identity of material facts; or whether it required, in addition, that the facts should be categorised as the same crime in both national criminal systems. Put another way, did there need to be a 'unity of the legal interest protected' as the Court had required in respect of Community sanctions for breaches of EC competition law?³⁵

The Court chose to interpret *ne bis in idem* more broadly than it had previously done in that area of EC law, and held that 'unity of the legal interest protected' is not required for the application of Article 54 of the CISA. According to the Court in *Van Esbroeck*, the 'only relevant criterion' for the purposes of Article 54 of the CISA is that there should be an 'identity of the material facts, understood in the sense of the existence of a set of concrete circumstances which are inextricably linked together'.³⁶

There seems to be an inconsistency *between* the case-law on Article 54 of the CISA, which does not require 'unity of the legal interest protected' but is content to apply *ne bis in idem* provided that there is 'identity of the material facts'³⁷ and that the defendants are the same before both courts; and the case-law on *ne bis in idem* as a 'fundamental principle of EC law', which requires a 'threefold condition' of 'identity of the facts, unity of offender and unity of the legal interest protected' before that principle is applicable.³⁸

The Court did not address this inconsistency, raised by the Advocate General Sharpston in her Conclusions, merely confirming its previous rulings, that the only relevant criterion for applying the concept of 'the same acts' is identity of the material acts, understood as the existence of a set of concrete circumstances which are inextricably linked together in time, in the space, as well as their subject.

The Court also stated that the relevant national authorities, which have to determine whether there is identity of material facts, must confine themselves to examining whether they constitute a set of facts inextricably linked.

I will further point out the main findings of the Court as being 'the same acts' for the purpose of application of Article 54 CISA. The Court concluded that it is not necessary for the quantities of drugs involved in the two-state contractors or people who allegedly participated in the events in the two states are identical.³⁹ Also export and import of the same drugs and continued in different contracting states in the convention are, in principle, to be regarded as "the same facts",⁴⁰ same as the marketing of goods in another Member State, after its importation into the Member State

³⁵ Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others v Commission* [2004] ECR I-123 (hereforth, *Cement*). In *Cement*, the Court held that the 'unity of the legal interest protected' is one of the threefold conditions that must be satisfied for the principle of *ne bis in idem* to apply in EC competition law.

³⁶ At paragraph 36. It is perhaps unfortunate that the neither the Court nor the Advocate General appear to have considered *Cement* in their examination of *Van Esbroeck*.

³⁷ *Van Esbroeck*, paragraph 42.

³⁸ *Cement*, paragraph 338.

³⁹ *Van Straaten*, paragraph 53.

⁴⁰ *Van Straaten*, paragraph 53.

which pronounced the acquittal;⁴¹ taking possession of contraband tobacco abroad in a Contracting State and the importation and possession of the same tobacco in another Contracting State, which is characterised by the fact that the accused who has been prosecuted in both Contracting States had from the outset intended to carry tobacco, after first taking possession, to a final destination across several Contracting States, constitute conduct that may fall within the concept of "same facts"⁴².

On the contrary, the Court held that different facts, including, first, to hold in a Contracting State money from a drug trafficking and, secondly, to sell in exchange bureaus located in another State Contractor money also coming from such trafficking must not be seen as the "same facts" because of the mere fact that the competent national authority finds that the facts are linked by the same criminal intent.⁴³

As it can be seen, the Court answered a lot of the questions raised at the beginning of these conclusions. Whether right or wrong, these rulings have the merit of harmonising the interpretation of the *ne bis in idem* principle further that any international convention or ruling of an international court has ever done it before.

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⁴¹ Gasparini, paragraph 57.

⁴² Kretzinger, paragraph 40.

⁴³ Kraaijenbrink, paragraph 36.