THE "*NE BIS IN IDEM*" PRINCIPLE IN THE CASE-LAW OF THE EUROPEAN COURT OF JUSTICE (II). THE 'FINAL JUDGMENT' AND 'ENFORCEMENT' ISSUES

Norel NEAGU[*]

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 "communautarisation" 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 this second study on the 'ne bis in idem principle' we will deal with the notion of 'final judgment' and 'enforcement' issues.

Keywords:.*European Court of Justice, ne bis in idem, final judgment, enforcement, case law*

1. Introduction

The European Court of Justice, dealing with cases in the field of the 'ne bis in idem' principle, has established an autonomous interpretation of the notion of the 'same acts', a very important component of the principle.

In the following cases the focus shall be on what constitutes final judgment according to the opinion of the Court. However, in this area the Court parted slightly from the autonomous concept, towards a case by case interpretation, ending with a national interpretation of the 'final judgment'.

2. Transaction between the Prosecutor and the Defendant in Judgment from 11 February 2003 in Joined Cases C-187/01 and C-385/01 *Hüseyin Gözütok and Klaus Brügge*

The facts underlying the preliminary reference are based on two disputes involving, on the one hand, Mr. Gözütok (of Turkish origin, residing in the Netherlands) and, on the other, Mr. Brügge (a German resident). These disputes arise from two criminal proceedings brought against the accused: in the former case, in Germany, concerning an offence committed in the Netherlands and, in the latter, in Belgium, concerning an offence committed on Belgian soil. They were combined by the Court because of links between the facts and the questions raised by national jurisdictions.[1]

[*] Researcher, Centre for Legal, Economic and Socio-Administrative Studies, "Nicolae Titulescu" University, Bucharest, Romania (e-mail: norel.neagu@gmail.com). This paper is part of a broader research activity which is carried out under the CNCSIS PN II Contract no.27/2010.

[1] For an anaysis of this case, see **Nadine Thwaites**, *Mutual Trust in Criminal Matters: the ECJ gives a first interpretation of a provision of the Convention implementing the Schengen Agreement. Judgment of 11 February 2003*

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*."[2]

Article 55 provides that:

1. A Contracting Party may, when ratifying, accepting or approving this Convention, declare that it is not bound by Article 54 in one or more of the following cases:

(a) where the acts to which the foreign judgment relates took place in whole or in part in its own territory; in the latter case, however, this exception shall not apply if the acts took place in part in the territory of the Contracting Party where the judgment was delivered;

(b) where the acts to which the foreign judgment relates constitute an offence against national security or other equally essential interests of that Contracting Party;

(c) where the acts to which the foreign judgment relates were committed by officials of that Contracting Party in violation of the duties of their office.

2. A Contracting Party which has made a declaration regarding the exception referred to in paragraph 1(b) shall specify the categories of offences to which this exception may apply.

3. A Contracting Party may at any time withdraw a declaration relating to one or more of the exceptions referred to in paragraph 1.

4. The exceptions which were the subject of a declaration under paragraph 1 shall not apply where the Contracting Party concerned has, in connection with the same acts, requested the other Contracting Party to bring the prosecution or has granted extradition of the person concerned.

...

Article 58 provides:

"The above provisions shall not preclude the application of broader national provisions on the *ne bis in idem* principle with regard to judicial decisions taken abroad."

2.2. Facts

Mr Gözütok is a Turkish national who has lived for some time in the Netherlands where he ran a coffee-shop in the town of Heerlen without the mandatory administrative authorisation. On 12 January and 11 February 1996 the Netherlands police searched the premises and seized certain quantities of hashish and marijuana.[3]

The criminal investigations instigated following the above events ended on 28 May and 18 June 1996, after Mr Gözütok accepted the offer of settlement made by the Netherlands Public Prosecutor's Office and paid the sums of three thousand Dutch guilders (NLG) and of seven hundred and fifty (NLG).

On 31 January 1996 a German bank, at which Mr Gözütok held an account, had alerted the criminal prosecution authorities in the Federal Republic of Germany to the fact that he was handling large sums of money.

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in Joined Cases C-187/01 a. C-385/01 Hüseyin Gözütok and Klaus Brügge, 4 German Law Journal No. 3 (1 March 2003), 253-262; **Maria Fletcher**, *Some Developments to the ne bis in idem Principle in the European Union: Criminal Proceedings Against Hüseyin Gözütok and Klaus Brügge,* The Modern Law Review 2003, v.66, n.5, 769-780.

[2] 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.

[3] 1 kg of hashish, 41 hashish cigarettes (*joints*) and 1.5 kg of marijuana in the first search, and 56 grammes of hashish, 10 *joints* and 200 grammes of marijuana in the second.

On 1 July 1996 the Aachen public prosecutor brought charges against Mr Gözütok accusing him of dealing, in the Netherlands, in significant quantities of narcotics on at least two occasions during the period from 12 January to 11 February 1996.

On 13 January 1997 the Amtsgericht (District Court), Aachen, convicted the defendant of dealing in significant quantities of narcotics and sentenced him to a period of one year and five months' imprisonment, suspended on probation.

Mr Gözütok and the Public Prosecutor appealed against the judgment. By decision of 27 August 1997, the Landgericht (Regional Court), Aachen, discontinued proceedings on the ground that, under Article 54 of the Convention, the decision taken by the Netherlands authorities to discontinue the case had the force of *res judicata* and, in accordance with that provision and with Article 103(3) of the *Grundgesetz* (Basic Law), constituted a bar to prosecution of the acts in the Federal Republic.

The above decision was contested by the Public Prosecutor's Office before the Oberlandesgericht Köln (Higher Regional Court, Cologne), on the ground *inter alia* that Article 54 of the Convention, in establishing the bar to a second prosecution, referred only to final judgments given by one of the Contracting Parties.

Mr Brügge, a German national, caused Mrs Leliaert bodily injury which rendered her unfit for work. The Bonn Public Prosecutor conducted an investigation in respect of those facts against Mr Brügge, in which he offered him an amicable settlement under which the case would not be proceeded with following payment of DEM 1 000.[4] On 13 August 1998 the defendant paid the fine and the Public Prosecutor ordered the discontinuance of the case.

Mr Brügge has been charged in respect of the same facts before the Rechtbank van Eerste Aanleg te Veurne, where the victim has entered an appearance claiming damages for the mental distress caused to her by the assault.[5]

2.3. Questions

1. The first question is whether the *ne bis in idem* principle stated in Article 54 of the Convention also applies when in one of the signatory States a criminal action is extinguished as the result of a decision to discontinue proceedings, taken by the Public Prosecutor's Office once the defendant has fulfilled the conditions imposed on him.

2. If the reply to the above question is positive, the German court wonders whether it is necessary for the decision taken by the Public Prosecutor's Office to be approved by a court.

2.4. Findings[6]

The Court stated that by the Treaty of Amsterdam the European Union set itself the objective of maintaining and developing the Union as an area of freedom, security and justice in which the free movement of persons is assured. Also the integration of the Schengen *acquis* (which includes Article 54 of the CISA) into the framework of the European Union is aimed at enhancing European integration and, in particular, at enabling the Union to become more rapidly the area of freedom, security and justice which it is its objective to maintain and develop.[7]

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

[4] The legislative basis for that offer is found in Article 153a of the *Strafprozeßordnung* (German Code of Criminal Procedure).

[5] Advocate General's Opinion in Joined Cases C-187/01 and C-385/01 *Hüseyn Gözütok and Klaus Brügge*, delivered on 19 September 2002, paragraphs 15-25.

[6] I will expose the most important Paragraphs of the Court's preliminary ruling.

[7] As it is shown in the first paragraph of the preamble to the Protocol.

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.[8]

It is clear from the wording of Article 54 of the CISA that a person may not be prosecuted in a Member State for the same acts as those in respect of which his case has been 'finally disposed of' in another Member State. A procedure whereby further prosecution is barred is a procedure by which the prosecuting authority, on which national law confers power for that purpose, decides to discontinue criminal proceedings against an accused once he has fulfilled certain obligations and, in particular, has paid a certain sum of money determined by the prosecuting authority. In such procedures, the prosecution is discontinued by the decision of an authority required to play a part in the administration of criminal justice in the national legal system concerned. Also, a procedure of this kind, whose effects as laid down by the applicable national law are dependent upon the accused's undertaking to perform certain obligations prescribed by the Public Prosecutor, penalises the unlawful conduct which the accused is alleged to have committed.

The Court concluded that following such a procedure, further prosecution is definitively barred and the person concerned must be regarded as someone whose case 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. In addition, once the accused has complied with his obligations, the penalty entailed in the procedure whereby further prosecution is barred must be regarded as having been 'enforced' for the purposes of Article 54.

The Court rejected the argumentation of the parties 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, saying that in the absence of an express indication to the contrary in Article 54 of the CISA, the procedure must be regarded as sufficient to allow the *ne bis in idem* principle laid down by that provision to apply.

Furthermore, nowhere in Title VI of the Treaty on European Union relating to police and judicial cooperation in criminal matters (Articles 34 and 31 of which were stated to be the legal basis for Articles 54 to 58 of the CISA), or in the Schengen Agreement or the CISA itself, is the application of Article 54 of the CISA made conditional upon harmonisation, or at the least approximation, of the criminal laws of the Member States relating to procedures whereby further prosecution is barred.[9]

In those circumstances, whether the *ne bis in idem* principle enshrined in Article 54 of the CISA is applied to procedures whereby further prosecution is barred (regardless of whether a court is involved) or to judicial decisions, there is a necessary implication that the Member States have ***mutual trust*** in their criminal justice systems and that each of them recognises the criminal law in force in the other Member States even when the outcome would be different if its own national law were applied.

For the same reasons, the application by one Member State of the *ne bis in idem* principle, as set out in Article 54 of the CISA, to procedures whereby further prosecution is barred, which have taken place in another Member State without a court being involved, cannot be made subject to a condition that the first State's legal system does not require such judicial involvement either.

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[8] Joined Cases C-187/01 and C-385/01 *Hüseyn Gözütok and Klaus Brügge,* [2003] ECR I-1345, paragraphs 36-38 (hereforth, *Gözütok and Brügge)*.

[9] See also for an analysis of the Court ruling **Francois Julien-Laferriere**, *Les effets de la communautarisation de l"aquis de Schengen" sur la regle "non bis in idem"*, Le Dalloz 2003, annee 179, 1er cahier (rouge), n.22/7119, 1458-1460.

The aptness of that interpretation of Article 54 of the CISA is borne out by the fact that it is the only interpretation to give precedence to the object and purpose of the provision rather than to procedural or purely formal matters, which, after all, vary as between the Member States concerned, and to ensure that the principle has proper effect.[10]

In conclusion, the *ne bis in idem* principle also applies to procedures whereby further prosecution is barred, by which the Public Prosecutor of a Member State discontinues criminal proceedings brought in that State, without the involvement of a court, once the accused has fulfilled certain obligations and, in particular, has paid a certain sum of money determined by the Public Prosecutor.

3. Parallel Proceedings as a Further Bar to Prosecution in Judgement from 10 March 2005 in Case C-469/03 *Filomeno Mario Miraglia*

The reference was made in the course of criminal proceedings against Mr Miraglia, who was charged with having organised, with others, the transport to Bologna of heroin-type narcotics.[11]

3.1. Legal Framework

The provisions of Netherlands law

In accordance with Article 36 of the Netherlands Code of Criminal Procedure:

'1. Where the criminal proceedings are not pursued, the trial court before which the case was last prosecuted may declare, at the defendant's request, that the case is closed.

2. The court may reserve its decision on the request at any time for a certain period if the prosecuting authorities adduce evidence demonstrating that the matter will still be prosecuted.

3. Before the court gives its decision, it shall summon the person directly concerned of whom it is aware in order to hear his views on the defendant's request.

4. The order shall be notified to the defendant forthwith.'

Article 255 of that Code provides:

'1. Where a case does not proceed to judgment, after the order declaring the case closed has been notified to the defendant, or after he has been notified that no further action is to be taken, without prejudice in the latter case to Article 12i or 246, no further proceedings may be taken against the defendant in respect of the same acts, unless new evidence is brought forward.

2. Only statements made by witnesses or the defendant or documents, acts or official records which have subsequently come to light and have not been examined can constitute new evidence.

3. In such a case, the defendant can be summoned before the Rechtbank only after a preliminary judicial inquiry into that new evidence …'.

Finally, with regard to requests for mutual assistance in criminal matters, Article 552-l of the Netherlands Code of Criminal Procedure provides:

'1. The request shall not be granted:

…

(b) in so far as to grant it would serve to collaborate in proceedings or an action incompatible with the principle underlying Article 68 of the Criminal Code and Article 255(1) of this Code;

(c) in so far as it is made for the purposes of an inquiry concerning facts in respect of which the defendant is prosecuted in the Netherlands …'.

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[10] *Gözütok and Brügge,* paragraphs 26-35.

[11] For an analysis of this case see **Lionel Rinuy**, *Cour de Justice, 10 mars 2005, Filomeno Maria Miraglia*, Revue des affaires europeenes v.14, n.2, 327-331.

3.2. Facts

The reference was made in the course of criminal proceedings against Mr Miraglia, who was charged with having organised, with others, the transport to Bologna of heroin-type narcotics. In connection with an investigation conducted by the Italian and Netherlands authorities in cooperation, Mr Miraglia was arrested in Italy on 1 February 2001 under an order for his pre-trial detention issued by the examining magistrate of the Tribunale di Bologna. Mr. Miraglia was charged with having organised, with others, the transport to Bologna of 20.16 kg of heroin, an offence laid down by and punishable under Articles 110 of the Italian Criminal Code and 80 of Presidential Decree No 309/90.

On 22 January 2002 the examining magistrate of the Tribunale di Bologna committed Mr Miraglia to be tried for that offence and decided to replace his detention in prison by house arrest. The Tribunale di Bologna later replaced house arrest by an obligation to reside in Mondragone (Italy), and then revoked all detention measures, so that at present the defendant is at liberty.

Criminal proceedings in respect of the same criminal acts were instituted concurrently before the Netherlands judicial authorities, Mr Miraglia being charged with having transported about 30 kg of heroin from the Netherlands to Italy. The defendant was arrested on that charge by the Netherlands authorities on 18 December 2000 and released on 28 December 2000. On 17 January 2001 the Gerechtshof te Amsterdam (Netherlands) rejected the appeal brought by the prosecuting authorities against the order of the Rechtbank te Amsterdam (Netherlands) dismissing their application for the defendant to be kept in custody.

The criminal proceedings against Mr Miraglia were closed on 13 February 2001 without any penalty or other sanction's being imposed on him. In those proceedings the Netherlands public prosecutor did not initiate a criminal prosecution of the defendant. It is apparent from the file before the Court that that decision was taken on the ground that a prosecution in respect of the same facts had been brought in Italy. By order of 9 November 2001 the Rechtbank te Amsterdam awarded the defendant compensation for the damage suffered through his having been remanded in custody and also the costs of the lawyers instructed.

By letter of 7 November 2002 the Public Prosecutor's Office of the Rechtbank te Amsterdam refused the request for judicial assistance made by the Public Prosecutor's Office of the Tribunale di Bologna, taking as its ground the reservation formulated by the Kingdom of the Netherlands with regard to Article 2(b) of the European Convention on Mutual Assistance in Criminal Matters, given that the Rechtbank had 'closed the case without imposing any penalty'.

On 10 April 2003 the Italian Public Prosecutor requested the Netherlands judicial authorities to provide information about the outcome of the criminal proceedings against Mr Miraglia and the way in which the proceedings had been settled in order to assess their significance for the purposes of Article 54 of the CISA. By note of 18 April 2003 the Netherlands Public Prosecutor informed his Italian counterpart that the criminal proceedings against Mr Miraglia had been stayed, but did not supply information considered sufficient by the Italian court about the order made and its content. The Netherlands Public Prosecutor stated that it was 'a final decision of a court' precluding, pursuant to Article 225 of the Netherlands Code of Criminal Procedure, any prosecution in respect of the same criminal acts and any judicial cooperation with foreign authorities, unless new evidence should be produced against Mr Miraglia. The Netherlands judicial authorities added that any request for assistance made by the Italian State would run foul of Article 54 of the CISA.

According to the Italian court, the Netherlands authorities decided not to prosecute Mr Miraglia on the ground that criminal proceedings against the defendant had in the meantime been instituted in Italy for the same criminal acts. That assessment is ascribable to the 'preventive' application of the principle *ne bis in idem*.[12]

[12] Case C-469/03 *Filomeno Mario Miraglia,* [2005] ECR I-2009, paragraphs 13-23 (hereforth, *Miraglia*).

3.3. Questions

Those were the circumstances in which the Tribunale di Bologna decided to stay proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must Article 54 of the [CISA] apply when the decision of a court in the first State consists of discontinuing the prosecution without any adjudication on the merits of the case and on the sole ground that proceedings have already been initiated in another State?'

3.4. Findings[13]

The aptness of that interpretation of Article 54 of the CISA is borne out by the fact that it is the only interpretation to give precedence to the object and purpose of the provision rather than to procedural or purely formal matters, which, after all, vary as between the Member States concerned, and to ensure that that article has proper effect.

The decision to close proceedings was adopted by the judicial authorities of a Member State when there had been no assessment whatsoever of the unlawful conduct with which the defendant was charged. The bringing of criminal proceedings in another Member State in respect of the same facts would be jeopardised especially 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. Such a consequence would clearly run counter to the very purpose of the provisions of Title VI of the Treaty on European Union, as set out in the fourth indent of the first subparagraph of Article 2 EU, namely: 'to maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to … prevention and combating of crime'.

That is why the Court concluded that:

The principle *ne bis in idem* does not fall to be applied to a decision of the judicial authorities of one Member State declaring a case to be closed, after the Public Prosecutor has decided not to pursue the prosecution on the sole ground that criminal proceedings have been started in another Member State against the same defendant and for the same acts, without any determination whatsoever as to the merits of the case.

4. Time Barring and "Finnaly Disposed of" in Judgement from 28 September 2006 in Case C-467/04 Giuseppe Francesco Gasparini

The reference was made in the course of criminal proceedings brought against Mr G.F. Gasparini, Mr J. M[a] L.A. Gasparini, Mr Costa Bozzo, Mr de Lucchi Calcagno, Mr F.M. Gasparini, Mr Hormiga Marrero and the Sindicatura Quiebra, who are suspected of having put smuggled olive oil on the Spanish market.

4.1. Legal Framework

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) provides in Article 3, headed 'Grounds for mandatory non-execution of the European arrest warrant':

'The judicial authority of the Member State of execution (hereinafter "executing judicial authority") shall refuse to execute the European arrest warrant in the following cases:

…

(2) 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 provided that, where there has been sentence,

[13] I will expose the most important paragraphs of the Court's preliminary ruling.

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 of the framework decision, headed 'Grounds for optional non-execution of the European arrest warrant', is worded as follows:

'The executing judicial authority may refuse to execute the European arrest warrant:

…

(4) where the criminal prosecution or punishment of the requested person is statute-barred according to the law of the executing Member State and the acts fall within the jurisdiction of that Member State under its own criminal law;

…'

Article 24 EC provides:

'Products coming from a third country shall be considered to be in free circulation in a Member State if the import formalities have been complied with and any customs duties or charges having equivalent effect which are payable have been levied in that Member State, and if they have not benefited from a total or partial drawback of such duties or charges.'

4.2. Facts

According to the Audiencia Provincial de Málaga (Provincial Court, Málaga), at some unspecified time in 1993, the shareholders and directors of the company Minerva agreed to import through the port of Setúbal (Portugal) refined olive oil from Tunisia and Turkey, which was not declared to the customs authorities. The goods were then transported in lorries from Setúbal to Málaga (Spain). The defendants devised a system of false invoicing to create the impression that the oil came from Switzerland.

The Supremo Tribunal de Justiça (Supreme Court of Justice, Portugal), in a decision on an appeal against a judgment of the Tribunal de Setúbal, found that the refined olive oil imported into Portugal originated on ten occasions in Tunisia and on one occasion in Turkey and that a lesser quantity than was actually imported was declared to the Portuguese customs authorities.

The Supremo Tribunal de Justiça acquitted two of the defendants in the case before it, on the ground that their prosecution was time-barred. They are both also being prosecuted in the main proceedings.

The Audiencia Provincial de Málaga explains that it has to rule on whether an offence of smuggling can be found or whether, on the contrary, no such offence can be found having regard to the binding force of the judgment of the Supremo Tribunal de Justiça or to the fact that the goods were in free circulation in the Community.[14]

4.3. Questions

It was in those circumstances that the Audiencia Provincial de Málaga decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'1. Is a finding by the courts of one Member State that prosecution of an offence is time-barred binding on the courts of the other Member States?

2. Does the acquittal of a defendant on account of the fact that prosecution of the offence is time-barred benefit, by extension, persons being prosecuted in another Member State where the facts are identical? In other words, can persons being prosecuted in another Member State on the basis of the same facts also benefit from a limitation period?

[14] Case C-467/04 *Gasparini and Others* [2006] ECR I-9199, paragraphs 16-19 (hereforth, *Gasparini*).

3. If the criminal courts of one Member State declare that the extra-Community nature of goods has not been established for the purposes of an offence of smuggling and acquit the defendant, may the courts of another Member State broaden the investigation in order to prove that the introduction of goods without payment of customs duties was from a non-member State?

4. Where a criminal court in a Member State has declared either that it is not established that goods have been unlawfully introduced into the Community or that prosecution of the offence of smuggling is time-barred:

a) can the goods be regarded as being in free circulation in the rest of the Community?

b) can the sale of the goods in another Member State following their importation into the Member State where the acquittal was given be regarded as independent conduct which may therefore be punished or, instead, as conduct forming an integral part of the importation?'

4.4. Findings

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.[15] It ensures that persons who, when prosecuted, have their cases finally disposed of are left undisturbed. They must be able to move freely without having to fear a fresh prosecution for the same acts in another Contracting State.

The laws of the Contracting States on limitation periods have not been harmonised. However, nowhere in Title VI of the EU Treaty, relating to police and judicial cooperation in criminal matters (Articles 34 and 31 of which were selected as the legal basis for Articles 54 to 58 of the CISA), or in the Schengen Agreement or the CISA itself is the application of Article 54 of the CISA made conditional upon harmonisation or approximation of the criminal laws of the Member States relating to procedures whereby further prosecution is barred[16] or, more generally, upon harmonisation or approximation of their criminal laws.[17]

There is a necessary implication in the *ne bis in idem* principle, that the Contracting States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Contracting States even when the outcome would be different if its own national law were applied.[18]

Framework Decision 2002/584 does not preclude the *ne bis in idem* principle from applying in the case of a final acquittal because prosecution of the offence is time-barred. Article 4(4) of the framework decision, relied upon by the Netherlands Government in the observations which it submitted to the Court, permits the executing judicial authority to refuse to execute a European arrest warrant inter alia where the criminal prosecution of the requested person is time-barred according to the law of the executing Member State and the acts fall within the jurisdiction of that State under its own criminal law. In order for that power to be exercised, a judgment whose basis is that a prosecution is time-barred does not have to exist. The situation where the requested person has been finally judged by a Member State in respect of the same acts is governed by Article 3(2) of the framework decision, a provision which lays down a mandatory ground for non-execution of a European arrest warrant.

The Court concluded that the answer to the first question must be that the *ne bis in idem* principle, enshrined in Article 54 of the CISA, applies in respect of a decision of a court of a Contracting State, made after criminal proceedings have been brought, by which the accused is acquitted finally because prosecution of the offence is time-barred.

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[15] See *Gözütok and Brügge*, paragraph 38, and Case C-150/05 *Van Straaten* [2006] ECR I-9327, paragraph 57.
[16] *Gözütok and Brügge*, paragraph 32.
[17] See Case C-436/04 *Leopold Henri Van Esbroeck* [2006] ECR I-2333, paragraph 29.
[18] *Van Esbroeck*, paragraph 30.

By its second question, the national court essentially asks who is capable of benefiting from the *ne bis in idem* principle. It is clear from the wording of Article 54 of the CISA that only persons who have already had a trial finally disposed of once may derive advantage from the *ne bis in idem* principle. Consequently, the answer to the second question must be that the *ne bis in idem* principle, enshrined in Article 54 of the CISA, does not apply to persons other than those whose trial has been finally disposed of in a Contracting State.[19]

The Court refused to answer the third question, considering it a hypothetical question not supported by the evidence submitted to the Court.[20]

For these reasons, the fourth question is inadmissible in so far as it is founded on the premises of acquittal of the defendants because there was no, or insufficient, evidence. On the other hand, it is admissible in so far as it relates to the situation where a court of a Member State has declared that prosecution of the offence of smuggling is time-barred.

By Question 4(a), the national court essentially asks whether it may be inferred from the decision of a court of a Contracting State which has become final finding that a prosecution for the offence of smuggling is time-barred that the goods in question are in free circulation in the other Member States.

Under Article 24 EC, three conditions must be met in order for products coming from a third country to be considered to be in free circulation in a Member State. Products are regarded as so being if the import formalities have been complied with, if any customs duties or charges having equivalent effect which are payable have been levied in that Member State and if the products have not benefited from a total or partial drawback of such duties or charges.

A finding by a court of a Member State that prosecution of a defendant for the offence of smuggling is time-barred does not alter the legal classification of the products in question. Also, the *ne bis in idem* principle binds the courts of a Contracting State only in so far as it precludes a defendant who has already had his case finally disposed of in another Contracting State from being prosecuted a second time for the same acts.

The answer to Question 4(a) must therefore be that a criminal court of a Contracting State cannot hold goods to be in free circulation in national territory solely because a criminal court of another Contracting State has found, in relation to the same goods, that prosecution for the offence of smuggling is time-barred.

By Question 4(b), the national court essentially asks whether the marketing of goods in another Member State, after their importation into the Member State where the accused was acquitted because the prosecution was time-barred, forms part of the same acts or constitutes conduct independent of importation into the latter Member State. The only relevant criterion for applying the concept of 'the same acts' within the meaning of Article 54 of the CISA is identity of the material acts, understood as the existence of a set of concrete circumstances which are inextricably linked together.[21]

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[19] *Gasparini*, paragraphs 27-37.

[20] According to the Court's settled case-law, while the Court is in principle bound to give a ruling where the questions submitted concern the interpretation of Community law, it can in exceptional circumstances examine the conditions in which the case was referred to it by the national court, in order to confirm its own jurisdiction. The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. See, inter alia, Case C-13/05 *Chacón Navas* [2006] ECR I-0000, paragraphs 32 and 33, and the case-law cited there.

[21] See *Van Esbroeck*, paragraph 36.

As a conclusion, the marketing of goods in another Member State, after their importation into the Member State where the accused was acquitted, constitutes conduct which may form part of the 'same acts' within the meaning of Article 54 of the CISA.[22]

The Court concluded that:

1. **The *ne bis in idem principle* applies in respect of a decision of a court of a Contracting State, made after criminal proceedings have been brought, by which the accused is acquitted finally because prosecution of the offence is time-barred.**

2. **That principle does not apply to persons other than those whose trial has been finally disposed of in a Contracting State.**

3. **A criminal court of a Contracting State cannot hold goods to be in free circulation in national territory solely because a criminal court of another Contracting State has found, in relation to the same goods, that prosecution for the offence of smuggling is time-barred.**

4. **The marketing of goods in another Member State, after their importation into the Member State where the accused was acquitted, constitutes conduct which may form part of the 'same acts' within the meaning of Article 54 of the Convention.**

5. Trial in Absentia and "Finally disposed" of in Judgement from December 11, 2008 in Case C-297/07 Klaus Bourquain

The reference was made in criminal proceedings instituted in Germany on 11 December 2002 against Mr Bourquain, a German national, for murder, although criminal proceedings instituted in respect of the same acts against him by a prosecuting authority of another Contracting State had already led on 26 January 1961 to his conviction in absentia.

5.1. Legal Framework

National law

The seventh to the ninth paragraphs of Article 120 of the Code of Military Justice for the French Army (*Journaux Officiels de la République Française* – 'JORF' – of 15 March 1928), in the version in force on 26 January 1961, provides:

'Judgment given against a person in absentia, in the normal form, shall ... be notified to the person convicted in absentia personally or at his place of residence.

In the five days following such notification, the person convicted in absentia may appeal. Should that period expire without an appeal having been lodged, the judgment shall be deemed to have been given in adversarial proceedings.

However, if that notification has not been served personally or if it does not derive from measures taken to enforce the judgment which were known to the person convicted, the appeal shall be admissible until the date on which enforcement of the sentence becomes time-barred.'

Article 121 of that code, as amended at the time of the facts in the main proceedings, lays down, with reference to Article 639 of the French Code of Criminal Procedure, that, if the person convicted in his absence reappears before enforcement of the sentence has become time-barred, the sentence is not to be enforced but new proceedings instituted, this time in the presence of the accused.

5.2. Facts

On 26 January 1961 in Bône (Algeria), Mr Bourquain, who was serving in the French Foreign Legion, was sentenced to death in absentia by the permanent military tribunal for the eastern zone of Constantine, having been found guilty of desertion and intentional homicide.

[22] *Gasparini*, paragraphs 47-57.

That tribunal, applying the Code of Military Justice for the French Army, held it proved that, on 4 May 1960, Mr Bourquain, while making efforts to desert on the Algerian-Tunisian border, shot dead another legionnaire, also of German nationality, who attempted to prevent him from deserting.

Having taken refuge in the German Democratic Republic, Mr Bourquain had not learnt of the notification of the judgment delivered in absentia and it was not possible to enforce the sentence imposed by the judgment deemed to have been given in adversarial proceedings.

There were no subsequent criminal proceedings against Mr Bourquain in either Algeria or France. Moreover, in France, all offences committed in connection with the war in Algeria were subject to the amnesty granted under the laws referred to above. By contrast, in the Federal Republic of Germany, an investigation was opened in relation to Mr Bourquain in respect of the same acts and, in 1962, an arrest warrant was sent to the authorities of the former German Democratic Republic, which rejected it.

At the end of 2001, it was discovered that Mr Bourquain was living in the area of Regensburg (Germany). On 11 December 2002, the Staatsanwaltschaft Regensburg (Regensburg Pubic Prosecutor's Office) charged him before the referring court with murder, in respect of the same acts, under Article 211 of the German Criminal Code.

In those circumstances the referring court, by letter of 17 July 2003, requested information from the French Ministry of Justice under Article 57(1) of the CISA in order to establish whether the judgment of the permanent military tribunal for the eastern zone of Constantine of 26 March 1961 precluded the opening of criminal proceedings in Germany in respect of the same acts, as a result of the prohibition of double jeopardy contained in Article 54 of the CISA.

The Public Prosecutor at the Tribunal aux Armées de Paris (Military Tribunal of Paris) replied to that request for information by pointing out in particular as follows:

'The judgment in absentia delivered on 26 January 1961 against [Mr Bourquain] has become final. In 1981, the period allowed for challenging the decision imposing the death sentence having expired, it was no longer possible to lodge an appeal against that judgment. Penalties in criminal cases being time-barred after 20 years under French law, the judgment can no longer be enforced in France.'

In addition, the referring court sought an opinion from the Max-Planck-Institut für ausländisches und internationales Strafrecht (Max Planck Institute for Foreign and International Criminal Law) on the interpretation of Article 54 of the CISA concerning the facts of the case in the main proceedings. In its opinion of 9 May 2006, that institute came to the conclusion that, even if the direct enforcement of the conviction in absentia was excluded on account of the specific features of the French system of criminal procedure, the conditions for application of Article 54 of the CISA were satisfied in the main proceedings, with the result that no new criminal proceedings could be brought against Mr Bourquain. The institute, in response to a request for further observations, reiterated its view by letter of 14 February 2007.[23]

5.3. Questions

The Landgericht (Regional Court) Regensburg, being of the view that Article 54 of the CISA could be interpreted as meaning that the first conviction by a Contracting State must have been capable of being enforced at some time in the past in order to operate as a bar on new proceedings in a second Contracting State, decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

[23] Case C-297/07 *Bourquain* [2008] ECR I-2245, paragraphs 18-25 (hereforth, *Bourquain*).

'May a person whose trial has been finally disposed of in one Contracting Party be prosecuted in another Contracting Party for the same act when, under the laws of the sentencing Contracting Party, the sentence imposed on him could never have been enforced?'

5.4. Findings

The Court stated that by its question, the referring court wishes to know, essentially, whether the *ne bis in idem* principle enshrined in Article 54 of the CISA can apply to criminal proceedings instituted in a Contracting State against an accused whose trial for the same acts as those for which he faces prosecution was finally disposed of in another Contracting State, even though, under the law of the State in which he was convicted, the sentence which was imposed on him could never have been enforced.

In principle a conviction in absentia is also covered by the scope of Article 54 of the CISA and can therefore constitute a procedural bar to the opening of new proceedings. According to the actual wording of Article 54 of the CISA, judgments rendered in absentia are not excluded from its scope of application, the sole condition being that there has been a final disposal of the trial by a Contracting Party. Having in mind the lack of obligation for harmonisation or approximation of the criminal laws of the Member States concerning in absentia judgments[24] and the principle of mutual trust,[25] the problem to answer remains whether the conviction in absentia by the permanent military tribunal for the eastern zone of Constantine is 'final' within the meaning of Article 54 of the CISA, taking into account the impossibility of direct enforcement of the penalty as a result of the obligation imposed by French law to hold a new trial if the person convicted in absentia should reappear, this time in his presence.

In that regard, the Czech and Hungarian Governments doubt whether the judgment of that permanent tribunal constitutes a final bar to continuation of the criminal proceedings, precisely on account of that obligation to institute new proceedings if the person convicted in absentia is arrested.

However, the sole fact that the proceedings in absentia would, under French law, have necessitated the reopening of the proceedings if Mr Bourquain had been arrested while time was running in the limitation period applicable to the penalty, and before he benefited from the amnesty, that is, between 26 January 1961 and 31 July 1968, does not, in itself, mean that the conviction in absentia cannot be regarded as a final decision within the meaning of Article 54 of the CISA. Thus, in order to observe 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,[26] it is necessary to comply within the European Union with a judgment such as that delivered on 26 January 1961 by the permanent military tribunal for the eastern zone of Constantine, ruling finally on the acts of which the person concerned was accused under the legislation of the Contracting State which instituted the first criminal proceedings.

The achievement of that objective would be jeopardised if the specific features of national proceedings, such as those which appear in the provisions of Articles 120 and 121 of the Code of Military Justice for the French Army, did not permit an interpretation of the concept of a trial being finally disposed of within the meaning of Article 54 of the CISA which includes judgments delivered in absentia in accordance with national legislation.

Also the Prosecutor at the Tribunal aux Armées of Paris, without referring at all to the fact that the offences committed by Mr Bourquain were subject to an amnesty granted in 1968, points out

[24] See, to that effect, concerning procedures whereby further prosecution is barred, *Gözütok and Brügge*, paragraph 32.

[25] See, to that effect, *Gözütok and Brügge*, paragraph 33.

[26] *Gözütok and Brügge*, paragraph 38.

that all challenges to the sentence were time-barred in 1981, that is to say, before the second criminal proceedings were instituted in Germany in 2002.

While Law No 68-697 on the grant of amnesty has the consequence that, since its entry into force, the offences committed by Mr Bourquain are no longer subject to any penalty, the effects of that law, as laid down in particular in Articles 9 and 15 of Law No 66-396, cannot be understood as meaning that there is no first judgment for the purposes of Article 54 of the CISA.

Since the judgment delivered in the absence of Mr Bourquain must, in the circumstances of the case, be regarded as final for the purposes of the application of Article 54 of the CISA, it should be determined whether the condition relating to enforcement referred to in that article, that is the fact that the penalty can no longer be enforced, is also satisfied when, at no time in the past, even before the amnesty or the expiry of the limitation period, could the penalty imposed pursuant to the first conviction have been directly enforced.

In that regard, the Hungarian Government submitted that the expression in Article 54 of the CISA, relating to the fact that the penalty 'can no longer be enforced' according to the laws of the sentencing Contracting Party, must be interpreted to mean that it must have been capable of being enforced under the rules of the sentencing Contracting State at least on the date when it was imposed.

However, that condition regarding enforcement does not require the penalty, under the law of that sentencing State, to have been capable of being enforced directly, but requires only that the penalty imposed by a final decision 'can no longer be enforced'. The words 'no … longer' refer to the time when the new proceedings begin, in relation to which the court with jurisdiction in the second Contracting State must therefore ascertain whether the conditions referred to in Article 54 of the CISA are satisfied.

It follows that the condition regarding enforcement referred to in that article is satisfied 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.

That interpretation is 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.

That right to freedom of movement is effectively guaranteed only if, in a situation such as that at issue in the main proceedings, the person can be sure that, once he has been convicted and when the penalty imposed on him can no longer be enforced under the laws of the sentencing Contracting State, he may travel within the Schengen area without fear of prosecution in another Contracting State on the ground that the penalty could not, on account of the specific features of the national legal procedures of the first Contracting State, have been directly enforced.

In the case in the main proceedings, in which it is agreed that the penalty imposed was no longer capable of being enforced in 2002 when the second criminal proceedings were instituted in Germany, it would be contrary to the effective application of Article 54 of the CISA to rule out its application solely on the ground of the specific features of the French criminal proceedings which made enforcement of the penalty conditional on a further conviction pronounced in the presence of the accused.

The Court concluded that the *ne bis in idem* principle, enshrined in Article 54 of the CISA, is applicable to criminal proceedings instituted in a Contracting State against an accused whose trial for the same acts as those for which he faces prosecution was finally disposed of in another Contracting

State, even though, under the law of the State in which he was convicted, the sentence which was imposed on him could never, on account of specific features of procedure such as those referred to in the main proceedings, have been directly enforced.[27]

6. "Finally Disposed of" in Judgement from December 22, 2008 in Case C- 491/07 Vladimir Turanský

The reference was made in criminal proceedings instituted in Austria on 23 November 2000 against Mr Turanský, a Slovak national suspected of having carried out, along with others, a serious robbery on an Austrian national in the territory of the Republic of Austria.

6.1. Legal Framework

Slovak law

Under Article 9(1)(e) of the Code of Criminal Procedure, in the version in force on the date on which the Slovak police authority adopted the decision to suspend the criminal proceedings in question in the main proceedings, such proceedings are not to be instituted or, where already instituted, continued 'if the matter concerns a person against whom previous criminal proceedings instituted in respect of the same act terminated in a judgment which has become final or if those proceedings were definitively suspended …'.

That provision transposes Article 50(5) of the Constitution of the Slovak Republic, according to which a person cannot be prosecuted for an act for which he was already finally convicted or acquitted.

Article 215(1) and (4) of the Code of Criminal Procedure provide:

'1. The Public Prosecutor shall suspend the criminal proceedings:

a) if there is no doubt that the act in respect of which criminal proceedings were instituted did not occur;

b) if that act is not a crime and there is no reason to investigate the case …

…

4. The suspension of the proceedings under paragraph 1 can also be ordered by the police, if no charge has been brought. …'

It is clear from the case-law of the Najvyšší súd Slovenskej republiky (Supreme Court of the Slovak Republic) and in particular from the judgment of 10 July 1980 in Case Tz 64/80, that Article 9(1)(e) of the Code of Criminal Procedure does not preclude proceedings which had been suspended under Article 215(1)(b) of that Code from being subsequently reopened in respect of the same acts, where the earlier proceedings were not terminated by a judgment which has become final.

6.2. Facts

Mr Turanský is suspected of having – on 5 October 2000, in the company of two Polish nationals who are being prosecuted separately – robbed a person of a sum of money belonging to him at his home in Vienna (Austria), and of thereafter seriously injuring him.

On 23 November 2000, the Staatsanwaltschaft Wien (Public Prosecutor in Vienna) therefore requested the investigating judge attached to the referring court to open a preliminary investigation concerning Mr Turanský, who was strongly suspected of serious robbery under the Austrian Criminal Code, and to issue an arrest warrant and an alert for his arrest.

[27] *Bourquain*, paragraphs 34-52.

On 15 April 2003, having been informed that Mr Turanský could be found in his country of origin, the Republic of Austria, in accordance with Article 21 of the European Convention on Mutual Assistance in Criminal Matters, requested the Slovak Republic to reopen proceedings against him.

Since the Slovak authorities approved that request, the investigating judge attached to the referring court stayed the criminal proceedings pending the final decision of those authorities.

On 26 July 2004, the police officer in Prievidza (Slovakia) in charge of the investigation opened criminal proceedings into the reported acts without however at the same time charging a specific person. In the course of that investigation, Mr Turanský was heard as a witness.

By letter of 20 December 2006, the Prosecutor General of the Slovak Republic notified the Austrian authorities of a decision of the Prievidza District Police Headquarters of 14 September 2006, ordering the suspension under Article 215(1)(b) of the Code of Criminal Procedure of the criminal proceedings relating to the alleged robbery. In that decision, the Prievidza police officer in charge of the investigation wrote:

'Under Article 215(1)(b) [of the Code of Criminal Procedure], I order, with regard to the criminal proceedings concerning the case of robbery in concert with others,

the suspension of the proceedings

since the act does not constitute a crime and there is no reason to continue the case.

Explanation of the grounds

… That has also been proved by the statements of the victim … and the statements of the witness [Turanský]. This means that Mr Turanský's act did not constitute the crime of robbery …

Even if one had to take into account the act of not preventing the crime …, it would likewise no longer be possible to continue the proceedings … with the objective of issuing formal charges, since prosecution would not be permitted in the present case, owing to expiry of the limitation period …'

A complaint, having suspensive effect, could be brought against that decision within a period of three days following the date on which it was pronounced. No such complaint was however made.

The Landesgericht für Strafsachen in Vienna has doubts whether the decision to suspend the criminal proceedings, taken by a Slovak police authority in an investigation into the same acts as those on which the proceedings pending before it are based, can give rise to the application of Article 54 of the CISA and, therefore, preclude the continuation of the pending proceedings.[28]

6.3. Questions

Since it has to rule on the question whether the decision of the Slovak police authority of 14 September 2006 precludes the investigating judge from continuing the preliminary proceedings which were stayed in the Republic of Austria, the referring court decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Must the bar on a second prosecution for the same acts (*ne bis in idem* principle) contained in [the CISA] be interpreted as precluding the prosecution of a suspect in the Republic of Austria when criminal proceedings instituted in the Slovak Republic in respect of the same acts, after its accession to the European Union, were discontinued after a police authority, following an examination of the merits of the case and without further sanction, terminated them with immediate effect by ordering their suspension?'

6.4. Findings

The referring court asked, essentially, whether the *ne bis in idem* principle enshrined in Article 54 of the CISA applies to a decision, whereby a police authority, after examining the merits

[28] Case C-491/07 *Turansky* [2008] ECR I-11039, paragraphs 18-24 (hereforth, *Turansky*).

of the case brought before it, makes an order, at a stage before the charging of a person suspected of a crime, suspending the criminal proceedings which had been instituted.

Article 54 of the CISA precludes the prosecution of a person 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 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.[29] The Court has also held that Article 54 of the CISA applies to a decision of the judicial authorities of a Contracting State by which the accused is finally acquitted for lack of evidence.[30]

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.

A decision which does not, under the law of the first 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.

In that regard, it emerges clearly from the written observations of the Slovak Government in the present case that a decision ordering the suspension of the criminal proceedings at a stage before a particular person is charged, taken under Article 215(1)(b) of the Slovak Code of Criminal Procedure, does not, under national law, preclude the institution of new criminal proceedings in respect of the same acts in the territory of the Slovak Republic.

Therefore, a decision of a police authority which, while suspending the criminal proceedings, does not under the national law concerned definitively bring the prosecution to an end, cannot constitute a decision which would make it possible to conclude that the trial of that person has been 'finally disposed of' within the meaning of Article 54 of the CISA.

That interpretation of Article 54 of the CISA is compatible with the objective of the article, which is to ensure that a person whose trial has been finally disposed of is not prosecuted for the same acts in the territory of several Contracting States on account of his having exercised his right to freedom of movement.[31]

The application of that article to a decision to suspend criminal proceedings would have the effect of precluding, in another Contracting State, in which more evidence may be available, any possibility of prosecuting and perhaps punishing a person on account of his unlawful conduct, even though such a possibility is not ruled out in the first Contracting State, in which the trial of the person is not considered to have been finally disposed of under national law.

Such an outcome would be contrary to the very purpose of the provisions of Title VI of the Treaty on European Union as stated in the fourth indent of the first paragraph of Article 2 thereof, that is, to take 'appropriate measures with respect to … prevention and combating of crime' while developing the Union as an area of freedom, security and justice in which the free movement of persons is assured.

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[29] *Gözütok and Brügge*, paragraph 30.
[30] *Van Straaten*, paragraph 61.
[31] See, to that effect, *Gözütok and Brügge*, paragraph 38.

While the goal of Article 54 of the CISA is to ensure that a person, once he has been found guilty and served his sentence, or, where applicable, been acquitted by a final judgment in a Member State, may travel within the Schengen territory without fear of being prosecuted for the same acts in another contracting State,[32] it is not intended to protect the suspect from having to submit to possible subsequent investigations, in respect of the same acts, in several Contracting States.

The Court concluded that the *ne bis in idem* principle enshrined in Article 54 of the CISA does not fall to be applied to a decision by which an authority of a Contracting State, after examining the merits of the case brought before it, makes an order, at a stage before the charging of a person suspected of a crime, suspending the criminal proceedings, where the suspension decision does not, under the national law of that State, definitively bar further prosecution and therefore does not preclude new criminal proceedings, in respect of the same acts, in that State.[33]

7. Conclusions

The *ne bis in idem* principle raises a lot of questions. What is a final judgement? Does it include acquittal or a dismissal of the charges? Does it also concern final settlements by prosecuting or other judicial authorities out of court?

I will try to answer 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 concept of 'finally disposed of' and 'enforced penalty'.

7.1. Arguments used

The Court emphasised the principle of 'mutual trust' underlying Article 54 of the CISA and treated the absence of harmonisation of national criminal codes and procedures as no obstacle to applying the *ne bis in idem* principle. In consequence, in *Gözütok and Brügge* it applied that principle to a specific procedure resulting in the barring of further prosecution in the 'first' Member State. In *Miraglia*, however, the Court held that a decision on the merits was a precondition for the principle in Article 54 of the CISA to apply. *Miraglia* therefore suggests that discontinuance of a case on mere procedural grounds in the first Member State is normally insufficient to trigger Article 54 of the CISA. This view is not confirmed in *Gasparini*, where the Court confirmed that a trial is finally disposed of if proceedings are discontinued in a Member State because of the limitation period, proceedings clearly discontinued without any assessment of the merits of the case.

What the Court tried in its rulings was to give precedence to the object and purpose of the ne bis in idem rule rather than to procedural or purely formal matters, which, after all, vary as between the Member States concerned, and to ensure that the principle has proper effect.[34]

From all cases analysed above results the inclination of the Court towards the free movement of persons, extending the scope of the *ne bis in idem* principle and denying its application only as an exception, when the conditions of the article have not been met.[35]

7.2. 'Finally Disposed of'

It is essential for the interpretation of the ne bis in idem principle to have an extended view over the Court's findings as regards the concept of 'finally disposed of'.

The Court held in *Gozutok and Brugge* that the condition of the case being 'finally disposed of' for the purpose of Article 54 CISA is met if proceedings are discontinued by the Public

[32] See, to that effect, *Van Esbroeck*, paragraph 34.
[33] *Turansky*, paragraphs 30-45.
[34] *Gözütok and Brügge,* paragraph 35.
[35] For example, if the judgement was not finally disposed of or not enforced – see Cases *Miraglia* and *Turansky*.

Prosecutor without involvement of the Court following a settlement with the accused. This constitutes an extension of the strict interpretation of the principle from decisions taken by a court to all forms of judicial decisions taken by an authority required to play a part in the administration of criminal justice in the national legal system concerned.

On the contrary, in *Miraglia* the Court stated that this condition is not fulfilled when proceedings are discontinued because of parallel proceedings instituted in another Member State.

The Court ruled in favour of the extension of the *ne bis in idem* principle in *Gasparini*, stating that the *ne bis in idem* principle applies in the case of a final acquittal because prosecution of the offence is time-barred. The Court avoided by this provision the danger of forum shopping for the conviction of the defendants and applied for the first time the principle even if there was no assessment of the merits of the case.

Also, in *Gasparini,* the Court ruled that the *ne bis in idem* principle 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. The Court argued that 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.[36]

The scope of this decision is somewhat limited in *Turansky*. The Court held that 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. A decision which does not, under the law of the first 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. As a conclusion, if the national legislation provides that a case can be reopened after the acquittal of the accused for lack of evidence if new evidence is found, this decision is not 'final'.

The Court took an interesting decision in *Bourquain*. Even if it had the choice of the smooth path already used in *Gasparini* regarding the limitation period, the Court chose to address another problem, that of a conviction *in absentia*. The Court stated that the conviction *in absentia* is 'final' even considering the impossibility of direct enforcement of the penalty as a result of the obligation to hold a new trial if the person convicted in absentia should reappear, this time in his presence.

There is a contradiction in Court's rulings in cases *Bourquain* and *Turansky*. In *Bourquain*, the Court ruled that a conviction is 'final' even if the prosecution is not definitively barred because of the obligation to hold a new trial if the person convicted in absentia should reappear. In *Turansky*, delivered 11 days after Bourquain, the Court stated that a decision is 'final' when it brings the criminal proceedings to an end and definitively bar further prosecution.

I am of the opinion that the decision taken in *Turansky* is the right one and the solution in *Bourquain*[37] should have been based on the amnesty or the expiry of the limitation period to fulfil the condition of 'finally disposed of' enshrined in Article 54 CISA.

Another problem addressed in *Gasparini* is whether the ne bis in idem principle also applies to persons other than those whose trial has been finally disposed of in a Contracting State (accessories to the crime).[38] The Court's answer was negative, stating that in this case the condition of the case being 'finally disposed of' for these persons is not met. Even if the accused invoked the principle of more favourable law (*mitior lex*), this principle would not apply in comparing legislation in force at the same time in different member states.

[36] See, to this effect, *Van Esbroeck*, paragraph 34.

[37] Even if the solution in *Bourquain* is correct in respect of the application of principle neb is in idem, I consider the motivation less satisfactorily.

[38] *Gasparini*, paragraphs 27-37.

7.3. 'Enforced penalty'

The Court analysed the meaning of 'enforcement' in several of its decisions.

The Court held that once the accused has complied with his obligations, the penalty entailed in the procedure whereby further prosecution is barred must be regarded as having been 'enforced' for the purposes of Article 54. This decision was taken by the Court in Case *Gözütok and Brügge*, following a discontinuance of criminal proceedings brought in a Member State by the Public Prosecutor, without the involvement of a court.[39]

Further clarification upon the concept of 'enforcement' was given by the Court in *Kretzinger.*[40]

The Court stated that the penalty has been 'enforced' or 'is actually in the process of being enforced' when the defendant was, in accordance with the law of that Contracting State, sentenced to a term of imprisonment the execution of which has been accompanied by a suspension.[41] ***However, this condition is not fulfilled if the accused was briefly taken into custody and / or remand and when, according to the law of the state of conviction, that deprivation of liberty shall be charged against subsequent enforcement of imprisonment.***[42]

Also in* Kretzinger*, the Court answered to the referring court essentially asking 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 Court concluded that the fact that a Member State in which a person has been convicted of a final judgement of conviction in domestic law can issue a European arrest warrant designed to arrest that person to carry out this trial under the Framework Decision should not affect the interpretation of the concept of "enforcement"[43]***. In the same spirit, the option open to a Member State to issue a European arrest warrant does not affect the interpretation of the concept of 'enforcement', even if the judgement relied upon in support of a possible European arrest warrant has been given* in absentia***.***[44]

The actual wording of the* ne bis in idem *principle, 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 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. 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. The Court's conclusion is, in other words, that an option of a Member State to enforce a penalty by issuing a European arrest warrant[45] ***cannot affect the meaning of 'enforcement'. That is, if a European arrest warrant has not been issued, the penalty is not 'enforced', 'in the process of being enforced' or 'can no longer be enforced' within the meaning of Article 54 of the CISA.***

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[39] *Gözütok and Brügge*, paragraph 48.

[40] Case C-288/05 *Kretzinger* [2007] ECR **I-06441**.

[41] *Kretzinger*, **paragraph 44.**

[42] *Kretzinger*, **paragraph 52.**

[43] *Kretzinger*, **paragraph 64.**

[44] *Kretzinger*, **paragraph 66.**

[45] The State may decide to issue an EAW for the enforcement of the penalty or may renounce to the enforcement of the penalty.

The Court stated in *Bourquain* that the condition regarding enforcement is satisfied when, at the time when the second criminal proceedings were instituted, the penalty imposed in that first State can no longer be enforced even if enforcement of the penalty given *in absentia* is conditional on a further conviction pronounced in the presence of the accused.[46]

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.

References

- **Nadine Thwaites**, *Mutual Trust in Criminal Matters: the ECJ gives a first interpretation of a provision of the Convention implementing the Schengen Agreement. Judgment of 11 February 2003 in Joined Cases C-187/01 a. C-385/01 Hüseyin Gözütok and Klaus Brügge*, 4 German Law Journal No. 3 (1 March 2003), 253-262
- **Maria Fletcher**, *Some Developments to the ne bis in idem Principle in the European Union: Criminal Proceedings Against Hüseyin Gözütok and Klaus Brügge,* The Modern Law Review 2003, v.66, n.5, 769-780.
- **Francois Julien-Laferriere**, *Les effets de la communautarisation de l''aquis de Schengen" sur la regle "non bis in idem"*, Le Dalloz 2003, annee 179, 1er cahier (rouge), n.22/7119, 1458-1460.
- **Lionel Rinuy**, *Cour de Justice, 10 mars 2005, Filomeno Maria Miraglia*, Revue des affaires europeenes v.14, n.2, 327-331.
- Joined Cases C-187/01 and C-385/01 *Hüseyn Gözütok and Klaus Brügge,* [2003] ECR I-1345
- Case C-469/03 *Filomeno Mario Miraglia,* [2005] ECR I-2009
- Case C-467/04 *Gasparini and Others* [2006] ECR I-9199
- Case C-436/04 *Leopold Henri Van Esbroeck* [2006] ECR I-2333
- Case C-297/07 *Bourquain* [2008] ECR I-2245
- Case C-491/07 *Turansky* [2008] ECR I-11039
- Case C-288/05 *Kretzinger* [2007] ECR I-06441

[46] *Bourquain*, paragraph 48.