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Schengen Convention

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Judgment of the Court of 11 February 2003

Criminal proceedings against Hüseyin Gözütok (C-187/01) and Klaus Brügge (C-385/01)

Joined cases C-187/01 and C-385/01

The ne bis in idem principle, laid down in Article 54 of the Convention implementing the Schengen Agreement, the objective of which is to ensure that no one is prosecuted on the same facts in several Member States on account of his having exercised his right to freedom of movement, 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.

On conclusion of such a procedure, the person concerned must be regarded as someone whose case has been "finally disposed of" for the purposes of Article 54 aforesaid and, once the accused has complied with the obligations imposed on him, the penalty entailed in the procedure must be regarded as having been "enforced" for the purposes of Article 54.

The effects of such a procedure must, in the absence of an express indication to the contrary in Article 54, be regarded as sufficient to allow the ne bis in idem principle laid down by that provision to apply, even though no court is involved in the procedure and the decision in which the procedure culminates does not take the form of a judicial decision.

Furthermore, nowhere in Title VI of the Treaty on European Union relating to police and judicial cooperation in criminal matters, or in the Schengen Agreement or the Convention implementing that agreement, is the application of Article 54 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.

In those circumstances, the ne bis in idem principle necessarily implies that, regardless of the way in which the penalty is imposed, 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.

The only effect of the ne bis in idem principle, as set out in Article 54 of the Convention implementing the Schengen Agreement, is to ensure that a person whose case has been finally disposed of in a Member State is not prosecuted again on the same facts in another Member State. The principle, when it applies to decisions definitively discontinuing prosecutions in a Member State, adopted without the involvement of a court and not taking the form of a judicial decision, does not preclude the victim or any other person harmed by the accused's conduct from bringing a civil action to seek compensation for the damage suffered.

Judgment of the Court (Fifth Chamber) of 10 March 2005

Criminal proceedings against Filomeno Mario Miraglia. Reference for a preliminary ruling: Tribunale di Bologna – Italy

Case C-469/03.

The principle ne bis in idem , enshrined in Article 54 of the Convention implementing the Schengen Agreement, the purpose of which is to ensure that no one is prosecuted on the same facts in several Member States on account of his having exercised his right to freedom of movement, 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. Such a decision cannot in fact constitute a decision finally disposing of the case against that person within the meaning of Article 54.

The consequence of applying that principle to such a decision to close criminal proceedings would be to make it more difficult, indeed impossible, actually to penalise in the Member States concerned the unlawful conduct with which the defendant is charged. 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.

Judgment of the Court (Grand Chamber) of 31 January 2006

Commission of the European Communities v Kingdom of Spain

Case C-503/03

The compliance of an administrative practice with the provisions of the Convention Implementing the Schengen Agreement may justify the conduct of the competent national authorities only in so far as the application of the relevant provisions is compatible with the Community rules governing freedom of movement for persons.

A Member State which refuses entry into the territory of the States party to the Schengen Agreement and which refuses to issue a visa for the purpose of entry into that territory to a national of a third country who is the spouse of a Member State national, on the sole ground that he is a person for whom an alert was entered in the Schengen Information System for the purposes of refusing him entry, without first verifying whether the presence of that person constitutes a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, fails to fulfil its obligations under Articles 1 to 3 of Directive 64/221 on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on ground of public policy, public security and health.

The inclusion of an entry in the Schengen Information System in respect of a national of a third country who is the spouse of a Member State national does indeed constitute evidence that there is a reason to justify refusing him entry into the Schengen Area. However, such evidence must be corroborated by information enabling a Member State which consults the Schengen Information System to establish, before refusing entry into the Schengen Area, that the presence of the person concerned in that area constitutes such a threat.

In the context of that verification, although the principle of genuine cooperation underpinning the Schengen acquis implies that the State consulting the Schengen Information System should give due consideration to the information provided by the State which issued the alert, it also implies that the latter should make supplementary information available to the consulting State to enable it to gauge, in the specific case, the gravity of the threat that the person for whom an alert has been issued is likely to represent.

In any event, the time within which a response to a request for information is given cannot exceed what is reasonable with regard to the circumstances of the case, which may be assessed differently according to whether a visa application or the crossing of a border is involved. In the latter case, it is essential that the national authorities who, having established that a national of a third country who is the spouse of a Member State national is the subject of an alert entered in the Schengen Information System for the purposes of refusing him entry, have requested additional information from the State which issued the alert receive it from the latter rapidly.

The second subparagraph of Article 5(1) of the Protocol integrating the Schengen acquis into the framework of the European Union must be understood as applicable only to proposals and initiatives to build upon an area of the Schengen acquis which the United Kingdom and/or Ireland have been authorised to take part in pursuant to Article 4 of that protocol.

Checks on persons at the external borders of the Member States and consequently the effective implementation of the common rules on standards and procedures for those checks must be regarded as constituting elements of the Schengen acquis within the meaning of the first subparagraph of Article 5(1) of the Protocol integrating the Schengen acquis into the framework of the European Union.

Therefore, Regulation No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, which is intended, as regards both its purpose and its content, to improve those checks, must be regarded as constituting a measure to build upon that acquis. Firstly, it is apparent from the first three recitals in the preamble to that regulation and from Article 1(1) and (2) thereof that it is intended to improve the integrated management of external borders and to facilitate and render more effective the application of the common rules on standards and procedures for the control of those borders. Secondly, the Agency set up by that regulation has the task, as may be seen from recital 3 and Article 2 thereof, in particular, of coordinating operational cooperation between Member States in the field of management of external borders, assisting Member States in the training of national border guards, and providing Member States, where circumstances require, with increased technical and operational assistance at external borders.

The common rules referred to by Regulation No 2007/2004 which are to be applied in connection with the integrated management of external borders were laid down in the Common Manual adopted by the Executive Committee established by the Convention

implementing the Schengen Agreement (CISA), which was established with a view to implementing the provisions of Chapter 2, 'Crossing external borders', of Title II of the CISA and forms part of the Schengen acquis as referred to in Article 1 of the Schengen Protocol.

The second subparagraph of Article 5(1) of the Protocol integrating the Schengen acquis into the framework of the European Union must be interpreted as being applicable only to proposals and initiatives to build upon an area of the Schengen acquis which the United Kingdom and/or Ireland have been authorised to take part in pursuant to Article 4 of that protocol.

Checks on persons at the external borders of the Member States and consequently the effective implementation of the common rules on standards and procedures for those checks must be regarded as constituting elements of the Schengen acquis for the purposes of the first subparagraph of Article 5(1) of the Protocol integrating the Schengen acquis into the framework of the European Union.

In so far as the verification of the authenticity of passports and other travel documents constitutes the main element of checks on persons at external borders, measures which make it possible to establish that authenticity and the identity of the holder of the document in question more easily and more reliably must be regarded as capable of guaranteeing and improving the effectiveness of those checks and thereby of the integrated management of external borders established by the Schengen acquis.

Having regard to its purpose and content, Regulation No 2252/2004 on standards for security features and biometrics in passports and travel documents issued by Member States must be regarded as constituting such a measure. It is apparent from recitals 2 and 3 in the preamble to that regulation and from Article 4(3) thereof that it is intended to combat falsification and fraudulent use of passports and other travel documents issued by the Member States. In order to achieve that objective, as is apparent from Articles 1 and 2 thereof, the said regulation harmonises and improves the minimum security standards with which passports and travel documents issued by the Member States must comply, and provides for a number of biometric features relating to the holders of such documents to be inserted in those documents.

Judgment of the Court (Second Chamber) of 9 March 2006

Criminal proceedings against Leopold Henri Van Esbroeck

Case C-436/04

The ne bis in idem principle, enshrined in Article 54 of the Convention implementing the Schengen Agreement, 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 Convention was not yet in force in the latter State at the time at which that person was convicted, in so far as the Convention 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.

Contrary to Article 14(7) of the International Covenant on Civil and Political Rights and Article 4 of Protocol No 7 to the European Convention of Human Rights, which enshrine the ne bis in idem principle by using the term ‘offence’, Article 54 of the Convention implementing the Schengen Agreement (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.

Nowhere in Title VI of the Treaty on European Union relating to police and judicial cooperation in criminal matters, 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. The ne bis in idem principle thus necessarily implies that the Contracting States have mutual trust in their criminal justice systems and that, since there is no harmonisation of national criminal laws, 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.

The definitive assessment of the identity of the material acts 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.

It follows that 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, the definitive assessment in that respect being the task of the competent national courts.

Judgment of the Court (First Chamber) of 28 September 2006

Criminal proceedings against Giuseppe Francesco Gasparini and Others Reference for a preliminary ruling: Audiencia Provincial de Málaga – Spain

Case C-467/04

The ne bis in idem principle, enshrined in Article 54 of the Convention implementing the Schengen Agreement, 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.

The main clause of the single sentence comprising Article 54 of the Convention makes no reference to the content of the judgment that has become final. It is not applicable solely to judgments convicting the accused.

Furthermore, not to apply Article 54 where the accused is finally acquitted because prosecution for the offence is time-barred would undermine the implementation of the objective of that provision which is to ensure 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. Such a person must therefore be regarded as having had his trial finally disposed of for the purposes of that provision.

It is true that 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, or in the Schengen Agreement or the Convention implementing the latter is the application of Article 54 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 or, more generally, upon harmonisation or approximation of their criminal laws. 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.

Finally, Framework Decision 2002/584 on the European arrest warrant and the surrender procedures between Member States 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. Exercise of the power, provided for in Article 4(4) of the framework decision, 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 is not conditional on the existence of a judgment whose basis is that a prosecution is time-barred. 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 ne bis in idem principle, enshrined in Article 54 of the Convention implementing the Schengen Agreement, does not apply to persons other than those whose trial has been finally disposed of in a Contracting State. This interpretation, based on the wording of Article 54 of the Convention, is borne out by the purpose of the provisions of Title VI of the Treaty on European Union, as set out in the fourth indent of the first paragraph of Article 2 EU.

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.

In order for products coming from a third country to be considered to be in free circulation in a Member State the three conditions laid down in Article 24 EC must be met. 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, since the ne bis in idem principle, enshrined in Article 54 of the Convention implementing the Schengen Agreement, 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 only relevant criterion for applying the concept of ‘the same acts’ within the meaning of Article 54 of the Convention implementing the Schengen Agreement is identity of the material acts, understood as the existence of a set of concrete circumstances which are inextricably linked together. Accordingly, the marketing of goods in another Member State, after their importation into the Member State where the accused was acquitted because prosecution for the offence of smuggling was time-barred, constitutes conduct which may form part of the ‘same acts’ within the meaning of Article 54 of the Convention. However, the definitive assessment in this regard is a matter for 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.

Judgment of the Court (First Chamber) of 28 September 2006

Jean Leon Van Straaten v Staat der Nederlanden and Republiek Italië

Case C-150/05

In the context of the cooperation between the Court of Justice and national courts that is provided for by Article 234 EC, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of Community law, the Court is, in principle, bound to give a ruling.

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.

Although the Court has no jurisdiction under Article 234 EC to apply a rule of Community law to a particular case and thus to judge a provision of national law by reference to such a rule, it may, in the framework of the judicial cooperation provided for by that article and on the basis of the material presented to it, provide the national court with an interpretation of Community law which may be useful to it in assessing the effects of the provision in question.

Article 54 of the Convention implementing the Schengen Agreement 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.

In the case of offences relating to narcotic drugs, first, 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. It is therefore possible that a situation in which such identity is lacking involves a set of facts which, by their very nature, are inextricably linked. Second, punishable acts consisting of exporting and of importing the same narcotic drugs and which are prosecuted in different Contracting States party to the 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.

The ne bis in idem principle, enshrined in Article 54 of the Convention implementing the Schengen Agreement, a provision which 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, 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 main clause of the single sentence comprising Article 54 of the Convention makes no reference to the content of the judgment that has become final. It is only in the subordinate clause that Article 54 refers to the case of a conviction by stating that, in that situation, the prohibition of a prosecution is subject to a specific condition. If the general rule laid down in the main clause were applicable only to judgments convicting the accused, it would be superfluous to provide that the special rule is applicable in the event of conviction.

Furthermore, not to apply Article 54 of the Convention 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.

Finally, in the case of a final acquittal for lack of evidence, the bringing of criminal proceedings in another Contracting State for the same acts would undermine the principles of legal certainty and of the protection of legitimate expectations. The accused would have to fear a fresh prosecution in another Contracting State although a case in respect of the same acts has been finally disposed of.

Judgment of the Court (Second Chamber) of 18 July 2007

Criminal proceedings against Jürgen Kretzinger

Case C-288/05

Article 54 of the Convention implementing the Schengen Agreement 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 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.

For the purposes of Article 54 of the Convention implementing the Schengen Agreement (CISA), 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.

A suspended custodial sentence, which penalises the unlawful conduct of a convicted person, 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.

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.

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. 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.

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 Framework Decision 2002/584 on the European arrest warrant and the surrender procedures between Member States cannot affect the interpretation of the notion of 'enforcement' within the meaning of Article 54 of the CISA.

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.

That outcome is supported by the fact that 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.

Accordingly, the fact that a final and binding custodial sentence could possibly be enforced in the sentencing State following the surrender by another State of the convicted person cannot affect the interpretation of the notion of ‘enforcement’ within the meaning of Article 54 of the CISA.

Judgment of the Court (Second Chamber) of 18 July 2007

Criminal proceedings against Norma Kraaijenbrink

Case C-367/05

Article 54 of the Convention implementing the Schengen Agreement 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;
- 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 that article 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 abovementioned criterion, to find that they are 'the same acts' within the meaning of the said Article 54.

It is apparent from Article 58 of the Convention implementing the Schengen Agreement (CISA) that the Contracting States are entitled to apply broader national provisions on the ne bis in idem principle with regard to judicial decisions taken abroad. However, that article does not in any way authorise a Contracting State to refrain from trying a drugs offence, in breach of its obligations under Article 71 of the CISA, read in conjunction with Article 36 of the Single Convention on Narcotic Drugs, concluded in New York on 30 March 1961 under the aegis of the United Nations, on the sole ground that the person charged has already been convicted in another Contracting State in respect of other offences motivated by the same criminal intention. On the other hand, those provisions do not mean that in national law the competent courts before which a second set of proceedings is brought are precluded

from taking account, when fixing the sentence, of penalties which may have already been imposed in the first set of proceedings.

Judgment of the Court (Second Chamber) of 11 December 2008

Klaus Bourquain

Case C-297/07

Since Article 54 of the Convention implementing the Schengen Agreement (CISA) does not provide that the person concerned must necessarily have been tried in the territory of the Contracting Parties, that provision, the purpose of which is to protect a person whose trial has been finally disposed of against further prosecution in respect of the same acts, cannot be interpreted as meaning that Articles 54 to 58 of the CISA are never applicable to persons who have been tried by a Contracting Party exercising its jurisdiction beyond the territory to which that Convention applies.

Article 54 of the Convention implementing the Schengen Agreement (CISA), applied to a judgment in absentia delivered in accordance with the national legislation of a Contracting State or to an ordinary judgment, necessarily implies 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.

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.

However, the sole fact that the proceedings in absentia would, under the national law governing the proceedings in question, have necessitated the reopening of the proceedings if the person concerned had been apprehended while time was running in the limitation period applicable to the penalty, 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.

The ne bis in idem principle, enshrined in Article 54 of the Convention implementing the Schengen Agreement (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 of the law of that State, have been directly enforced.

In that regard, 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.

Judgment of the Court (Sixth Chamber) of 22 December 2008

Criminal proceedings against Vladimir Turanský

Case C-491/07

The ne bis in idem principle enshrined in Article 54 of the Convention implementing the Schengen Agreement, which aims to ensure that a person 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, 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.

Therefore, a decision of a police authority which, while suspending 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 abovementioned Convention.

Judgment of the Court (Grand Chamber) of 16 November 2010

Gaetano Mantello

Case C-261/09

For the purposes of the issue and execution of a European arrest warrant, the concept of ‘same acts’ in Article 3(2) of Council Framework Decision 2002/584 on the European arrest warrant and the surrender procedures between Member States constitutes an autonomous concept of European Union law. In addition, that concept of the ‘same acts’ also appears in Article 54 of the Convention implementing the Schengen Agreement and has, in that context, been interpreted as referring only to the nature of the acts, encompassing a set of concrete circumstances inextricably linked together, irrespective of the legal classification given to them or the legal interest protected. In view of the shared objective of Article 54 of the Schengen Convention and Article 3(2) of the Framework Decision, which is to ensure that a person is not prosecuted or tried more than once in respect of the same acts, an interpretation of that concept given in the context of the Schengen Implementing Convention is equally valid for the purposes of Framework Decision 2002/584.

In circumstances in which, in response to a request for information within the meaning of Article 15(2) of Framework Decision 2002/584 on the European arrest warrant and the surrender procedures between Member States made by the executing judicial authority, the issuing judicial authority, applying its national law and in compliance with the requirements deriving from the concept of ‘same acts’ as set forth in Article 3(2) of the Framework Decision, expressly stated that the earlier judgment delivered under its legal system did not constitute a final judgment covering the acts referred to in the arrest warrant issued by it and therefore did not preclude the criminal proceedings referred to in that arrest warrant, the executing judicial authority has no reason to apply, in connection with such a judgment, the ground for mandatory non-execution provided for in Article 3(2) of the Framework Decision.

A requested person is considered to have been finally judged in respect of the same acts within the meaning of Article 3(2) of Framework Decision 2002/584 when, following criminal proceedings, further prosecution is definitively barred or when the

judicial authorities of a Member State have adopted a decision by which the accused is finally acquitted in respect of the alleged acts. Whether a person has been 'finally' judged for the purposes of Article 3(2) of the Framework Decision is determined by the law of the Member State in which judgment was delivered. Thus, a decision which, under the law of the Member State which instituted criminal proceedings against a person, does not definitively bar further prosecution at national level in respect of certain acts cannot, in principle, constitute a procedural obstacle to the possible opening or continuation of criminal proceedings in respect of the same acts against that person in one of the Member States of the European Union. That is the case, in particular, where the issuing judicial authority states expressly that, under its national law, the accused had been finally judged in respect of the individual acts consisting in illegal possession of drugs but that the criminal proceedings covered by the arrest warrant were based on different acts related to organised crime offences and other offences of illegal possession of drugs intended for resale, which were not covered by its earlier judgment, and that is so even if the investigating authorities already held certain factual information concerning those offences. When it is clear from the reply given by the issuing judicial authority that the first judgment delivered by a national court cannot be regarded as having definitively barred further prosecution at national level in respect of the acts referred to in the arrest warrant issued by it, the executing judicial authority was obliged to draw all the appropriate conclusions from the assessments made by the issuing judicial authority in its response.

When classifying a measure as falling within an area of the Schengen acquis or as a development of that acquis , account must be taken of the necessary coherence of that acquis and of the need to preserve that coherence in any changes. Thus, the coherence of the Schengen acquis and of its future development means that the States taking part in that acquis are not obliged, when they develop it and deepen the closer cooperation which they have been authorised to establish by Article 1 of the Schengen Protocol, to provide for special adaptation measures for the other Member States which have not taken part in the adoption of the measures relating to earlier stages of the acquis ' evolution.

Decision 2008/633 concerning access for consultation of the Visa Information System (VIS) by designated authorities of Member States and by Europol for the purposes of the prevention, detection and investigation of terrorist offences and of other serious criminal offences, must be classified as a measure falling within the area of the Schengen acquis concerning the common visa policy. The provisions of that decision contain conditions restricting access to the VIS, which make clear that they organise in essence the ancillary use of a database concerning visas, the principal purpose of which is linked to the control of borders and of entry to the territory and which is therefore available, merely by way of consultation, for police cooperation purposes on a secondary basis only, solely to the extent that use for those purposes does not call into question its principal use.

In addition, the direct access to the VIS authorised by Decision 2008/633 for the authorities responsible for internal security is physically possible only for such authorities of the Member States as have central access points to the VIS as referred to in Article 3(2) of Regulation No 767/2008 concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas (VIS Regulation), that is to say, the authorities only of those Member States which take part

in the provisions of the Schengen acquis concerning the common visa policy. In the case of a Member State which does not participate in the provisions of the Schengen acquis concerning the abolition of checks at internal borders and movement of persons, including the common visa policy, its participation by means of direct access to the consultation mechanism permitted by the VIS Regulation and set up by Decision 2004/512 establishing the Visa Information System would have required, as is also evident from recital 15 in the preamble to Decision 2008/633, specific measures in respect of that Member State, because it has not participated in the VIS and does not have the national interface which allows every Member State participating in the VIS to communicate with that system. Even though it cannot be disputed that Decision 2008/633 pursues police cooperation objectives, that fact does not, in the light of all the other objective factors which characterise it, preclude it from being held to be a measure developing the provisions of the Schengen acquis concerning the common visa policy. The participation of a Member State in the adoption of a measure adopted pursuant to Article 5(1) of the Schengen Protocol is conceivable, in light of the system of closer cooperation applicable to the Schengen acquis , only to the extent that that State has accepted the area of the Schengen acquis which is the context of the measure or of which it is a development.

The question whether a measure constitutes a development of the Schengen acquis is separate from that of the legal basis on which that development must be founded. The choice of legal basis for a European Union measure must rest on objective factors amenable to judicial review, including, in particular, the aim and the content of the measure.

With regard to Decision 2008/633 concerning access for consultation of the Visa Information System (VIS) by designated authorities of Member States and by Europol for the purposes of the prevention, detection and investigation of terrorist offences and of other serious criminal offences, the aim of which is to permit access to the VIS by the Member State authorities responsible for internal security and by Europol, and the content of which relates both to the rules on designation, by the Member States, of the authorities responsible for internal security which are authorised to consult the VIS and to the conditions governing access, communication and keeping of data used for the abovementioned purposes, it falls within the scope of police cooperation and

may be regarded as setting up a form of police cooperation. It follows that, since the Community legislature seeks to develop the Schengen acquis by permitting, in well-defined circumstances, the use of the VIS for police cooperation purposes, it is obliged, in order to do so, to act on the basis of the provisions of the Treaty which entitle it to legislate in that field of police cooperation.

Judgment of the Court (Grand Chamber), 27 May 2014

Zoran Spasic

Case C-129/14 PPU

The fact that the order for reference concerning the interpretation of a convention adopted on the basis of Title VI of the EU Treaty, in the version applicable prior to the entry into force of the Treaty of Lisbon, does not mention Article 35 EU but rather refers to Article 267 TFEU cannot of itself render the reference for a preliminary ruling inadmissible.

Article 54 of the Convention Implementing the Schengen Agreement (CISA), which makes the application of the *ne bis in idem* principle subject to the condition that, upon conviction and sentencing, the penalty imposed 'has been enforced' or is 'actually in the process of being enforced', is compatible with Article 50 of the Charter of Fundamental Rights of the European Union, in which that principle is enshrined.

The additional condition laid down in Article 54 CISA constitutes a limitation of the *ne bis in idem* principle that is compatible with Article 50 of the Charter, since that limitation is covered by the explanations relating to the Charter as regards Article 50 of the Charter which are directly referred to in the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter.

In any event, the execution condition which subjects the more extensive protection offered by Article 50 to an additional condition constitutes a limitation of the right enshrined in that article within the meaning of Article 52 of the Charter.

In the first place, the limitation of the *ne bis in idem* principle must be considered as being provided for by law, since it arises from Article 54 CISA.

In the second place, a provision such as Article 54 CISA must be regarded as respecting the essence of the *ne bis in idem* principle. The execution condition laid down in that provision does not call into question the *ne bis in idem* principle as such, since it is intended to avoid a situation in which a person definitively convicted and

sentenced in one Contracting State can no longer be prosecuted for the same acts in another Contracting State and therefore ultimately remains unpunished if the first State did not execute the sentence imposed.

In the third place, as can be seen from Article 67(3) TFEU, in order to achieve its objective of constituting an area of freedom, security and justice, the European Union endeavours to ensure a high level of security through measures to prevent and combat crime, and through measures for coordination and cooperation between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws. The execution condition laid down in Article 54 CISA is to be seen in that context since it is intended to prevent, in the area of freedom, security and justice, the impunity of persons definitively convicted and sentenced in an EU Member State. Moreover, the execution condition is appropriate for attaining the objective pursued, since by allowing, in cases of non-execution of the sentence imposed, the authorities of one Contracting State to prosecute a person definitively convicted and sentenced by another Contracting State on the basis of the same acts, the risk that the person concerned would enjoy impunity by virtue of his leaving the territory of the State in which he was sentenced is avoided. As to whether the execution condition is necessary, while there are numerous instruments of secondary legislation at the EU level intended to facilitate cooperation between the Member States in criminal law matters, such instruments of mutual assistance do not lay down an execution condition similar to that of Article 54 CISA and, accordingly, are not capable of fully achieving the objective pursued. However, in the application *in concreto* of the execution condition laid down in Article 54 CISA in a given case, it cannot be excluded that the competent national courts may — on the basis of Article 4(3) TEU and the abovementioned instruments of secondary legislation — contact each other and initiate consultations in order to verify whether the Member State which imposed the first sentence really intends to execute the penalties imposed.

Article 54 of the Convention Implementing the Schengen Agreement (CISA) must be interpreted as meaning that the mere payment of a fine by a person sentenced by the self-same decision of a court of another Member State to a custodial sentence that has

not been served is not sufficient to consider that the penalty ‘has been enforced’ or is ‘actually in the process of being enforced’ within the meaning of that provision.

First, although Article 54 CISA lays down the condition, using the singular, that the ‘penalty … has been enforced’, that condition covers the situation where two principal punishments have been imposed. A different interpretation would render the *ne bis in idem* principle set out in Article 54 CISA meaningless and would undermine the effective application of that article. Accordingly, in such a situation, since one of the two penalties imposed has not been ‘enforced’, within the meaning of Article 54 CISA, that condition cannot be regarded as having been fulfilled.

Secondly, where two principle punishments have been imposed and the convicted person has not begun to serve his custodial sentence, it cannot be considered that, as a result of the payment of the fine, the penalty is ‘actually in the process of being enforced’, within the meaning of Article 54 CISA.

Judgment of the Court (Fourth Chamber), 5 June 2014

M.Request for a preliminary ruling from the Tribunale di Fermo

Case C-398/12

Article 54 of the Convention implementing the Schengen Agreement must be interpreted as meaning that an order making a finding that there is no ground to refer a case to a trial court which precludes, in the Contracting State in which that order was made, the bringing of new criminal proceedings in respect of the same acts against the person to whom that finding applies, unless new facts and/or evidence against that person come to light, must be considered to be a final judgment, for the purposes of that article, precluding new proceedings against the same person in respect of the same acts in another Contracting State.

In that regard, in order to determine whether a judicial decision constitutes a decision finally disposing of the case against a person, within the meaning of that article, it is necessary to be satisfied that that decision was given after a determination had been made as to the merits of the case. Such is the case of a decision of the judicial authorities of a Contracting State by which an accused person is definitively acquitted because of the inadequacy of the evidence which excludes any possibility that the case might be reopened on the basis of the same body of evidence and which means that further prosecution is definitively time-barred.

The possibility of reopening the criminal investigation if new facts and/or evidence become available cannot affect the final nature of the order making a finding of 'non-lieu'. That possibility involves the exceptional bringing of separate proceedings based on different evidence, rather than the mere continuation of proceedings which have already been closed. Furthermore, any new proceedings against the same person for the same acts can be brought only in the Contracting State in which that order was made.

Since Ireland and the United Kingdom do not take part in all the provisions of the Schengen *acquis*, they are in a special situation, which the Protocol (No 19) on the Schengen *acquis* integrated into the framework of the European Union (the Schengen Protocol) took into account in two respects. First, Article 4 of the protocol reserves to those two Member States the right to apply at any time to take part in all or some of the provisions of the Schengen *acquis* in force on the date of the application to take part. Secondly, Article 5 of the protocol, which governs the adoption of proposals and initiatives to build upon the Schengen *acquis*, allows those Member States to choose whether or not to take part in the adoption of such a measure, with that option being available to one of those Member States only if the context of the measure is an area of the Schengen *acquis* which that Member State has accepted pursuant to Article 4 of the protocol, or if the measure is a development of such an area.

In that context, while, pursuant to Article 4 of the Schengen Protocol and to Decisions 2000/365 concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen *acquis* and 2002/192 concerning Ireland's request to take part in some of the provisions of the Schengen *acquis*, Ireland and the United Kingdom take part in certain provisions of the Schengen *acquis*, that participation does not extend to the provisions of the *acquis* relating to the crossing of the external borders. Ireland and the United Kingdom can therefore take part in the provisions in force of the Schengen *acquis* relating to that area, or in the adoption of proposals and initiatives to build upon that *acquis* which relate to that area, only after a request to that effect has been made by the Member State concerned and accepted by the Council deciding in accordance with the procedure laid down in Article 4 of the Schengen Protocol. It follows that the EU legislature cannot validly establish a procedure that differs from that provided for in Article 4 of the Schengen Protocol, whether in the direction of strengthening or easing that procedure, for the purpose of authorising Ireland or the United Kingdom to take

part in such provisions or in the adoption of such proposals and initiatives. Similarly, the EU legislature cannot give Member States the possibility of concluding agreements between themselves having such an effect.

As regards Article 19 of Regulation No 1052/2013 establishing the European Border Surveillance System (Eurosur), which makes provision for establishing cooperation for the exchange of information relating to the crossing of the external borders on the basis of bilateral or multilateral agreements between Ireland or the United Kingdom and one or several neighbouring Member States, that provision cannot be regarded as giving the Member States the option of concluding agreements which allow Ireland or the United Kingdom to take part in the provisions in force of the Schengen *acquis* in the area of the crossing of the external borders. The agreements mentioned in that provision allow the implementation of a limited form of cooperation between Ireland and the United Kingdom and one or several neighbouring Member States, but cannot place Ireland or the United Kingdom in a situation equivalent to that of the other Member States, in that those agreements cannot validly lay down rights or obligations for those two Member States comparable to those of the other Member States in connection with the Eurosur system or a large part of it.

It follows from the general scheme of the Schengen Protocol, from Declaration No 45 on Article 4 of the Protocol integrating the Schengen *acquis* into the framework of the European Union, and from the principle of sincere cooperation that the system established in Articles 4 and 5 of the Schengen Protocol cannot be regarded as intended to require Ireland and the United Kingdom to participate in the entire Schengen *acquis*, excluding any form of limited cooperation with those Member States. Moreover, to interpret Article 4 of the Schengen Protocol as not applying to limited forms of cooperation does not call into question the effectiveness of that article, in so far as that interpretation does not allow Ireland and the United Kingdom to obtain rights comparable to those of the other Member States as regards the provisions in force of the Schengen *acquis*, or to take part in the adoption of proposals and initiatives to build upon the Schengen *acquis*, without first having been authorised to take part in those provisions by a unanimous decision of the Council on the basis of that article.

Similarly, the fact that the Member States participating in the Schengen *acquis* are not obliged, when they develop and deepen the enhanced cooperation which they have been authorised to establish by Article 1 of the Schengen Protocol, to provide for special adaptation measures for the other Member States does not mean that the EU legislature is prohibited from enacting such measures, in particular allowing certain limited forms of cooperation with those other Member States, where it finds it appropriate. Furthermore, the fact that the establishment of limited forms of cooperation may lead to fragmentation of the rules applicable in that area, assuming that to be the case, cannot call that conclusion into question, as the implementation of enhanced cooperation inevitably leads to a certain fragmentation of the rules applicable to the Member States in the area concerned. It follows from all the above considerations that limited forms of cooperation do not constitute a form of taking part within the meaning of Article 4 of the Schengen Protocol.

It follows both from the preamble to the Protocol on the Schengen *acquis* integrated into the framework of the European Union and from Article 1 of the protocol that the integration of the Schengen *acquis* into the framework of the European Union is based on the provisions of the Treaties on enhanced cooperation. It follows from Title III of Part Six of the FEU Treaty, in particular Article 327 TFEU, that the implementation of enhanced cooperation is structured by the distinction between participating States, which are bound by the acts adopted in that context, and non-participating States, which are not. Moving from the status of a non-participating Member State to that of a participating Member State is governed generally by Article 331 TFEU, and, as that article indicates, means that the Member State in question is required to apply the acts already adopted within the framework of the enhanced cooperation concerned.

In the context of enhanced cooperation in the areas covered by the Schengen *acquis*, Article 4 of the Schengen Protocol applies in lieu of Article 331 TFEU and must therefore be read as having the objective of allowing Ireland and the United Kingdom to be placed, as regards certain provisions in force of the Schengen *acquis*, in a situation equivalent to that of the Member States participating in that *acquis*, not of regulating the rights and obligations of Ireland and the United Kingdom where they choose, in certain areas, to stay outside that enhanced cooperation.

Judgment of the Court (Grand Chamber) of 29 June 2016

Criminal proceedings against Piotr Kossowski

Case C-486/14

The principle of *ne bis in idem* laid down in Article 54 of the Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, which was signed in Schengen (Luxembourg) on 19 June 1990, read in the light of Article 50 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that a decision of the public prosecutor terminating criminal proceedings and finally closing the investigation procedure against a person, albeit with the possibility of its being reopened or annulled, without any penalties having been imposed, cannot be characterised as a final decision for the purposes of those articles when it is clear from the statement of reasons for that decision that the procedure was closed without a detailed investigation having been carried out; in that regard, the fact that neither the victim nor a potential witness was interviewed is an indication that no such investigation took place.


JM