OPINION OF ADVOCATE GENERAL SHARPSTON
delivered on 15 June 2006 [1]

1. In this request for a preliminary ruling, the Sección Primera de la Audiencia Provincial de Málaga (First Section, Provincial Court, Málaga) (the 'referring court') seeks clarification of the scope of the principle of *ne bis in idem* embodied in Article 54 of the Convention implementing the Schengen Agreement ('CISA'). [2]

2. The referring court wishes in particular to know whether, by virtue of that principle, a decision of a court of one Member State barring any further criminal proceedings arising out of particular facts on grounds that the prosecution for the offence is time-barred under national law constitutes a decision which precludes the criminal courts of another Member State from prosecuting the same or other defendants for a crime arising out of the same facts.

3. Answering that question requires the Court to define one of the fundamental aspects of the principle of *ne bis in idem* in Article 54 of the CISA (and hence, necessarily, more generally in Community law), namely whether the principle can apply only where the first court reached its decision after an assessment of the merits.

Relevant provisions

Provisions relating to the Schengen acquis and the CISA

4. Pursuant to Article 1 of the Protocol integrating the Schengen acquis into the framework of the European Union [3] ('the Protocol'), 13 Member States, including Spain and Portugal, are authorised to establish closer cooperation among themselves within the scope of the so-called 'Schengen acquis'.

1 — Original language: English.

2 — OJ 2000 L 239, p. 19.

3 — Annexed by the Treaty of Amsterdam to the Treaty on the European Union ('TEU') and to the Treaty establishing the European Community.

5. The annex to the Protocol defines the 'Schengen acquis' as including the Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, signed at Schengen on 14 June 1985 [4] (the 'Schengen Agreement') and, in particular, the CISA.

6. The aim of the signatories of the Schengen Agreement and the CISA is 'to abolish checks at their common borders on the movement of persons ...', [5] given that 'the ever closer union of the peoples of the Member States of the European Communities should find expression in the freedom to cross internal borders for all nationals of the Member States ...'. [6] Pursuant to the first paragraph of the preamble to the Protocol, the Schengen acquis is aimed 'at enhancing European integration and, in particular, at enabling the European Union to develop more rapidly into an area of freedom, security and justice'.

7. Under the fourth indent of the first paragraph of Article 2 EU the maintenance and development of such an area, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime, is one of the objectives of the European Union.

8. The first subparagraph of Article 2(1) of the Protocol provides that, from the date of entry into force of the Treaty of Amsterdam, the Schengen acquis is to apply immediately to the 13 Member States referred to in Article 1 of the Protocol.

9. Acting under the second sentence of the second subparagraph of Article 2(1) of the Protocol, the Council adopted Decision 1999/436/EC determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the Schengen acquis. [7] It is apparent from Article 2 of that decision, in conjunction with Annex A thereto, that the Council selected Articles 31 EU and 34 EU, which form part of Title VI of the Treaty on European Union, 'Provisions on Police and Judicial Cooperation in Criminal Matters', as the legal basis for Articles 54 to 58 of the CISA.

4 — OJ 2000 L 239, p. 13.

5 — Second paragraph of the preamble to the CISA.

6 — First paragraph of the preamble to the Schengen Agreement.

7 — Of 20 May 1999, OJ 1999 L 176, p. 17.

10. Articles 54 to 58 of the CISA together constitute Chapter 3, entitled 'Application of the *ne bis in idem* principle', of Title III, which deals with 'Police and Security'. [8]

11. Article 54 provides that '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.'

12. Article 57 lays down rules to ensure that the competent authorities of the Contracting Parties cooperate in order to exchange information to give effect to the principle of *ne bis in idem.*

International conventions concerning the principle of ne bis in idem

13. Several conventions directly or indirectly regulate the application of the principle of *ne bis in idem* internationally and at the European level. [9] Amongst these, Article 4 of Protocol No 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR') deals specifically with the principle of *ne bis in idem.*

14. Article 4(1) of Protocol No 7 states 'No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with

8 — The text of these provisions was inspired by the text in the Convention between the Member States of the European Communities on Double Jeopardy which was signed on 25 May 1987, but which has not entered into force owing to the absence of sufficient ratifications. Other Community measures in force which refer to the principle of *ne bis in idem* include Article 6 read with recital 10 of Council Regulation No 2988/95 of 18 December 1995 on the protection of the European Communities' financial interests (OJ 1995 L 312, p. 1); Article 7 of the Convention on the protection of the European Communities' financial interests (OJ 1995 C 316, p. 49); Article 10 of the Convention on the Fight against Corruption involving Officials of the European Communities or Officials of the Member States of the EU (OJ 1997 C 195, p. 1) and Articles 3(2), 4(3) and 4(5) of the Framework Decision on the European Arrest Warrant (OJ 2002 L 190, p. 1). Article II-110 of the draft European Constitution 'constitutionalised' the principle of *ne bis in idem* as one of the fundamental rights of the Union. That provision, entitled 'Right not to be tried or punished twice in criminal proceedings for the same criminal offence', read as follows: 'No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.'

9 — At UN level, Article 14(7) of the 1966 International Covenant on Civil and Political Rights states that 'no one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country'. In the European context, Article 53 to 55 of the 1970 European Convention on the International Validity of Criminal Judgments and Articles 35 to 37 of the 1972 European Convention of the Transfer of Proceedings in Criminal Matters adopted in the framework of the Council of Europe dealt, in identical terms, with the issue of international *ne bis in idem.* Both those conventions have, however, received very few ratifications. For a comprehensive review of the international instruments relating to *ne bis in idem* adopted in the context of the Council of Europe, see J. Vervaele, 'The transnational *ne bis in idem* principle in the EU: Mutual Recognition and equivalent protection of human rights', (2005) *Utrecht Law Review* Vol. I, Issue 2, (December) 100, at 103 et seq.

the law and penal procedure of that State'. Article 4(2) provides, however, that 'the provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case'.

15. Article 4(2) of Protocol No 7 was cited by the Court when it held that the principle of *ne bis in idem* was a fundamental principle of Community law. [10]

The national proceedings and the questions referred

16. The reference arises out of criminal proceedings brought in Spain against a number of individuals connected with the Spanish company Minerva SA, in respect of the sale of olive oil.

17. It appears from the order for reference that Minerva, located in Málaga, was established in 1989 for the purpose of refining olive oil and selling it in bulk. It marketed its products both in Spain and abroad. In 1997, criminal proceedings were brought in Portugal against its shareholders and directors, whom I shall refer to as 'the defendants in Portugal'. In those proceedings, it was apparently alleged that the shareholders and directors agreed in 1993 to import low-grade olive oil from Tunisia and Turkey through the port of Setúbal, in Portugal; that a series of consignments were brought into Setúbal; that the oil was not declared to the customs authorities, but was transported by road to Málaga, in Spain; and that a system of false invoicing was devised to create the impression that the oil came from Switzerland.

18. It appears that the defendants in the Spanish proceedings ('the defendants in Spain') include two of the defendants in Portugal.

19. The order for reference states that, on appeal by the prosecution against the judgment of the Tribunal Judicial de Setúbal — Vara Competência Mista ('Setúbal Criminal Court') in the Portuguese proceedings, the Supremo Tribunal (Supreme Court) found 'that the low-grade oil imported into Portugal originated on ten occasions in Tunisia

10 — Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others* v *Commission* [2002] ECR I-8375. See point 57 below.

and on one occasion in Turkey and that a lesser quantity than was actually imported was declared in Portugal. The defendants [in Portugal] were acquitted when it was found that prosecution of the offence was time-barred [pursuant to the Portuguese criminal code]'.

20. I should immediately make it clear that the accuracy of the referring court's description of the facts is hotly contested by the defendants in Spain. I discuss this issue in greater detail during my examination of admissibility. [11]

21. In Spain, criminal proceedings were also initiated in Málaga in 1997. The Juzgado de Instrucción (examining magistrate) made an order permitting summary criminal proceedings to go ahead. The defendants in Spain appealed against that order to the referring court.

22. Their case was essentially that the facts had already been adjudicated upon in Portugal. Therefore, by reason of the *res judicata* principle, those facts could not be adjudicated upon a second time in Spain. They also contended that all the defendants in Spain should benefit by extension from the principle of *res judicata* in criminal proceedings, irrespective of the fact that the actual decisions of the Portuguese courts concerned only two of the defendants in Spain. They also submitted that it had not been established in the Portuguese criminal proceedings that the goods originated outside the Community.

23. The prosecution contended that the Spanish criminal proceedings did not relate to the illegal importation of the oil (already adjudicated upon in Portugal) but to subsequent sales in Spain, which was conduct independent from the importation. The prosecution also submitted that the fact that the extra-Community nature of the goods had not been proved in Portugal did not prevent other Member States, in which the goods were subsequently sold, from broadening the criminal investigation in order to establish that the goods originated outside the Community and had been clandestinely imported, evading the common customs tariff.

24. The defendants replied that smuggling comprises a course of action and that, since the goods were imported specifically for the purpose of sale, importation and sale were

11 — See points 29 to 33 below.

inextricably linked and could not be appraised independently.

25. The referring court has therefore stayed proceedings and asked the following questions:

'*As regards res judicata in criminal proceedings*, this court requests an interpretation of Article 54 of the [CISA]:

(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?

(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?

As regards the notion of goods in free circulation, this court requests an interpretation of Article 24 EC as to whether:

(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?'

26. Written observations were submitted on behalf of the defendants in Spain, with the exception of José Hormiga Marrero and the Sindicatura Quiebra, and by the Commission, Spain, Italy, the Netherlands and Poland. At the hearing, those same parties, with the exception of Poland, and France presented oral observations.

Assessment

Admissibility

27. Pursuant to Article 35 EU, Spain has accepted the jurisdiction of the Court to give preliminary rulings on the validity and interpretation of acts adopted under Title VI of the EU Treaty. Spain selected the option, provided for in Article 35(3)(a) EU, whereby only a domestic court or tribunal against whose decisions there is no judicial remedy under national law may submit a request to the Court for a preliminary ruling.

28. At the hearing, Spain explained that the referring court falls within the scope of Article 35(3)(a) EU in the context of the present case, since its decision on the appeal lodged by the defendants [12] which gives rise to this request for a preliminary ruling is not open to further ordinary appeal under domestic law. Thus, in application of the case-law of the Court under Article 234 EC on the notion of what constitutes a 'court against whose decisions there is no judicial remedy under national law', the referring court is properly to be considered as a court of last instance within the meaning of Article 35(3)(a) EU. The request for a preliminary reference is therefore in principle admissible.

29. A more delicate issue of admissibility might arise from the way in which the order for reference is framed. Although none of the parties presenting observations has explicitly suggested that the preliminary questions should be held inadmissible for this reason, some of them have criticised the statements of fact made in the order for reference in fundamental respects.

12 — See point 21 above.

30. The defendants in Spain submit that the description of the factual background made by the referring court, in particular its paraphrase of the findings of the Portuguese Supreme Court, is simply wrong.

31. The defendants transcribe paragraphs of that court's judgment in their written observations. They also referred extensively at the hearing to the judgment at first instance of the Setúbal Criminal Court. They claim that in fact both courts, after examining the evidence submitted, declared that the prosecution *failed* to establish that there had been unlawful importation, which is the exact opposite of what is recorded in the order for reference.

32. Similarly, the Commission, and to a lesser extent the Netherlands Government, consider in their observations that the hypothesis on which the third and fourth questions referred appear to be based (that unlawful importation and the extra-Community nature of the goods had *not* been established for the purposes of an offence of smuggling) is in open contradiction with the statements of fact contained in the order for reference as set out above. [13]

33. Having examined the judgments of the Setúbal Criminal Court and the Portuguese Supreme Court, [14] it is clear to me that the order for reference is confusing and summarises the facts in a way that is plainly at odds with those texts. It appears from those judgments that the defendants in Portugal were charged with four criminal offences arising from a single set of facts, namely the importation on various occasions of different types of oil into Portugal. Prosecution of two of those offences was declared to be time-barred at first instance by a separate order of the Setúbal Criminal Court. It appears that the defendants in Portugal were acquitted of the other two charges at first instance on the grounds that the prosecution had failed to prove the necessary facts. Both those decisions were then confirmed on appeal by the Portuguese Supreme Court. It is, however, unclear from the file whether the two acquittals were the consequence of criminal law proceedings stricto sensu, or of the parallel civil law proceedings in which the potential civil liability of the defendants was considered by the same courts. [15]

34. Nevertheless, I do not consider that the questions should be declared inadmissible.

13 — See points 17 to 19 above.

14 — Both of which were duly lodged, as part of the national court's file, with the Court's Registry.

15 — I should make clear at this stage that my reasoning is based on the premiss that Article 54 of the CISA applies only in the case of decisions arising from national criminal proceedings and does not extend to decisions arising from civil law proceedings.

Pursuant to settled case-law, it is for the national court alone to determine the subject-matter of the questions that it wishes to refer to the Court under Article 234 EC. [16] The national court has indicated that it requires assistance on the scope of particular aspects of the principle of *ne bis in idem* in Article 54 of the CISA (questions 1, 2 and 3) and on the notion of what constitutes 'goods in free circulation' within the meaning of Article 24 EC (question 4). It is evident that the first three questions are pertinent; and it cannot definitively be excluded that an answer to the fourth question may also be relevant to some part of the criminal proceedings before the referring court.

35. Accordingly I consider that all the questions are admissible and should be answered.

Substance

The Court's existing case-law on *ne bis in idem*

36. Thus far, the Court has interpreted the principle of *ne bis in idem* laid down in Article 54 of the CISA in three judgments: *Gözütok and Brügge*, [17] *Miraglia*, [18] and *Van Esbroeck*. [19]

37. In addition, the Court has interpreted the general principle of *ne bis in idem* in other areas of Community law. [20] The most extensive application of the principle has taken place in cases concerning the imposition of Community sanctions in EC competition law. [21] For present purposes, the most relevant of those cases are *Vinyl Maatschappij* [22] and *Cement*. [23]

16 — See, inter alia, Case C-380/01 *Gustav Schneider* [2004] ECR I-1389, at paragraph 21 and the case-law cited therein.

17 — Joined Cases C-187/01 and C-385/01 [2003] ECR I-1345.

18 — Case C-469/03 [2005] ECR I-2009.

19 — Case C-436/04 [2006] ECR I-2333. The judgment was delivered on 9 March 2006. In addition, on 8 June 2006 Advocate General Ruiz-Jarabo Colomer delivered his Opinion in Case C-150/05 *Van Straaten* which examines another aspect of the principle of *ne bis in idem* in Article 54 of the CISA.

20 — The first application of the principle was in Joined Cases 18/65 and 35/65 *Gutmann* [1967] ECR 61 in the context of EC staff disciplinary procedures.

21 — See, inter alia, Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01 *Tokai Carbon and Others* v *Commission* [2004] ECR II-1181, paragraph 130 et seq., which contains a summary of the case-law of the Court on the application of the principle to this area of EC law.

22 — Cited in footnote 10 above.

23 — Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I-123 *(Cement)*.

Case-law on Article 54 of the CISA

38. In *Gözütok and Brügge* the Court was asked whether the *ne bis in idem* principle in Article 54 of the CISA applied to national procedures leading to 'out-of-court settlements' pursuant to which the prosecution may, without the intervention of any judicial authority, make an unilateral offer to discontinue criminal proceedings if the defendant fulfils certain conditions, in particular the payment of monetary fines. Acceptance of those conditions bars further prosecution for the same facts under national criminal law.

39. The Court answered that question in the affirmative. According to the Court, 'where, following such a procedure, further prosecution is definitively barred, 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'. [24]

40. The Court justified its findings as follows.

41. First, it held that 'a procedure of this kind ... *penalises* the unlawful conduct which the defendant is alleged to have committed'. [25]

42. Second, it considered that the fact that no court was involved 'does not cast doubt on that interpretation, since such matters of procedure and form do not impinge on the [barring] effects of the procedure, ... which, in the absence of an express indication to the contrary in Article 54 of the CISA, must be regarded as sufficient to allow the *ne bis in idem* principle laid down by that provision to apply'. [26]

43. Third, the Court pointed out that prior harmonisation of national criminal laws was not a requirement for Article 54 of the CISA to apply: '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 relating to

24 — At paragraph 30.

25 — At paragraph 29 (my emphasis).

26 — At paragraph 31.

procedures whereby further prosecution is barred.' [27]

44. Fourth, the Court placed special emphasis on the principle of mutual trust underlying Article 54 of the CISA. That principle necessarily implied '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'. [28]

45. Fifth, the Court considered that the interpretation adopted was 'the only interpretation to give precedence to the object and purpose of [Article 54 of the CISA] 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'. [29]

46. Finally, the Court stressed the integration objectives of the EU Treaty. It recalled that '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' and that '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'. [30] Against that background, 'Article 54 of the CISA, the objective of which is to ensure that no one is prosecuted on the same facts in several Member States on account of his having exercised his right to freedom of movement, cannot play a useful role in bringing about the full attainment of that objective unless it also applies to decisions definitively discontinuing prosecutions in a Member State, even where such decisions are adopted without the involvement of a court and do not take the form of a judicial decision'. [31]

47. I note that, in reaching its decision, the Court made a point of the fact that procedures such as those at issue were of limited application, and generally applied only to crimes that were not serious. [32] I also emphasise that the Court's starting point for its analysis was that the abbreviated procedures under consideration did indeed *penalise* the unlawful conduct in question. [33]

27 — At paragraph 32.
28 — At paragraph 33.
29 — At paragraph 35.
30 — At paragraphs 36 and 37.
31 — At paragraph 38.
32 — At paragraph 39.
33 — See point 41 above.

48. In *Miraglia*, the Court was asked to clarify a different aspect of Article 54 of the CISA. It held that 'a judicial decision ... taken after the public prosecutor has decided not to pursue the prosecution on the sole ground that criminal proceedings have been initiated in another Member State against the same defendant and in respect of the same acts, but where no determination has been made as to the merits of the case, cannot constitute a decision finally disposing of the case against that person within the meaning of Article 54 of the CISA'. [34] Accordingly, the *ne bis in idem* principle did not apply.

49. The Court's reasoning in *Miraglia* was similar to that in *Gözütok and Brügge*, but led to the opposite conclusion. As in *Gözütok and Brügge*, the Court said that its interpretation was the only one that would 'give precedence to the object and purpose of [Article 54 of the CISA] rather than to procedural or purely formal matters, which, after all, vary as between the Member States concerned, and ... ensure that that article has proper effect'. [35] However, in contrast to *Gözütok and Brügge*, in *Miraglia* the Court gave priority to the need to ensure penalisation of the crime, and placed less emphasis on promoting free movement of persons. It stated in terms that 'the consequence of applying [Article 54 of the CISA] to a decision to close criminal proceedings, such as that in question in the main 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'. [36] The Court stressed that 'that 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'. [37] It went on, 'the bringing of criminal proceedings in another Member State in respect of the same facts would be jeopardised even when it was the very bringing of those proceedings that justified the discontinuance of the prosecution by the Public Prosecutor in the first Member State. 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*'. [38]

50. Finally, in *Van Esbroeck*, the Court was requested to clarify, inter alia, the scope of the notion of 'the same acts' in Article 54 of the CISA. The issue arose in the context of criminal proceeding brought in two different

34 — At paragraph 30.
35 — At paragraph 31.
36 — At paragraph 33 (my emphasis).
37 — At paragraph 34 (my emphasis).
38 — Ibid. (my emphasis).

Contracting States (Norway and Belgium) [39] against the same person arising out of the same facts, namely the transport of unlawful drugs from Belgium into Norway. The defendant was prosecuted in Norway for the criminal act of *importing* unlawful substances and in Belgium for the criminal act of *exporting* them. The preliminary question was whether 'the same acts' required merely identity of material facts; or whether it required, in addition, that the facts should be categorised as the same crime in both national criminal systems. Put another way, did there need to be a 'unity of the legal interest protected' as the Court had required in respect of Community sanctions for breaches of EC competition law? [40]

51. The Court chose to interpret *ne bis in idem* more broadly than it had previously done in that area of EC law, and held that 'unity of the legal interest protected' is not required for the application of Article 54 of the CISA. According to the Court in *Van Esbroeck*, the 'only relevant criterion' for the purposes of Article 54 of the CISA is that there should be an 'identity of the material facts, understood in the sense of the existence of a set of concrete circumstances which are inextricably linked together'. [41]

52. In reaching that conclusion the Court applied the same reasoning as in *Gözütok and Brügge*.

53. First, it relied on the literal wording of Article 54 of the CISA, which refers only to the nature of the acts without specifying their legal classification. [42]

54. Second, the Court relied on the 'pro-free movement' and 'mutual trust' reasoning adopted in *Gözütok and Brügge*. It recalled that none of the relevant provisions subjected the application of the principle in Article 54 of the CISA to prior harmonisation or, at least, the approximation of national criminal laws. [43] Rather, the *ne bis in idem* principle necessarily implies the existence of mutual trust between the Con-

39 — The term 'Contracting Party' rather than 'Member State' is used in the CISA. The Court has used 'Member State' when the case before it concerned Member States (as in *Gözütok and Brügge* and *Miraglia*) and 'Contracting State' when the case involves a party to the Schengen Agreement and the CISA which is not an EU Member State (as in *Van Esbroeck*, which involved Norway). I follow the Court's practice.

40 — In *Cement*, cited in footnote 23 above, the Court held that the 'unity of the legal interest protected' is one of the threefold conditions that must be satisfied for the principle of *ne bis in idem* to apply in EC competition law. See points 58 and 155 to 158 below.

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

42 — At paragraph 27.

43 — At paragraph 29.

tracting Parties in each others' criminal justice systems. [44] For that reason, the fact that different legal classifications may be applied to the same facts in two different Contracting Parties should not be an obstacle to the application of Article 54 of the CISA.

55. Third, the Court, referred to the aim of Article 54 of the CISA, stating that the right of free movement would be fully guaranteed only if the perpetrator of an act knew that, once he had been found guilty and served his sentence, or had been acquitted by a final judgment in a Member State, he could freely move within the Schengen area without fearing new criminal proceedings merely because the act in question was classified differently in the legal order of another Member State. [45]

56. The Court concluded that, owing to the absence of harmonisation of national criminal laws, applying a 'criterion based on the legal classification of the acts or on the protected legal interest might create as many barriers to freedom of movement in the Schengen territory as there are penal systems in the Contracting States'. [46]

44 — At paragraph 30.

45 — At paragraph 34.

46 — At paragraph 35.

Case-law on the fundamental principle of *ne bis in idem* in EC competition law

57. In *Vinyl Maatschappij* the Court stated that the principle of *ne bis in idem* 'is a fundamental principle of Community law also enshrined in Article 4(1) of Protocol No 7 to the ECHR'. [47] It went on to hold that that principle 'does not in itself preclude the resumption of proceedings in respect of the same anti-competitive conduct where the first decision was annulled for procedural reasons *without any ruling having been given on the substance of the facts alleged*, since the annulment decision *cannot* in such circumstances *be regarded as an "acquittal" within the meaning given to that expression in penal matters*'. [48]

58. In *Cement*, the Court made the application of the fundamental principle of *ne bis in idem* to the area of EC competition law subject to a 'threefold condition' of 'identity

47 — Cited in footnote 10 above, at paragraph 59. See also *Van Esbroeck*, cited in footnote 19 above, at paragraph 40.

48 — At paragraph 62 (my emphasis). To state the obvious: it may of course be that a distinction can and should be drawn between (a) the concept of acquittal borrowed from penal matters and applied to competition law and (b) the concept of acquittal in penal (criminal) law itself. The Court itself does not appear to have drawn that distinction explicitly. The present case is also concerned with a time-bar on further prosecution, rather than the procedural annulment of a decision already taken.

of the facts, unity of offender and unity of the legal interest protected'.[49]

Tensions in the present case-law

59. Examination of these cases reveals two areas of tension in the Court's existing case-law on *ne bis in idem*.

60. First, there is a degree of contradiction *within* the Court's case-law on Article 54 of the CISA.

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

62. Furthermore, in *Gözütok and Brügge* and *Van Esbroeck* 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.

63. Second, there is an inconsistency *between* the case-law on Article 54 of the CISA, which does not (it seems) require 'unity of the legal interest protected' but is content to apply *ne bis in idem* provided that there is 'identity of the material facts'[50] and

49 — *Cement*, cited in footnote 23 above, at paragraph 338. The 'threefold condition' has since been applied consistently by the Court of First Instance in the competition law cases before it in which the principle of *ne bis in idem* has been alleged. See for instance, *Tokai Carbon*, cited in footnote 21 above, paragraph 130 et seq., or more recently Case T-38/02 *Danone* v *Commission* [2005] ECR II-4407, paragraph 134 et seq.

50 — *Van Esbroeck*, cited in footnote 19 above

that the defendants are the same before both courts; [51] and the case-law on *ne bis in idem* as a 'fundamental principle of EC law', which requires a 'threefold condition' of 'identity of the facts, unity of offender and unity of the legal interest protected' before that principle is applicable. [52]

The first question

64. The first question asks for clarification as to whether the principle of *ne bis in idem* in Article 54 of the CISA should be interpreted as applying to a situation where a competent court of the 'first' Member State has reached a final decision (*res judicata*) prohibiting further prosecution of certain individuals on the ground that the proceedings are time-barred under that Member State's criminal law.

Preliminary observations

65. Before answering the first question, a number of preliminary observations appear to me to be necessary.

Time-limits

66. In most continental legal systems the State's right to initiate criminal proceedings is subject to time-limits. Once those time-limits have elapsed, the right to prosecute is time-barred by application of the relevant legislation. When a competent court at final instance declares the prosecution to be time-barred, the matter becomes *'res judicata'*. Criminal proceedings against the alleged offender for the same acts can no longer be brought in that Member State.

67. Time-limits are set in relation to the seriousness of the criminal offence. There are, however, significant differences between Member States as to what the time-limits are for offences that are roughly similar. [53]

68. In contrast, in the English, Scottish and Irish systems, criminal proceedings are not,

51 — See reply to the second question below, points 121 to 124.

52 — *Cement*, cited in footnote 23 above.

53 — Thus, for instance, in France there is a 10 year time-bar for prosecuting serious crimes, 5 years for less serious crimes ('délits') and only 1 year for minor offences ('contraventions'). In Spain, depending on the seriousness of the sentence or sanction they may attract, prosecutions for criminal offences (using that term generically) are time-barred after 20, 15, 10, 5 or 3 years.

as a general rule, subject to time-limitations. [54]

69. There is therefore an absence of any universal recognition of time-bars as a general principle of all Member States' criminal law systems.

70. Several reasons are adduced to justify placing a time-bar on the State's right to prosecute. For example, it is argued that after a certain number of years have passed, it is better for the sake of social peace to let the past rest rather than to revive the social unrest caused by the alleged offence. If the State acts negligently in failing to bring the defendant to trial within the established time-limits, that may justify society losing its right to punish the individuals concerned. Finally, on a more practical level, the more time that has elapsed since the alleged offence, the more difficult it is likely to be to obtain reliable evidence and to hold a fair trial.

54 — There are certain exceptions. Thus, for example, until its abolition by the 2003 Sexual Offences Act, a time-limit of 12 months applied to prosecutions for unlawful sexual intercourse with girls under the age of 16 (for a discussion of that time-limit, see the judgment of the House of Lords in *Regina v J (Appellant)* [2004] UKHL 42). Obviously, the general absence of time-bars does not exclude the possible application of principles such as abuse of process, which may limit the powers of the prosecuting authorities to bring proceedings in certain circumstances, thus arriving at the same practical result by a different intellectual route.

71. All those reasons relate to the effective administration of criminal justice and, more generally, to public interest considerations. [55]

Rationale underlying *ne bis in idem*

72. In contrast, the principle of *ne bis in idem* responds to a different rationale. That principle, whose origins in Western legal systems can be traced back to classical times, [56] is mainly (although not exclu-

55 — For a critical discussion of the principle and its rationale see generally, A. Merle and A. Vitu, *Traité de Droit Criminel, Tome II, Procédure Pénale*, 4th edition, 1979, at paras. 46 et seq., and the bibliography cited therein.

56 — Thus, references to the principle can be found as early as Demosthenes, who states that 'the laws forbid the same man to be tried twice on the same issue' (Speech 'Against Leptines' (355 BC), *Demosthenes I*, translated by J. H. Vince, Harvard University Press, 1962) and in Roman Law, where it appeared in Justinian's Corpus Juris Civilis (Dig.48.2.7.2 and Cj.9.2.9pr: 529-534 AD). The first recorded enunciation of an equivalent principle in the common law arguably arises from the 12th century dispute between Archbishop Thomas à Becket and Henry II. Becket argued that clerks convicted in the ecclesiastical courts were exempt from further punishment in the King's courts since such further secular punishment would violate the ecclesiastical law prohibition on double punishment (itself based on St Jerome's comment (AD 391) 'For God judges not twice for the same offence'). The King's judges, possibly influenced by the popular veneration (and subsequent canonisation) of Becket after his murder by the King's knights in Canterbury cathedral and by Henry II's ultimate public penance before Becket's tomb, started applying that maxim as a principle of law. On the history of the principle see generally, J.A. Sigler, 'A History of Double Jeopardy' (1963) 7 *Am J of Legal History* 283. On the history of the principle in English law see also M. Friedland, *Double Jeopardy*, 1969, OUP, at pp. 5 to 15, and P. McDermott, *Res Judicata and Double Jeopardy*, Butterworths, 1999, at pp. 199 to 201.

sively) [57] regarded as a means of protecting the individual against possible abuses by the State of its *jus puniendi*. [58] The State should not be allowed to make repeated attempts to convict an individual for an alleged offence. Once a trial has been carried out, surrounded by all the appropriate procedural guarantees, and the issue of the individual's possible debt to society has been assessed, the State should not subject him to the ordeal of a new trial (or, as Anglo-American legal systems describe it, to place him in 'double jeopardy' [59]). As Black J of the Supreme Court of the United States concisely put it, 'the underlying idea, ... is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offence, thereby subjecting him to embarrassment, expense and ordeal, compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty'. [60]

73. The right not to be prosecuted twice for the same acts has thus evolved into a fundamental human right to be protected against the *jus puniendi* of the State, and has been codified in several international conventions. [61]

74. If that is the rationale behind *ne bis in idem*, the principle nevertheless presupposes that society has already had one full chance to settle its accounts with the individual it suspects of having committed an offence against it.

75. On one view, that can happen only if a substantive trial has taken place and the defendant's conduct has been examined by the appointed representatives of society. Such a view finds support in the wording of Article 4(2) of Protocol No 7 to the ECHR, which provides that a case may nevertheless be reopened in accordance with the law and penal procedure of the State concerned if

57 — As Spain has argued in its observations, the principle also seeks to compel police forces and public prosecutors to prepare and make their cases as effectively as possible. In that respect, see W.P.J. Wils, 'The principle of *ne bis in idem* in EC antitrust enforcement: a legal and economic analysis', (2003) World Competition 26(2), 131, in particular at 138. The principle of finality of criminal proceedings also underlies the principle of *ne bis in idem*. The finality value is however closely related to the main rationale of the principle, namely the protection of the individual against the *jus puniendi* of the State. On this point see further the Law Commission's Report *Double Jeopardy and Prosecution Appeals* (March 2001), available at www.lawcom.gov.uk, at 37-38.

58 — For a discussion of the rationale behind the principle of *ne bis in idem* both in the common and continental law traditions, see Friedland, cited in footnote 56 above, at pp. 3 to 5; McDermott, cited in footnote 56 above, at chapters 21 and 22. A recent in depth discussion can be found in the Law Commission's Report of March 2001 cited in footnote 57 above.

59 — The concept is, for example, so described in the Fifth Amendment to the USA Constitution which states that no person shall 'be subject for the same offence to be twice put in jeopardy of life or limb'.

60 — In *Green* v *United States* (1957) 355 U.S. 184, at pp. 187-8, cited by Friedland, footnote 56 above, at p. 4.

61 — See point 13 above and related footnote.

there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case. [62] Put another way, society is normally allowed a single chance to try the defendant, but is (exceptionally) entitled to 'have a second go' after an initial acquittal when either (a) there is (important) new material or (b) the defendant's conduct was not duly assessed during the course of the first criminal proceedings. In the EU context, Article 4 of Protocol No 7 may fairly be said to embody the highest legal expression of the principle of *ne bis in idem* as a fundamental human right.

76. The alternative view is that society's single chance to settle its accounts with the defendant is itself confined within society's own self-imposed time-limits for prosecution; and it does not matter if — for that very reason — there is never a trial 'on the substance'. Whilst I respect the intellectual coherence of that approach, it seems to me that it is likely to give rise to considerable disquiet in the multi-national, multi-societal world of the CISA. Within the context of a single 'society', it is indeed reasonable to say that society has itself surrendered the opportunity to have an accounting after X years have elapsed. The same argument seems less reasonable when it is applied across 17 societies, i.e., the 13 Member States that have so far fully implemented the Schengen acquis, with the addition of Iceland and Norway as Contracting Parties to the CISA and the UK [63] and Ireland [64] as regards, inter alia, Articles 54 to 58 of the CISA. [65]

77. It therefore seems to me that the jurisprudential heart of the present case is whether a decision to dismiss criminal proceedings on grounds that the prosecution is time-barred does involve placing the person concerned 'in jeopardy' for the purposes of Article 54 of the CISA, thus entitling him to exercise his fundamental right not to be placed '*bis*' '*in idem*'. As I shall explain below, I take the view that that is not

62 — Similar exceptions apply in the legal systems of most Member States.

63 — Article 1 of Council Decision 2000/365/EC of 29 May 2000 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 (OJ 2000 L 131, p. 43) and Council Decision 2004/926/EC of 22 December 2004 on the putting into effect of parts of the Schengen acquis by the United Kingdom of Great Britain and Northern Ireland (OJ 2004 L 395, p. 70).

64 — Article 1 of Council Decision 2002/192/EC of 28 February 2002 concerning Ireland's request to take part in some of the provisions of the Schengen acquis (OJ 2002 L 64, p. 20). The relevant provisions have, however, still to be put into effect by a second Council decision.

65 — Once Switzerland and the Member States which joined the EU in 2004 fully implement the Schengen acquis, the divergences in approaches to criminal law will obviously increase. See further points 108 to 114 below.

the case *unless* that decision is the outcome of proceedings which have involved consideration of the merits of the case. Only then has the person in question really been 'placed in jeopardy' so as to be entitled to rely on Article 54 of the CISA. [66]

Scope of the principle of *ne bis in idem*

78. Although the rationale for the principle of *ne bis in idem* is generally recognised, and some variant on such a principle is to be found (as one would expect) generally in the legal systems of the CISA Contracting States and indeed in most developed legal systems, it is apparent from a brief comparative survey that there is no single, truly common definition of what precisely that principle means, what exactly its scope is, when precisely it falls to be applied, and so on. [67]

79. In the EU context, the absence of an underlying common approach is evidenced by the failure of the various legislative measures and initiatives adopted by the Community institutions and Member States under Title VI of the EU Treaty to define the scope of the principle in Article 54 of the CISA. [68]

66 — See points 92 to 96 below. In his Opinion in *Van Straaten*, cited in footnote 19 above, Advocate General Ruiz-Jarabo Colomer also suggests that *ne bis in idem* is triggered provided that acquittal has involved an analysis of the merits (at points 65 and 67). The Commission's Green Paper On Conflicts of Jurisdiction and the Principle of *ne bis in idem* in Criminal Proceedings (COM(2005) 696 final) asks this very question at pp. 54 to 56.

67 — Even the case-law of the European Court of Human Rights is contradictory as to the exact scope of the principle in Article 4(1) of Protocol No 7, in particular as to whether it merely requires identity of material facts or also requires identity of the legal interest protected. On this point see the dissenting Opinion of Judge Repki in Oliveira v Switzerland, No 25711/94, judgment of 30 July 1998, *ECHR Reports of Judgments and Decisions* 1998-V. On the difficulties in applying the principle in a transnational context, see generally Vervaele, cited in footnote 9 above, and C. Van den Wyngaert and G. Stessens, 'The international *non bis in idem* principle: resolving the unanswered questions', 1999, *International and Comparative Law Quarterly*, Vol. 48, p. 779. The Commission's Green Paper, cited in footnote 66 above, deals extensively with the difficulties arising from the application of the principle of *ne bis idem* in the EU context.

68 — Thus, the 1987 Convention on Double Jeopardy, cited in footnote 8 above, never entered into force owing to the absence of sufficient ratifications. More recently, in 1999 the European Council of Tampere asked the Council and the Commission to adopt, by December 2000, a programme of measures to implement the principle of mutual recognition of judicial decisions in both civil and criminal matters. That programme proposed 24 vaguely defined measures ranked by priority. No actual implementation of the suggested measures as regards the principle of *ne bis in idem* has taken place. In 2003, in the wake of the Court's decision in *Gözütok and Brügge*, the Greek Presidency submitted an initiative with a view to adopting a Council Framework Decision concerning the application of the *'ne bis in idem'* principle (OJ 2003 C 100, p. 24). Its aim was to provide the Member States with common legal rules relating to *ne bis in idem* in order to ensure uniformity both in the interpretation of those rules and in their practical implementation. As yet, the Member States have not agreed the Council Framework Decision.

Ne bis in idem as a *propriae naturae* principle within Community law

80. For the purposes of EU law, it seems to me almost inevitable that, in consequence, the concept of *ne bis in idem* (which, as the Court noted in *Vinyl Maatschappij*, is a fundamental principle of Community law) is to be understood as a free-standing, or *propriae naturae*, principle. In the absence of further initiatives by way of Treaty amendment or secondary Community legislation, it is therefore to be refined and developed by the Court in the exercise of its 'hermeneutic monopoly' on such key concepts of EU law.[69] The specific application of the principle in particular areas (be these competition law or through Article 54 of the CISA) should form part of a core understanding of what that fundamental principle means (or ought to mean) within the Community legal order.

81. The proposition that *ne bis in idem* should be understood as a free-standing principle in the context of the EU is not, I venture to suggest, too adventurous. The EU constitutes a new legal order[70] and the European integration process a unique international construction. For its part, Article 54 of the CISA represents one of the first successful attempts to apply the *ne bis in idem* principle in a multilateral manner in a transnational context.[71] It therefore seems natural that the definition of the principle should be *propriae naturae*, adapted to the particular features of the supranational context in which it is to apply.

The balance between free movement of persons and the requirements of combating crime and providing a high level of safety within 'an area of freedom, security and justice'

69 — The formulation employed by the late Judge Mancini in 'The free movement of workers in the case-law of the ECJ', in *Constitutional Adjudication in EC and National Law*, D. Curtin, and D. O'Keefe (eds.), 1992, Butterworths, p. 67. From the outset, the Court has given a Community definition to key concepts of the EC Treaty. See for instance the case-law concerning the definition of 'worker' or 'employment' (respectively commencing with Case 75/63 *Hoekstra (née Unger)* [1964] ECR 177, at 184, and Case 53/81 *Levin* [1982] ECR 1035, paragraph 11). It is now settled case-law that 'the need for uniform application of Community law and the principle of equality require that the terms of a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the Community; that interpretation must take into account the context of the provision and the purpose of the legislation in question' (see, inter alia, Case C-373/00 *Adolf Truley* [2003] ECR I-1931, paragraph 35 and the case-law cited therein).

70 — Case 26/62 *Van Gend en Loos* [1963] ECR 3, at 12.

71 — Those international conventions which regulate the application of the principle in a transnational context have been remarkably unsuccessful in obtaining ratification. See footnote 9 above.

82. Finally, it is necessary to place this discussion within the wider context of the appropriate balance to be struck between two equally fundamental and important concepts: free movement of persons, on the one hand, and the effective combat against crime and the provision of a high level of safety within 'an area of freedom, security and justice', on the other hand.

83. Here, I recall that pursuant to Article 29 EU (the first provision of Title VI 'Provisions on police and judicial cooperation in criminal matters', on which Articles 54 to 58 of the CISA are based), '... [t]he Union's objective shall be to provide citizens a high level of safety within an area of freedom, security and justice by developing common action amongst Member States in the fields of police and judicial cooperation in criminal matters'. Thus, whereas the realisation of the free movement of persons is important, the attainment of a 'high level of safety' is equally so. Article 2 EU similarly gives equal importance to the realisation of the free movement of persons and to the prevention and combating of crime. [72]

84. It seems to me that, ultimately, whilst free movement of persons is indubitably important, it is not an absolute. [73] What the CISA aims to achieve is free movement *within* an area of freedom, security and justice. An integral part of that process is finding a *propriae naturae* definition of *ne bis in idem* that allows free movement rights *within* an area of freedom, security and justice characterised by a high level of safety. It was (of course) necessary to include a provision incorporating *ne bis in idem* in the CISA — omission of such a fundamental concept would have been a grave lacuna. At the same time, the principle must not be distorted out of proportion. Put another way: it must be given appropriate scope, but not unlimited scope.

The answer to be given to the first question

85. In answering the first question referred, the Court is faced with a stark choice between holding that a procedural time-bar (whose application in principle does not necessitate any examination of the merits of the case against the defedant) is sufficient to trigger the application of *ne bis in idem*,

72 — As explicitly recognised in *Miraglia*, see point 49 above

73 — It is not, indeed, an absolute in traditional EC Treaty terms. Articles 39(3) EC (workers), Article 46 EC (establishment) and Article 55 EC (services) all explicitly allow for derogations from the principle of free movement of persons on grounds of public policy, public security and public health. Those derogations have been further expanded by the Court's case-law on 'mandatory requirements'. See further points 110 to 112 below.

and holding that, for that principle to apply, some examination of the merits within the context of the first prosecution is required (and, if so, to what degree). For convenience, I shall refer to the former as a 'procedure-based approach', and the latter as a 'substance-based approach'.

86. The position of the parties may briefly be summarised as follows.

87. The defendants in Spain argue in essence for a procedure-based approach.

88. In contrast, all the Member States that have submitted observations adopt a substance-based approach. Spain, the Netherlands, Poland and France argue in essence that Article 54 of the CISA applies only where the competent court has, in a final decision, assessed the merits of the case and has passed a judgment on the criminal responsibility of the defendant. That is not the case where criminal proceedings are definitively discontinued on the sole ground that prosecution of the offences is time-barred. Italy argues in similar vein that Article 54 of the CISA applies only when the final decision to discontinue proceedings because the offence is time-barred is the result of proceedings involving consideration of the merits of the case and the criminal responsibility of the defendant.

89. The Commission adopts a procedure-based approach, on the basis of strictly practical considerations. It considers that, depending on circumstances at national level, 'acquittals' on procedural grounds may, or may not, involve an assessment of the merits. In order to avoid difficulties that may arise for national courts if they have to establish whether an earlier decision in another jurisdiction has in fact involved such an assessment, the Commission suggests that, as a general rule, any final decision barring future criminal proceedings for the same facts in one Member State is to be considered to be a final decision for the purposes of Article 54 of the CISA.

90. I agree with the Commission to this extent: it does indeed seem that national proceedings leading to decisions involving the application of a time-bar may or may not (depending on precisely how, when and by whom the time-bar issue is raised) involve an examination of the merits. [74] In my view, however, discontinuance of criminal proceedings through the application of a time-

74 — See footnote 78 below.

bar without any assessment of the merits should not be covered by the principle of *ne bis in idem* in Article 54 of the CISA.

93. In contrast, as I have indicated, time-bars are based on a different rationale. Society is thereby passing a judgment not on the defendant, but on the importance it attaches to an offence objectively considered [75] — a judgment that varies greatly from one State to the other — and thus on how long it is appropriate for the State to retain its right to prosecute.

91. I set out in the next section my reasons for considering the substance-based approach to be the better interpretation of Article 54 of the CISA. I then examine a number of objections, raised by those who support the procedure-based view, towards taking a substance-based approach.

Arguments in favour of a substance-based approach to *ne bis in idem*

94. I recall that we are here operating in a supranational context where there is no common definition of the scope of the principle, and there is also no directly relevant external authority. [76] In such a context, it seems to me that different meanings can and should be attributed, for the purposes of *ne bis in idem*, to (a) the 'definitive discontinuance of criminal proceedings' due to the fact that prosecution of the offence is time-barred and (b) the impossibility of further criminal proceedings for the same facts after the 'definitive acquittal' of a individual following a full trial. That is so even if, in a purely domestic

92. First, the substance-based approach is more faithful to the rationale behind the principle of *ne bis in idem*. Pursuant to that principle, the State has one opportunity to assess and pass judgment on an individual's alleged criminal conduct. It is only after a *substantive* assessment that one can sensibly say that the person concerned has been placed 'in jeopardy' and that, save in exceptional circumstances, there should not be a second assessment ('*ne bis*') of the same matter ('*in idem*').

75 — Thus, for example, the crime of genocide is not subject to any time-bar in several Member States which apply limitation periods to other offences.

76 — Unfortunately, the scope of Article 4 of Protocol No 7 to the ECHR is explicitly restricted to a domestic context (i.e., that of each State signatory to the Protocol): see the Explanatory Report to Protocol No 7 at paragraph 27. For that reason, neither its actual text nor the interpretation given to it by the European Court of Human Rights is ultimately helpful as a guide to the proper interpretation of Article 54 of the CISA. The same is true of Article 14(7) of the 1966 International Covenant on Civil and Political Rights, which is also intended to apply to the domestic context of each individual State signatory.

context, both procedures may lead to the same result (i.e. the barring of future criminal proceedings against the same person for the same facts).

95. For the purposes of the application of the *ne bis in idem* principle in Article 54 of the CISA, the holding of a trial in which the defendant's conduct is considered on its legal merits by the criminal court and consequently his conduct is assessed, seems to me to be a necessary requirement. [77] That is obviously the case when a final verdict on the substance is returned. I would not, however, go so far to require a formal verdict of 'guilty' or 'not guilty' for the principle to apply. That would in my view subject the application of Article 54 of the CISA to unduly stringent conditions and reduce its practical relevance to an unacceptable degree.

96. I would therefore suggest that a defendant should also be able to invoke *ne bis in idem* where he has de facto been placed in jeopardy but his case has eventually been dismissed because prosecution is time-barred. [78] If the national criminal proceedings have involved any significant consideration of the merits of the case, it seems to me that the defendant has indeed been placed in a situation of jeopardy. [79] He must therefore benefit from *ne bis in idem* and any subsequent prosecution of the same defendant in another Member State for the same facts should be excluded under Article 54 of the CISA. [80] That accords with the rationale behind *ne bis in idem*. It follows that, if a decision that the prosecution is time-barred *precedes* any consideration of the merits,

77 — The present case concerns decisions *by a court* and this discussion is therefore framed in those terms. In *Gözütok and Brügge* society had likewise had, and used, the opportunity to settle its account with the defendant (there, through pre-trial administrative bargains offered to, and accepted by, both defendants involving admission of guilt and acceptance of lesser punishments than if their cases had proceeded to full trial). This part of the underlying analysis is not dependent upon whether, formally, a court is involved.

78 — A brief comparative survey shows that, even though the question of whether the prosecution is time-barred is normally decided ex officio by the competent court at the start of the trial (if, indeed, the prosecution has not already realised this before the defendant is ever charged), the point can also be raised at any stage of the criminal proceedings by any party, even after the hearing has taken place and the evidence presented. It seems to me that in the latter event the merits of the case have been examined, even if no formal judgment on the substance is in fact passed upon them. A defendant who has sat through criminal proceedings up to that point has clearly been placed at jeopardy by the State. The principle of *ne bis in idem* should therefore apply.

79 — I do realise that what this means in practice may vary from one Member State to another; and that the national court in the 'second' Member State may have to make additional enquiries. However, as I discuss at points 117 and 118 below, those practical difficulties can be reduced by invoking existing mechanisms for cooperation between national criminal courts. It may also be that national criminal law itself defines the point at which the defendant is placed 'in jeopardy'. That is, for example, also the case in the US, where jeopardy attaches in a jury trial when the jury is selected and sworn. Such a rule is considered to be part of the core of the double jeopardy principle enshrined in the Fifth Amendment. See *Crist* v *Bretz* (1978) 437 U.S. 28. For a discussion of this issue in the context of common law systems, see Friedland, cited in footnote 56 above, chapters 2 and 3.

80 — My analysis in the present case is deliberately confined to the issue of time-bars. Without engaging here in detailed consideration of the hypotheses that Advocate General Ruiz-Jarabo Colomer sets out briefly at point 65 of his Opinion in *Van Straaten* (cited in footnote 19 above), I do not share his view that all the illustrations he gives necessarily involve an analysis of the merits and therefore entitle a defendant to invoke *ne bis in idem*.

whilst there is to that extent a definitive discontinuance of criminal proceedings, it is a discontinuance that should fall outside the scope of the principle of *ne bis in idem*.[81]

97. Second, the substance-based approach seems to me to strike a more appropriate balance between the two desirable objectives of promoting free movement of persons, on the one hand, and ensuring that free movement rights are exercised within an area of 'freedom, security and justice' characterised by a high level of safety, in which crime is effectively controlled, on the other hand. As I have indicated,[82] neither Article 2 nor Article 29 EU gives priority to free movement of persons over the prevention and combating of crime and the attainment of a high level of safety. Indeed, the Court in *Miraglia* gave precedence to the latter objective over the former. In carrying out the necessary balancing act between those equally fundamental aims, I conclude that a person against whom criminal proceedings have been discontinued in one Member State because the prosecution is time-barred *without* consideration of the merits of the case should not benefit from the application of Article 54 of the CISA.

98. Third, the substance-based approach is in my view not only a logical application of the essence of the principle of *ne bis in idem*, but is also supported by the Court's case-law thus far.

99. Of the cases concerning Article 54 of the CISA, the Court in *Miraglia* explicitly required an assessment of the merits for the *ne bis in idem* principle to apply. In *Van Esbroeck* and *Gözütok and Brügge* the defendants had, respectively, either already been subject to a formal trial and served part of the sentence handed down or, in effect, admitted their guilt at a pre-trial stage. In both *Van Esbroeck* and *Gözütok and Brügge* they had therefore been punished for the offences in question. All three cases therefore *in fact* applied a substance-based approach.

100. The correctness of the substance-based interpretation is further borne out by the Court's case-law on *ne bis in idem* in competition law, in particular *Vinyl Maatschappij*. There, the Court expressly held that '... "acquittal" within the meaning given to that expression in penal matters' only takes place, and the general principle of *ne bis in idem* only operates, when a ruling has been given on the substance of the facts alleged.'[83]

81 — That is also the meaning which in my view it is appropriate to ascribe to the words 'finally acquitted' in Article II-110 of the draft European Constitution. See footnote 8 above.

82 — See point 83 above.

83 — See point 57 above.

101. Fourth, the interpretation to be given to *ne bis in idem* should be the same in all areas of EU law. That conclusion follows from Article 6 EU, inserted in Title I 'Common provisions', which is applicable to all pillars under the EU Treaty. Article 6(1) states that the 'Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States'. Article 6(2) further provides that 'the Union shall respect fundamental rights, as guaranteed by the European Convention of Human Rights and Fundamental Freedoms ... and as they result from the constitutional traditions common to the Member States, as general principles of Community law'. The fundamental principle of *ne bis in idem* thus constitutes a higher rule of law within the EU legal system. Its interpretation must therefore be consistent in all areas of activity that are subject to the EU Treaty, that is, including both the EC Treaty and the Schengen acquis. [84]

102. Thus, if under the EC Treaty competition rules the fundamental principle of *ne bis in idem* requires an assessment of the merits (as it does), the same must be true when the principle is applied under Article 54 of the CISA.

103. It may be suggested that *ne bis in idem* in competition law can and should be different from *ne bis in idem* under Article 54 of the CISA. I examine that argument later. [85] However, the question whether *ne bis in idem* requires there to have been an assessment of the merits goes to one of the core elements of the principle itself. That core element must remain constant regardless of the legal context in which the principle is then applied. I cannot see how a core element of a fundamental principle could vary substantially in its content depending on whether *ne bis in idem* is being applied under Article 54 of the CISA or generally as a fundamental principle of Community law (for example, within competition law).

104. Fifth, the substance-based approach would in addition help to prevent the possibility, which I regard as undesirable, of 'criminal jurisdiction shopping'. An unrestricted application of the mutual trust principle could result in an individual deliber-

84 — This reasoning finds support in the case-law of the Court applying Article 6 EU. See for instance Case C-109/01 *Akrich* [2003] ECR I-9607, at paragraph 58 and Joined Cases C-465/00, C-138/01 and C-139/01, *Österreichischer Rundfunk* [2003] ECR I-4989, at paragraphs 68 and 69. Indeed, in *Van Esbroeck*, cited in footnote 19 above, the Court seems to have implicitly accepted this point, inasmuch as it referred (at paragraph 40) to *Vinyl Maatschappij when stating that the principle in Article 54 of the CISA has been recognised as a fundamental principle of Community law.*

85 — See points 155 to 158 below.

ately courting prosecution in a Member State where he knew that proceedings would necessarily be declared to be time-barred; and then relying on *ne bis in idem* to move freely within the EU. [86]

Possible objections to the substance-based approach

105. The objections that I need to address appear to be three in number: the role of the 'mutual trust' principle underlying Article 54 of the CISA; the explicit rejection by the Court of prior harmonisation as a precondition for the application of Article 54 of the CISA; and the practical difficulties that may arise from applying a substance-based approach. I examine each in turn.

106. First, does a substance-based approach fall foul of the emphasis that the Court has placed thus far on the importance of 'mutual trust' between Member States?

107. In *Gözütok and Brügge* and *Van Esbroeck* the Court indeed placed considerable emphasis on the principle of 'mutual trust' [87] that underlies Article 54 of the CISA and Member States' cooperation in criminal matters under the Treaty of Amsterdam [88] (as expressly recognised by the Tampere Council). [89]

108. However, in my view the concept of mutual trust does not extend so far as to provide a sensible basis for applying *ne bis in idem* to all national decisions discontinuing criminal proceedings through application of a time-bar.

109. It seems to me that, on the contrary, a distinction can and should be drawn between

86 — This is far from a theoretical issue. By way of illustration, it appears that because of their lenient treatment of offences relating to trade in stolen works of art, both Belgium and the Netherlands have long been the preferred location for dealers in such items.

87 — This concept clearly has close affinities with the 'mutual recognition' that forms a traditional part of the four freedoms under the EC Treaty. The Court in its judgments speaks of 'mutual trust' rather than 'mutual recognition', which is the term used by the European Council, the Council and the Commission (see footnote 89 below). I assume, however, that these are different names for the same principle.

88 — See points 44 and 54.

89 — The principle of 'mutual recognition' in criminal matters was endorsed, at the suggestion of the UK, by the European Council of Tampere in 1999. That Council's conclusions state that, 'the European Council ... endorses the principle of mutual recognition which, in its view, should become the cornerstone of judicial co-operation in both civil and criminal matters within the Union. The principle should apply both to judgments and to other decisions of judicial authorities'. (at point 33 of the Presidency Conclusions). According to the introduction to the Programme of measures to implement the principle of mutual recognition of decisions in criminal matters adopted subsequently by the Council and the Commission (OJ 2001 C 12, p. 10), implementation of that principle 'presupposes that Member States have trust in each others' criminal justice systems. That trust is grounded, in particular, on their shared commitment to the principles of freedom, democracy and respect for human rights, fundamental freedoms and the rule of law'.

trusting other Member States' criminal proceedings in general (including such matters as fair trial guarantees, the substantive delineation of offences and rules on production and admissibility of evidence), on the one hand, and trusting a decision that no substantive assessment of the offence can take place at all because the prosecution is time-barred, on the other hand. The first is a proper expression of respect, in a non-harmonised world, for the quality and validity of other sovereign States' criminal law. The second is tantamount to de facto harmonisation around the lowest common denominator. [90]

110. Here, one may perhaps draw a parallel with the case-law on the principle of mutual recognition applicable to the main freedoms under the EC Treaty. Although mutual recognition is important, there are exceptions to that principle both under specific EC Treaty provisions and under the 'mandatory requirements' case-law. For its full application, the principle requires in any event that the qualifications or features of the persons, goods or services seeking to rely upon the free movement provisions be comparable to those required in the host or importer State. [91]

111. A fortiori, similar exceptions and 'comparability' requirements must be possible in the context of the Schengen acquis (which, even though it is now part of EU law following the Treaty of Amsterdam, still falls short of the full integration aims and mechanisms of the EC Treaty). They must, moreover, be appropriate in the context of cooperation in the field of criminal law, a delicate area of national sovereignty in so far as it codifies the moral and social values of national societies. [92]

90 — In this instance, it would moreover be the Court that acted as legislator, which serves to underscore the undesirability of such an approach.

91 — See in this respect the analysis made by S. Peers, 'Mutual Recognition and Criminal Law in the EU: Has the Council got it Wrong?', (2004) *Common Market Law Review* 5.

92 — Indeed, 'Le crime et la peine sont donc des phénomènes sociaux, soumis aux lois de la sociologie, et ainsi conditionnés par tous les changements apportés à l'organisation sociale, par exemple, par les variations du milieu économique et, plus encore, par l'état des croyances morales et du degré de culture de chaque époque et de chaque peuple'. (Émile Garçon, 1851-1922, *Le droit pénal, origines, évolution, état actuel*, Payot, 1922, p. 3). The Court has in the past avoided questioning under Community law the moral choices made by Member States as reflected in their legislation. *Grogan* (Case C-159/90 [1991] ECR I-4685) provides the classic example, albeit not the only one, in that context. See generally S. O'Leary and J.M. Fernández-Martín, 'Judicially created exceptions to the free provision of services' in *Services and Free movement in EU Law*, M. Andenas, and R. Wulf-Henning (eds.), 2002, OUP, 163. It is interesting to note that, in the context of the avowedly federal system of the USA, the double jeopardy clause of the Fifth Amendment is not breached by successive State and/or federal prosecutions for the same underlying conduct. States are in respect of each other and in respect of the federal government considered as separate sovereigns for the purposes of the double jeopardy clause (*Heath* v *Alabama* (1985) 474 U.S. 82).

112. By way of illustration, let us take the age of criminal responsibility — clearly a deliberate choice by society, and one that varies significantly from one Member State to another. [93] In the absence of any harmonisation agreement between Member States, it seems to me that a vaguely defined 'principle of mutual trust' would not form an appropriate basis for treating the discontinuance of criminal proceedings in the 'first' Member State because the defendant was under the age of criminal responsibility as the trigger for applying *ne bis in idem* in another Member State where the age of criminal responsibility was lower. At the present stage of European integration in criminal matters, such a result does not seem consonant with the degree of competence still enjoyed by each Member State. [94]

113. Second, does the substance-based approach require, as a precondition for the application of *ne bis in idem*, some minimum level of harmonisation between the criminal law systems of the Member States? If so, it would clearly run counter to the approach adopted by the Court in both *Gözütok and Brügge* and *Van Esbroeck*.

114. It seems to me that the observations just advanced in respect of the principle of mutual trust are also of pertinence here. Just as with mutual recognition in the context of the free movement provisions of the EC Treaty, the principle of mutual trust cannot on its own effectively ensure that the aims sought by Title VI EU (Police and Judicial Cooperation in Criminal Matters) are attained. In order fully to guarantee free movement in a context where there is considerable diversity in national approaches to criminal matters, a certain degree of harmonisation or approximation of national criminal laws will in due course probably be necessary. [95] That applies fairly clearly to the issue of time-barring. Unless and until that happens, it seems to me that the mutual trust principle provides an unsatisfactory basis for extending the *ne bis in idem* principle so as to cover *res judicata* on procedural grounds arising from application of a time-bar without assessment of the merits. If the result is

93 — In the EU, depending on the Member States, the age of criminal responsibility is set at 7, 8, 13, 14, 16 and 18 years old.

94 — In this respect, I differ from the view expressed in passing by Advocate General Ruiz-Jarabo Colomer in *Van Straaten*, cited in footnote 19 above, at point 65.

95 — In the same vein, see H. Schermers, 'Non bis in idem' in *Du Droit International au Droit de l'Intégration, Liber Amicorum Pierre Pescatore*, F. Capotorti et al. (eds), Nomos, 601 at 611. See also van den Wyngaert and Stessens, cited in footnote 67 above, at p. 792.

to give priority in this instance to the maintenance of a high level of safety within an area of freedom, security and justice rather than to absolute rights of free movement, so be it.

115. Third, are there (as the Commission argues) serious practical difficulties in adopting a substance-based approach? The Commission has suggested two main problems that may arise. First, national courts will need to determine whether there has been any assessment of the merits in the 'first' Member State. Second, the Commission fears that there might as a consequence be instances of discriminatory treatment. Individuals 'acquitted' in a Member State where that decision involves an assessment of the merits of the case would be in a position to benefit from the principle of *ne bis in idem*, whereas individuals 'acquitted' for the same reasons in a Member State where no assessment of the merits is required would not.

116. I disagree with the Commission.

117. As to the argument based on practical difficulties, I cannot see how those difficulties are inherently different from the difficulties that national criminal courts necessarily face when cooperating with criminal courts of other Member States. In addition to the cooperation obligation imposed by Article 57 of the CISA, there are sufficient cooperation mechanisms already in place to ensure the (relatively) smooth resolution of any doubts that a national court may have as regards the scope of a criminal law decision adopted by a court of another Member State to which it is required to have regard. It would be sufficient for the criminal court in the 'second' Member State to ask the national court in the 'first' Member State to clarify, within the context of those cooperation procedures, whether an examination of the merits did, or did not, take place.

118. It also seems reasonable to assume that counsel for the defendant will raise the issue in the second proceedings; and will argue (as have counsel for the defendants in Spain in the present case) that the acquittal in the first Member State, though based in part on the time-bar on prosecution, nevertheless involved an assessment of the merits.

119. As to the discrimination argument, discrimination consists in treating two comparable situations differently. The situation of a defendant acquitted following an examination of the merits is not comparable to the situation of a defendant acquitted without any such assessment. I therefore do not consider that the substance-based approach

is likely to give rise to any issue of discrimination.

The second question

121. By its second question the referring court essentially wishes to know whether the *ne bis in idem* principle laid down in Article 54 of the CISA is to be interpreted as preventing individuals from being prosecuted in Member State B by virtue of the fact that criminal proceedings arising out of the same facts, but involving different individuals, were discontinued in Member State A because prosecution for the alleged offence was time-barred.

120. In view of the foregoing, I suggest, in agreement with the position adopted by Spain, Italy, Poland, France and the Netherlands, that the first question should be answered in the sense that, at the present stage of development of European Union law, Article 54 of the CISA is to be interpreted as meaning that a national court is bound by a decision adopted in criminal proceedings by a court in another Member State that a prosecution is time-barred only if (a) that decision is final under national law, (b) the proceedings in the other Member State have involved consideration of the merits of the case; and (c) the material facts [96] and the defendant(s) are the same in the proceedings before both courts. [97] It is for the national court to decide whether those conditions are satisfied in a particular case. Where they are satisfied, further proceedings against the same defendant(s) on the basis of the same material facts are precluded.

122. I share the view of all the parties submitting observations — with the exception (unsurprisingly) of the defendants in the main proceedings — that this question is straightforward and should be answered in the negative.

123. Article 54 of the CISA explicitly states that '*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'. It follows from a literal reading of that provision that it benefits only the specific individual or individuals who have been finally acquitted or convicted. On its face, that provision does not therefore cover other individuals who may have been involved in the same acts but

96 — See the reply to question 4(b), points 148 to 154 below.

97 — See the reply to the second question, points 121 to 124 below.

who have not yet been tried. The Court has, indeed, already applied that literal construction of Article 54 in *Gözütok and Brügge*, when it held that 'the only effect of the *ne bis in idem* principle, as set out in that provision, 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'. [98]

124. That conclusion is reinforced by the judgment in *Cement*. In that case, the Court stated in respect of the EC competition rules that the application of the *ne bis in idem* principle is subject to, inter alia, the condition of 'unity of offender'. [99]

The third question

125. The third question asks whether, in the event that 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 therefore acquit the defendant, the criminal courts of another Member State may broaden the investigation in order to prove that the introduction of goods without payment of customs duties was from a non-Member State.

126. As the Commission and the defendants in Spain have correctly pointed out, this question is based on a hypothesis that is at odds with the description of the facts in the order for reference. [100] Since there are indications that an answer to this question may be useful for the referring court, I shall nevertheless examine it.

127. I agree with most of the Member States submitting observations [101] that the answer to this question depends in essence on whether the decision in which the first findings of fact were made itself fulfils the conditions for the principle of *ne bis in idem* in Article 54 of the CISA to apply. I have already examined those conditions in my analysis of the first two questions; and refer back to the conclusions I reached.

98 — At paragraph 47 (my emphasis).

99 — *Cement*, cited in footnote 23 above, at paragraph 338.

100 — See points 29 to 33 above. It is, however, perfectly consistent with the texts of the judgments of the Setúbal Criminal Court and the Portuguese Supreme Court, see point 33 above.

101 — All Member States (with the exception of France which did not comment on the third question in its oral observations), made the answer to the third question dependent on the answers to the first two questions.

128. I therefore suggest that the answer to the third question should be that, at the present stage of development of European Union law, Article 54 of the CISA is to be interpreted as meaning that criminal courts in one Member State are bound by a decision adopted in criminal proceedings by a court in another Member State only if (a) the decision is final under national law, (b) the proceedings in the other Member State have involved consideration of the merits of the case; and (c) the material facts and the defendant(s) are the same in the proceedings before both courts.

The fourth question

129. It is for the national court to decide whether those conditions are satisfied in a particular case. Where they are satisfied, further criminal proceedings against the same defendant(s) on the basis of the same material facts are precluded, and the national court may not, by broadening the scope of its examination, call in question any findings of fact in the first decision. [102]

130. On the other hand, if the conditions I have mentioned are not present, criminal courts in other Member State may start fresh criminal inquiries, where that is their function under national criminal law, in order to establish whether an offence of unlawful importation has occurred.

131. The wording of the fourth question implies that the Portuguese Supreme Court had already found that the goods at stake had *not* been unlawfully imported into Portugal, an implication which is contradicted by other parts in the order for reference. [103] Having regard, however, to the overall tenor of the order for reference, I will, as have the Commission and all Member States submitting observations, reformulate these questions with the aim of providing the national court with a useful answer.

132. The fourth question consists of two separate questions.

102 — I should emphasise that the answer I propose should not be read as necessarily precluding the reopening of a case under Article 4(2) of Protocol No 7 to the ECHR (for example, should evidence emerge of new or newly discovered facts). Since the point is not raised in the present reference, I do not consider it further here.

103 — See points 29 to 33 above.

Question 4(a)

133. The first sub-question, which concerns the notion of goods in free circulation under Article 24 EC, consists in turn of two elements.

134. The first element raises the issue of whether a finding by a criminal court in one Member State that no unlawful importation has been established confers on the goods in question the irreversible status of goods in free circulation benefiting from Article 24 EC and binds the criminal courts in other Member States in criminal proceedings relating to the same goods.

135. The second element once again focuses on whether the final decision of a criminal court holding a prosecution based on unlawful importation to be time-barred and, on those grounds, also barring any further criminal proceedings for unlawful importation in that Member State, binds the criminal courts and competent authorities of all other Member States, which as a consequence, must accept that the goods in question are indeed in free circulation.

136. I have already developed, albeit in general terms, the necessary elements to reply to both those elements when examining the first three questions.

137. However, in order to provide a more useful reply, I think it necessary to distinguish between the *administrative law status* of goods in free circulation, on the one hand; and the *criminal liability* that may arise from unlawful importation into the Community of goods originating in third countries, on the other hand. The former is regulated by Community rules. In contrast, the latter falls under national criminal law.

138. According to Article 24 EC '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'.

139. Further detailed rules are laid down by the Community Customs Code established by Council Regulation (EEC) No 2913/92 [104] ('the Customs Code'), and by Commission

104 — Of 12 October 1992, OJ 1992 L 302, p. 1.

Regulation (EEC) No 2454/93 implementing the Customs Code ('the implementing Regulation'). [105]

140. Pursuant to Article 24 EC and the relevant provisions in the Customs Code and the implementing Regulation, [106] goods in free circulation are to be understood as meaning those products which, coming from third countries, have been duly imported into any one of the Member States in accordance with the requirements laid down by Article 24 EC. [107] Once goods imported from third countries have been released for free circulation, they acquire the status of Community goods. [108] Release for free circulation entails the 'completion of the ... formalities laid down in respect of the importation of goods and the charging of any duties legally due'. [109] There is a presumption that goods moving within the Community enjoy the status of goods in free circulation until the contrary is proved. [110]

141. Under the applicable Community rules, customs authorities are still entitled, within the limits laid down by the case-law of the Court on the principle of proportionality and the free movement of goods, [111] to verify the authenticity of the documents establishing the status of the goods and to carry out inquiries with a view to ensuring that customs rules are complied with. [112] In the case of unlawfully imported goods or goods unlawfully released for free circulation, the Customs Code and the implementing Regulation provide that such goods give rise to a customs debt which must be satisfied by the responsible person. [113]

142. Thus, once import formalities have been completed, and any charges due paid, goods imported from third countries benefit from the status of goods in free circulation and enjoy all related rights under Community rules. National authorities are bound by those Community rules. The authorities of other Member States are to presume that a declaration by national customs authorities that goods are in free circulation is valid until the contrary is proven. If the latter is the case, the resulting customs debt must be satisfied. It is at this point that the remit of Community customs law ends.

105 — Of 2 July 1993, OJ 1993 L 253, p. 1. A consolidated version of this regulation is available at http://europa.eu.int/eur-lex/en/consleg/pdf/1993/en_1993R2454_do_001.pdf.

106 — Articles 4(6) and (7) of the Community Customs Code and Article 313 of the implementing Regulation.

107 — Case 41/76 *Donckerwolcke* [1976] ECR 1921; Case C-83/89 *Houben* [1990] ECR I-1161.

108 — Article 4(6) and (7) and 79 of the Customs Code.

109 — Article 79 of the Customs Code.

110 — Article 313(1) of the implementing Regulation.

111 — On the conditions applicable under Articles 28 and 30 EC to import controls and inspections after 1993, see P. Oliver, assisted by M. Jarvis, *Free Movement of Goods in the European Community*, 4th ed., 2003, Sweet & Maxwell, at 6.10, 7.04 and 12.12 to 12.20.

112 — Article 250 of the Customs Code.

113 — See Chapter 2, 'Incurrence of Custom Debt' of Title VII, entitled, 'Custom Debt', of the Customs Code.

143. Community rules thus deal only with the administrative law aspects of unlawful importation. They do not seek to harmonise the legal treatment of customs offences under national criminal laws. Member States have retained the power to penalise customs offences against the Customs Code, [114] subject to the conditions laid down by the Court in particular as regards proportionality. Therefore, the question whether unlawful importation gives rise to a custom offence (in addition to the customs debt under administrative law) subject to criminal liability is to be determined in accordance with the applicable national criminal laws.

144. Clearly, the elements of such an offence that relate to whether there has been, on the facts, unlawful importation into the Community are regulated by the relevant Community rules. To that extent, the Community rules do play a role in determining whether a customs offence has been committed under national criminal law. Whether or not such findings of fact have been made in particular criminal proceedings will turn on how and when any question of time-bar was raised in those proceedings.

145. It follows that, as I have already pointed out in my reply to the third question, at the present stage of development of European Union law, where all the conditions necessary for the *ne bis in idem* principle in Article 54 of the CISA to apply are met, further criminal proceedings against the same defendant(s) on the basis of the same material facts are precluded, and a national criminal court may not call in question any findings of fact in the first decision. [115]

146. If that is not the case, however, criminal courts in other Member States are not bound by previous findings made by the criminal courts in another Member State.

147. The assessment of whether particular goods enjoy the status of 'Community goods' or whether their importation into the Community constitutes a customs offence subject to criminal liability is a matter for the national court which must apply, in determining the issue whether the goods are 'in free circulation', the relevant Community law provisions (that is, Article 28 EC, the Customs Code and its implementing regula-

114 — See in particular Case 240/81 *Einberger* [1982] ECR 3699; see also Case 252/87 *Kiwall* [1988] ECR 4753, at paragraph 11.

115 — Clearly, the same proviso made in footnote 102 above as regards Article 4(2) of Protocol No 7 of the ECHR also applies here.

tion); and, as regards criminal liability, the relevant national rules relating to customs offences.

Question 4(b)

148. The second sub-question asks in essence whether, for the purposes of applying Article 54 of the CISA, the importation and the subsequent sale of goods must be considered as a single act, or as two separate acts.

149. The notion of 'same acts' for the purposes of Article 54 of the CISA has been interpreted by the Court in *Van Esbroeck*. It held that the 'only relevant criterion' for the purposes of that provision is that there should be an 'identity of the material facts, understood in the sense of the existence of a set of concrete circumstances which are inextricably linked together'.[116] The Court suggested that material facts would qualify as the 'same acts' if they constituted a 'set of facts which are inextricably linked together in time, in space and by their subject-matter'.[117]

116 — At paragraph 36.

117 — At paragraph 38.

150. The facts in *Van Esbroeck* (export and import of the same drugs from and to different Contracting States) were deemed by the Court to be *in principle* the 'same acts' for the purposes of Article 54 of the CISA.[118] However, since the issue arose as a question of fact in the context of a request for a preliminary ruling, it fell to be resolved by the national court.

151. Does the importation and marketing of goods constitute an 'identity of material facts', understood as 'a set of facts which are inextricably linked together in time, in space and by their subject-matter'?

152. I do not think that that is necessarily the case. The act of unlawfully importing goods, understood as bringing goods within the customs territory of the EU without satisfying the relevant customs duties or import obligations, does not *necessarily or automatically also comprise* the act of selling those goods in that territory to third parties. One can, for example, readily conceive of unlawful importation of goods for one's own consumption, in which case no sale takes

118 — Ibid. Indeed, goods which are transported over the border are by the same act both exported from the territory of one contacting authority and imported into the territory of another. Considering such course of action to be composed of two distinct acts would, as duly stressed by Advocate General Ruiz-Jarabo Colomer in *Van Esbroeck*, go against the aims and principles underlying the whole internal market ideals of the EC Treaty: see his Opinion in *Van Esbroeck*, cited in footnote 19 above, at point 52.

place at all. It is likewise possible to envisage unlawful importation by one person and subsequent sale by another person in a different Member State. In such a case, there would be two distinct sets of material facts, involving two different persons, at two different places and at two different times.

153. It therefore seems to me that the unlawful importation and the sale of the same goods are not always 'a set of facts which are inextricably linked together in time, in space and by their subject-matter'. As a result, they are not necessarily the 'same acts' for the purposes of Article 54 of the CISA as interpreted by the Court in *Van Esbroeck*. Or, to use the words of the referring court, the sale of unlawfully imported goods does not necessarily form an integral part of the importation.

154. Of course there may be circumstances in which unlawful importation and subsequent sale of the smuggled goods are indeed so inextricably linked [119] that they may be considered to be the same facts within the meaning of *Van Esbroeck*. That will be for the national court to decide.

119 — For example, when the importer has already agreed to the sale, or effects it shortly after the unlawful importation of the goods.

155. I should draw attention here to a divergence of approach between *Van Esbroeck* and *Cement*. In *Cement*, in the context of applying *ne bis in idem* as a fundamental principle of EC law to competition law, the Court made its application subject to the 'threefold condition' of 'identity of the facts, unity of offender and unity of the legal interest protected'. [120] In contrast, in *Van Esbroeck* the Court explicitly stated that the existence of a 'unity of the legal interest protected' is *not* a condition under Article 54 of the CISA. A mere identity of material facts is sufficient.

156. If one accepts, as I do, [121] that as a matter of logic the principle of *ne bis in idem* should not be substantially different depending on whether it applies under Article 54 of the CISA or as a fundamental principle of Community law, it is necessary to reconcile these two cases.

157. It seems to me that the distinguishing element is that in *Cement* the Court was applying the principle of *ne bis in idem* to the

120 — *Cement*, cited in footnote 23 above, at paragraph 338. See also Case 137/85 *Maizena* [1987] ECR 4587, in which the Court rejected the application of the principle of *ne bis in idem* because the two Community law provisions (imposing on the plaintiffs in the national proceedings the provision of two securities in connection with the same export licence) had different purposes. The Court thus implicitly applied the criterion of the unity of the legal interest protected as a pre-requisite for *ne bis in idem*. See in the same sense Case C-304/02 *Commission* v *France* [2005] ECR I-6263, at paragraph 84; and see also the case-law cited in footnote 49 above.

121 — See points 101 to 103 above.

powers of Community institutions to sanction undertakings under the EC competition rules — that is, in a strictly supranational context and with respect to a *single* legal order governed by one *uniform* set of rules. In such circumstances, the legal interest protected is, by definition, already established by the EC competition rules; and is one and the same for the whole Community. It is therefore reasonable for the Court to require, in that 'unitary' context, that there should be 'unity of the legal interest protected' as one of the conditions for the application of the *ne bis in idem* principle.

158. The expression of *ne bis in idem* in Article 54 of the CISA is, on the contrary, expressly *not* meant to apply in the context of a single uniform legal system. Rather, it is intended to govern certain aspects of Member States' cooperation in criminal matters within the framework of the Schengen agreement. In that context, the different domestic legal orders may be expected to seek to protect very varied legal interests through the medium of their criminal laws. As both the Advocate General [122] and the Court [123] pointed out in *Van Esbroeck*, to require 'unity of the legal interest' for the *ne bis in idem* principle in Article 54 of the CISA to apply would have emptied the principle of any substance and effectiveness in achieving its aim of furthering free movement of persons.

159. It is, finally, important to note that the difference in approach between *Cement* and *Van Esbroeck* may be of considerable significance in defining the scope of Article 54 of the CISA. Thus, under the broad approach adopted in *Van Esbroeck*, whenever an individual has been charged with several offences arising from the same nexus of facts in national criminal proceedings, final acquittal in respect of one charge suffices to trigger *ne bis in idem* under Article 54 of the CISA. [124]

122 — Opinion of Advocate General Ruiz-Jarabo Colomer in *Van Esbroeck*, cited in footnote 19 above, at points 45 to 48. As I have indicated above (see footnote 67 above), the case-law of the European Court of Human Rights is not consistent as to whether the unity of the legal interest protected is a precondition for *ne bis in idem*, or whether identity of the material facts is sufficient.

123 — See point 56.

124 — Suppose, by way of illustration, that a defendant is charged with three criminal offences arising from the same facts. The competent criminal court declares by order, without a review of the merits, that two of the prosecutions are time-barred. After trial, it acquits the defendant of the third charge by final judgment because there is insufficient evidence to support a conviction. Applying *Van Esbroeck*, only identity of the material facts and of the defendant is required; 'unity of the legal interest protected' is not. The defendant may thereafter rely on *ne bis in idem* under Article 54 of the CISA, even with regard to the first and second charges.

Conclusion

160. In view of the foregoing, I am of the opinion that the Court should give the following answers to the questions referred by the Audiencia Provincial de Málaga:

(1) At the present stage of development of European Union law, Article 54 of the Convention implementing the Schengen Agreement is to be interpreted as meaning that a national court is bound by a decision adopted in criminal proceedings by a court in another Member State that a prosecution is time-barred only if (a) that decision is final under national law, (b) the proceedings in the other Member State have involved consideration of the merits of the case; and (c) the material facts and the defendant(s) are the same in the proceedings before both courts. It is for the national court to decide whether those conditions are satisfied in a particular case. Where they are satisfied, further proceedings against the same defendant(s) on the basis of the same material facts are precluded.

(2) Since Article 54 of the Convention implementing the Schengen Agreement applies only where the same defendant is concerned, it does not prevent individuals from being prosecuted in one Member State by virtue of the fact that criminal proceedings arising out of the same facts, but involving different individuals, were discontinued in another Member State because prosecution for the alleged offence was time-barred.

(3) At the present stage of development of European Union law, Article 54 of the Convention implementing the Schengen Agreement is to be interpreted as meaning that criminal courts in one Member State are bound by a decision adopted in criminal proceedings by a court in another Member State only if

(a) the decision is final under national law, (b) the proceedings in the other Member State have involved consideration of the merits of the case; and (c) the material facts and the defendant(s) are the same in the proceedings before both courts. It is for the national court to decide whether those conditions are satisfied in a particular case. Where they are satisfied, further proceedings against the same defendant(s) on the basis of the same material facts are precluded, and the national court may not, by broadening the scope of its examination, call in question any findings of fact in the first decision.

(a) The answer to question 3 is applicable irrespective of whether the criminal court in the first Member State has decided that alleged facts have not been proved or whether it has declared prosecution for the offence(s) in question to be time-barred under its national criminal rules.

(b) Unlawful importation and subsequent sale of the same goods are not the 'same acts' for the purposes of Article 54 of the Convention implementing the Schengen Agreement unless they are inextricably linked together in time, in space and by their subject-matter. It is for the national court to decide whether those conditions are satisfied in a particular case.