

OPINION OF ADVOCATE GENERAL  
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<sup>1</sup> — Original language: Spanish.

## I — Introduction

### 1. The Schengen *acquis* comprises:

(a) the Agreement, signed in Schengen, Luxembourg, on 14 June 1985 by the three States comprising the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the gradual abolition of checks at their common borders (hereinafter ‘the Schengen Agreement’); and

(b) the Convention implementing that Agreement, signed on 19 June 1990 by the same contracting parties<sup>2</sup> (hereinafter ‘the Convention’).<sup>3</sup>

2. These questions, referred for a preliminary ruling under Article 35 TEU,<sup>4</sup> give the Court of Justice the opportunity to interpret the Convention for the first time.

3. The doubts entertained by the Oberlandesgericht Köln and the Rechtbank van Eerste Aanleg te Veurne relate to Article 54. They wish to know whether the *ne bis in idem* principle,<sup>5</sup> stated in that provision, is applicable when criminal proceedings have been discontinued under the legal system of one of the signatory States as the result of a settlement agreed between the prosecuting authority and the accused.

## II — The applicable European legislation

4. Article 1 of the Protocol integrating the Schengen *acquis* into the framework of the European Union, annexed to the Treaty on European Union and to the Treaty establishing the European Community (hereinafter ‘the Protocol’), authorised thirteen Member States, amongst them the Federal Republic of Germany, the Kingdom of Belgium and the Kingdom of the Netherlands,<sup>6</sup> to establish closer cooperation within the scope of those legal provisions.

5. As stated in the preamble to the Protocol, the Schengen *acquis* is ‘aimed at

2 — OJ 2000 L 239, p. 19.

3 — It also includes the accession protocols and agreements to both instruments of other Member States of the European Union, the decisions and declarations adopted by the Executive Committee set up by the Convention, as well as the acts adopted by the organs on which the abovementioned Committee has conferred decision-making powers.

4 — Formerly article K.7 of the Treaty on European Union.

5 — The parameters of this principle are not well-defined even in the case-law of the European Court of Human Rights, as that Court itself acknowledges in the judgment in *Göktan v. France*, no. 00033402/96, §§ 44 and 46, 2 July 2002.

6 — The others are the Kingdom of Denmark, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Grand Duchy of Luxembourg, the Republic of Austria, the Portuguese Republic, the Republic of Finland and the Kingdom of Sweden.

enhancing European integration and, in particular, at enabling the European Union to develop more rapidly into an area of freedom, security and justice’.

6. The second paragraph 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.

7. Taking the second paragraph of Article 2(1) of the Protocol as a basis, the Council adopted on 20 May 1999 Decisions 1999/435/EC and 1999/436/EC defining the Schengen Agreement and 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*.<sup>7</sup>

8. It is clear from Article 2 of, and Annex A to, the second of those decisions that the legal basis for Articles 54 to 58 of the Convention is Articles 34 and 31 of the Treaty on European Union, which form part of Title VI, headed ‘Provisions on police and judicial cooperation in criminal matters’.

9. The abovementioned articles of the Convention make up Chapter 3, which is entitled ‘Application of the *non bis in idem* principle’, of Title III, ‘Police and Security’.

10. Article 54 provides:

‘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.’

11. Under Article 55:

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

(a) where the acts to which the foreign judgment relates took place in whole or in part in its own territory; in the latter case, however,

<sup>7</sup> — OJ 1999 L 176, pp. 1 and 17, respectively.

this exception shall not apply if the acts took place in part in the territory of the Contracting Party where the judgment was delivered;

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

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

12. Article 56 states as follows:

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

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

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

13. Article 57 establishes:

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

'1. Where a Contracting Party charges a person with an offence and the competent authorities of that Contracting Party have reason to believe that the charge relates to the same acts as those in respect of which the person's trial has been finally disposed of in another Contracting Party, those

authorities shall, if they deem it necessary, request the relevant information from the competent authorities of the Contracting Party in whose territory judgment has already been delivered.

### III — The facts, main proceedings and questions referred for a preliminary ruling

#### 1. Case C-187/01

2. The information requested shall be provided as soon as possible and shall be taken into consideration as regards further action to be taken in the proceedings underway.

3. Each Contracting Party shall, when ratifying, accepting or approving this Convention, nominate the authorities authorised to request and receive the information provided for in this Article.'

14. Finally, Article 58 provides:

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

15. Mr Gözütok is a Turkish national who has lived for some time in the Netherlands where he ran a coffee-shop in the town of Heerlen without the mandatory administrative authorisation. On 12 January and 11 February 1996 the Netherlands police searched the premises and seized certain quantities of hashish and marijuana.<sup>8</sup>

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

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

<sup>8</sup> — 1 kg of hashish, 41 hashish cigarettes (*joints*) and 1.5 kg of marijuana in the first search, and 56 grammes of hashish, 10 *joints* and 200 grammes of marijuana in the second.

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

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

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

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

22. The Oberlandesgericht Köln believes that a decision on the appeal hinges on the scope accorded to the terms of that provision of the Convention, and therefore refers the following questions to the Court of Justice:

'Is there a bar to prosecution in the Federal Republic of Germany under Article 54 of the Schengen Implementing Convention if, under Netherlands law, a prosecution on the same facts is barred in the Netherlands?

In particular, is there a bar to prosecution where a decision by the Public Prosecutor's Office to discontinue proceedings, after the fulfilment of the conditions imposed (Netherlands *transactie*), which under the law of other Contracting States requires judicial approval, bars prosecution before a Netherlands court?'

## 2. Case C-385/01

23. Mr Brügge, a German national, caused Mrs Leliaert bodily injury which rendered her unfit for work.

24. The Bonn Public Prosecutor conducted an investigation in respect of those facts against Mr Brügge, in which he offered him an amicable settlement under which the case would not be proceeded with following payment of DEM 1 000.<sup>9</sup> On 13 August 1998 the defendant paid the fine and the Public Prosecutor ordered the discontinuance of the case.

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

26. That court considers that, in order to give a ruling in the case, it needs to know the scope of Article 54 of the Convention and refers the following question to the Court of Justice:

‘Under Article 54 of the Schengen Agreement of 19 June 1990, is the Belgian Public Prosecutor’s Office permitted to require a German national to appear before a Belgian criminal court and be tried on the same facts as those in respect of which the German Public Prosecutor’s Office made him an offer, by way of a settlement, to discontinue the case after payment of a certain sum, which was paid by the accused?’

<sup>9</sup> — The legislative basis for that offer is found in Article 153a of the *Strafprozeßordnung* (German Code of Criminal Procedure).

#### IV — Procedure before the Court of Justice

27. In Case C-187/01 written observations have been presented, within the period laid down for the purpose by Article 20 of the EC Statute of the Court of Justice, by Mr Gözütok, the German, Netherlands and French Governments, and by the Commission. In the other case, as well as the first two governments mentioned above and the Commission, the Belgian Government took part in the written stage.

28. On 9 July 2002 a joint hearing was held, at which the representatives of those who had presented written observations and the representative of the Italian Government submitted oral argument.

#### V — A note on the jurisdiction of the Court of Justice under Article 35 TEU

29. The Treaty of Amsterdam has extended the jurisdiction of the Court of Justice to give preliminary rulings to the third pillar (justice and home affairs) and opened the way for the Court, at the request of the national courts, to give rulings on the validity and interpretation of framework decisions and decisions, on the interpre-

tation of conventions adopted for police and judicial cooperation in criminal matters and on the validity and interpretation of the measures implementing them (Article 35(1) TEU).

30. Under the Protocol and Council Decisions 1999/435 and 1999/436, cited above,<sup>10</sup> Article 54 of the Convention may be interpreted in a preliminary ruling given by the Court of Justice, whose jurisdiction on this point is contingent since, in order to be effective, it must be accepted by the Member States in accordance with the provisions of Article 35(2) TEU.

31. A Member State which accepts that new jurisdiction of the Court of Justice may choose between granting the power to refer questions for a preliminary ruling either to any of its courts or tribunals or only to those courts or tribunals which give a final decision against which there is no further 'judicial remedy' (Article 35(3)) TEU.

32. The Federal Republic of Germany has opted to confer the power to refer questions for a preliminary ruling to all courts and tribunals, but, in the case of those which

give final decisions, the power becomes a duty.<sup>11</sup>

33. When Belgium signed the Treaty of Amsterdam, it made a declaration accepting the jurisdiction of the Court of Justice and has given all its courts and tribunals power to refer questions for a preliminary ruling under Article 35 TEU.

34. Since the decisions of the Oberlandesgericht Köln in this sphere are not subject to appeal and the Rechtbank van Eerste Aanleg te Veurne is a Belgian court within the meaning of the aforementioned provision, the former had the obligation and the latter the option to apply to the Court of Justice after establishing that, in order to reach a decision in the case concerned, it was necessary to interpret Article 54 of the Convention.

11 — See Article 1(2) of the Law on the jurisdiction of the Court of Justice of the European Communities to give preliminary rulings in criminal matters under Article 35 TEU (*Gesetz betreffend die Anrufung des Gerichtshofes der Europäischen Gemeinschaften im Wege des Vorabentscheidungsverfahrens auf dem Gebiet der polizeilichen Zusammenarbeit und der justitiellen Zusammenarbeit in Strafsachen nach Artikel 35 des EU-Vertrages*; hereinafter 'EuGH-Gesetz'). That decision of the German authorities is the consequence of Declaration No 10 annexed to the Final Act of the Treaty of Amsterdam, according to which 'Member States may... reserve the right to make provisions in their national law to the effect that, where a question relating to the validity or interpretation of an act referred to in Article 35(1) is raised in a case pending before a national court or tribunal against whose decision there is no judicial remedy under national law, that court or tribunal will be required to refer the matter to the Court of Justice.'

10 — See points 7 and 8 above.



35. On that premiss and since the questions referred for a preliminary ruling do not affect any of the matters referred to in Article 35(5) TEU,<sup>12</sup> it is unquestionable that the Court of Justice has jurisdiction.

sequences which should ensue with regard to the discontinuance of the criminal action. It falls to the Court of Justice only to interpret the provision. Consequently, it cannot express a view on whether, once the criminal action has been extinguished in the Netherlands, that means that it is barred under the German legal system.

## VI — Analysis of the questions referred for a preliminary ruling

### 1. *A few preliminary points*

36. The purpose of the jurisdiction to give preliminary rulings conferred by Article 35(1) TEU is — as of all the powers of this kind conferred on the Court of Justice — that the Court shall interpret or, if appropriate, give its opinion on the validity of the provisions of European law which constitute its substantive scope. However, it certainly does not go as far as regulating the application of those rules to the case pending before a national court.

37. Therefore, it is not for the Court to express a view on the effect of Article 54 of the Convention on the criminal proceedings against Mr Gözütok or on the con-

38. On those premisses, the Court of Justice must disregard the terms in which the Oberlandesgericht Köln formulates the first of its questions. In actual fact, if the overall meaning of the questions raised by the two national courts is considered, it may be said that the doubts they entertain are the following:

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

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

<sup>12</sup> — '... the validity or proportionality of operations carried out by the police or other law enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.'

39. In order to clarify the above questions it is necessary to consider the scope of the aforementioned principle and, in particular, its significance in the context of Article 54 of the Convention, by ascertaining the objective and purpose of this provision of the agreement. It is also necessary to examine criminal procedures which are in the nature of a settlement and their effects, in relation to the wording of the provision which the Court of Justice is asked to interpret.

40. In carrying out that task it is necessary to bear in mind two facts which appear contradictory and yet are complementary, the two sides of a single phenomenon.

41. The first is that criminal law within the European Union is fragmented into as many different systems as there are Member States. The second is that, however different the national criminal justice systems are, the aim is to achieve closer and closer cooperation within the framework of the third pillar.

42. This dual finding has two consequences. One is that the reply must be sought disregarding the peculiarities of each system. Article 54 of the Convention uses terms whose scope differs in the various domestic legal systems, so it is necessary to avoid any interpretation which looks to the national legal orders. The law of the European Union, which is the

common substratum formed by the objectives pursued by the Schengen *acquis*, must form the basis of the investigation. As the Commission points out in its written observations, the Court of Justice should suggest an independent interpretation of Article 54 of the Convention.

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

## *2. Article 54 of the Convention as a genuine expression of the ne bis in idem principle*

44. Article 54 of the Convention is a legislative provision in a dynamic process of European integration through the deve-

lopment of a common area of freedom and justice. The gradual abolition of common border controls is a necessary step on the path to achieving that objective. However, the removal of administrative obstacles lifts the barriers for everybody, including those who take advantage of the reduction in security in order to expand their unlawful activities.

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

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

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

3. *The bases of the ne bis in idem principle. Its importance in the case-law of the Court of Justice*

48. This rule of law, in order to protect identical legal rights and in respect of the same unlawful conduct, prevents a person from being subject to more than one penalising procedure and, possibly, being punished repeatedly, in so far as that duplication of procedures and penalties involves the unacceptable repetition of the exercise of the *ius puniendi*.<sup>13</sup>

13 — In the 17th Century, the brilliant Cervantes was concerned that his characters should observe the principle. When Don Quixote, who had been wounded during a duel, saw that his helmet was broken and cried for vengeance, Sancho gave him wise advice: 'I'd just like to point out, Don Quixote sir, that if that knight has done as he was told and has gone to present himself before my lady Dulcinea del Toboso, then he's done his duty and doesn't deserve another punishment unless he commits another crime'. Don Quixote, convinced by his squire's arguments, replied: 'You have spoken well and to the purpose...', and so I hereby annul my oath as regards exacting fresh vengeance on him.' (Miguel de Cervantes, *Don Quixote*, Part I, Chapter X, 'About what happened next between Don Quixote and the Basque, and the peril with which he was threatened by a mob of men from Yanguas' (*El ingenioso caballero Don Quijote de la Mancha* translated into English with an Introduction and Notes by John Rutherford, Penguin Classics 2001).

49. The principle rests on two pillars found in every legal system. One is legal certainty and the other is equity. When the offender is prosecuted and punished, he must know that, by paying the punishment, he has expiated his guilt and need not fear further sanction. If he is acquitted, he must have the certainty that he will not be prosecuted again in further proceedings.

50. In the event of a conviction, it should not be forgotten that every penalty has a dual purpose: to punish and to deter. It is designed to punish misconduct and to discourage the perpetrators, as well as other possible offenders, from legally culpable behaviour. It therefore has to be proportionate to those purposes, keeping an appropriate balance to provide retribution for the conduct which is being penalised and, at the same time, to serve as an example. The principle of equity, of which the proportionality rule is a tool, thus prevents penalties from overlapping.

51. The Court of Justice applied the *ne bis in idem* principle for the first time in the *Gutmann* case,<sup>14</sup> which considered the fact that two sets of disciplinary proceedings were brought against an official on the same facts. However, that was a case in which the double punishment was imposed under the same legal system. It was necess-

ary to wait until the *Walt Wilhelm*<sup>15</sup> and *Boehringer*<sup>16</sup> cases for consideration of the effect of the principle when the prosecution is repeated under different legal systems.

52. The Court of Justice has therefore had the opportunity to consider situations which have resulted in overlapping penalties. Indeed, the factual situations in which it is appropriate to apply the European Community system and the legal systems of the Member States are not exceptional. The field of competition provides a good example.<sup>17</sup> Thus, according to the Court of Justice, 'Community and national law on cartels consider cartels from different points of view. Whereas Article 85 regards them in the light of obstacles which may result for trade between Member States, each body of national legislation proceeds on the basis of the considerations peculiar to it and considers cartels only in that context.'<sup>18</sup>

53. Consistently with that approach, the Court of Justice has allowed a cartel to be analysed from the point of view both of

14 — Joined Cases 18/65 and 35/65 *Gutmann v Commission of the EAEC* [1966] ECR 103.

15 — Case 14/68 *Walt Wilhelm and Others* [1969] ECR 1.

16 — Case 45/69 *Boehringer Mannheim v Commission* [1970] ECR 769. See too Case 7/72 *Boehringer Mannheim v Commission* — 'the *Boehringer II* case' — [1972] ECR 1281, and also the Opinion delivered in that case, on 29 November 1972, by Advocate General Mayras.

17 — I shall shortly be delivering my Opinions in Cases C-213/00 P *Italcementi v Commission*, C-217/00 P *Buzzi Unicem v Commission* and C-219/00 P *Cementir v Commission*, in which I analyse the *ne bis in idem* principle within the sphere of competition law.

18 — Paragraph 3 of the judgment in *Wilhelm*, cited above.

national and Community law and, what is more significant, for that dual examination to give rise to two penalties imposed on the same person on identical facts.<sup>19</sup>

54. Does the previous statement mean that the same act may be judged and, if appropriate, punished twice if the *ius puniendi* is exercised from two different legal systems? I do not think so, in spite of the contrary view held by Advocate General Mayras in the Opinion cited above, in which he says that the principle '*non bis in idem* is applicable only within the framework of a particular legal system'.<sup>20</sup>

55. The Advocate General's statement cannot be taken out of context, a historical moment in which the spacial effect of criminal law, the expression of the sovereignty of the States, revolved around the

principle of territoriality. Mr Mayras' opinion is the expression of that notion. However, a strict application of that territorialism is incompatible with many situations in which there are elements of extra-territoriality and in which the same act may have legal effects in different parts of the territory of the Union. The construction of a Europe without borders, with its corollary of the approximation of the various national legal systems, including the criminal systems, presupposes that the States involved will be guided by the same values. It is here, in the sphere of values, that the principle under consideration achieves its full significance.

56. The classic formulation of the *ne bis in idem* principle requires that three identical circumstances should be present: the same facts, the same offender and the same legal principle — the same value — to be protected.<sup>21</sup> The decisive factor is not whether the right to impose a penalty is exercised under one legal system or under several legal systems, but that, in order to know whether an act may be punished more than once, the person exercising the power to impose the penalty, must ascertain whether, with the various penalties, the same legal principles are being protected or whether, on the contrary, the values which are being protected are different.

19 — In actual fact, as I point out in the Opinions which I have cited in footnote 17, in the *Wilhelm* judgment the *ne bis in idem* principle has not been applied. For the Court of Justice, the identity of the subject-matter to be protected — which is required for application of the rule — was not present in that case. On the other hand, it is clear from that judgment that, for Community case-law, even if the aforementioned principle is not applicable and the double sanction is lawful, 'a general requirement of natural justice... demands that any previous punitive decision must be taken into account in determining any sanction which is to be imposed' (paragraph 11). There is a similar provision in Article 56 of the Convention. In those circumstances, even though mention is made to the application of the *ne bis in idem* principle (*Anrechnungsprinzip* or 'taking into consideration principle') in actual fact it is something else. As I have pointed out in the Opinions to which I have referred, the maxim which focuses my attention is not a procedural rule which works as a palliative, in the interests of proportionality, when a person is prosecuted and punished twice for the same acts, but a fundamental safeguard for citizens, which prevents a second judgment on the same matter (*Erledigungsprinzip* or 'exhaustion of procedure principle').

20 — Part II(2), sixth paragraph of the Opinion.

21 — In Case 137/85 *Maizena* [1987] ECR 4587, the Court of Justice denied that the *ne bis in idem* principle had been infringed, because the two securities required from a person on the basis of identical facts did not have the same purpose (paragraphs 22 and 23).

57. Currently, the Member States and the European Union itself are bound by the *ne bis in idem* principle, which, as I have pointed out, is a fundamental safeguard for Citizens.<sup>22</sup>

58. It would be inherently unfair and contrary to the principles on which the construction of a United Europe rests if, in order to protect a certain legal principle, a person could be punished in several Member States for committing the same acts.

59. It is contrary to the very concept of justice to deny the effectiveness of foreign criminal judgments. That approach would both undermine the fight against criminality and the rights of the convicted person. Today, Advocate General Mayras' position would be untenable because it conflicts with the wording of Article 54 of the Convention, which reproduces Article 1 of the Brussels Convention of 25 May 1987 on the implementation of the *ne bis in idem* principle.

60. The above considerations are not merely a device for stating what Article 54

of the Convention already says, because the reasons which explain the existence of the *ne bis in idem* rule and the values which justify it may help me to find a reply to the doubts entertained by the Oberlandesgericht Köln and the Rechtbank van Eerste Aanleg te Veurne.

#### 4. *The penal settlement as an expression of the ius puniendi*

61. Thus, when a person's trial in respect of certain acts has been finally disposed of, he cannot be tried again, irrespective of whether he was acquitted or convicted in the first proceedings.

62. That statement leads to the key factor in the queries of the national courts. Where a settlement is reached in criminal proceedings, are the acts 'finally disposed of'? Or to put it another way: Is the settlement an expression of criminal justice?

63. The question must be clarified using specific knowledge of the way settlements operate in the justice system and the effects which are likely to be generated. In that investigation it is essential to take a look,

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

albeit a bird's eye view, at the legal systems of the Member States which envisage a penal settlement procedure.<sup>23</sup>

65. Austria has a procedure which is called 'diversion',<sup>26</sup> which allows the Prosecutor (or the trial judge) to abandon criminal proceedings in exchange for payment of a sum of money, community service, a probationary period or penal mediation (*aussergerichtlicher*). Once the accused has fulfilled the obligations imposed, the criminal action is permanently discontinued.<sup>27</sup>

#### A. Settlement procedures in the Member States

64. Under German law<sup>24</sup> the Public Prosecutor's Office may decide to discontinue criminal proceedings provided that the offender consents and fulfils the obligations imposed on him. Although, as a general rule, the approval of the competent court is required, it is not essential in the case of minor offences punishable by a penalty which is not higher than the minimum provided in the Criminal Code and if the damage caused is slight. If there is agreement, the Prosecutor fixes a time-limit for fulfilment of what has been agreed and, once it has been fulfilled, the liability is finally extinguished and 'the offence cannot be prosecuted as a crime'.<sup>25</sup>

66. In Belgium there are two kinds of procedure within the jurisdiction of the Public Prosecutor's Office: settlement and penal mediation, provided for in Articles 216a and 216b of the *Code d'instruction criminelle*, which allow the Prosecutor to order the final discontinuance of the proceedings if the accused fulfils certain conditions. However, in the second subparagraph of paragraph 4 of the second of those Articles, it is provided that discontinuance of a criminal action by penal mediation does not prejudice the right of victims or their successors to bring civil proceedings.

67. The French legal system has a procedure known as 'penal settlement',<sup>28</sup> in which the Public Prosecutor's Office has the power to suggest to the perpetrator of an offence that the action will be discon-

23 — For a detailed examination of the rules governing the various kinds of settlement in the Member States, reference may be had to the report prepared in 1996 by H. Labayle for DG XX of the European Commission, published by the Catania European Criminal Law Centre: *La transaction dans L'Union Européenne*, Giuffrè Editore, 1998. It is now somewhat outdated, but still of interest.

24 — Article 153a of the *Strafprozeßordnung*, cited above.

25 — Paragraph 1 of the abovementioned Article 153a. The German Criminal Code differentiates between a misdemeanour (*Vergehen*) and a crime (*Verbrechen*). An offence punishable by a term of imprisonment of one year or more is a 'crime'. The others, which receive lighter punishments, are 'misdemeanours'.

26 — It is governed by Articles 90a to 90m of the *Strafprozessordnung* (Code of Criminal Procedure).

27 — Articles 90c(5), 90d(5), 90f(4) and 90g(1) of the *Strafprozessordnung*.

28 — Introduced by Law No 99-515 of 23 June 1999.

tinued in return for the carrying out of one or more specific services. Under the French settlement system the Public Prosecutor's Office must obtain the consent of the competent court in order to settle. In any event, the power to discontinue proceedings remains in the hands of the Prosecutor.

68. Denmark provides<sup>29</sup> that, in the case of an offence punishable by a fine, the Public Prosecutor's Office may suggest to the defendant that the proceedings will be discontinued if he acknowledges his guilt and undertakes to pay a fine within a certain period. At the end of the two-month period prescribed for reversal of the proposal by a higher authority, the decision to discontinue proceedings becomes final.

69. The Spanish legal system permits the accused to agree with the penalty sought by the Prosecutor, in which case the court pronounces sentence in accordance with the mutually agreed sanction.<sup>30</sup>

70. Finnish law does not have a settlement procedure as such; however, it does have measures in the nature of a settlement which may lead to the discontinuance of

criminal proceedings. It is a simplified procedure for misdemeanours,<sup>31</sup> in which the Prosecutor may impose a fine without the need to refer the matter to a court. That decision is final and has the force of *res judicata*.

71. Ireland has means of preventing an offence being the subject of criminal prosecution, for various reasons. One example is the payment of a fine,<sup>32</sup> which puts an end to the matter.

72. Although under Italian law there is in general no settlement or penal mediation (except for offences committed by minors), there is a particular procedure called *patteggiamento*.<sup>33</sup> It is a special procedure which presupposes the existence of a settlement agreement in respect of both the proceedings and the sentence, which must not be more than two years long. On the other hand, the punishment may be conditional and, if the person receiving the penalty fulfils the conditions imposed on him, the sentence lapses after five years. Both the Prosecutor and the accused may introduce the *patteggiamento* procedure. In any event, the agreement must be ratified by a court.

73. In Luxembourg, the Law of 6 May 1999 has incorporated a paragraph 5 into

29 — In Article 924 of the Code of Procedure.

30 — See Articles 655, 791(3) and 793(3) of the Law of Criminal Procedure.

31 — *Laki rangaistusmääräysmenettelystä/ lagen om straffordörförfarande* 26.7.1993/692.

32 — *Road Traffic Acts, 1961-1995; Litter Pollution Act, 1997*, p. 28.

33 — Governed by Articles 444 to 448 of the *Código de Procedimiento Penal*.



Article 24 of the *Code d'instruction criminelle*, under which, before bringing proceedings, the Prosecutor may have recourse to mediation, which may lead to a decision to continue with the proceedings or to allow the criminal action to lapse.

74. The Netherlands also has the settlement procedure (*transactie*), which is governed by Article 74 et seq. of the Netherlands Criminal Code. The criminal action is discontinued when the accused fulfils the conditions imposed by the Prosecutor. That discontinuance is expressly provided for in Article 74(1).

75. In Portugal<sup>34</sup> proceedings may be temporarily suspended. This mechanism authorises the Public Prosecutor's Office to bring a halt to a criminal action by imposing certain obligations during a specific period. The decision is subject to the acceptance of the accused and, where appropriate, the prosecution and to the approval of the trial judge. Once the accused fulfils what has been agreed, the case is discontinued and cannot be reopened.<sup>35</sup>

76. In the United Kingdom, there is a settlement procedure under English law in

the context of road traffic. A fixed penalty notice offers a person the opportunity to avoid criminal proceedings by paying a fine and having penalty points imposed on his driving licence. Once the conditions have been fulfilled, the criminal action lapses.<sup>36</sup> It should be borne in mind that Lord Justice Auld has recommended<sup>37</sup> that the field of compromise procedures should be extended and that his proposal was the subject of a White Paper issued by the British Government in the middle of July this year. Under Scottish law the Prosecutor is permitted<sup>38</sup> to make a conditional offer to the accused in order to avoid criminal proceedings, in respect of the offences which may be judged by District Courts. If the accused accepts the proposal, he must pay a fine and, once that has been done, the criminal action lapses.<sup>39</sup>

77. Finally, there is in Sweden a procedure for imposing penalties without the intervention of a court (*stafföreläggande*),<sup>40</sup> which is used for minor offences such as driving under the influence of alcohol and petty theft. If the Prosecutor's order is accepted by the accused (with the agreement of the possible victims), the imposition of the penalty acquires the force of *res judicata*.

34 — See Articles 281 and 282 of the *Código de Processo Penal* and the particular case of the simplified procedure (*processo sumaríssimo*), provided for in Articles 392 to 398 of the same legal code.

35 — Article 282(3) of the *Código de Processo Penal*.

36 — Section 52(1) of the Road Traffic Offenders Act 1988.

37 — 'A Review of the Criminal Courts of England and Wales.'

38 — Article 302 of the Criminal Procedure (Scotland) Act 1995.

39 — Article 302(6).

40 — Chapter 48, Article 4 of the *Rättegångsbalk* (Criminal Code) 1942.

## B. The aim and objective of the criminal settlement

78. In order to describe a legal institution, particularly if its field of operation is the branch of the law which most directly affects the dignity and basic values of the individual, it is necessary to avoid pointless nominalisms and consider its inherent nature.

79. As we can see, many of the Member States<sup>41</sup> have procedures, called compromises or given other similar names, in which the Public Prosecutor's Office — subject to legal authorisation and, in some systems, without the intervention of any legal pronouncement — discontinues criminal proceedings against an individual after that person pays a sum of money into public funds or fulfils another condition.

80. It is a procedure which, although appearing to be bilateral, is characterised by the fact that the State authorities act from a position of superiority. It is a way of administering criminal justice which, however, does not apply to all offences. It is the expression of a justice designed to respond to a particular category of behaviour,

which is less socially reprehensible and whose punishment does not require the full force of the State's penalising mechanism to be brought to bear nor, consequently, the full operation of the safeguards of criminal procedure through the intervention of a court.

81. Also, the settlement is to a large extent a way of avoiding the collapse of the legal system by providing a simple, quick and efficient response in cases in which criminal policy advises. North American pragmatism has imposed a significant development on these mediation procedures, based always on acceptance by the accused of the penalty offered to him, although in large cities it has given rise to a singular practice.<sup>42</sup>

42 — The North American writer T. Wolfe, in his novel *The Bonfire of the Vanities* (Ed. Picador, London 1988) relates some cases of these arrangements: 'It soon became apparent that the purpose of this hearing was to allow Lockwood to plead guilty to the charge, which was armed robbery, in return for a light sentence, two to six years, offered by the District Attorney's Office. But Lockwood wasn't going for it. All that Sonnenberg could do was reiterate his client's plea of not guilty' (p. 32). The judge takes the initiative and says to the defendant: 'You've got a job, you've got a home, you're young, you're a nice-looking, bright young man. You've got a lot going for you. You've got more than most people. But you've got one big problem to overcome. You been involved in these... robberies. Now, the district attorney has made you an offer of two to six years. If you take that offer and you behave yourself, this will all be behind you, in no time, and you'll still be a young man with your whole life ahead of you. If you go to trial and you're convicted, you could get eight to twenty-five. Now think about that. The district attorney has made you an offer' (p. 136). Later on, Kramer, the assistant district attorney, says: 'You ought to sit in on the plea-bargaining sessions some morning up on the Grand Concourse. One of the ways you justify a plea bargain is, the judge asks the defendant if he has a job, and if he does, that is supposed to show he has roots in the community, and so on (p. 266). On another occasion, the protagonist's lawyer comes out unexpectedly with: 'If I was being sued in an automobile negligence case... I'd go to one of these lawyers on lower Broadway... They're the absolute bottom of the barrel of the legal profession.... [y]ou can't even imagine what they're like... But... they know how to make the deals' (p. 319).

41 — The only exception is Greece.

82. With the settlement it is hoped to find the most appropriate way of dealing with certain kinds of criminality, which do not require the imposition of heavy sentences; a lighter, less traumatic reaction is enough. This circumstance allows the accused, without having to undergo legal proceedings, to acknowledge his guilt, either expressly or implicitly, and to expiate it by fulfilling the condition which he has agreed with the Prosecutor, within the limits laid down by the legislature, which in any event will be less onerous than if an agreement is not reached and the criminal prosecution pursues its normal route. In return, the State abandons its action, which lapses.

### C. The criminal settlement, a way of doing justice

83. In this characterisation there are two features which cannot be ignored. The first is that the conditions which the accused fulfils are a punishment in retribution for his conduct. The second is that it is the State which is meting out the punishment, from a position of superiority. The accused is free to accept the settlement; if he does not do so, he must know that the criminal action will proceed. The *ius puniendi* is still the same, although it is exercised in a different way.

84. Indeed, the fact that, in a settlement, no court exercises its power to give judgment,

does not have a 'dejudicialising' effect, such that a decision to settle does not fulfil the criteria of Article 54 of the Convention. The phenomenon which some<sup>43</sup> have called 'judgeless justice', as if it were a *quasi* private agreement does not arise.

85. The settlement is a means of resolving criminal cases by mutual agreement between the official bringing the criminal action and the accused, without the need for legal proceedings in the strict sense. Where a dispute is settled in this way, there is no bargaining between the offender and the Prosecutor for fixing the penalty. An offer — which may be taken or left — is made by the State public authority through the official bringing the criminal proceedings to impose the penalty.

86. It is not an agreement which is negotiated between the accused and the Public Prosecutor, as Mr Gözütok's representative has pointed out, but a decision, which is actually less aggressive than a conviction, in which the *ius puniendi* is still manifest.

43 — M. Delmas-Marty and C. Teitgen-Colly in *Punir sans juger? De la répression administrative au droit administratif pénal*. Popular ed. 1992.

87. It would be a mistake to describe the criminal settlement as contractual,<sup>44</sup> because there is a conviction, which although it is light and accepted by the defendant is still a punishment and fulfils the role of any penalty. It is therefore, as the Commission has pointed out, an alternative sanction which constitutes retribution for the culpable conduct and a deterrent against future transgressions.

88. What is more, the settlement has an 'implicit judicial nature'; it is not an institution which is outside criminal justice; its existence is only justified as a demonstration of the exercise of criminal justice. All criminal acts may be prosecuted by the Public Prosecutor's Office<sup>45</sup> and punished after a fair trial. However, in some systems the official entitled to bring the criminal action is authorised, in respect of certain offences, to agree a penalty with the defendant, on the firm understanding that if the pact is not made, if the accused does

not accept the proposal, the prosecution and punishment of the criminal infringements follow their normal course.

89. Because the legislature has so intended, the State uses the settlement to exercise the *ius puniendi* in respect of certain breaches through the intervention of the official entitled to bring the criminal action which, once the punishment has been complied with, is extinguished. The State delivers a final judgment through the competent body. Therefore, in this response to a particular kind of criminality, criminal justice is administered.

90. To sum up, a defendant who settles and accepts the conditions imposed by the Prosecutor is convicted for the acts which, by accepting the punishment, he confesses he is guilty of committing. Once the agreement becomes firm, his case may be regarded as finally disposed of and, because he has fulfilled the conditions to which he has agreed, the punishment may be considered completed. Consequently, his case cannot be heard again because that is prohibited under Article 54 of the Convention.

44 — It is not a civil settlement, in which the parties are in a fundamental position of equality. I take advantage of this call on the private law settlement to point out that, in several national legal systems, it has the force of *res judicata*. That is the case in French law (Article 2052 of the Civil Code), Belgian law (Article 2044 of the Civil Code) and Spanish law (Article 1816 of the Civil Code). In the light of the above provisions, it is surprising that the Court of Justice, in Case C-414/92 *Kleinmotoren* [1994] ECR I-2237, stated that a civil settlement, even if concluded before a court, does not constitute a judgment within the meaning of Article 25 of the Brussels Convention.

45 — And also by the persons, if any, entitled to bring private and civil cases.

#### D. Protection of the rights of the individual in the criminal settlement

91. In the settlement, then, the State brings a criminal action against an individual

who, as a matter of fact, acknowledges his guilt and, once the conditions imposed have been fulfilled, the action is extinguished,<sup>46</sup> as in the case of a ruling of unconditional discharge, an acquittal or a conviction, in the latter case when the punishment has been completed.

92. This manner of administering justice protects the fundamental rights of the accused.

93. An accused to whom a settlement is offered faces a criminal charge within the meaning of the European Convention on Human Rights and, *de iure*, enjoys the rights conferred by that Convention on every defendant, in particular the rights contained in Article 6.

94. For a start, the Public Prosecutor's Office is required to inform him that the settlement is optional and that he has the right to be tried by an independent tribu-

nal. The principal international legislation<sup>47</sup> and the case-law of the European Court of Human Rights recognise the right of every accused to have access to the courts.<sup>48</sup>

95. The freedom to accept or reject the settlement is fundamental. It may *prima facie* be doubted whether such freedom exists since, *de facto*, the accused has to accept the offer made by the Public Prosecutor's Office if he wishes to escape criminal proceedings. However, that fact does not invalidate his consent, since the threat of bringing a particular action is not objectionable if the means used and the objectives pursued are lawful.

96. That lawfulness is found in the 'take it or leave it' option of the criminal settlement. The European Court of Human Rights has stated that, while the prospect of having to appear in court may affect a person's willingness to reject or accept the settlement, the pressure thereby brought to bear is not incompatible with the Convention.<sup>49</sup>

97. To sum up, the settlement in criminal proceedings is a manifestation of the *ius*

46 — See Article 74(1) of the Netherlands Criminal Code and Articles 216a and 216b of the Belgian *Code d'instruction criminelle*.

47 — See Article 14 of the International Covenant on Civil and Political Rights, Article 7 of the Universal Declaration of Human Rights, Article 6(1) of the European Convention on Human Rights and Article 47 of the Charter of fundamental rights of the European Union.

48 — See, for example, *Golder v. United Kingdom*, judgment of 21 February 1975, Series A no. 18, and *Deweert v. Belgium* judgment of 27 February 1980, Series A no. 35.

49 — See paragraph 51 of the judgment in *Deweert*, cited above.

*puniendi*, a form of administering justice which protects the rights of the accused and culminates in the imposition of a penalty. There is therefore no doubt that, through use of the procedure, a verdict is given on the acts being judged and on the guilt of the perpetrator.

98. Since the rights of the individual are protected, it is irrelevant, in the context of the questions raised by the national courts, in particular by the Oberlandesgericht Köln, and in spite of the approach taken by the French Government, whether the decision to discontinue the criminal action is approved by a court.

99. All things considered, the possible subsequent intervention of a court adds nothing new. Given that the accused's rights are protected *ab initio*, and that there is a recognition and, therefore, an implicit decision with regard to guilt, subsequent ratification by a court is merely a formality; it is a procedure which could become simply red tape.

#### E. *Res judicata* of the criminal settlement

100. The administration of criminal justice by this means of agreement is not, therefore, a substitute but a different form of

operating the *ius puniendi*, which is an alternative to the strictly jurisdictional function in relation to certain infractions.

101. From the moment the accused accepts the public representative's proposal and fulfils the conditions imposed, the State has given its final response to the unlawful conduct, so that a person who settles and accepts the agreement, just as an accused whose case is disposed of in a non-appealable judgment, is entitled to expect that there shall be no looking back, that the content of the settlement shall remain firm and that he will not be troubled in the future in respect of the same acts.

102. That is to say, the settlement is binding and, once it has been executed, constitutes the State's final word on the matter. Enforceability and *res judicata* are the two factors which characterise any legal decision disposing of an action.<sup>50</sup>

103. This special operation of the decision only goes as far as the point at which the Public Prosecutor's Office may settle, that

50 — The eminent French criminologist F. Hélie points out that the efficaciousness of judgments lies in their definitive nature. (*Pratique Criminelle des Cours et Tribunaux*, 6th edition, in 4 volumes, adapted and brought up to date with the legislation and case-law by J. Brouhot and F. Brouhot, *Librairies techniques de la Cour de Cassation*, 1954).

is to say, the criminal action, but it is not capable of affecting actions which, like the civil action arising out of every criminal infraction, may be brought by the victim or, more generically, the injured party. For that reason, Articles 216a and 216b of the Belgian *Code d'instruction criminelle* provide that the discontinuance of criminal proceedings by penal mediation does not prejudice the right of victims or their successors to bring a civil action and the Netherlands legal code recognises the right of interested parties to appeal against the Prosecutor's decision before a court.<sup>51</sup>

104. That is to say, under Article 54 of the Convention the discontinuance of criminal proceedings in one Member State as a consequence of a settlement agreed and successfully executed is a bar to a criminal prosecution on the same facts in another Member State, but does not prevent a victim bringing a civil action before the relevant court.

105. That assertion is obviously unnecessary, since the above provision relating to agreements refers only to criminal procedure. In systems in which the injured party may not bring the civil action at the same time as the criminal action before that court, there is no doubt. In legal systems in

which it is possible for joint actions to be brought before the criminal courts, when a case is discontinued the injured party's right to bring the civil action before whom-ever and in whatever manner appropriate remains unaffected.

106. To sum up my arguments so far, I can say that Article 54 of the Convention applies to the criminal settlement since: (i) it is a means of exercising the *ius puniendi* of the State, (ii) it involves the delivery of an implicit final decision on the conduct of the accused and the imposition of penalising measures, and (iii) it does not affect any right the victim may have to claim compensation.

##### *5. Interpretation of the expression 'finally disposed of' in Article 54 of the Convention*

107. In spite of the foregoing reasons, which lead to a broad interpretation, the German and French Governments suggest that Article 54 of the Convention should be construed restrictively, interpreting the terms used in the German, French and Netherlands versions literally. In their view, the expressions *rechtskräftig abgeur-*

<sup>51</sup> — See Articles 12 et seq. of the *Wetboek van Strafvordering* (Code of Criminal Procedure).

teilt, *onherroepelijk vonnis* and *définitivement jugée*<sup>52</sup> refer to intervention by a court and, since in the settlement procedure no part is played by a judge, the settlement procedure falls outside the field of application of Article 54 of the Convention.

not to limit the scope of Article 54 to judicial decisions in the strict sense.

108. If Article 54 is read with Article 58, it may be seen that it does not so obviously refer only to legal decisions, that is, to a ruling given by a court or tribunal at the end of legal proceedings conducted with all the safeguards of the adversarial procedure and rights of the defence. Article 58 allows the States signatory to the Convention to approve provisions granting broader effect to the *ne bis in idem* principle with regard to 'judicial decisions' than that afforded by the preceding articles. In the French, Netherlands and German versions of the latter provision, the terms used are *décisions judiciaires*, *vonnis* and *Justizentscheidungen* respectively,<sup>53</sup> which suggests that the intention of the Contracting Parties was

109. When that provision speaks of a person whose case has been 'finally disposed of' ([a person who has been] *rechtskräftig abgeurteilt, onherroepelijk vonnis, définitivement jugée, juzgada en sentencia firme, giudicata con sentenza definitiva* or *definitivamente julgado*), in spite of the literal meaning of the Spanish version, it does not refer to a decision taken by a court in the form of a judgment delivered after proceedings providing all the safeguards laid down in Article 6 of the European Convention on the Protection of Human Rights, but, more generically, to any pronouncement made in the legal sphere, by which the State's final word on the acts being prosecuted and the guilt of the perpetrator is expressed, whether by a court in its role as judge, or by an examining magistrate as the result of his investigations or by a Prosecutor bringing the prosecution against the criminal acts.

110. This assessment is justified because the terms used by the various versions are not homogenous, so that although the approach taken by the abovementioned Governments seems *prima facie* persuasive, it is not so convincing if the lack of uniformity between the various versions

52 — The Spanish version uses the expression *juzgada en sentencia firme*. The English version reads 'finally disposed of' while the Italian and Portuguese versions use the phrases *giudicata con sentenza definitiva* and *definitivamente julgado* respectively.

53 — The English text uses the words 'judicial decisions' the Italian version uses *decisione giudiziaria* and the Portuguese version *decisões judiciais*.



of Article 54 is borne in mind.<sup>54</sup> An in-depth study, like the one I have made in the previous paragraphs, of the dynamics of the provision, the nature of the settlement and the basis of the *ne bis in idem* principle, reveals that that approach is inconsistent.

111. The strict interpretation suggested by the abovementioned governments may have absurd consequences. For example, a person who is acquitted in a final judgment because he has proved that he did not participate in the criminal acts could not be prosecuted again in another Member State, whereas a defendant who, at the investigation stage, obtains from the examining magistrate an order for the unconditional discontinuance of proceedings for the same reason could have the sword of Damocles of a further action hanging over his head. The law must reject interpretations which have consequences which are contrary to reason and logic.

112. Furthermore, the restrictive approach may result in the practice failure. The accused who settles does so because he knows that, by acknowledging his guilt and agreeing to the punishment suggested to him by the Public Prosecutor's Office, he is going to settle his accounts more favourably than if he does not accept the settle-

ment and is obliged to undergo criminal proceedings ending in a verdict. However, if he does not have the guarantee that, once he has completed the punishment, his conduct will not be judged again, he will be inclined to reject the proposal, so that this means of administering criminal justice, which is a true escape valve for the legal system, may come to a dead end, rendering it useless.

113. The German Government maintains that Article 4 of Protocol 7 to the European Convention on Human Rights restricts the *ne bis in idem* principle to decisions taken by courts. That interpretation conflicts with the wider view taken by the European Court of Human Rights, which considers that the aim of the provision 'is to prohibit the repetition of criminal proceedings that have been concluded by a final decision. That provision does not therefore apply before new proceedings have been opened'.<sup>55</sup>

114. The position adopted by the French, Belgian and German Governments lack perspective. The *ne bis in idem* principle is not, as I have already pointed out, a procedural rule, but a fundamental safeguard for citizens in legal systems which, like those of the partners in the European Union, are based on the acknowledgment that the individual has a series of rights and

54 — This is not the first time that the Court of Justice has met differences between the various language versions of a legislative provision. In similar situations it has pointed out that it is necessary to consider the versions taken as a whole (see Case 19/67 *Van der Vecht* [1967] ECR 345, especially page 354) and also, I would add, the legislative context.

55 — Judgment of 23 October 1995 in *Gradinger v Austria*, Series A, No 328-C, paragraph 53.

freedoms in respect of the acts of public bodies. When planning their cooperation in matters of security and justice, the Member States have recognised the effect of the abovementioned principle in Article 54 et seq. of the Convention; that recognition clearly constitutes a restriction on the exercise of the right to prosecute and punish a criminal act.

115. The extent of this restriction must be defined from the citizen's point of view, since it is one of his safeguards. If it means that once he has been prosecuted, judged and, if convicted, punished by the imposition of a penalty, the defendant has the right for no other signatory State to do the same. The form of the legal pronouncement and the manner in which it is given are of little importance provided that all the conditions and requirements fixed in the legal system under which the decision is delivered are fulfilled. It would be ludicrous to argue that Article 54 of the Convention can refer only to decisions taken by courts — that is to say, decisions delivered after proceedings conducted with all the safeguards —, and, precisely with that argument, to reduce the scope of application of one of those safeguards.

116. Furthermore, a literal and strict interpretation of Article 54 of the Convention

would have untoward consequences. Indeed, I have pointed out that the settlement procedure is a means of administering criminal justice in respect of minor or medium offences, but that it is not used in the field of more serious crimes. Therefore, the approach taken by the German, French and Belgian Governments would provide better treatment for the perpetrators of major offences, who would benefit from the *ne bis in idem* rule, than to the perpetrators of minor transgressions, which are less socially reprehensible. The perpetrator of a more serious crime, who may be convicted only by a final judgment, could not be judged again in another State signatory to the Convention, quite unlike the perpetrator of a petty offence who has accepted and completed the punishment suggested by the Prosecutor.

117. Apart from that, in order to establish the scope of Article 54 of the Convention, it is irrelevant to examine the intention of the legislature, in view of the fact that not even the Member States themselves are in agreement on that point.<sup>56</sup>

118. From the above it may be inferred that Article 54 of the Convention applies to a person who obtains from the Public Prosecutor's Office an order for the discontinuance of criminal proceedings, once he has fulfilled the conditions which he has agreed with that representative of the State authority.

<sup>56</sup> — See the written observations submitted by the governments in the two references for a preliminary ruling.

6. *The other side of the coin: the principle of mutual trust*

that the effectiveness of foreign decisions is guaranteed as between the Member States.

119. The *ne bis in idem* rule is not only a subjective safeguard for the citizen, but also a tool serving the principle of legal certainty, which requires that decisions adopted by the public authorities, once definitive and final, cannot be challenged *sine die*.

123. In order to fulfil this purpose, the new Title VI of the Treaty on European Union provides that common action in criminal matters includes 'facilitating and accelerating cooperation between competent ministries and judicial or equivalent authorities of the Member States in relation to proceedings and the enforcement of decisions'.<sup>58</sup>

120. Accordingly, when a criminal action has been discontinued in one Member State, the others cannot disregard that fact.

121. In an integrated Europe, which is openly undergoing a process to promote ever closer cooperation between the Member States, it would be unacceptable if a person could be troubled for a second time.

124. This shared goal cannot be achieved without the mutual trust of the Member States in their criminal justice systems<sup>59</sup> and without the mutual recognition of their respective judgments, adopted in a true 'common market of fundamental rights'. Indeed, recognition is based on the thought that while another State may not deal with a certain matter in the same or even a similar way as one's own State, the outcome will be such that it is accepted as

122. The objective stated in the Treaty on European Union,<sup>57</sup> of establishing an area of freedom, security and justice, requires

<sup>58</sup> — Article 31(a) EU.

<sup>59</sup> — In paragraph 33 of the Conclusions of the meeting of the European Council held in Tampere on 15 and 16 October 1999, it is stated: 'Enhanced mutual recognition of judicial decisions and judgments and the necessary approximation of legislation would facilitate cooperation between authorities and the judicial protection of individual rights. The European Council therefore endorses the principle of mutual recognition which, in its view, should become the cornerstone of judicial cooperation in both civil and criminal matters within the Union. The principle should apply both to judgments and to other decisions of judicial authorities.'

<sup>57</sup> — In the fourth indent of Article 2 EU one of the objectives is stated as '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 external border controls, asylum, immigration and the prevention and combating of crime'.

equivalent to a decision by one's own State because it reflects the same principles and values. Mutual trust is an essential element in the development of the European Union: trust in the adequacy of one's partners' rules and also trust that these rules are correctly applied.<sup>60</sup>

125. Recognition of a judgment also means taking it into consideration, one of the corollaries of which is the *ne bis in idem* principle.

126. It is clear that all the arguments lead to a broad interpretation of Article 54 of the Convention allowing for the inclusion in its field of application of decisions to discontinue criminal proceedings taken by the Public Prosecutor's Office, following a settlement agreed and successfully executed. This is the position maintained by the Commission and the Netherlands and Italian Governments.

127. The Commission had already made this suggestion. 'Full mutual recognition as envisaged to be achieved among EU

Member States would have to be based on the principle that a decision taken by no matter which authority in the EU fully deals with the issue and that no further decision needs to be taken at all... In other words, if someone was convicted or acquitted... in Member State A, he should not be prosecuted... in Member State B, even if Member State B has jurisdiction over the facts... and even if in Member State B, a different judgment could have been pronounced...' <sup>61</sup>

128. That path was taken by the Council which, in the Programme of measures to implement the principle of mutual recognition of decisions in criminal matters,<sup>62</sup> recommends that it should be fully applied.<sup>63</sup>

129. Admittedly, it is stated in that document that that aim has been only partially realised in Articles 54 to 57 of the Convention and that it is necessary to extend the principle of mutual recognition to acquittals and also to decisions adopted 'following penal mediation'. However, the above declarations are not, as the Belgian Government claims, a definitive endorsement of the strict interpretation defended by the Belgian and German Governments.

60 — Communication from the Commission to the Council and the European Parliament — Mutual recognition of Final Decisions in criminal matters (COM/2000/495), point 3.1.

61 — See point 6.2 of the Commission's Communication, cited above.

62 — OJ 2001 C 12, p. 10.

63 — Section 1.1, Measure No 1.

130. The abovementioned document is not a legislative provision which binds the Court of Justice. At most, it is an extra interpretive element which cannot be considered in isolation, without account being taken of other constituents — much more decisive for the Court's exercise of its judicial function, which is 'to state the law' and interpret the provisions which make up the Community legal system —, like those which I have presented throughout this Opinion: the rationale of Article 54 of the Convention, the bases of the *ne bis in idem* principle, the nature of settlement procedures and the process of European integration, which requires ever closer cooperation between the Member States, in the terms stated by the Council in the Programme.

131. Furthermore, the conclusion drawn by the Belgian Government cannot be inferred from the reference to penal mediation; firstly, because the Council does not have the monopoly on interpreting the Convention and, secondly, because that reference is imprecise and does not make it possible to state, without a shred of doubt, whether it refers to penal mediation in the strict sense or includes any settlement procedure, like those which I have considered in this Opinion, in which the State authority offers the accused an agreement by which the proceedings are discontinued in return for the fulfilment of certain obligations.

132. I think that, on the contrary, the Council's most recent pronouncements show that its intention is very far from that which the Belgian Government seeks to attribute to it after a cursory reading of the abovementioned Programme.

133. It is clear from Article 9 of the Framework Decision of 13 June 2002 on combating terrorism<sup>64</sup> that the Member States must collaborate in coordinating judicial actions with the aim of concentrating a criminal action in one State. As was suggested during the Spanish presidency,<sup>65</sup> it is a question of the principles of equality and mutual trust guiding the application of the *ius puniendi* by the partners, in order to preserve the European social order by protecting the fundamental rights and personal freedoms which form the basis of the legal systems of the Union and those of the States of which it is composed and which include the *ne bis in idem* principle.

<sup>64</sup> — OJ 2002 L 164, p. 3.

<sup>65</sup> — See the Council Framework Decision of 13 June 2002 on joint investigation teams (OJ 2002 L 162, p. 1), in the first recital of which it is stated that '[o]ne of the Union's objectives is to provide citizens with a high level of safety within an area of freedom, security and justice and this objective is to be achieved by preventing and combating crime through closer cooperation between police forces, customs authorities and other competent authorities in the Member States, while respecting the principles of human rights and fundamental freedoms and the rule of law on which the Union is founded and which are common to the Member States'.

## VII — Conclusion

134. In accordance with the foregoing considerations, I propose that the Court of Justice should state, in reply to the questions submitted by the Oberlandesgericht Köln and the Rechtbank van Eerste Aanleg te Veurne, that: the *ne bis in idem* principle stated in Article 54 of the Convention implementing the Schengen Agreement on the gradual abolition of checks at the common borders also applies when criminal proceedings are discontinued under the legal system of one Contracting Party as the consequence of a decision taken by the Public Prosecutor's Office, once the defendant has fulfilled certain conditions — and it is irrelevant whether that decision has to be approved by a court — provided that:

- (1) the conditions imposed are in the nature of a penalty;
- (2) the agreement presupposes an express or implied acknowledgment of guilt and, accordingly, contains an express or implied decision that the act is culpable; and
- (3) the agreement does not prejudice the victim and other injured parties, who may be entitled to bring civil actions.