JUDGMENT OF THE COURT (Second Chamber)

9 March 2006 *

In Case C-436/04,

REFERENCE for a preliminary ruling under Article 35 EU from the Hof van Cassatie (Belgium), made by decision of 5 October 2004, received at the Court on 13 October 2004, in the criminal proceedings against

Leopold Henri Van Esbroeck,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, R. Schintgen (Rapporteur), R. Silva de Lapuerta, G. Arestis and J. Klučka, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: K. Sztranc, Administrator,

having regard to the written procedure and further to the hearing on 22 September 2005,

* Language of the case: Dutch.

after considering the observations submitted on behalf of:

— Mr Van Esbroeck, by T. Vrebos, advocaat,

— the Czech Government, by T. Boček, acting as Agent,

— the Netherlands Government, by H.G. Sevenster and C.M. Wissels, acting as Agents,

— the Austrian Government, by C. Pesendorfer, acting as Agent,

— the Polish Government, by T. Nowakowski, acting as Agent,

— the Slovak Government, by R. Procházka, acting as Agent,

— the Commission of the European Communities, by W. Bogensberger and R. Troosters, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 20 October 2005,

gives the following

Judgment

1 The reference for a preliminary ruling concerns the interpretation of Articles 54 and 71 of the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (OJ 2000 L 239, p. 19; 'the CISA'), signed on 19 June 1990 in Schengen (Luxembourg).

2 The question was raised in the context of criminal proceedings initiated in Belgium against Mr Van Esbroeck for the trafficking of narcotic drugs.

Legal context

The Convention implementing the Schengen Agreement

3 Under 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 by the Treaty of Amsterdam ('the Protocol'), 13 Member States of the European Union, including the Kingdom of Belgium, are authorised to establish closer cooperation among themselves within the scope of the Schengen *acquis*, as set out in the annex to the Protocol.

4 The Schengen *acquis* thus defined includes, inter alia, the Agreement, signed in Schengen on 14 June 1985, between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (OJ 2000 L 239, p. 13; 'the Schengen Agreement') and the CISA.

5 By virtue of the first paragraph of Article 2(1) of the Protocol, from the date of entry into force of the Treaty of Amsterdam, 1 May 1999, the Schengen *acquis* is to apply immediately to the 13 Member States referred to in Article 1 of the Protocol.

6 In accordance with the second sentence of the second paragraph of Article 2(1) of the Protocol, the Council of the European Union adopted, on 20 May 1999, 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* (OJ 1999 L 176, p. 17). It is apparent from Article 2 of that decision, in conjunction with Annex A thereto, that the Council determined Articles 34 EU and 31 EU and Articles 34 EU, 30 EU and 31 EU, which form part of Title VI of the Treaty on European Union entitled 'Provisions on police and judicial cooperation in criminal matters', as the legal basis for Articles 54 and 71 of the CISA.

7 Under Article 54 of the CISA, which forms part of Chapter 3 ('Application of the *ne bis in idem* principle') of Title III ('Police and security'):

'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.'

8 Article 71 of the CISA, which forms part of Chapter 6 ('Narcotic drugs') of Title III, states:

'1. The Contracting Parties undertake as regards the direct or indirect sale of narcotic drugs and psychotropic substances of whatever type, including cannabis, and the possession of such products and substances for sale or export, to adopt in accordance with the existing United Nations Conventions [Single Convention on Narcotic Drugs of 1961, as amended by the 1972 Protocol amending the 1961 Single Convention on Narcotic Drugs and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988] all necessary measures to prevent and punish the illicit trafficking in narcotic drugs and psychotropic substances.

2. The Contracting Parties undertake to prevent and punish by administrative and penal measures the illegal export of narcotic drugs and psychotropic substances, including cannabis, as well as the sale, supply and handing over of such products and substances, without prejudice to the relevant provisions of Articles 74, 75 and 76.

3. To combat the illegal import of narcotic drugs and psychotropic substances, including cannabis, the Contracting Parties shall step up their checks on the movement of persons, goods and means of transport at their external borders. Such measures shall be drawn up by the working party provided for in Article 70. This working party shall consider, inter alia, transferring some of the police and customs staff released from internal border duty and the use of modern drug-detection methods and sniffer dogs.

4. To ensure compliance with this Article, the Contracting Parties shall specifically carry out surveillance of places known to be used for drug trafficking.

5. The Contracting Parties shall do their utmost to prevent and combat the negative effects arising from the illicit demand for narcotic drugs and psychotropic substances of whatever type, including cannabis. Each Contracting Party shall be responsible for the measures adopted to this end.'

The Agreement concluded by the Council of the European Union, the Republic of Iceland and the Kingdom of Norway concerning the latters' association with the implementation, application and development of the Schengen acquis

9 In accordance with the first subparagraph of Article 6 of the Protocol, an agreement was drawn up on 18 May 1999 by the Council of the European Union, the Republic of Iceland and the Kingdom of Norway concerning the latters' association with the implementation, application and development of the Schengen *acquis* (OJ 1999 L 176, p. 36; 'the Agreement').

10 Article 1(b) of Council Decision 2000/777/EC of 1 December 2000 on the application of the Schengen *acquis* in Denmark, Finland and Sweden, and in Iceland and Norway (OJ 2000 L 309, p. 24) provides that, in accordance with Article 15(4) of the Agreement, all the provisions referred to in Annexes A and B of that agreement are, from 25 March 2001, to apply 'to Iceland and Norway, in their relations between each other and with Belgium, Denmark, Germany, Greece, Spain, France, Italy, Luxembourg, Netherlands, Austria, Portugal, Finland and Sweden'. Articles 54 and 71 of the CISA form part of Annex A.

11 Consequently, Articles 54 and 71 of the CISA have been applicable since 25 March 2001 in relations between the Kingdom of Norway and the Kingdom of Belgium.

The United Nations Conventions on Narcotic Drugs and Psychotropic Substances

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

'Penal provisions

1. (a) Subject to its constitutional limitations, each Party shall adopt such measures as will ensure that cultivation, production, manufacture, extraction, preparation, possession, offering, offering for sale, distribution, purchase, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation and exportation of drugs contrary to the provisions of this Convention, and any other action which in the opinion of such Party may be contrary to the provisions of this Convention, shall be punishable offences when committed intentionally, and that serious offences shall be liable to adequate punishment particularly by imprisonment or other penalties of deprivation of liberty.

(b) ...

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

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

...'

13 Article 22 of the 1971 Convention on Psychotropic Substances ('the 1971 Convention') contains a provision which is, in substance, identical to Article 36(2)(a)(i) of the Single Convention.

The main proceedings and the questions referred for a preliminary ruling

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

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

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

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

'(1) Must Article 54 of the [CISA] be construed as meaning that it may apply in proceedings before a Belgian court with regard to a person against whom a prosecution is brought in Belgium after 25 March 2001 before a criminal court in respect of the same acts for which that person was convicted by judgment of a Norwegian criminal court of 2 October 2000, and where the sentence imposed has already been served, in a situation where, pursuant to Article 2(1) of [the Agreement], Article 54 of the [CISA] is to be implemented and applied by Norway only as from 25 March 2001?

If the reply to Question 1 is in the affirmative:

(2) Must Article 54 of the [CISA], read with Article 71 thereof, be construed as meaning that offences of possession for the purposes of export and import in respect of the same narcotic drugs and psychotropic substances of any kind, including cannabis, and which are prosecuted as exports and imports respectively in different countries which have signed the [CISA], or where the Schengen *acquis* is implemented and applied, are deemed to be "the same acts" for the purposes of Article 54?'

The questions

The first question

18 By the first question the national court is effectively asking whether the *ne bis in idem* principle, enshrined in Article 54 of the CISA, must be applied to criminal proceedings brought in a Contracting State for acts for which a person has already been convicted in another Contracting State even though the CISA was not yet in force in that State at the time at which that person was convicted.

19 In that regard, it must first be noted that the Schengen *acquis* has been applicable in Belgium since 1 May 1999 and in Norway since 25 March 2001. The acts which Mr Van Esbroeck was accused of took place on 31 May and 1 June 1999. In addition, on 2 October 2000, he was found guilty in Norway of illegally importing prohibited substances, while, on 19 March 2003, he was found guilty in Belgium of unlawfully exporting the same substances.

20 Second, it must be pointed out that the Schengen *acquis* contains no provision dealing specifically with the entry into force of Article 54 of the CISA or with its effects in time.

21 Third, it must be noted that, as the Commission of the European Communities rightly points out, the problem in respect of the application of the *ne bis in idem* principle arises only when criminal proceedings are brought for a second time against the same person in another Contracting State.

22 Since it is in the context of the latter proceedings that the competent court is entrusted with the task of assessing whether all the conditions for the application of the principle at issue are satisfied, it is necessary, for the purposes of the application of Article 54 of the CISA by the court before which the second proceedings are brought, that the CISA be in force at that time in the second Contracting State concerned.

23 Consequently, the fact that the CISA was not yet binding on the first Contracting State at the time when, within the meaning of Article 54 of the Convention, the trial of the person concerned had been finally disposed of in that State is not relevant.

24 In those circumstances, the answer to the first question must be that the *ne bis in idem* principle, enshrined in Article 54 of the CISA, must be applied to criminal proceedings brought in a Contracting State for acts for which a person has already been convicted in another Contracting State even though the CISA was not yet in force in the latter State at the time at which that person was convicted, in so far as the CISA was in force in the Contracting States in question at the time of the assessment, by the court before which the second proceedings were brought, of the conditions of applicability of the *ne bis in idem* principle.

The second question

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

26 In that regard, the Czech Government submitted that identity of the acts means identity of their legal classification and of the protected legal interests.

27 In the first place, however, the wording of Article 54 of the CISA, 'the same acts', shows that that provision refers only to the nature of the acts in dispute and not to their legal classification.

28 It must also be noted that the terms used in that article differ from those used in other international treaties which enshrine the *ne bis in idem* principle. Unlike Article 54 of the CISA, Article 14(7) of the International Covenant on Civil and Political Rights and Article 4 of Protocol No 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms use the term 'offence', which implies that the criterion of the legal classification of the acts is relevant as a prerequisite for the applicability of the *ne bis in idem* principle which is enshrined in those treaties.

29 In the second place, it should be pointed out that, as the Court found in Joined Cases C-187/01 and C-385/01 *Gözütok and Brügge* [2003] ECR I-1345, paragraph 32, nowhere in Title VI of the Treaty on European Union relating to police and judicial cooperation in criminal matters (Articles 34 and 31 of which were stated to be the legal basis for Articles 54 to 58 of the CISA), or in the Schengen Agreement or the CISA itself, is the application of Article 54 of the CISA made conditional upon harmonisation, or at the least approximation, of the criminal laws of the Member States.

30 There is a necessary implication in the *ne bis in idem* principle, enshrined in that article, that the Contracting States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Contracting States even when the outcome would be different if its own national law were applied (*Gözütok and Brügge*, paragraph 33).

31 It follows that the possibility of divergent legal classifications of the same acts in two different Contracting States is no obstacle to the application of Article 54 of the CISA.

32 For the same reasons, the criterion of the identity of the protected legal interest cannot be applicable since that criterion is likely to vary from one Contracting State to another.

33 The above findings are further reinforced by the objective of Article 54 of the CISA, which is to ensure that no one is prosecuted for the same acts in several Contracting States on account of his having exercised his right to freedom of movement (*Gözütok and Brügge*, paragraph 38, and Case C-469/03 *Miraglia* [2005] ECR I-2009, paragraph 32).

34 As pointed out by the Advocate General in point 45 of his Opinion, that right to freedom of movement is effectively guaranteed only if the perpetrator of an act knows that, once he has been found guilty and served his sentence, or, where applicable, been acquitted by a final judgment in a Member State, he may travel within the Schengen territory without fear of prosecution in another Member State on the basis that the legal system of that Member State treats the act concerned as a separate offence.

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

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

37 As regards, more particularly, a situation such as that at issue in the main proceedings, it must be observed that such a situation may, in principle, constitute a set of facts which, by their very nature, are inextricably linked.

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

39 Contrary to the submissions made by the Slovak Government, that interpretation can be reconciled with Article 71 of the CISA which provides for the adoption, by the Contracting States, of all the measures necessary to combat illegal trafficking of narcotic drugs.

40 As rightly submitted by the Netherlands Government, the CISA does not lay down an order of priority amongst the different provisions, and, in addition, Article 71 of the Convention does not contain any element which might restrict the scope of Article 54, which enshrines, within the Schengen territory, the *ne bis in idem* principle, which is recognised in the case-law as a fundamental principle of Community law (see, to that effect, Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others* v *Commission* [2002] ECR I-8375, paragraph 59).

41 It follows that the reference made in Article 71 of the CISA to existing United Nations Conventions cannot be understood as hindering the application of the *ne bis in idem* principle laid down in Article 54 of the CISA, which prevents only the

plurality of proceedings against a person for the same acts and does not lead to decriminalisation within the Schengen territory.

42 In the light of the above, the answer to the second question must be that Article 54 of the CISA must be interpreted as meaning that:

— the relevant criterion for the purposes of the application of that article of the CISA is identity of the material acts, understood as the existence of a set of facts which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected;

— punishable acts consisting of exporting and importing the same narcotic drugs and which are prosecuted in different Contracting States to the CISA are, in principle, to be regarded as 'the same acts' for the purposes of Article 54 of the Convention, the definitive assessment in that respect being the task of the competent national courts.

Costs

43 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

1. **The *ne bis in idem* principle, enshrined in Article 54 of the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, signed on 19 June 1990 in Schengen, must be applied to criminal proceedings brought in a Contracting State for acts for which a person has already been convicted in another Contracting State even though the Convention was not yet in force in the latter State at the time at which that person was convicted, in so far as the Convention was in force in the Contracting States in question at the time of the assessment, by the court before which the second proceedings were brought, of the conditions of applicability of the *ne bis in idem* principle.**

2. **Article 54 of the Convention must be interpreted as meaning that:**

   — **the relevant criterion for the purposes of the application of that article is identity of the material acts, understood as the existence of a set of facts which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected;**

   — **punishable acts consisting of exporting and importing the same narcotic drugs and which are prosecuted in different Contracting**

States to the Convention are, in principle, to be regarded as 'the same acts' for the purposes of Article 54, the definitive assessment in that respect being the task of the competent national courts.

[Signatures]