

JUDGMENT OF THE COURT (First Chamber)

28 September 2006 *

In Case C-467/04,

REFERENCE for a preliminary ruling under Article 35 EU from the Audiencia Provincial de Málaga (Spain), made by decision of 8 July 2004, received at the Court on 2 November 2004, in the criminal proceedings against

Giuseppe Francesco Gasparini,

José M^a L.A. Gasparini,

Giuseppe Costa Bozzo,

Juan de Lucchi Calcagno,

Francesco Mario Gasparini,

José A. Hormiga Marrero,

Sindicatura Quiebra,

* Language of the case: Spanish.

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, N. Colneric (Rapporteur), J.N. Cunha Rodrigues, M. Ilešič and E. Levits, Judges,

Advocate General: E. Sharpston,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 16 March 2006,

after considering the observations submitted on behalf of:

- G.F. Gasparini, by H. Oliva García, L. Pinto, I. Ayala Gómez and P. González Rivero, abogados,

- J. M^a L.A. Gasparini, by C. Font Felú, abogado,

- G. Costa Bozzo, by L. Rodríguez Ramos, abogado, and J.C. Randón Reyna, procurador,

- J. de Lucchi Calcagno, by F. García Guerrero-Strachan, abogado, and B. De Lucchi López, procuradora,

- F.M. Gasparini, by J. García Alarcón, abogado,

- the Spanish Government, by M. Muñoz Pérez, acting as Agent,

- the French Government, by J.-C. Niollet, acting as Agent,

- the Italian Government, by I.M. Braguglia, acting as Agent, and G. Aiello, avvocato dello Stato,

- the Netherlands Government, by H.G. Sevenster, C. Wissels and C. ten Dam, acting as Agents,

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

- the Commission of the European Communities, by L. Escobar Guerrero, W. Bogensberger and F. Jimeno Fernández, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 15 June 2006,

gives the following

Judgment

- 1 This reference for a preliminary ruling concerns the interpretation of, first, 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 (OJ 2000 L 239, p. 19), signed in Schengen (Luxembourg) on 19 June 1990 ('the CISA'), and, second, Article 24 EC.

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

Legal context

Community legislation

- 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, amongst them the Kingdom of Spain and the Portuguese Republic, 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 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), signed in Schengen on 14 June 1985 ('the Schengen Agreement'), and the CISA.
- 5 By virtue of the first subparagraph of Article 2(1) of the Protocol, from the date of entry into force of the Treaty of Amsterdam the Schengen *acquis* was to apply immediately to the 13 Member States referred to in Article 1 of the Protocol.
- 6 Pursuant to the second sentence of the second subparagraph of Article 2(1) of the Protocol, on 20 May 1999 the Council of the European Union adopted Decision 1999/436/EC determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the Schengen *acquis* (OJ 1999 L 176, p. 17). It is apparent from Article 2 of the decision, in conjunction with Annex A thereto, that the Council selected Articles 34 EU and 31 EU, which form part of Title VI of the EU Treaty entitled 'Provisions on police and judicial cooperation in criminal matters', as the legal basis for Articles 54 to 58 of the CISA.
- 7 Articles 54 to 58 form Chapter 3 ('Application of the *ne bis in idem* principle') of Title III ('Police and security') of the CISA.

8 Article 54 of the CISA 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.’

9 Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1) provides in Article 3, headed ‘Grounds for mandatory non-execution of the European arrest warrant’:

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

...

(2) if the executing judicial authority is informed that the requested person has been finally judged by a Member State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State;

...’

- 10 Article 4 of the framework decision, headed ‘Grounds for optional non-execution of the European arrest warrant’, is worded as follows:

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

...

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

...’

- 11 The Court’s jurisdiction to give preliminary rulings on matters falling within Title VI of the EU Treaty is governed by Article 35 thereof.
- 12 The Kingdom of Spain has declared that it accepts the jurisdiction of the Court of Justice to give preliminary rulings on the validity and interpretation of the acts referred to in Article 35 EU in accordance with the arrangements laid down in Article 35(2) and (3)(a) EU (OJ 1999 C 120, p. 24).

13 Article 24 EC provides:

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

National legislation

14 The first two subparagraphs of Article 1(1) of Organic Law No 7/1982 of 13 July 1982 amending the legislation on smuggling and regulating related offences and administrative infringements (BOE No 181, 30 July 1982, p. 20623) provide:

‘1. The offence of smuggling is committed, where the value of the goods or articles is ESP 1 000 000 or more, by any person who:

- (1) imports or exports lawfully traded goods without presenting them to a customs office;

- (2) carries out commercial transactions in respect of, possesses or puts into circulation lawfully traded goods from abroad without fulfilling the statutory conditions for importation.’

- 15 In accordance with Article 847 of the Ley de Enjuiciamiento Criminal (Code of Criminal Procedure), no appeal lies against a decision made on appeal by an Audiencia Provincial (Provincial Court).

The main proceedings and the questions referred for a preliminary ruling

- 16 According to the Audiencia Provincial de Málaga (Provincial Court, Málaga), there is coherent evidence that, at some unspecified time in 1993, the shareholders and directors of the company Minerva agreed to import through the port of Setúbal (Portugal) lampante (refined) olive oil from Tunisia and Turkey, which was not declared to the customs authorities. The goods were then transported in lorries from Setúbal to Málaga (Spain). The defendants devised a system of false invoicing to create the impression that the oil came from Switzerland.
- 17 The Audiencia Provincial de Málaga further states that the Supremo Tribunal de Justiça (Supreme Court of Justice, Portugal), in a decision on an appeal against a judgment of the Tribunal de Setúbal, found that the lampante olive oil imported into Portugal originated on ten occasions in Tunisia and on one occasion in Turkey and that a lesser quantity than was actually imported was declared to the Portuguese customs authorities.
- 18 The Supremo Tribunal de Justiça acquitted two of the defendants in the case before it, on the ground that their prosecution was time-barred. They are both also being prosecuted in the main proceedings.

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

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

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

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

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

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

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

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

The Court's jurisdiction

²¹ It is apparent from paragraphs 12 and 15 of this judgment that in the present case the Court has jurisdiction to rule on the interpretation of Article 54 of the CISA by virtue of Article 35(1) to (3)(a) EU.

The questions

Question 1

²² By this question, the national court essentially asks whether the *ne bis in idem* principle, enshrined in Article 54 of the CISA, applies in respect of a decision of a court of a Contracting State by which the accused is acquitted finally because prosecution of the offence is time-barred.

- 23 Under Article 54 of the CISA, a person may not be prosecuted in a Contracting State for the same acts as those in respect of which his trial has already been 'finally disposed of' in another Contracting State provided that, in the event of conviction, the penalty has been enforced, is actually in the process of being enforced or can no longer be enforced.
- 24 The main clause of the single sentence comprising Article 54 of the CISA makes no reference to the content of the judgment that has become final. It is not applicable solely to judgments convicting the accused (see, to this effect, the judgment delivered today in Case C-150/05 *Van Straaten* [2006] ECR I-9327, paragraph 56).
- 25 Thus, the *ne bis in idem* principle, enshrined in Article 54 of the CISA, falls to be applied in respect of a decision of the judicial authorities of a Contracting State by which the accused is acquitted finally for lack of evidence (*Van Straaten*, paragraph 61).
- 26 The main proceedings raise the question whether the same is true with regard to a final acquittal because prosecution of the offence is time-barred.
- 27 It is settled case-law that Article 54 of the CISA has the objective of ensuring that no one is prosecuted for the same acts in several Contracting States on account of the fact that he exercises his right to freedom of movement (see Joined Cases C-187/01 and C-385/01 *Gözütok and Brügger* [2003] ECR I-1345, paragraph 38, and *Van Straaten*, paragraph 57). It ensures that persons who, when prosecuted, have their cases finally disposed of are left undisturbed. They must be able to move freely without having to fear a fresh prosecution for the same acts in another Contracting State.

- 28 Not to apply Article 54 of the CISA when a court of a Contracting State, following the bringing of criminal proceedings, has made a decision acquitting the accused finally because prosecution of the offence is time-barred would undermine the implementation of that objective. Such a person must therefore be regarded as having had his trial finally disposed of for the purposes of that provision.
- 29 It is true that the laws of the Contracting States on limitation periods have not been harmonised. However, nowhere in Title VI of the EU Treaty, relating to police and judicial cooperation in criminal matters (Articles 34 and 31 of which were selected as the legal basis for Articles 54 to 58 of the CISA), or in the Schengen Agreement or the CISA itself is the application of Article 54 of the CISA made conditional upon harmonisation or approximation of the criminal laws of the Member States relating to procedures whereby further prosecution is barred (*Gözütok and Brügge*, paragraph 32) or, more generally, upon harmonisation or approximation of their criminal laws (see Case C-436/04 *Van Esbroeck* [2006] ECR I-2333, paragraph 29).
- 30 It should be added that there is a necessary implication in the *ne bis in idem* principle, enshrined in Article 54 of the CISA, 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 (*Van Esbroeck*, paragraph 30).
- 31 Framework Decision 2002/584 does not preclude the *ne bis in idem* principle from applying in the case of a final acquittal because prosecution of the offence is time-barred. Article 4(4) of the framework decision, relied upon by the Netherlands Government in the observations which it submitted to the Court, permits the executing judicial authority to refuse to execute a European arrest warrant *inter alia* where the criminal prosecution of the requested person is time-barred according to

the law of the executing Member State and the acts fall within the jurisdiction of that State under its own criminal law. In order for that power to be exercised, a judgment whose basis is that a prosecution is time-barred does not have to exist. The situation where the requested person has been finally judged by a Member State in respect of the same acts is governed by Article 3(2) of the framework decision, a provision which lays down a mandatory ground for non-execution of a European arrest warrant.

32 Having regard to the complexity of the main proceedings, it should be pointed out, finally, that it is for national courts to determine whether the acts in respect of which a case has been finally disposed of are the same as those at issue before them.

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

Question 2

34 By its second question, the national court essentially asks who is capable of benefiting from the *ne bis in idem* principle.

35 It is clear from the wording of Article 54 of the CISA that only persons who have already had a trial finally disposed of once may derive advantage from the *ne bis in idem* principle.

- 36 This interpretation is borne out by the purpose of the provisions of Title VI of the EU Treaty, as set out in the fourth indent of the first paragraph of Article 2 EU, namely 'to maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to ... the prevention and combating of crime'.
- 37 Consequently, the answer to the second question must be that the *ne bis in idem* principle, enshrined in Article 54 of the CISA, does not apply to persons other than those whose trial has been finally disposed of in a Contracting State.

Question 3

- 38 The third question is based on the premiss that the criminal courts of a Member State declare that it has not been established for the purposes of the offence of smuggling that the goods are from outside the Community.
- 39 Such a premiss is inconsistent, however, with the facts of the main proceedings as described by the national court and reproduced in paragraphs 16 to 18 of the present judgment.
- 40 Admittedly, the majority of the defendants in the main proceedings allege that the national court has misread the judgment of the Supremo Tribunal de Justiça. They contend that, contrary to what is stated in the order for reference, the Supremo Tribunal de Justiça did not find that a lesser quantity than was actually imported into Portugal was declared to the customs authorities. According to them, the criminal proceedings relating to the offences of smuggling and of falsification of documents were declared time-barred by a judicial decision made prior to the

commencement of the hearing before the Supremo Tribunal de Justiça. In addition, judgment was given in favour of the defendants on an application for compensation under civil law made in the same proceedings, because the facts alleged were not proved.

41 It is to be recalled that the system under Article 234 EC is capable of being applied to references for a preliminary ruling pursuant to Article 35 EU, subject to the conditions laid down in the latter article (see Case C-105/03 *Pupino* [2005] ECR I-5285, paragraph 28). Under the procedure envisaged in Article 234 EC, which is based on a clear separation of functions between the national courts and the Court of Justice, any assessment of the facts in the case is a matter for the national court. The Court of Justice is thus empowered to rule on the interpretation or validity of Community provisions only on the basis of the facts which the national court puts before it (see Case C-235/95 *Dumon and Froment* [1998] ECR I-4531, paragraph 25, and Case C-421/01 *Traunfellner* [2003] ECR I-11941, paragraph 21).

42 In the light of the national court's reading of the judgment of the Supremo Tribunal de Justiça, doubts arise as to the admissibility of the third question.

43 On such a reading, the premiss upon which the third question is founded, namely the acquittal of the defendants because there was no, or insufficient, evidence that the goods were from outside the Community, is not present.

44 According to the Court's settled case-law, while the Court is in principle bound to give a ruling where the questions submitted concern the interpretation of Community law, it can in exceptional circumstances examine the conditions in which the case was referred to it by the national court, in order to confirm its own jurisdiction. The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of

Community law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, inter alia, Case C-13/05 *Chacón Navas* [2006] ECR I-6467, paragraphs 32 and 33, and the case-law cited).

45 Here, having regard to the national court's description of the facts, the third question concerns a hypothetical problem.

46 Consequently, there is no reason for the Court to answer this question.

Question 4

47 For the reasons set out in paragraphs 41 to 45 of the present judgment, the fourth question is inadmissible in so far as it is founded on the premiss of acquittal of the defendants because there was no, or insufficient, evidence. On the other hand, it is admissible in so far as it relates to the situation where a court of a Member State has declared that prosecution of the offence of smuggling is time-barred.

Question 4(a)

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

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

50 A finding by a court of a Member State that prosecution of a defendant for the offence of smuggling is time-barred does not alter the legal classification of the products in question.

51 The *ne bis in idem* principle binds the courts of a Contracting State only in so far as it precludes a defendant who has already had his case finally disposed of in another Contracting State from being prosecuted a second time for the same acts.

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

Question 4(b)

53 By Question 4(b), the national court essentially asks whether the marketing of goods in another Member State, after their importation into the Member State where the accused was acquitted because the prosecution was time-barred, forms part of the same acts or constitutes conduct independent of importation into the latter Member State.

- 54 The only relevant criterion for applying the concept of ‘the same acts’ within the meaning of Article 54 of the CISA is identity of the material acts, understood as the existence of a set of concrete circumstances which are inextricably linked together (see *Van Esbroeck*, paragraph 36).
- 55 More specifically, a situation such as that at issue in the main proceedings may involve such a set of facts.
- 56 However, the definitive assessment in this regard is a matter for the competent national courts which are charged with the task of determining whether the material acts at issue constitute a set of facts which are inextricably linked together in time, in space and by their subject-matter (see *Van Esbroeck*, paragraph 38).
- 57 It follows from the foregoing that the marketing of goods in another Member State, after their importation into the Member State where the accused was acquitted, constitutes conduct which may form part of the ‘same acts’ within the meaning of Article 54 of the CISA.

Costs

- 58 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 (First 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 in Schengen on 19 June 1990, applies in respect of a decision of a court of a Contracting State, made after criminal proceedings have been brought, by which the accused is acquitted finally because prosecution of the offence is time-barred.**

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

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

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

[Signatures]