JUDGMENT OF THE COURT (Second Chamber)
18 July 2007 *

In Case C-367/05,

REFERENCE for a preliminary ruling under Article 35 EU from the Hof van Cassatie (Belgium), made by decision of 6 September 2005, received at the Court on 29 September 2005, in the criminal proceedings against

Norma Kraaijenbrink,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, J. Klučka, R. Silva de Lapuerta, J. Makarczyk and L. Bay Larsen (Rapporteur), Judges,

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

having regard to the written procedure and further to the hearing on 4 July 2006,

* Language of the case: Dutch.

after considering the observations submitted on behalf of:

— Ms Kraaijenbrink, by M. De Boel, advocaat,

— the Kingdom of the Netherlands, by H.G. Sevenster, acting as Agent,

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

— the Hellenic Republic, by M. Apessos, S. Trekli and M. Tassopoulou, acting as Agents,

— the Kingdom of Spain, by M. Muñoz Pérez, acting as Agent,

— the Republic of Austria, by C. Pesendorfer, acting as Agent,

— the Republic of Poland, by J. Pietras, 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 5 December 2006,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 54, read in conjunction with Article 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 reference was made in the course of criminal proceedings brought in Belgium against Ms Kraaijenbrink in which she was charged with laundering the proceeds of drug trafficking.

Legal context

Community law

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 Belgium

and the Kingdom of the Netherlands, are authorised, within the legal and institutional framework of the Union and of the EU and EC Treaties, 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, signed in Schengen on 14 June 1985 (OJ 2000 L 239, p. 13), 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, on 1 May 1999, the Schengen acquis was to apply immediately to the 13 Member States referred to in Article 1 of that 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 that decision, in conjunction with Annex A thereto, that the Council selected, first, Articles 34 EU and 31 EU and, second, 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 to 58 and 71 respectively of the CISA.

7 As provided in 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') of the CISA:

'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 58 of the CISA, which is in that same chapter, states:

'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.'

9 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 ... 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 ...

...

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. ...'

10 According to the information published in the *Official Journal of the European Communities* of 1 May 1999 (OJ 1999 L 114, p. 56), concerning the date of entry into force of the Treaty of Amsterdam, the Kingdom of Belgium declared, pursuant to Article 35(2) EU, that it accepted the jurisdiction of the Court of Justice to give preliminary rulings in accordance with the arrangements laid down in Article 35(3)(b) EU.

International law

11 Article 36 of the Single Convention on Narcotic Drugs, concluded in New York on 30 March 1961 under the aegis of the United Nations ('the Single Convention'), is worded as follows:

'1. (a) Subject to its constitutional limitations, each Party shall adopt such measures as will ensure that cultivation, production, manufacture, extrac-

tion, 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;

(ii) Intentional participation in, conspiracy to commit and attempts to commit, any of such offences, and preparatory acts and financial operations in connexion with the offences referred to in this article, shall be punishable offences as provided in paragraph 1;

...'

National law

12 Article 65 of the Belgian Criminal Code provides:

'Where several offences are founded on the same conduct, or where several offences simultaneously before the same court demonstrate successive and continuous criminal intention, sentence shall be passed only in respect of the most serious offence.

When a court finds that offences considered in an earlier final judgment and other conduct — assuming it is factually proven — which is currently before it both predates that judgment and, together with those offences, demonstrates successive and continuous criminal intention, the sentence already imposed shall be taken into account in determining the sentence to be imposed. If the sentence already imposed seems adequate as a penalty for the whole course of criminal conduct, the court shall make a finding of guilt and shall refer in its judgment to the sentence already imposed. The total sentence imposed under this article may not exceed the maximum sentence for the most serious offence.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

13 Ms Kraaijenbrink, a Dutch national, was sentenced by judgment of 11 December 1998 of the Arrondissementsrechtbank te Middelburg (Middelburg District Court, Netherlands) to a suspended six month term of imprisonment for several offences under Article 416 of the Wetboek van Strafrecht (Netherlands Penal Code) of receiving and handling the proceeds of drug trafficking between October 1994 and May 1995 in the Netherlands.

14 By judgment of 20 April 2001, the rechtbank van eerste aanleg te Gent (Court of First Instance, Ghent, Belgium) sentenced Ms Kraaijenbrink to two years' imprisonment for committing several offences under Article 505 of the Belgian Criminal Code by exchanging in Belgium between November 1994 and February 1996 the proceeds of drug trafficking operations in the Netherlands. That judgment was confirmed by a judgment of 15 March 2005 of the hof van beroep te Gent, correctionele Kamer (Appeal Court of Ghent, Criminal Chamber).

15 Referring to Article 71 of the CISA and Article 36(2)(a)(i) and (ii) of the Single Convention, both those courts considered that Ms Kraaijenbrink could not rely on Article 54 of the CISA. They considered that the offences of receiving and handling the proceeds of drug trafficking committed in the Netherlands and the money laundering offences in Belgium resulting from that trafficking must be regarded in that State as separate offences. That was so notwithstanding the common intention underlying the offences of receiving and handling in the Netherlands and those of money laundering in Belgium.

16 Ms Kraaijenbrink then appealed on a point of law and pleaded, in particular, infringement of the *ne bis in idem* principle in Article 54 of the CISA.

17 The Hof van Cassatie observes first of all that, contrary to Ms Kraaijenbrink's contention, the finding that there was a 'common intention' underlying the unlawful conduct in the Netherlands and the money laundering offence committed in Belgium does not necessarily entail a finding that the sums of money involved in the money laundering operations in Belgium were the proceeds of the trafficking of drugs in respect of the receipt and handling of which Ms Kraaijenbrink had already been sentenced in the Netherlands.

18 On the other hand, it follows from the judgment of the hof van beroep te Gent of 15 March 2005, against which the appeal on the point of law was lodged, that different acts are involved in the two Contracting States which none the less constitute the successive and continuous implementation of the same criminal intention with the result that, if they had all been carried out in Belgium, they would be regarded as a single legal act which would have been dealt with under Article 65 of the Belgian Criminal Code.

19 Accordingly, the Hof van Cassatie considered that the question arose as to whether the notion of 'same acts' within the meaning of Article 54 of the CISA must be interpreted as covering different acts consisting, first, in holding in one Contracting State the proceeds of drug trafficking and, second, in the exchanging at exchange bureaux in another Contracting State of sums of money having the same origin.

20 It was in those circumstances that the Hof van Cassatie decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Must Article 54 of the [CISA], read with Article 71 of that agreement be construed as meaning that the criminal offences of acquiring or having available in the Netherlands or transferring from there sums of money in foreign currencies originating from the trade in narcotics (offences which were prosecuted and in respect of which a conviction was obtained in the Netherlands for receiving and handling in breach of Article 416 of the Criminal Code), which differ from the criminal offences consisting in the exchanging at exchange bureaux in Belgium of the relevant sums of money from the trade in narcotics received in the Netherlands (prosecuted in Belgium as the offence of receiving and handling and performing other acts in regard to goods resulting from crime, in breach of Article 505 of the Criminal Code), are to be regarded as the "same acts" for the purposes of Article 54 aforesaid where the courts establish that they share a common intention and thus legally constitute a single act?

(2) If Question 1 is answered affirmatively:

> Must the expression "may not be prosecuted ... for the same acts" in Article 54 of the [CISA] be interpreted as meaning that the 'same acts' may also be constituted by different acts sharing the same intention, and thus constituting a single act, which would mean that a defendant can no longer be prosecuted for the offence of money-laundering in Belgium once he has been duly convicted in the Netherlands of other offences committed with the same intention, regardless of any other offences committed during the same period but which became known or in respect of which prosecutions were brought in Belgium only after the date of the definitive foreign judgment or, in such a case, must that expression be interpreted as meaning that the court determining the merits may enter a conviction in respect of these other acts on a subsidiary basis, taking into account the sentences already imposed, unless it considers that those other sentences in its view constitute sufficient punishment of all the offences, and ensuring that the totality of the penalties imposed may not exceed the maximum of the severest penalty?'

The jurisdiction of the Court

21 It is apparent from paragraph 10 of this judgment that, in the circumstances of this case, the Court has jurisdiction to give a ruling on the interpretation of the CISA pursuant to Article 35 EU.

22 In that respect, it should be noted that Article 54 of the CISA applies *ratione temporis* to criminal proceedings such as those in the main proceedings. Although it is true that the CISA was not yet in force in the Netherlands at the time of Ms Kraaijenbrink's first conviction in that State, it was, however, in force in the two States concerned when the court before which the second proceedings were brought

considered the conditions governing the applicability of the *ne bis in idem* principle, which prompted this reference for a preliminary ruling (see, to that effect, Case C-436/04 *Van Esbroeck* [2006] ECR I-2333, paragraph 24).

The questions referred for a preliminary ruling

The first question

23 It must be pointed out at the outset that the fact, referred to in the first question referred for a preliminary ruling, that the legal classification of the acts in respect of which the sentence was passed in the first Contracting State differs from that of the acts in respect of which the proceedings were brought in the second State is irrelevant, since a divergent legal classification of the same acts in two different Contracting States is no obstacle to the application of Article 54 of the CISA (see *Van Esbroeck*, paragraph 31).

24 Moreover, Article 71 of the CISA, also referred to in the first question, does not contain any element which might restrict the scope of Article 54 of the CISA (see *Van Esbroeck*, paragraph 40). It follows that the reference to existing United Nations Conventions in Article 71 cannot be understood as hindering the application of the *ne bis in idem* principle laid down in Article 54 (see *Van Esbroeck*, paragraph 41).

25 Accordingly, by its first question, the referring court must be understood as seeking, in essence, to ascertain whether the notion of 'same acts' within the meaning of Article 54 of the CISA must be construed as covering different acts consisting, in

particular, first, in holding in one Contracting State the proceeds of drug trafficking and, second, in the exchanging at exchange bureaux in another Contracting State of sums of money having the same origin, where the national court before which the second criminal proceedings are brought finds that those acts are linked together by the same criminal intention.

26 In order to answer that question, it should be noted that the Court has already held that the only relevant criterion for the application 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; Case C-467/04 *Gasparini and Others* [2006] ECR I-9199, paragraph 54, and Case C-150/05 *Van Straaten* [2006] ECR I-9327, paragraph 48).

27 In order to assess whether such a set of concrete circumstances exists, the competent national courts must determine whether the material acts in the two proceedings constitute a set of facts which are inextricably linked together in time, in space and by their subject-matter (see, to that effect, *Van Esbroeck*, paragraph 38; *Gasparini and Others*, paragraph 56, and *Van Straaten*, paragraph 52).

28 It follows that the starting point for assessing the notion of 'same acts' within the meaning of Article 54 of the CISA is to consider the specific unlawful conduct which gave rise to the criminal proceedings before the courts of the two Contracting States as a whole. Thus, Article 54 of the CISA can become applicable only where the court dealing with the second criminal prosecution finds that the material acts, by being linked in time, in space and by their subject-matter, make up an inseparable whole.

29 On the other hand, if the material acts do not make up such an inseparable whole, the mere fact that the court before which the second prosecution is brought finds that the alleged perpetrator of those acts acted with the same criminal intention does not suffice to indicate that there is a set of concrete circumstances which are inextricably linked together covered by the notion of 'same acts' within the meaning of Article 54 of the CISA.

30 As the Commission of the European Communities in particular pointed out, a subjective link between acts which gave rise to criminal proceedings in two different Contracting States does not necessarily mean that there is an objective link between the material acts in question which, consequently, could be distinguished in time and space and by their nature.

31 As regards more specifically a situation such as that at issue in the main proceedings, in which it has not been clearly established to what extent it is the same financial gains derived from the drug trafficking that underlie, in whole or in part, the unlawful conduct in the two Contracting States concerned, it must be stated that, in principle, such a situation can be covered by the notion of 'same acts' within the meaning of Article 54 of the CISA only if an objective link can be established between the sums of money in the two sets of proceedings.

32 In that respect, it is for the competent national courts to assess whether the degree of identity and connection between all the factual circumstances that gave rise to those criminal proceedings against the same person in the two Contracting States is such that it is possible to find that they are 'the same acts' within the meaning of Article 54 of the CISA.

33 Moreover, it must be pointed out in this case that it is apparent from Article 58 of the CISA that the Contracting States are entitled to apply broader national provisions on the *ne bis in idem* principle with regard to judicial decisions taken abroad.

34 However, Article 58 of the CISA certainly does not authorise a Contracting State to refrain from trying a drugs offence, in breach of its obligations under Article 71 of the CISA, read in conjunction with Article 36 of the Single Convention, on the sole ground that the person charged has already been convicted in another Contracting State in respect of other offences motivated by the same criminal intention.

35 On the other hand, those provisions do not mean that in national law the competent courts before which a second set of proceedings is brought are precluded from taking account, when fixing the sentence, of penalties which may have already been imposed in the first set of proceedings.

36 In the light of the foregoing, the answer to the first question must therefore be that Article 54 of the CISA is to be interpreted as meaning that:

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

— different acts consisting, in particular, first, in holding in one Contracting State the proceeds of drug trafficking and, second, in the exchanging at exchange bureaux in another Contracting State of sums of money also originating from such trafficking should not be regarded as 'the same acts' within the meaning of Article 54 of the CISA merely because the competent national court finds that those acts are linked together by the same criminal intention;

— it is for that national court to assess whether the degree of identity and connection between all the facts to be compared is such that it is possible, in the light of the said relevant criterion, to find that they are 'the same acts' within the meaning of Article 54 of the CISA.

The second question

37 The second question was referred only if the response to the first question confirmed that a common criminal intention is a sufficient condition in itself, which if satisfied, enables different acts to be regarded as 'the same acts' within the meaning of Article 54 of the CISA.

38 Since that has not been confirmed by the Court in its reply to the first question, it follows that there is no need to answer the second question.

Costs

39 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:

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 (Luxembourg), must be interpreted as meaning that:

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

— **different acts consisting, in particular, first, in holding in one Contracting State the proceeds of drug trafficking and, second, in the exchanging at exchange bureaux in another Contracting State of sums of money also originating from such trafficking should not be regarded as 'the same acts' within the meaning of Article 54 of the Convention implementing the Schengen Agreement merely because the competent national court finds that those acts are linked together by the same criminal intention;**

— **it is for that national court to assess whether the degree of identity and connection between all the facts to be compared is such that it is possible, in the light of the said relevant abovementioned criterion, to find that they are 'the same acts' within the meaning of Article 54 of the Convention implementing the Schengen Agreement.**

[Signatures]