Revija za evropsko pravo: VI (2004) 1.

SUDSKA PRAKSA

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INTERPRETATION OF THE RULE *NE BIS IN IDEM*

Joined Cases C-187/01 and C-385/01, Criminal proceedings against Hüseyin Gözütok and Klaus Brügge, Judgment of the Court of Justice of 11 February
2003, Full Court, [2003] ECR I-5689

Introduction

In the past the ECJ's competence was restricted to the first EU pillar which resulted in leaving out very important issues outside the Court's jurisdiction. The situation changed after the adoption of the Treaty of Amsterdam which, for the first time, extended the ECJ's jurisdiction to the third pillar. However, this jurisdiction was subjected to the conditions laid down in the Treaty: to give preliminary rulings on the validity and interpretation of framework decisions and decisions, on the interpretation of conventions established under the Title on Police and Judicial Cooperation in Criminal Matters and on the validity and interpretation of the measures implementing them. By a declaration made at the time of the signature of the Treaty of Amsterdam or at any time thereafter, any Member State is able to accept the jurisdiction of the Court of Justice to give preliminary rulings regarding third pillar issues.

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Both Belgium and Germany which are the parties in these cases opted for the full range of courts and tribunals. However, case law of the ECJ on third pillar issues is still very rare. That is why this judgment becomes even more important than any ECJ judgment in any other field.

Even before the establishment of the third pillar, member states agreed to cooperate on JHA issues, namely to establish cooperation in criminal matters on ***ad hoc*** basis in the framework of the European Political Cooperation. This resulted in the signing of the Schengen Agreement in 1985 which represented the agreement of member states to cooperate in the field of migration, police cooperation and judicial cooperation in criminal matters. The member states also agreed to set up a Schengen Information System (SIS). Initially the Agreement was signed between France, Germany and Benelux States but soon after the other members states, joined, with the notable exception of the United Kingdom and Ireland. The two latter countries signed two Protocols which give them special status in regard to Schengen ***acquis***. The intergovernmental Schengen agreements of 1985 and 1990 and the elaborated Schengen ***acquis*** have been incorporated into the structure of the EU pursuant to a Protocol attached to the EU Treaty and EC Treaty by the Treaty of Amsterdam.[76] The provisions concerning asylum, refugee policy, etc. have been integrated in the first pillar (i.e. the EC Treaty: Title IV), while the provisions on police cooperation and judicial cooperation in criminal matters remained in the third pillar (after Amsterdam the third pillar is called the Police and Judicial Cooperation in Criminal Matters.

Issue of Dispute in the Case of ***Gözütok and Brügge***

In the case ***Gözütok and Brügge*** the European Court of Justice ruled for the first time on the interpretation of the Convention Implementing the Schengen Agreement, namely on Article 54 of the Convention. The procedure before the European court of Justice was initiated though the preliminary ruling procedure by the Higher Regional Court in Cologne and Court of First Instance of Veurne. Each of the courts referred a question for a preliminary ruling under Article 35 TEU on the interpretation of Article 54 of the Convention implementing the Schengen Agreement of 14 June 1985. The Court raised a very interesting questions on the validity and the scope of a leading principle of human rights, the ***ne bis in idem*** principle in the

[76] See more in ***Common Market Law Review*** 41; 795–812, 2004.

EU / Schengen context. This question arose in two sets of criminal proceedings, the first in Germany against Mr Gözütok and the second in Belgium against Mr Brügge, for offences committed in the Netherlands and Belgium respectively, although proceedings brought in other Member States against the two accused on the same facts had been definitively discontinued after they had paid a sum of money determined by the Public Prosecutor as part of a procedure whereby further prosecution was barred.

Facts in Both Cases

Case C-187/01

The first case concerned Mr Gözütok, a Turkish national who was resident in Netherlands and who was owner of the snack bar in a small town in Netherlands. On two occasions during searches of those premises he was caught in possession of significant amount of hashish and marijuana. The criminal proceedings against Mr Gözütok in the Netherlands relating to the seizures on first occasion were discontinued after he had accepted offers made by the Public Prosecutor's Office in the context of a procedure whereby further prosecution was barred and has paid the requested sum demanded by the Public Prosecutor's Office.[77] In a meantime The German authorities' attention was drawn to Mr Gözütok by a German bank which at the same time alerted them to the fact that large sums of money were passing through Mr Gözütok's account. After receiving information from Dutch authorities the German authorities proceeded with the arrest of Mr Gözütok and charged him with dealing in narcotics in the Netherlands on at least two occasions, one involving significant quantities. The District Court in Aachen in Germany convicted the aforementioned soon after and sentenced him to a period of one year and five months' imprisonment, suspended on probation.

Mr Gözütok and the Public Prosecutor's Office lodged the appeals and the Regional Court in Aachen terminated the criminal proceedings brought against Mr Gözütok on the ground ***inter alia*** that under Article 54 of the CISA the definitive discontinuance of criminal proceedings by the Netherlands

[77] Article 74 (1) of the Wetboek van Strafrecht (Netherlands Criminal Code) provides: Before the start of the court proceedings, the Public Prosecutor may impose one or more conditions for avoidance of a prosecution of any offences, other than those subject by statute to imprisonment of a term of more than six years, or any misdemeanours. There shall be a bar on further prosecution once those conditions have been fulfilled.

authorities bound the German prosecuting authorities. After the second appeal lodged by the Public Prosecutor's Office to the Higher Regional Court, this Court decided to stay proceedings and make a reference to the ECJ for a preliminary ruling on the basis of Article 35 TEU.

Case C-385/01

The second case concerned Mr Brügge, a German national residing in Germany. He was charged by the Belgian prosecuting authorities with having intentionally assaulted and wounded Mrs Leliaert in Belgium, with the result that she became ill or unable to work[78]. As expected, Mrs Leliaert filed an action requesting damages (non-pecuniary damages in the amount of BEF 20 000 together with interest) before the Court of First Instance of Veurne[79]. Similar situation to the one in the previous case happened here. The Public Prosecutor's Office in Bonn offered Mr Brügge an out-of-court settlement in return for payment of the required amount. Mr Brügge paid the proposed amount and the Public Prosecutor's Office did not proceed with the prosecution[80]. The District Court of Veurne decided to stay proceedings and refer to the ECJ for a preliminary ruling on the basis of Article 35 TEU.

Relevant Legal Background for Both Cases

Firstly it is important to mention the Protocol integrating the Schengen ***acquis*** into the EU framework annexed to the TEU and TEC. Article 1 of this Protocol instructed the contracting parties to establish closer cooperation among themselves within the scope of the Schengen ***acquis***. The objective of enabling the European Union to develop more rapidly into an area of freedom, security and justice is stipulated in the Preamble to the Protocol. A part of the Schengen ***acquis*** is also the Convention implementing the

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[78] He was charged with violation of Articles 392, 398(1) and 399(1) of the Belgian Criminal Code.

[79] This court sits as a criminal courtt.

[80] The settlement was made under Paragraph 153a, read with the second sentence of Paragraph 153(1), of the German Code of Criminal Procedure, pursuant to which the Public Prosecutor may, on certain conditions, discontinue criminal proceedings without the approval of the competent court, in particular after the accused has paid a certain sum of money to a charitable organisation or to the Treasury.

Schengen Agreement on the gradual abolition of checks at their common borders (CISA).

The main legal provisions are however contained in the CISA Articles 54 to 58. The rule of ***ne bis in idem*** is clearly prescribed by Article 54 which states the following: "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". Article 55 enumerates exceptions to the rule of ***ne bis in idem***. The exceptions must be stipulated at the moment of ratifying, accepting or approving this Convention. Finally, Article prescribes that national provisions may go beyond the Schengen provisions on ***ne bis in idem***, by giving a broader protection.

Significance of the Rule *Ne Bis in Idem*

It is widely accepted that the principle of ***ne bis in idem*** is inherent to criminal law. Very often this rule is guaranteed by the highest national act, namely the Constitution. Traditionally a distinction is made between ***nemo de bet bis vexari pro una et eadem causa*** (no one should have to face more than one prosecution for the same offence) and ***nemo debet bis puniri pro uno delicto*** (no one should be punished twice for the same offence).[81] Besides the national guarantee of this rule, this rule also prescribed by certain international instruments. It is important to mention the International Convent on Civil and Political Rights[82] and the European Convention on Human Rights (ECHR). The rule in question was prescribed by Protocol 7 of the ECHR, but only 15 member states ratified it. The case law of the European Court of Human Rights is more important which clearly shows that the principle ***ne bis in idem*** includes double prosecution.

[81] ***Common Market Law Review*** 41; p. 802, 2004.

[82] Article 14 (7) stipulates: No one shall be liable to be tried or punished for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Questions referred for Preliminary Ruling

Due to the fact that in both cases the relevant courts referred the same question to the ECJ, the Court of Justice decided to join the cases. The main question that was asked by the two national courts concerned the interpretation of Article 54 of the CISA, namely whether the rule ***ne bis in idem*** prescribed by this Article also applies to procedures whereby further prosecution is barred, such as those at issue in the main actions. The same outcome after pressing the charges happened in both cases. Both Gözütok and Brügge paid the required amount and the further prosecution was barred. This procedure whereby further prosecution is barred is a "procedure by which the prosecuting authority, on which national law confers power for that purpose, decides to discontinue criminal proceedings against an accused once he has fulfilled certain obligations and, in particular, has paid a certain sum of money determined by the prosecuting authority".[83] Thus, it is the decision of the authority which plays a significant part in the administration of justice. However, one should not forget that this procedure is completely dependent on the behaviour of the accused, that is his or her willingness to fulfil certain obligations. In both cases here, as was said previously, it involved the payment of required amount of money both by Mr Gözütok and Mr Brügge. Briefly, this was an out-of-court settlement where proceedings in the relevant member states were discontinued in compliance with the provisions of the national law, after reaching an agreement with the public prosecutor. In addition, as the Court of Justice concluded the penalty entailed in the procedure whereby further prosecution is barred must be regarded as having been enforced for the purposes of Article 54.[84] Furthermore, national legal systems which provide for procedures for barring further prosecution generally do so only in respect of minor offences which are punishable only by relatively light penalties.

The absence of a court decision was a consequence of this agreement reached with the public prosecutor. This fact was perceived as a major problem by parties in giving the interpretation of the rule ***ne bis in idem,*** since the parties believed that the principle ***ne bis in idem*** applies only to cases in which the court decision was passed. However, the Court position was entirely different. The Court expressly stated that neither the Title VI of the TEU nor the Schengen Agreement and CISA makes application of Article 54

[83] In Joined Cases C-187/01 and C-385/01, para 27.
[84] Op. cit, para 30.

conditional upon harmonization, or at least approximation of the criminal laws of the member states relating to procedures whereby further prosecution is barred. The main point made by the Court which makes this judgment so important is that the application of the principle ***ne bis in idem*** either in cases where further prosecution is barred or to judicial decisions derives from the idea that member states have mutual trust in their criminal systems and that each of them recognises the criminal law in force in the other Member States, even when the outcome would be different if its own national law were applied. This statement certainly overcomes the status quo that existed in the field of police and judicial cooperation in criminal matters due to its hidden idea of approximation of criminal legislation in member states which would come as a next step in further and in similar cases disable doubts about certain procedures and application of certain rules that emerged in the two cases analysed here.

If the principle ***ne bis in idem*** was restricted only to cases where the discontinuance of procedure was based on a judicial decision the objective of Article 54 would be jeopardised since its application would be limited to those defendants who on account of the seriousness of the committed crime or prescribed penalties may not use "simplified methods of disposing of certain criminal cases by a procedure whereby further prosecution is barred"[85]. The goal of the Article is to ensure that no one is prosecuted on the same facts in several Member States on account of him or her having exercised his or her right to freedom of movement.

The Court's view was not accepted by contracting parties which raised their objections during the proceeding. The German and Belgian governments opposed the interpretation of Article 54 by restricting its scope to those proceedings where there are judicial decisions. The Belgian government also added that the application of the principle ***ne bis in idem*** in this manner would put in question the protection of victim's rights. These objections were taken into consideration by the Court of Justice which, with special regard to the second objection of the Belgian government concluded that the only effect of the ***ne bis in idem*** principle, as set out in that provision, is to ensure that a person whose case has been finally disposed of in a Member State is not prosecuted again on the same facts in another Member State. Moreover, the ***ne bis in idem*** principle does not preclude the victim or any other person

[85] Op. cit, para 40.

harmed by the conduct of the accused from bringing a civil action to seek compensation for the damage suffered. Thus the Court rules that:

The ***ne bis in idem*** principle, laid down 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 at Schengen, also applies to procedures whereby further prosecution is barred, such as the procedures at issue in the main actions, by which the Public Prosecutor of a Member State discontinues criminal proceedings brought in that State, without the involvement of a court, once the accused has fulfilled certain obligations and, in particular, has paid a certain sum of money determined by the Public Prosecutor.

COMMENT OF THE REASONING OF THE COURT

The reasoning of the Court was very much based on the Opinion of the Advocate General D. Ruiz-Jarabo Colomer who qualified Article 54 as a genuine expression of the ***ne bis in idem*** principle in a dynamic process of European integration. It is not a procedural rule but a fundamental safeguard, based on legal certainty and equity, for persons who are subject to the exercise of the ***ius puniendi*** in a common area of freedom and justice.[86] Moreover, the Advocate General observed that it would be "inherently unfair and contrary to the principles on which the construction of a United Europe rests if … a person could be punished in several Member States for committing the same acts".[87] The Court of Justice in its judgment also emphasized the fact that restricted application of this principle is not possible in situations with extra-territorial element.

The significance of this case however lies in the idea of mutual trust of member states in national criminal justice systems, and mutual recognition of criminal law in force in other countries, even if their own national rules would reach a different outcome. Since the application of CISA is not dependent upon harmonisation of national penal systems, mutual trust is the foundation of cooperation in the field of police and judicial cooperation in

[86] ***Common Market Law Review*** 41; p. 799, 2004.
[87] At para. 58 Opinion.

criminal matters. Some authors justifiably make a parallel between ***Gözütok and Brügge*** and ***Cassis de Dijon*** since the former judgement advocates for the same idea of mutual recognition in this field as it was propagated in ***Casis de Dijon***. The gradual evolution from the mutual recognition will grow in harmonised standards of criminal justice. Finally, this reasoning of the Court is in accordance with the intention of the EU to create the area of freedom, security and justice.