JUDGMENT OF THE COURT (Fifth Chamber)

10 March 2005 *

In Case C-469/03,

REFERENCE for a preliminary ruling under Article 35 EU, from the Tribunale di Bologna (Italy), made by decision of 22 September 2003, registered at the Court on 10 November 2003, in the criminal proceedings brought against

Filomeno Mario Miraglia,

THE COURT (Fifth Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, R. Schintgen (Rapporteur) and P. Kūris, Judges,

Advocate General: A. Tizzano,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 15 December 2004,

* Language of the case: Italian.

after considering the observations submitted on behalf of:

— Mr Miraglia, by N. Trifirò, avvocatessa,

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

— the Greek Government, by M. Apessos, I. Bakopoulos and M. Tassopoulou, acting as Agents,

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

— the French Government, by R. Abraham, G. de Bergues and C. Isidoro, acting as Agents,

— the Netherlands Government, by H.G. Sevenster and J. van Bakel, acting as Agents,

— the Swedish Government, by A. Kruse, acting as Agent,

— the Commission of the European Communities, by E. de March and W. Bogensberger, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of 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; 'the CISA'), signed on 19 June 1990 at Schengen (Luxembourg).

2 The reference was made in the course of criminal proceedings against Mr Miraglia, who is charged with having organised, with others, the transport to Bologna of heroin-type narcotics.

The legal background

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, amongst them the Italian Republic and the Kingdom of the Netherlands, 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 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, on 20 May 1999 the Council 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 Treaty on European Union, 'Provisions on Police and Judicial Cooperation in Criminal Matters', as the legal basis for Articles 54 to 58 of the CISA.

7 The latter make up Chapter 3, 'Application of the *ne bis in idem* principle', of Title III, 'Police and Security'. In particular, they provide as follows:

'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.'

European Convention on Mutual Assistance in Criminal Matters

8 Article 2(b) of the European Convention on Mutual Assistance in Criminal Matters, signed at Strasbourg on 20 April 1959 ('the European Convention on Mutual Assistance'), provides:

'Assistance may be refused:

...

(b) if the requested Party considers that execution of the request is likely to prejudice the sovereignty, security, *ordre public* or other essential interests of its country.'

9 The Kingdom of the Netherlands has formulated the following reservation concerning Article 2(b) of the European Convention on Mutual Assistance:

'The Government of the Kingdom of the Netherlands reserves the right not to grant a request for assistance:

...

(b) in so far as the request concerns a prosecution or proceedings incompatible with the principle *ne bis in idem*;

(c) in so far as it relates to an investigation of facts for which the defendant is prosecuted in the Netherlands.'

The provisions of Netherlands law

10 In accordance with Article 36 of the Netherlands Code of Criminal Procedure:

'1. Where the criminal proceedings are not pursued, the trial court before which the case was last prosecuted may declare, at the defendant's request, that the case is closed.

2. The court may reserve its decision on the request at any time for a certain period if the prosecuting authorities adduce evidence demonstrating that the matter will still be prosecuted.

3. Before the court gives its decision, it shall summon the person directly concerned of whom it is aware in order to hear his views on the defendant's request.

4. The order shall be notified to the defendant forthwith.'

11 Article 255 of that Code provides:

'1. Where a case does not proceed to judgment, after the order declaring the case closed has been notified to the defendant, or after he has been notified that no further action is to be taken, without prejudice in the latter case to Article 12i or 246, no further proceedings may be taken against the defendant in respect of the same acts, unless new evidence is brought forward.

2. Only statements made by witnesses or the defendant or documents, acts or official records which have subsequently come to light and have not been examined can constitute new evidence.

3. In such a case, the defendant can be summoned before the Rechtbank only after a preliminary judicial inquiry into that new evidence ...' .

12 Finally, with regard to requests for mutual assistance in criminal matters, Article 552-l of the Netherlands Code of Criminal Procedure provides:

'1. The request shall not be granted:

...

(b) in so far as to grant it would serve to collaborate in proceedings or an action incompatible with the principle underlying Article 68 of the Criminal Code and Article 255(1) of this Code;

(c) in so far as it is made for the purposes of an inquiry concerning facts in respect of which the defendant is prosecuted in the Netherlands ...'.

The case in the main proceedings and the question referred for a preliminary ruling

13 In connection with an investigation conducted by the Italian and Netherlands authorities in cooperation, Mr Miraglia was arrested in Italy on 1 February 2001 under an order for his pre-trial detention issued by the examining magistrate of the Tribunale di Bologna.

14 Mr Miraglia was charged with having organised, with others, the transport to Bologna of 20.16 kg of heroin, an offence laid down by and punishable under Articles 110 of the Italian Criminal Code and 80 of Presidential Decree No 309/90.

15 On 22 January 2002 the examining magistrate of the Tribunale di Bologna committed Mr Miraglia to be tried for that offence and decided to replace his detention in prison by house arrest. The Tribunale di Bologna later replaced house arrest by an obligation to reside in Mondragone (Italy), and then revoked all detention measures, so that at present the defendant is at liberty.

16 Criminal proceedings in respect of the same criminal acts were instituted concurrently before the Netherlands judicial authorities, Mr Miraglia being charged with having transported about 30 kg of heroin from the Netherlands to Italy.

17 The defendant was arrested on that charge by the Netherlands authorities on 18 December 2000 and released on 28 December 2000. On 17 January 2001 the Gerechtshof te Amsterdam (Netherlands) rejected the appeal brought by the prosecuting authorities against the order of the Rechtbank te Amsterdam (Netherlands) dismissing their application for the defendant to be kept in custody.

18 The criminal proceedings against Mr Miraglia were closed on 13 February 2001 without any penalty or other sanction's being imposed on him. In those proceedings the Netherlands public prosecutor did not initiate a criminal prosecution of the defendant. It is apparent from the file before the Court that that decision was taken on the ground that a prosecution in respect of the same facts had been brought in Italy.

19 By order of 9 November 2001 the Rechtbank te Amsterdam awarded the defendant compensation for the damage suffered through his having been remanded in custody and also the costs of the lawyers instructed.

20 By letter of 7 November 2002 the Public Prosecutor's Office of the Rechtbank te Amsterdam refused the request for judicial assistance made by the Public Prosecutor's Office of the Tribunale di Bologna, taking as its ground the reservation formulated by the Kingdom of the Netherlands with regard to Article 2(b) of the European Convention on Mutual Assistance in Criminal Matters, given that the Rechtbank had 'closed the case without imposing any penalty'.

21 On 10 April 2003 the Italian Public Prosecutor requested the Netherlands judicial authorities to provide information about the outcome of the criminal proceedings against Mr Miraglia and the way in which the proceedings had been settled in order to assess their significance for the purposes of Article 54 of the CISA.

22 By note of 18 April 2003 the Netherlands Public Prosecutor informed his Italian counterpart that the criminal proceedings against Mr Miraglia had been stayed, but did not supply information considered sufficient by the Italian court conquering the order made and its content. The Netherlands Public Prosecutor stated that it was 'a final decision of a court' precluding, pursuant to Article 255 of the Netherlands Code of Criminal Procedure, any prosecution in respect of the same criminal acts and any judicial cooperation with foreign authorities, unless new evidence should be produced against Mr Miraglia. The Netherlands judicial authorities added that any request for assistance made by the Italian State would run foul of Article 54 of the CISA.

23 According to the Italian court, the Netherlands authorities decided not to prosecute Mr Miraglia on the ground that criminal proceedings against the defendant had in

the meantime been instituted in Italy for the same criminal acts. That assessment is ascribable to the 'preventive' application of the principle *ne bis in idem*.

24 Now, according to the Tribunale di Bologna, that interpretation of Article 54 of the CISA is mistaken, for it removes any real opportunity for the two States concerned to take action so that the defendant's responsibility could actually be examined.

25 Indeed, Article 54 of the CISA, thus interpreted, would at the same time prevent the Netherlands authorities from prosecuting Mr Miraglia on the ground that proceedings were pending in Italy for the same acts, and the Italian authorities from determining whether the defendant was guilty.

26 The Italian court adds that, even if it should not find, as the Netherlands authorities have done, a situation in which the principle *ne bis in idem* applied and should decide to continue the proceedings, it would be forced to determine Mr Miraglia's guilt or innocence without the important benefit of the evidence gathered by the Netherlands authorities or their judicial assistance.

27 Those were the circumstances in which the Tribunale di Bologna decided to stay proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must Article 54 of the [CISA] apply when the decision of a court in the first State consists of discontinuing the prosecution without any adjudication on the merits of the case and on the sole ground that proceedings have already been initiated in another State?'

Concerning the question referred

28 By its question the Italian court seeks, in substance, to ascertain whether the principle *ne bis in idem*, enshrined in Article 54 of the CISA, is applicable to a decision of the judicial authorities of one Member State declaring a case to be closed, after the Public Prosecutor has decided not to pursue the prosecution on the sole ground that criminal proceedings had been started in another Member State against the same defendant and for the same acts, without any determination whatsoever as to the merits of the case.

29 It is clear from the actual wording of Article 54 of the CISA that a person may not be prosecuted in a Member State for the same acts as those in respect of which his case has been 'finally disposed of' in another Member State.

30 Now, a judicial decision, such as that at issue in the case in the main proceedings, taken after the public prosecutor has decided not to pursue the prosecution on the sole ground that criminal proceedings have been initiated in another Member State against the same defendant and in respect of the same acts, but where no determination has been made as to the merits of the case, cannot constitute a decision finally disposing of the case against that person within the meaning of Article 54 of the CISA.

31 The aptness of that interpretation of Article 54 of the CISA is borne out by the fact that it is the only interpretation to give precedence to the object and purpose of the provision rather than to procedural or purely formal matters, which, after all, vary as between the Member States concerned, and to ensure that that article has proper effect.

32 It is in fact settled case-law that the objective of Article 54 of the CISA is to ensure that no one is prosecuted on the same facts in several Member States on account of his having exercised his right to freedom of movement (Joined Cases C-187/01 and C-385/01 *Gözütok and Brügge* [2003] ECR I-1345, paragraph 38).

33 Now, the consequence of applying that article to a decision to close criminal proceedings, such as that in question in the main proceedings, would be to make it more difficult, indeed impossible, actually to penalise in the Member States concerned the unlawful conduct with which the defendant is charged.

34 First, that decision to close proceedings was adopted by the judicial authorities of a Member State when there had been no assessment whatsoever of the unlawful conduct with which the defendant was charged. Next, the bringing of criminal proceedings in another Member State in respect of the same facts would be jeopardised even when it was the very bringing of those proceedings that justified the discontinuance of the prosecution by the Public Prosecutor in the first Member State. Such a consequence would clearly run counter to the very purpose of the provisions of Title VI of the Treaty on European Union, as set out in the fourth indent of the first subparagraph 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 ... prevention and combating of crime'.

35 Consequently, the reply to be given to the question referred has to be that the principle *ne bis in idem*, enshrined in Article 54 of the CISA, does not fall to be applied to a decision of the judicial authorities of one Member State declaring a case to be closed, after the Public Prosecutor has decided not to pursue the prosecution on the sole ground that criminal proceedings have been started in another Member State against the same defendant and for the same acts, without any determination whatsoever as to the merits of the case.

Costs

36 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 (Fifth Chamber) rules as follows:

The principle *ne bis in idem*, 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 at Schengen, does not fall to be applied to a decision of the judicial authorities of one Member State declaring a case to be closed, after the Public Prosecutor has decided not to pursue the prosecution on the sole ground that criminal proceedings have been started in another Member State against the same defendant and for the same acts, without any determination whatsoever as to the merits of the case.

[Signatures]