Mutual Trust in Criminal Matters: the European Court of Justice gives a first interpretation of a provision of the Convention implementing the Schengen Agreement

Judgment of the European Court of Justice of 11 February 2003 in Joined Cases C-187/01 and C-385/01, *Hüseyin Gözütok and Klaus Brügge*

By Nadine Thwaites(*)

A. Introduction

It is common knowledge that the Internal Market is based on the notion of free movement which, in turn, rests on four basic freedoms (goods, persons, services and capital). The European Court of Justice (hereinafter "Court") has always interpreted these freedoms broadly while construing the exceptions to these freedoms strictly. This approach was to no small extent based on a presumption of mutual trust and mutual recognition among Member States. It allowed the Court, in many cases, to ensure free movement within the Internal Market without having to await the adoption of harmonised European Community measures.

On the procedural side, one has to recall that one of the most important means to enforce free movement has been the preliminary reference[1], which allows national jurisdictions to put questions to the Court regarding the interpretation of European Community law. Hence, it allows the national judge to dialogue directly with the Community judge, thereby avoiding the national judicial hierarchy. By virtue of a preliminary ruling, the Court clarifies the law and gives its interpretation of the latter. The preliminary ruling constitutes, thus, a means of making European Community law enter national law *via* the national judge. Moreover, and throughout the years, it has been an important tool by which the Court has contributed to further European integration.
The European Community rapidly adopted harmonisation measures which facilitated the freedom of movement of economically active persons, measures which

(*)Teaching Assistant, Department of Legal Studies, College of Europe, Dijver 11, B-8000 Brugge, E-Mail: nthwaites@coleurop.be

[1] See Article 234 of the *Treaty establishing the European Community* (hereinafter "TEC").

https://doi.org/10.1017/S2071832200015935 Published online by Cambridge University Press

have been extended to European citizens in general during the 1990s. However, two aspects of the free movement of persons remained, to a large extent, unrealised: the free movement of third country nationals (requiring harmonisation of national immigration and asylum rules) and the harmonisation of those national criminal law provisions hampering (or being likely to hamper) free movement. Both aspects touching upon sensitive national interests, the Member States have, for several years, preferred to deal with them in intergovernmental frameworks. Although such cooperation was institutionalised by the *Treaty of Maastricht*, it remained, nevertheless, beyond the reach of the Court's jurisdiction. This changed with the *Treaty of Amsterdam* (hereinafter "TOA") since "visas, asylum, immigration and other policies related to the free movement of persons" were transferred to the first (Community) pillar and since the Court was granted jurisdiction in the third (intergovernmental) pillar where criminal matter issues remained. The political sensitivity of the latter is, however, reflected by the fact that Article 35[2] of the *Treaty on European Union* (hereinafter "TEU") left the Member States the faculty to decide whether or not – and to what extent – to accept the use of the preliminary reference procedure by their national judges. Against this background, one could, therefore, expect with great interest the first ruling of the Court based on Article 35 of the TEU.

Rendered very recently, the Court's preliminary ruling in joined cases *Gözütok and Brügge* will most certainly provoke many reactions. Certain people already see it as being a historical landmark in the third pillar. It is, indeed, very particular. This is the first time that the Court has responded to a preliminary reference on the basis of Article 35 of the TEU on a subject relevant to the third pillar, that is, 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*[3] (hereinafter "CISA"). In addition, this is the first time that the Court has interpreted a provision of the CISA.

[2] For information purposes, Article 35 of the TEU allows the Court, under certain conditions, to give a preliminary ruling on the interpretation and the validity of framework decisions, decisions and conventions concluded by Member States according to Title VI of the TEU, and on the interpretation and the validity of their measures of application. Such a preliminary ruling allows the Court to appreciate not only the uniform interpretation of these instruments, but also their conformity with any superior norm in the European Union's juridical order, except for conventions concluded between Member States for which the preliminary reference determining validity is not foreseen. See LENAERTS, K., et JADOUL, L., "Quelle contribution de la Cour de justice des Communautés européennes au développement de l'espace de liberté, de sécurité et de justice?", *in* de KERCHOVE, G., and WEYEMBERGH, A., eds., *L'espace pénal européen: enjeux et perspectives*, Bruxelles, Editions de l'Université de Bruxelles, 2002, p. 201.
[3] Signed on 19 June 1990 at Schengen, Luxembourg.

https://doi.org/10.1017/S2071832200015935 Published online by Cambridge University Press

In the joined cases at stake, the questions referred to the Court by Belgian and German courts concern the interpretation that should be given to Article 54 of the CISA, regarding the *ne bis in idem* principle, in the framework of criminal proceedings instituted against two individuals. It should be noted that Article 54 CISA stipulates that: "[a] person whose trial has been finally disposed of in one Contracting Party[4] 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".

B. Facts

The facts underlying the preliminary reference are based on two disputes involving, on the one hand, Mr. Gözütok (of Turkish origin, residing in the Netherlands) and, on the other, Mr. Brügge (a German resident). These disputes arise from two criminal proceedings brought against the accused: in the former case, in Germany, concerning an offence committed in the Netherlands and, in the latter, in Belgium, concerning an offence committed on Belgian soil. They were combined by the Court because of links between the facts and the questions raised by national jurisdictions.

M. Gözütok runs a snack bar in the Netherlands. Charges were laid against him following two searches performed by the Dutch police in January 1996 which revealed several kilograms of drugs in his snack bar. These criminal charges for drug trafficking were discontinued in the Netherlands after Mr. Gözütok accepted to pay a certain amount of money, following an offer from the Public Prosecutor's Office within the framework of a procedure of discontinuation of the public action. It should be noted that the Dutch Criminal Code permits the Public Prosecutor's Office to impose, before the beginning of a hearing, certain conditions (such as the payment of a sum of money) for avoidance of a prosecution for any offences, unless the misdemeanour is sanctioned by a penalty of more than six years' imprisonment.

A few weeks later, German authorities were informed of substantial transactions in the German bank account of Mr. Gözütok. After enquiring about this through the Dutch authorities, the German police arrested him for the same facts as those invoked by the Dutch authorities in January 1996. On this basis, the District Court Aachen ("Amtsgericht Aachen") condemned him to a prison term.

[4] Please note that the Court uses "Contracting Party" in some sections of the preliminary ruling, while "Member State" in others. We will use the expression "Member State" throughout the text.

The appeal by Mr. Gözütok and the Public Prosecutor's Office against this decision was declined by the Regional Court Aachen ("Landgericht Aachen") on the basis that the *ne bis in idem* principle as stated in Article 54 of the CISA, and with the argument that the discontinuation of the proceedings against Mr. Gözütok in the Netherlands was binding upon the German Public Prosecutor. The Public Prosecutor's Office appealed this decision to the Higher Regional Court Cologne ("Oberlandesgericht Köln").

As far as Mr. Brügge is concerned, he had been charged by the Belgian Public Prosecutor for having voluntarily struck and injured a Belgian citizen in Belgium. Within the framework of the enquiry requested by the victim in Germany concerning Mr. Brügge, and regarding the same facts, the Public Prosecutor's Office, Bonn, proposed a settlement to him in the form of the payment of a certain amount of money. Mr. Brügge paid the amount and the German Public Prosecutor's Office put an end to the procedures. It should be noted that the settlement out of court intervened in virtue of the German Code of criminal procedure which permits the Public Prosecutor, under certain circumstances, to put an end to criminal procedures, without the approval of the relevant jurisdiction, in the case where the accused has paid a certain sum of money in favour of certain institutions.

C. Questions

Faced with these situations, both national jurisdictions ("Oberlandesgericht Köln" and "Rechtbank van eerste aanleg te Veurne") realised that their respective responses were dependent on an interpretation of Article 54 of the CISA. Consequently, they separately asked the Court whether the principle of *ne bis in idem*, as formulated in Article 54 of the CISA, prevents a jurisdiction of a Member State from judging an individual on the same grounds as those which resulted in a discontinuation of procedures through a financial settlement offered by the Public Prosecutor's Office of another Member State (and not by a court/judicial decision).

D. Findings[5]

The Court responded to these questions by specifying that "the *ne bis in idem* principle, laid down in Article 54 of the (CISA) (…) also applies to procedures whereby

[5] We will expose the most important points of the Court's preliminary ruling. However, it should be mentioned that the Court answers – and rejects – a series of additional questions raised by the Belgian as well as the German governments regarding the wording, the object and the purpose of Article 54 of the CISA; the exceptions to the *ne bis in idem* principle set out in Article 55 of the CISA; the intention of the Member States; the fact that settlements in criminal proceedings are likely to prejudice the rights of the victim; etc. (see §§ 41-47 of Joined Cases C-187/01 and C-385/01, European Court of Justice, 11.03.2003, *Gözütok and Brügge*, § 48 (hereinafter *Gözütok and Brügge*)).

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"[6]. In so doing, the Court followed the Advocate General's opinion[7].

1. 'Finally disposed of' and proceedings in which no court participates and which do not lead to a judicial decision

The Court's reasoning begins by recalling the wording of Article 54 of the CISA by virtue of which "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"[8].

The Court then states that in situations such as those at stake, the cases of the accused are considered to have been 'finally disposed of' according to Article 54 of the CISA. The Court mentions that such is the case where criminal proceedings have been discontinued by a decision of "an authority required to play a part in the administration of criminal justice in the national legal system concerned"[9], when the individuals have satisfied certain conditions (for ex. the payment of a certain sum fixed by the Public Prosecutor) which punish an act they committed.

According to the Court, this interpretation remains unchanged by the fact that no court participates in such proceedings and that these proceedings do not lead to a judicial decision. For the Court, "such matters of procedure and form do not impinge on the effects of the procedure" [10], which, in the absence of any express indication to the contrary in the wording of Article 54 of the CISA, are sufficient for the application of the *ne bis in idem* principle enshrined in this Article.

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[6] *Id.*, § 48.

[7] Advocate General D. Ruiz-Jarabo Colomer, Opinion presented on 19 September 2002.

[8] *Gözütok and Brügge*, § 26.

[9] *Id.*, § 28.

[10] *Id.*, § 31.

2. Mutual trust in each other's criminal justice systems and "effet utile" of Article 54

The Court then underlines that the application of the *ne bis in idem* principle by one Member State to proceedings which have been discontinued in another Member State without a court or judicial decision being involved, cannot be refused by the first Member State on the ground that its criminal legal system requires a judicial involvement in such types of proceedings.

In this respect, the Court stresses that neither Title VI of the TEU (part of which is the legal basis for Articles 54 and following of the CISA), nor the *Schengen Agreement*[11], nor the CISA require, for Article 54 of the CISA to apply, any "harmonisation, or at the least approximation, of the criminal laws of the Member States relating to procedures whereby further prosecution is barred"[12]. Furthermore, the Court mentions that there is a "*necessary implication* that the Member States have *mutual trust in their criminal justice 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"[13].

According to the Court, this is reinforced by the fact that it is the only interpretation which ensures the object and purpose of Article 54 of the CISA as well as the *effet utile* of the provision. In this respect, the Court emphasises that both the TEU and the *Protocol integrating the Schengen "acquis" into the framework of the European Union*[14] (which includes Article 54 of the CISA) set the objective of developing and maintaining the European Union as an area of freedom, security and justice in which the free movement of persons is guaranteed and protected.

In this vein, the Court explains that for Article 54 of the CISA to deploy its full *effet utile*, it must also apply to decisions permanently discontinuing prosecutions in a Member State, even if these decisions do not involve a court and/or do not take the form of a judicial decision. In this regard, the Court concludes with the following words: "(…) if Article 54 of the CISA were to apply only to decisions discontinuing prosecutions which are taken by a court or take the form of a judicial decision, the consequence would be that the *ne bis in idem* principle laid down in that provision

[11] Signed on 14 June 1985 at Schengen, Luxembourg.

[12] *Gözütok and Brügge*, § 32.

[13] *Id.*, § 33 (emphasis added).

[14] This protocol is annexed to the TOA.

https://doi.org/10.1017/S2071832200015935 Published online by Cambridge University Press

(and, thus, the freedom of movement which the latter seeks to facilitate) would be of benefit only to defendants who were guilty of offences which - on account of their seriousness or the penalties attaching to them - preclude use of a simplified method of disposing of certain criminal cases by a procedure whereby further prosecution is barred, such as the procedures at issue in the main actions"[15].

E. Some Comments

The *Gözütok and Brügge* preliminary ruling is certainly "historical". It is, as mentioned, the first time that the Court has responded, on the basis of Article 35 of the TEU, to a preliminary reference on a subject relevant to the third pillar (the CISA). In addition, this is the first time that the Court has interpreted a provision of the CISA. In times when several developments are occurring within the European Union in the third pillar, all eyes are naturally turned toward the European institutions – the Court included – to observe their vision and their contribution to an area of freedom, security and justice. Furthermore, the fact that the Court pronounced itself in the framework of the third pillar and, in so doing, touched upon penal matters in the European Union, is also of great interest. Indeed, the "European penal domain" remains a highly sensitive one for Member States and, for this reason, still remains jealously guarded and, in a large part, in their hands.

The Court's preliminary ruling has the merit of interpreting and, thus, clarifying the meaning of the expression 'finally disposed of' (for the application of the *ne bis in idem* principle), contained in Article 54 of the CISA. It should be noted that paragraphs 33 and 34 of the ruling offer a relatively broad interpretation of the contents of this expression. Indeed, while making it obvious that proceedings in which a court/judicial decision is involved satisfy the requirements of the expression; the Court clearly states that such is also the case where criminal proceedings have been discontinued by a decision of an authority required to play a part in the administration of criminal justice in the national legal system concerned, when the individual has satisfied certain conditions (for ex. the payment of a certain sum fixed by the Public Prosecutor) which punish an act he committed. Hence, instead of placing the emphasis on the judicial character of the court/decision, the Court places it on the sanctioning character of the settlement/decision. In the same line of thought, the Court proceeds, in paragraph 44 of the ruling, to a restrictive interpretation of the exceptions to the *ne bis in idem* principle. This approach, at least regarding the interpretation of dispositions of the CISA, resembles, in a striking way, the "classical logic" applied by the Court in the Internal Market regarding the scope of the freedom of movement and of the exceptions to this notion.

[15] *Gözütok and Brügge*, § 40.

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After having clarified the meaning of the expression 'finally disposed of', the Court underlines that that the application of the *ne bis in idem* principle by one Member State to proceedings which have been discontinued in another Member State without a court or judicial decision being involved, cannot be refused by the first Member State on the ground that its criminal legal system requires a judicial involvement in such types of proceedings. The Court bases this interpretation on the fact that nothing requires the Member States to approximate or harmonise their criminal laws relating to proceedings where further prosecution is permanently discontinued. Moreover, and this goes to the very heart of the Court's preliminary ruling, the Court also bases this interpretation on the concepts of mutual trust and mutual recognition of each other Member State's criminal justice system with the following explicit and powerful words: there is a "*necessary implication* that the Member States have *mutual trust in their criminal justice 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*"[16]. This approach strikingly recalls the reasoning of the Court in the *Cassis de Dijon* case on mutual recognition regarding the free movement of products[17]. In *Gözütok and Brügge*, the Court seizes the occasion to affirm the importance of this principle, this time in criminal matters.

According to this preliminary ruling, the Member States will be obliged to accept each other Member State's decisions to discontinue proceedings. This goes rather far, especially if a Member State believes that a crime should be judged and that in another Member State, a settlement is accepted for certain categories of crimes. In this regard, it is worth noting that the Court appears to try to "reassure" certain Member States concerning the mutual trust/recognition issue by saying that "national legal systems which provide for procedures whereby further prosecution is barred do so only *in certain circumstances* or in respect of *certain exhaustively listed or defined offences* which, as a general rule, are *not serious offences and are punishable only by relatively light penalties*"[18].

In addition, one can imagine that this will incite the Member States to harmonise, at least partially, their criminal justice systems in order to establish minimal guarantees or rules which are acceptable to all. By indirectly encouraging the Member States to harmonise their criminal justice systems, even if in a very specific field, the Court goes quite far, especially in an intergovernmental pillar.

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[16] *Id.*, § 33 (emphasis added).

[17] Case 120/78, European Court of Justice, 20.02.1979, *Rewe v. Bundesmonopolverwaltung für Branntwein ("Cassis de Dijon")*, § 14.

[18] *Gözütok and Brügge*, § 39 (emphasis added).

Consequently, the Court appears to be giving a generous interpretation of the concepts of mutual trust and mutual recognition. This rests on the need to ensure the *effet utile* of Article 54 of the CISA which aims, *inter alia*, at developing and maintaining an area of freedom, security and justice in which the freedom of movement of persons is guaranteed.

The noteworthiness of establishing, developing and maintaining an area of freedom, security and justice and the importance of the concepts of mutual trust as well as mutual recognition have been constantly affirmed in recent years by various initiatives of the institutions. As one author recently said, "[m]utual recognition of judgments and of pre-trial orders, which has been labelled a cornerstone of the area of freedom, justice and security, is said to be based on, or to require mutual confidence between judicial authorities"[19]. In the same line of thought, certain instruments of the European institutions place an emphasis on the principle of mutual recognition. Such is the case, for example, for the European arrest warrant which states that mutual recognition has been referred to by the European Council as "the "cornerstone" of judicial cooperation", and which points out that "[t]he mechanism of the European arrest warrant is based on a high level of confidence between Member States"[20]. The *Gözütok and Brügge* preliminary ruling can only be seen as an encouragement towards such initatives as it goes in the same direction. Furthermore, the global evolution of the Member States' opinion concerning criminal matters in the European Union and regarding the concepts of mutual trust/recognition renders the current political context rather open to these notions. This preliminary ruling will, most certainly, please "progressive" Member States in criminal matters. This being said, it will, most likely, seriously perturb other less "progressive" Member States.

F. Conclusion

The *Gözütok and Brügge* preliminary ruling not only constitutes a vivid expression, by the Court, of the concepts of mutual trust and mutual recognition in penal matters: it is also an indirect appeal for some harmonisation of the Member States' criminal justice systems. In this way, it echoes a growing concern within the European Union for a (partially) common criminal law. Finally, in times when the European Convention is discussing the "communautarisation" of the third pillar, the

[19] STESSENS, G., "The Principle of Mutual Confidence between Judicial Authorities in the Area of Freedom, Justice and Security", *in* de KERCHOVE, G., and WEYEMBERGH, A., eds., *L'espace pénal européen: enjeux et perspectives*, Bruxelles, Editions de l'Université de Bruxelles, 2002, p. 93.

[20] Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States, Official Journal L 190/1, 18.07.2002, preamble §§ 6 and 10.

Court's preliminary ruling constitutes a direct incentive towards the work of this European Convention.

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