

JUDGMENT OF THE COURT (Second Chamber)

18 July 2007*

In Case C-288/05,

REFERENCE for a preliminary ruling under Article 35 EU, from the Bundesgerichtshof (Germany), made by decision of 30 June 2005, received at the Court on 19 July 2005, in the criminal proceedings against

Jürgen Kretzinger

in the presence of:

Hauptzollamt Augsburg,

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,

* Language of the case: German.

Advocate General: E. Sharpston,
Registrar: B. Fülöp, Administrator,

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

after considering the observations submitted on behalf of:

- J. Kretzinger, initially by Mr Kretzinger himself, and subsequently by G. Dannecker, Rechtsanwalt,

- the Federal Republic of Germany, by A. Dittrich and M. Lumma, acting as Agents,

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

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

- the Kingdom of the Netherlands, by H.G. Sevenster and C.A.H.M. ten Dam, acting as Agents,

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

- the Republic of Poland, by T. Nowakowski, acting as Agent,

- the Kingdom of Sweden, by K. Petkovska, acting as Agent,

- the Commission of the European Communities, by W. Bogensberger and S. Grünheid, 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 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 in Schengen (Luxembourg) on 19 June 1990.

- 2 The reference was made in the context of criminal proceedings brought in Germany, in which Mr Kretzinger was charged with receiving goods on a commercial basis on which duty had not been paid.

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 Federal Republic of Germany and the Italian Republic, 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 (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 on 1 May 1999 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 that 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 entitled ‘Provisions on police and judicial cooperation in criminal matters’, as the legal basis for Articles 54 to 58 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 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; ‘the Framework Decision’) defines, in Article 1(1), the European arrest warrant as a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes inter alia of executing a sentence.

- 9 The Framework Decision provides, in Article 3, headed ‘Grounds for mandatory non-execution of the European arrest warrant’:

‘The judicial authority of the Member State of execution ... shall refuse to execute the European arrest warrant in the following cases:

(1) ...

- (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 5 of the Framework Decision, headed ‘Guarantees to be given by the issuing Member State in particular cases’, provides:

‘The execution of the European arrest warrant by the executing judicial authority may, by the law of the executing Member State, be subject to the following conditions:

- (1) 'where the European arrest warrant has been issued for the purposes of executing a sentence ... imposed by a decision rendered *in absentia* and if the person concerned has not been summoned in person or otherwise informed of the date and place of the hearing which led to the decision rendered *in absentia*, surrender may be subject to the condition that the issuing judicial authority gives an assurance deemed adequate to guarantee the person who is the subject of the European arrest warrant that he or she will have an opportunity to apply for a retrial of the case in the issuing Member State and to be present at the judgment;

...'

- 11 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 Federal Republic of Germany 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.

National law

- 12 In accordance with Paragraph 374 of the German Tax Code (Abgabenordnung), a person may be convicted for evasion of import duties which arose on illegal imports into a Member State other than the Federal Republic of Germany.

- 13 In order to comply with the provisions of the Framework Decision, the Federal Republic of Germany adopted, following a judgment of the Bundesverfassungsgericht (German Constitutional Court) of 18 July 2005 declaring the first law implementing the Framework Decision in Germany void, the Law of 20 July 2006 on the European arrest warrant (Europäisches Haftbefehlsgesetz, BGBl. 2006 I, p. 1721).

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

- 14 On two occasions, in May 1999 and April 2000, Mr Kretzinger transported cigarettes from countries that were not members of the European Union, which had previously been smuggled into Greece by third parties, by lorry through Italy and Germany, bound for the United Kingdom. They were not presented for customs clearance at any point.
- 15 The lorry containing the first consignment, consisting of 34 500 cartons of cigarettes, was seized by officers of the Italian Guardia di Finanza on 3 May 1999. Mr Kretzinger was released after questioning on 4 May 1999.
- 16 By judgment of 22 February 2001 the Corte d'appello di Venezia (Court of Appeal, Venice (Italy), allowing the appeal brought by the Public Prosecutor against the decision of acquittal at first instance, imposed on Mr Kretzinger *in absentia* a suspended custodial sentence of one year and eight months. It found him guilty of an offence of importing into Italy and being in possession of 6 900 kilograms of contraband foreign tobacco and an offence of failing to pay the customs duty relating to that tobacco. That judgment has become final under Italian law. The sentence was entered in the defendant's criminal record.

- 17 The lorry transporting a second consignment was carrying 14 927 cartons of contraband cigarettes when Mr Kretzinger was again stopped by the Italian Guardia di Finanza on 12 April 2000. He was held briefly in Italian police custody and/or on remand pending trial, following which he returned to Germany.
- 18 By judgment of 25 January 2001 the Tribunale di Ancona (Italy) imposed, again *in absentia* and applying the same provisions of Italian law, a custodial sentence of two years which was not suspended. That judgment has also become final. The custodial sentence, which has not been executed, was also entered in the defendant's criminal record.
- 19 The referring court notes that, despite several attempts to obtain clarification of those judgments, it has been unable to establish with certainty precisely which import duties they applied to, and in particular whether at least one of them encompassed any charges relating to, or sentence imposed for, customs fraud.
- 20 Aware of those judgments by the Italian courts, the Landgericht Augsburg sentenced Mr Kretzinger to one year and ten months' imprisonment in respect of the first consignment and one year's imprisonment in respect of the second. In so doing, the Landgericht Augsburg found Mr Kretzinger guilty of evasion of the customs duties which had arisen on the importation of the smuggled goods into Greece, an offence under Paragraph 374 of the German Tax Code.

- 21 Whilst indicating that the two final sentences imposed in Italy had not yet been enforced, the Landgericht Augsburg rejected the notion that there was any procedural impediment under Article 54 of the CISA. According to that court, although the same two smuggled consignments of cigarettes formed the factual basis of the two convictions in Italy and of its own decisions, that article was not applicable.
- 22 Mr Kretzinger lodged an appeal before the Bundesgerichtshof, which expressed doubts as to whether the reasoning adopted by the Landgericht Augsburg was compatible with Article 54 of the CISA.
- 23 First, the Bundesgerichtshof has doubts as to how it should interpret the notion of 'same acts' within the meaning of Article 54 of the CISA.
- 24 Next, as regards the notion of 'enforcement', the Bundesgerichtshof, which, in principle, is of the view that a custodial sentence such as that relating to the first consignment, the enforcement of which was suspended, is covered by Article 54 of the CISA, wishes to ascertain whether a brief period of remand pending trial is sufficient to bar further prosecutions.
- 25 Finally, as regards the existence of a procedural impediment under Article 54 of the CISA, the Bundesgerichtshof, whilst observing that the Italian authorities took no steps under the Framework Decision to enforce Mr Kretzinger's sentence in respect of the second consignment, wonders whether and to what extent the interpretation of that article is affected by the provisions of the Framework Decision.

26 It was in those circumstances that the Bundesgerichtshof decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

- (1) Is it a criminal prosecution of “the same acts” within the meaning of Article 54 of the CISA if a defendant has been convicted by an Italian court of importing contraband foreign tobacco into Italy and of being in possession of it there, as well as of failing to pay duty at the border on importing the tobacco, and is subsequently convicted by a German court — in connection with his earlier receipt of the same goods in Greece — of being party to evasion in relation to the (technically) Greek import duty that arose when the goods were previously imported by third parties, in so far as the defendant had intended from the outset to transport the goods to the United Kingdom via Italy, after taking delivery of them in Greece?

- (2) Has a penalty “been enforced” or is it “actually in the process of being enforced” within the meaning of Article 54 of the CISA
 - (a) if the defendant was given a custodial sentence, the enforcement of which was suspended in accordance with the law of the State in which judgment was given;

 - (b) if the defendant was for a short time taken into police custody and/or held on remand pending trial, and that detention would count towards any subsequent enforcement of the penalty of imprisonment under the law of the State in which judgment was given?

- (3) Is the interpretation of the notion of enforcement for the purposes of Article 54 of the CISA affected by
- (a) the fact that, having transposed the ... Framework Decision ... into national law, the (first) State in which judgment was given is in a position at any time to enforce its judgment which, under national law, is final and binding;

 - (b) the fact that a request for judicial assistance by the State in which judgment was given, with a view to extraditing the convicted person or enforcing judgment within that State, might not automatically be complied with because judgment was given *in absentia*?

The Court's jurisdiction

²⁷ It is apparent from paragraph 11 of this judgment that, in the circumstances of this case, pursuant to Article 35 EU the Court has jurisdiction to give a ruling on the interpretation of Article 54 of the CISA and, in so far as it is relevant in this case, of the Framework Decision.

The questions referred for a preliminary ruling

The first question

- 28 By that question, the Bundesgerichtshof essentially wishes to ascertain the relevant criterion for the purposes of the application of the notion of ‘same acts’ within the meaning of Article 54 of the CISA and, more specifically, whether the unlawful acts of receiving contraband foreign tobacco in one Contracting State and of importing that tobacco into another Contracting State and being in possession of it there are covered by that notion, in so far as the defendant, who has been prosecuted in two Contracting States, had intended from the outset to transport the tobacco, after first taking possession of it, to a final destination, passing through several Contracting States in the process.
- 29 In that respect, the Court has already held, first, at paragraph 36 in Case C-436/04 *Van Esbroeck* [2006] ECR I-2333, that the only relevant criterion for the purposes of the application of Article 54 of the CISA is identity of the material acts, understood as the existence of a set of facts which are inextricably linked together and, second, at paragraph 42 of that judgment, that that criterion applies irrespective of the legal classification given to those acts or the legal interest protected (see also Case C-150/05 *Van Straaten* [2006] ECR I-9327, paragraphs 48 and 53).
- 30 It follows, first, that it is irrelevant that the charges against Mr Kretzinger in the first Contracting State (Italy) were based on failure to declare cigarettes and/or non-payment of customs duties arising from their importation into that State, whilst in the other Contracting State (Germany), the charges related to the initial taking of possession in Greece of the contraband tobacco.

- 31 Second, the finding of identity of the material acts, understood as the existence of a set of facts which are inextricably linked together, must be made irrespective of the legal interest protected, since that interest may vary from one Contracting State to another.
- 32 However, the German and Spanish Governments submitted at the hearing, which took place after the judgment in *Van Esbroeck*, that the criterion based on identity of the material acts should be applied so as to enable the competent national courts to take account also of the legal interest protected when assessing a set of concrete circumstances.
- 33 In that respect, it must be pointed out that, because there is no harmonisation of national criminal law, considerations based on the legal interest protected might create as many barriers to freedom of movement within the Schengen area as there are penal systems in the Contracting States (see *Van Esbroeck*, paragraph 35).
- 34 Consequently, it must be confirmed that the competent national courts which are called upon to determine whether there is identity of the material acts must confine themselves to examining whether those acts 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), and considerations based on the legal interest protected are not to be deemed relevant.
- 35 As regards more specifically a situation such as that at issue in the main proceedings, it should be recalled that the Court has already held that punishable acts consisting of exporting and importing the same illegal goods and which are prosecuted in different CISA Contracting States constitute conduct which may be

covered by the notion of ‘same acts’ within the meaning of Article 54 of the CISA (see, to that effect, *Van Esbroeck*, paragraph 42, *Van Straaten*, paragraph 51, and Case C-467/04 *Gasparini and Others* [2006] ECR I-9199, paragraph 57).

36 The transportation of contraband cigarettes such as those at issue in the main proceedings, involving successive crossings of internal Schengen area borders, is therefore capable of constituting a set of facts covered by the notion of ‘same acts’. However, it is for the competent national courts to make a final assessment in that respect; they must determine whether the material acts in question constitute a set of facts which are inextricably linked together in time, in space and by their subject-matter.

37 In the light of the foregoing, the answer to the first question must be that Article 54 of the CISA 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;

- acts consisting in receiving contraband foreign tobacco in one Contracting State and of importing that tobacco into another Contracting State and being in possession of it there, characterised by the fact that the defendant, who was prosecuted in two Contracting States, had intended from the outset to transport the tobacco, after first taking possession of it, to a final destination, passing through several Contracting States in the process, constitute conduct which may be covered by the notion of ‘same acts’ within the meaning of Article 54. It is for the competent national courts to make the final assessment in that respect.

Question 2(a)

- 38 By that question, the referring court essentially asks whether, for the purposes of Article 54 of the CISA, it is necessary to consider that a penalty imposed by a court of a Contracting State 'has been enforced' or is 'actually in the process of being enforced' if a defendant has been given a suspended custodial sentence in accordance with the law of that Contracting State.
- 39 It should be recalled, first, that, in accordance with Article 54 of the CISA, the prohibition on criminal prosecutions for the same acts applies, in the case of a penalty such as that at issue in the main proceedings, only if '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' ('the enforcement condition').
- 40 Second, as the Advocate General stated at points 44 and 45 of her Opinion, the mechanism enabling national courts to suspend a sentence if the legal conditions are satisfied is a feature of the criminal systems of the Contracting States.
- 41 Mr Kretzinger, the governments which submitted observations in this case and the Commission of the European Communities agree that a person who has been given a suspended custodial sentence must be regarded as having been tried, convicted and sentenced, with all the consequences that the legal system concerned attaches thereto.

- 42 In that respect, it must be noted that, in so far as a suspended custodial sentence penalises the unlawful conduct of a convicted person, it constitutes a penalty within the meaning of Article 54 of the CISA. That penalty must be regarded as ‘actually in the process of being enforced’ as soon as the sentence has become enforceable and during the probation period. Subsequently, once the probation period has come to an end, the penalty must be regarded as ‘having been enforced’ within the meaning of that provision.
- 43 That interpretation, according to which a suspended custodial sentence also satisfies the enforcement condition, is borne out, as stated in particular by the Czech Government and the Commission, by the fact that it would be inconsistent, on the one hand, to regard any deprivation of liberty actually suffered as enforcement for the purposes of Article 54 of the CISA and, on the other hand, to rule out the possibility of suspended sentences, which are normally passed for less serious offences, satisfying the enforcement condition in that article, thus allowing further prosecutions.
- 44 In those circumstances, the answer to question 2(a) must be that, for the purposes of Article 54 of the CISA, it is necessary to consider that a penalty imposed by a court of a Contracting State ‘has been enforced’ or ‘is actually in the process of being enforced’ if the defendant has been given a suspended custodial sentence in accordance with the law of that Contracting State.

Question 2(b)

- 45 By that question, the referring court essentially asks whether, for the purposes of Article 54 of the CISA, a penalty imposed by a court of a Contracting State must be regarded as ‘having been enforced’ or ‘actually in the process of being enforced’ where the defendant was for a short time taken into police custody and/or held on

remand pending trial and that detention would count towards any subsequent enforcement of the penalty of imprisonment under the law of the State in which judgment was given.

46 In that respect, it is necessary to examine whether, if the other conditions imposed by Article 54 of the CISA were fulfilled, a brief period of deprivation of liberty, such as police custody and/or detention on remand pending trial, before the conviction in a first Contracting State had become final, the length of that period counting towards that of the sentence finally passed, could have the effect of satisfying the enforcement condition in advance and therefore preclude further prosecutions in a second Contracting State.

47 At the hearing, Mr Kretzinger claimed *inter alia* that, generally, in a case such as that at issue in the main proceedings, where the sentencing Contracting State did not enforce an unconditional custodial sentence and there were no legal reasons preventing it from doing so, the enforcement condition had not been applicable since the Schengen *acquis* was integrated into the Community framework.

48 On the other hand, the seven governments which submitted written observations to the Court, and the Commission, asserted that periods spent in police custody and/or on remand pending trial must not be regarded automatically as the enforcement of a penalty for the purposes of Article 54 of the CISA.

49 In that respect, the Court notes that it is apparent from the very wording of that article that it cannot apply before the 'trial [of the person in question] has been

finally disposed of'. It is clear that, in judicial proceedings, both police custody and detention on remand pending trial precede final judgment.

50 It follows, as the Advocate General observed at point 59 of her Opinion, that Article 54 of the CISA cannot apply to such periods of deprivation of liberty, even if they are, by virtue of national law, to be taken into account in the subsequent enforcement of any custodial sentence.

51 That interpretation is supported, as the German, Spanish and Austrian Governments and the Commission observed, by the fact that the purpose of detention on remand pending trial is very different from that underlying the enforcement condition laid down in Article 54 of the CISA. Although the purpose of the first is of a preventative nature, that of the second is to avoid a situation in which a person whose trial has been finally disposed of in the first State can no longer be prosecuted for the same acts and therefore ultimately remains unpunished if the State in which sentence was first passed did not enforce the sentence imposed.

52 Consequently, the answer to question 2(b) must be that, for the purposes of Article 54 of the CISA, a penalty imposed by a court of a Contracting State is not to be regarded as 'having been enforced' or 'actually in the process of being enforced' where the defendant was for a short time taken into police custody and/or held on remand pending trial and that detention would count towards any subsequent enforcement of the custodial sentence under the law of the State in which judgment was given.

The third question

53 By its third question, the referring court essentially asks whether, and to what extent, the provisions of the Framework Decision have an effect on the interpretation of the notion of 'enforcement' within the meaning of Article 54 of the CISA.

54 Before replying to that question, it must first be pointed out that, since the Framework Decision was implemented in Germany with effect from 2 August 2006, the execution of a European arrest warrant has become possible again and it cannot therefore automatically be ruled out that the provisions of that framework decision could have an effect on the main proceedings.

55 Moreover, it is apparent from Article 32 of the Framework Decision that that decision applies to requests relating to acts which, like those in the main proceedings, were committed before the expiry of the period for implementation of that decision, namely 1 January 2004, provided the Member State of execution has not made a statement indicating that it will continue to deal with such requests in accordance with the extradition system applicable before that date. It appears that the Federal Republic of Germany did not make such a statement.

Question 3(a)

56 By that question, the referring court essentially asks whether the fact that a Member State may, under the Framework Decision, issue a European arrest warrant for the arrest of a person who has been sentenced by a final and binding judgment under its national law in order to enforce that sentence has an effect on the interpretation of the notion of 'enforcement' within the meaning of Article 54 of the CISA.

- 57 At the hearing, Mr Kretzinger submitted that the fact that it is legally possible under that the Framework Decision for the sentencing State to issue a European arrest warrant in order to enforce a judgment which has become final and binding means that the enforcement condition must be regarded as satisfied, which is why the competent German courts could no longer prosecute him.
- 58 By contrast, the seven governments which submitted written observations and the Commission take the view that the Framework Decision has no bearing whatsoever on the interpretation of Article 54 of the CISA and do not agree that the mere option open to the sentencing State to issue a European arrest warrant may in itself be sufficient to satisfy the enforcement condition, which requires that penalties must actually be enforced.
- 59 In that respect, it must be pointed out that the interpretation of Article 54 of the CISA advocated by Mr Kretzinger would run counter to the actual wording of that provision which, apart from the existence of a final and binding conviction in respect of the same acts, expressly requires the enforcement condition to be satisfied.
- 60 That enforcement condition could not, by definition, be satisfied where, in a case such as that in the main proceedings, a European arrest warrant were to be issued after trial and conviction in a first Member State precisely in order to ensure the execution of a custodial sentence which had not yet been enforced within the meaning of Article 54 of the CISA.
- 61 That is confirmed by the Framework Decision itself which, in Article 3(2), requires the Member State addressed to refuse to execute a European arrest warrant 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 and that, where there has been sentence, the enforcement condition has been satisfied.

- 62 In addition, as the Spanish and Austrian Governments and the Commission observed, that outcome is supported by the fact that the interpretation of Article 54 of the CISA cannot depend on the provisions of the Framework Decision without giving rise to legal uncertainty that would result, first, from the fact that the Member States bound by the Framework Decision are not all bound by the CISA which, moreover, applies to certain non-Member States and, second, from the fact that the scope of the European arrest warrant is limited, which is not case in respect of Article 54 of the CISA, which applies to all offences punished by the States which have acceded to that agreement.
- 63 Accordingly, the fact that a final and binding custodial sentence could possibly be enforced in the sentencing State following the surrender by another State of the convicted person cannot affect the interpretation of the notion of 'enforcement' within the meaning of Article 54 of the CISA.
- 64 The answer to question 3(a) must therefore be that the fact that a Member State in which a person has been sentenced by a final and binding judgment under its national law may issue a European arrest warrant for the arrest of that person in order to enforce the sentence under the Framework Decision cannot affect the interpretation of the notion of 'enforcement' within the meaning of Article 54 of the CISA.

Question 3(b)

- 65 By its question 3(b), the referring court essentially asks whether, under the set of rules put in place by Article 5(1) of the Framework Decision, the fact that the executing Member State is not automatically required to execute a European arrest

warrant issued in order to enforce a judgment given *in absentia* has an effect on the interpretation of the notion of ‘enforcement’ within the meaning of Article 54 of the CISA.

66 In that respect, it must be stated, as follows from paragraphs 59 to 64 of this judgment, that the option open to a Member State to issue a European arrest warrant has no effect on the interpretation of the notion of ‘enforcement’ within the meaning of Article 54 of the CISA. As the Spanish Government and the Commission correctly observed, in circumstances such as those described in the main proceedings, the fact that the judgment relied on in support of a European arrest warrant was given *in absentia* does not undermine that finding.

67 It follows that, in this case, it is not necessary to examine the question whether a judgment given *in absentia*, the enforceability of which may be subject to conditions under Article 5(1) of the Framework Decision, must be regarded as a decision by which a person’s ‘trial has been finally disposed of’ within the meaning of Article 54 of the CISA.

68 Consequently, there is no need to answer Question 3(b).

Costs

69 Since these proceedings are, for the parties to the main proceedings, a step in the proceedings 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:

1. 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, 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;

— acts consisting in receiving contraband foreign tobacco in one Contracting State and of importing that tobacco into another Contracting State and being in possession of it there, characterised by the fact that the defendant, who was prosecuted in two Contracting States, had intended from the outset to transport the tobacco, after first taking possession of it, to a final destination, passing through several Contracting States in the process, constitute conduct which may be covered by the notion of ‘same acts’ within the meaning of Article 54. It is for the competent national courts to make the final assessment in that respect

2. For the purposes of Article 54 of the CISA, a penalty imposed by a court of a Contracting State ‘has been enforced’ or is ‘actually in the process of

being enforced' if the defendant has been given a suspended custodial sentence;

- 3. For the purposes of Article 54 of the CISA, a penalty imposed by a court of a Contracting State is not to be regarded as 'having been enforced' or 'actually in the process of being enforced' where the defendant was for a short time taken into police custody and/or held on remand pending trial and that detention would count towards any subsequent enforcement of the custodial sentence under the law of the State in which judgment was given;**

- 4. The fact that a Member State in which a person has been sentenced by a final and binding judgment under its national law may issue a European arrest warrant for the arrest of that person in order to enforce the sentence under Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States cannot affect the interpretation of the notion of 'enforcement' within the meaning of Article 54 of the CISA.**

[Signatures]