Reports of Cases

OPINION OF ADVOCATE GENERAL
SHARPSTON
delivered on 6 February 2014[1]

Case C-398/12

Procura della Repubblica
v
M

(Request for a preliminary ruling from the Tribunale di Fermo (Italy))

(Article 54 of the Convention Implementing the Schengen Agreement (CISA) — Ne bis in idem principle — Pre-trial finding of 'non-lieu'('no case to answer') barring further prosecution of the same person for the same facts — Finding subject to the possibility of new facts and/or evidence emerging — Criminal prosecution in another Member State for an offence arising out of the same facts)

1. Following a thorough criminal investigation, the judicial authorities of one Member State (Belgium) refused a request to send the person under investigation for trial and instead made a finding of 'non-lieu' (roughly equivalent to 'no case to answer').[2] That finding effectively terminated the (potential) prosecution before trial, but is capable in national law of being set aside in the light of new facts and/or evidence against the person concerned. By its request for a preliminary ruling, the Tribunale di Fermo (District Court, Fermo) (Italy) wishes to know whether, under Article 54 of the Convention implementing the Schengen Agreement ('CISA'),[3] the *ne bis in idem* principle precludes that person being prosecuted for a crime arising out of the same facts in the criminal courts of another Member State.

Legal framework

EU law

2. Article 3(2) TEU provides:

'The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.'

1 — Original language: English.

2 — 'No case to answer' in the English legal system is not a precise equivalent inasmuch as that is a submission made by the defence to the bench, based on the state of the evidence presented, which the court may or may not accept. In a 'non lieu', it is the judicial authorities who, of their own motion, decide that the case ought not to proceed against the accused.

3 — 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).

3. Article 67(1) TFEU states:

‘The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States.’

4. Pursuant to the second recital of Protocol No 19 to the TFEU,[4] the Contracting Parties aim to preserve the Schengen *acquis* and to ‘develop this *acquis* in order to contribute to achieving the objective of offering citizens of the Union an area of freedom, security and justice without internal borders’.

5. Pursuant to Article 2 of that Protocol, the Schengen *acquis*, which includes the CISA,[5] applies to the Member States referred to in Article 1 of the Protocol. These include the Kingdom of Belgium and the Italian Republic.

6. Chapter 3 of Title III of the CISA (‘Police and Security’) is entitled ‘Application of the *ne bis in idem* principle’ and comprises Articles 54 to 58.

7. Article 54 provides:

‘A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party.’

8. Article 57 lays down rules to ensure that the competent authorities of the Contracting Parties cooperate in order to exchange information to give effect to the principle of *ne bis in idem*.

9. Article 50 of the Charter of Fundamental Rights of the European Union (‘the Charter’) states:

‘No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.’

10. The Explanations Relating to the Charter of Fundamental Rights[6] state, with regard to Article 50, that ‘the *non bis in idem* rule applies not only within the jurisdiction of one State but also between the jurisdictions of several Member States. That corresponds to the *acquis* in Union law; see Articles 54 to 58 of the Schengen Convention … As regards the situations referred to by Article 4 of Protocol No 7 [to the European Convention for the Protection of Human Rights and Fundamental Freedoms (the “ECHR”)], namely the application of the principle within the same Member State, the guaranteed right has the same meaning and the same scope as the corresponding right in the ECHR’.

European Convention for the Protection of Human Rights and Fundamental Freedoms

11. Article 4 of Protocol No 7 to the ECHR provides:

‘(1) No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

4 — Protocol (No 19) on the Schengen *acquis* integrated into the framework of the European Union (OJ 2012 C 326, p. 290).

5 — The annex to the Protocol to the Amsterdam Treaty integrating the Schengen *acquis* into the framework of the European Union (OJ 1997 C 340, p. 93) lists those matters which form part of the Schengen *acquis*. These include, at paragraph 2, the CISA.

6 — OJ 2007 C 303, p. 17.

(2) The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.'

12. The Explanatory Report[7] to Protocol No 7 states, in relation to Article 4:

'(29) The principle established in this provision applies only after the person has been finally acquitted or convicted in accordance with the law and penal procedure of the State concerned. This means that there must have been a final decision as defined above, in paragraph 22. [8]

(30) A case may, however, be reopened in accordance with the law of the State concerned if there is evidence of new or newly discovered facts, or if it appears that there has been a fundamental defect in the proceedings, which could affect the outcome of the case either in favour of the person or to his detriment.

(31) The term "new or newly discovered facts" includes new means of proof relating to previously existing facts. Furthermore, this article does not prevent a reopening of the proceedings in favour of the convicted person and any other changing of the judgment to the benefit of the convicted person.'

13. According to the definition contained in the Explanatory Report of the European Convention on the International Validity of Criminal Judgments,[9] a decision is final 'if, according to the traditional expression, it has acquired the force of *res judicata*. This is the case when it is irrevocable, that is to say when no further ordinary remedies are available or when the parties have exhausted such remedies or have permitted the time-limit to expire without availing themselves of them'.

National law

Belgian law

14. Article 128 of the Belgian Code d'instruction criminelle (Criminal investigation code: the 'CIC') provides that, when a request is made for a person under investigation to be committed for trial, '[i]f the pre-trial chamber is of the opinion that the facts disclose no crime, offence or misdemeanor, or that there are no facts and/or evidence against the accused, it shall declare that the proceedings should not be continued'.

Such a finding is known as a decision of 'non-lieu'.

15. Article 246 CIC states:

'Where the indictment division has decided that there is no cause to send the case to trial, the accused may not be tried thereafter on the basis of the same facts, unless new facts and/or evidence become available.'

7 — ETS No 117.

8 — Paragraph 22 refers to the definition contained in the Explanatory Report of the European Convention on the International Validity of Criminal Judgments (see point 13 below).

9 — ETS No 070.

16. Article 247 CIC provides:

'Witness statements, documents and minutes which it was not possible to submit to examination by the indictment division, and which are capable either of strengthening the evidence that the indictment division found to be too weak or of presenting the facts in new ways which are useful in establishing the truth, are considered to be new facts and/or evidence.'

17. The Belgian Cour de cassation (Court of cassation) has held [10] that Articles 246 and 247 CIC apply not only to decisions of the indictment division that the case should not proceed to trial, but also to all instances in which investigatory courts, including the pre-trial chamber referred to in Article 128 CIC, have closed an investigation by a finding of non-lieu.

18. If new facts and/or evidence emerge, Article 248 CIC requires the relevant senior police officer or examining magistrate to send copies of the documents and factual and/or evidentiary material forthwith to the senior prosecutor to the court of appeal, who may apply to the president of the indictment division to designate the judge before whom a new investigation is to proceed at the request of the prosecuting authority. [11]

Italian law

19. Article 604 of the Criminal Code provides that acts of sexual violence committed by Italian nationals may be prosecuted in Italy even if they were committed abroad.

Facts, procedure and questions referred

20. M, an Italian citizen residing in Belgium, was investigated in Belgium in connection with allegations of multiple acts of sexual violence or, in any event, unlawful acts of a sexual nature, following a series of reports made in early 2004 by his daughter-in-law, Q. It was alleged that between May 2001 and February 2004, M carried out those acts in Belgium against his granddaughter, N, a minor (born on 29 April 1999).

21. The Belgian police carried out an extensive investigation during which they collected a large number of documents, interviewed a number of persons, including N, and obtained a number of expert reports. The issues covered by the expert reports included: whether the minor N bore physical and/or psychological signs of the reported violence; whether the complainant, Q, could be regarded as reliable; and whether M had a personality disorder with regard to sex.

22. Following that investigation, on 15 December 2008 the pre-trial chamber of the Tribunal de première instance de Mons (Court of First Instance, Mons) adopted a finding of 'non-lieu' terminating the criminal proceedings, rather than referring the case to the trial court. It did so on the ground that there were insufficient facts and/or evidence to support the accusations made against M.

23. On 21 April 2009, the indictment division of the Cour d'appel de Mons (Court of Appeal, Mons) upheld the finding of 'non-lieu'. Its ruling was in turn upheld by the Cour de cassation by judgment dated 2 December 2009. That decision definitively concluded the proceedings in Belgium, subject only to the possibility of new facts and/or evidence emerging (as envisaged by Articles 246 and 247 CIC).

10 — Cass. 7 September 1982, Pas. 1983, I, 27-30.

11 — The French text of the relevant articles of the CIC refers primarily to '[nouvelles] charges,' which I understand to encompass both (new) factual material and (new) evidence, rather than to 'éléments (or 'moyens') de preuve' – that is, evidence as such. I have tried to preserve this distinction so far as possible in what follows by using 'facts and/or evidence' (occasionally 'factual and/or evidentiary material') to represent 'charges' and 'evidence' where the French text refers to preuve(s).

24. Meanwhile, following a report made by Q to the Italian police on 23 November 2006, criminal proceedings against M were opened in Italy in the Tribunale di Fermo on the basis of the same facts that had triggered the investigation in Belgium. There followed an extensive investigation that essentially covered the same ground as the investigation being carried out contemporaneously in Belgium. On 19 December 2008 (that is, four days after the pre-trial chamber of the Tribunal de première instance de Mons made its finding of 'non-lieu'), the examining magistrate of the Tribunale di Fermo committed M to be tried before the collegiate formation of that court.

25. At a hearing held on 9 December 2009 before the Tribunale di Fermo, M submitted that he was entitled to rely on the principle of *ne bis in idem* in view of the judgment a week earlier (on 2 December 2009) of the Belgian Cour de cassation, which had concluded the parallel proceedings in Belgium.

26. Against that background, the Tribunale di Fermo (Italy) stayed the proceedings and referred the following question:

'Does a final judgment of "non-lieu" that terminates criminal proceedings after an extensive investigation but which permits the proceedings to be re-opened in the light of new evidence, given by a Member State of the European Union and a party to the Convention Implementing the Schengen Agreement (CISA), preclude the initiation or conduct of proceedings in respect of the same facts and the same person in another Contracting State?'

27. Written observations were submitted by Q, the Austrian, Belgian, German, Italian, Netherlands, Polish and Swiss Governments and the Commission. At the hearing held on 12 September 2013 Q, the German, Netherlands and Polish Governments and the Commission were represented and made oral submissions.

Assessment

28. The answer to the referring court's question turns on the interpretation of the phrase 'finally disposed of' in Article 54 CISA. Does a decision of 'non-lieu', as in the Belgian proceedings, finally dispose of the person's trial so that the *ne bis in idem* principle enshrined in Article 54 then applies?

29. The existing case law of the Court on Article 54 CISA and the principle of *ne bis in idem*,[12] concerning decisions disposing of criminal proceedings taken both before and after trial, does not provide an unequivocal answer to that question.

30. Where the decision follows a trial, the case law establishes that *ne bis in idem* applies whether the defendant was acquitted or found guilty. That holds good for a guilty verdict reached following a trial conducted *in absentia* (notwithstanding an obligation under national law to institute new proceedings if the person were subsequently arrested)[13] and for an acquittal for lack of evidence following a full trial.[14] In the latter case, the Court expressly declined to decide the general question whether an acquittal that was *not* based on determining the merits of the case could trigger Article 54 CISA. It limited itself to confirming that an acquittal for lack of evidence 'is based on such a determination' and therefore triggers the *ne bis in idem* principle in Article 54 CISA.[15]

12 — Joined Cases C-187/01 and C-385/01 *Gözütok and Brügge* [2003] ECR I-1345; Case C-469/03 *Miraglia* [2005] ECR I-2009; Case C-467/04 *Gasparini* [2006] ECR I-9199; Case C-150/05 *Van Straaten* [2006] ECR I-9327; Case C-297/07 *Bourquain* [2008] ECR I-9425; and Case C-491/07 *Turanský* [2008] ECR I-11039.

13 — *Bourquain*, cited in footnote 12 above, at paragraphs 39 and 40.

14 — *Van Straaten*, cited in footnote 12 above, at paragraph 58. Advocate General Ruiz-Jarabo Colomer noted that no one submitting observations had disputed that the *ne bis in idem* principle was effective in such a situation within the *national* legal system (see point 73 of his Opinion).

15 — Paragraph 60 of the judgment.

31. Where the decision is reached before a trial is concluded, the Court has likewise taken a liberal approach. *Ne bis in idem* applies where – without the involvement of a court – the public prosecutor discontinues proceedings against defendants who have agreed to pay fines in respect of their conduct. [16] The Court there identified the objective of Article 54 CISA as being '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'; and went on to hold that, in order fully to attain that objective, Article 54 must apply 'to decisions definitively discontinuing prosecutions in a Member State, even when such decisions are adopted without the involvement of a court and do not take the form of a judicial decision'. [17]

32. *Ne bis in idem* also applies where the prosecution in the 'first' Member State is dismissed as time-barred, [18] notwithstanding that the laws of the Contracting States on limitation periods have not been harmonised, with the result that a prosecution might not be time-barred in the 'second' Member State. (The Commission's submission in the present case – that only a decision reached after a trial acquitting a defendant for lack of evidence should give rise to the application of Article 54 CISA – seems to me doomed in the light of that ruling.) [19] The Court stressed in *Gasparini* that the principle of *ne bis in idem* necessarily implies that the Contracting States have mutual trust in each other's criminal justice systems and that in consequence each recognises the criminal law in force in the other Contracting States even when the outcome would be different if its own national law were applied. [20]

33. By contrast, in *Miraglia* [21] criminal proceedings in the Netherlands had been stayed on the grounds that there were proceedings against the same defendant in Italy in respect of the same facts. The decision ordering the stay precluded any prosecution in the Netherlands in respect of the same criminal acts and any judicial cooperation with foreign authorities, unless new evidence were produced. [22] The Court held that such a judicial decision, which had been reached without any determination as to the merits of the case, could not constitute a decision finally disposing of the case against that person within the meaning of Article 54 CISA so as to prevent the prosecution in Italy from proceeding. [23] If the Netherlands decision (made precisely *because* there were ongoing proceedings in Italy) were held to suffice to trigger *ne bis in idem*, that 'might make it more difficult, indeed impossible, actually to penalise in the Member State concerned the unlawful conduct with which the defendant was charged'. [24] The Court thus emphasised the importance of assuring free movement of persons in conjunction with maintaining appropriate measures with respect to preventing and combating crime [25] (which, as stated in Article 3(2) TEU, is the purpose of the provisions under Title V establishing an area of freedom, security and justice).

16 — *Gözütok and Brügge*, cited in footnote 12 above, at paragraph 48.

17 — Paragraph 38 of the judgment.

18 — *Gasparini*, cited in footnote 12 above, at paragraph 33.

19 — The Court clearly took the view, in deciding that *ne bis in idem* did apply in *Gasparini*, that it was immaterial that the application of the limitation period meant that the defendants had *never been in jeopardy* in the first set of proceedings.

20 — *Gasparini*, cited in footnote 12 above, at paragraphs 29 and 30.

21 — Cited at footnote 12 above.

22 — See paragraph 22 of the judgment.

23 — Paragraph 35 of the judgment. In this regard see also, in the context of competition law, the decision in Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschaappij and Others* v *Commission* [2002] ECR I-8375, paragraph 62, in which the Court held that an annulment decision which had been reached without any ruling on the substance of the facts alleged could not be regarded as an acquittal giving rise to the application of the *ne bis in idem* principle.

24 — *Miraglia*, cited in footnote 12 above, at paragraph 33.

25 — Ibid., at paragraph 34.

34. In *Turanský*,[26] a decision had been taken ordering the suspension of criminal proceedings before the defendant was charged. Under national law, that decision did not preclude new criminal proceedings being instituted in respect of the same acts. The Court held that the suspension decision had not 'finally disposed of' the trial so as to trigger the application of *ne bis in idem*.[27] The Court there set out the '*Turanský* test' for whether a case has been 'finally disposed of'. The decision 'must bring … the criminal proceedings to an end and definitively bar further prosecution';[28] and 'it is necessary first of all to ascertain that the decision in question is considered under the law of the Contracting State which adopted it to be final and binding, and to verify that it leads, in that State, to the protection granted by the *ne bis in idem* principle'.[29] That test was approved and applied in *Mantello* (a European Arrest Warrant case).[30]

35. In general terms, the Court's approach thus far seems to me not dissimilar from that of the European Court of Human Rights in relation to Article 4(1) of Protocol 7 to the ECHR. The guarantee under that article 'becomes relevant … where a prior acquittal or conviction has already acquired the force of *res judicata*'.[31] As the Explanatory Report relevant to that Protocol further clarifies, 'this is the case when [the decision] is irrevocable, that is to say when no further ordinary remedies are available or when the parties have exhausted such remedies or have permitted the time limit to expire without availing themselves of them'.[32]

36. The formulation of the *ne bis in idem* principle in Article 50 of the Charter reflects that contained in Article 4 of Protocol No 7. The Explanations relating to the Charter state that Article 50 applies 'not only within the jurisdiction of one State but also between the jurisdictions of several Member States', adding that '[a]s regards the situations referred to by Article 4 of Protocol No 7, namely the application of the principle within the same Member State, the guaranteed right has the same meaning and the same scope as the corresponding right in the ECHR'.

Did the finding of 'non-lieu' finally dispose of M's trial in Belgium?

37. Ordinarily, the courts of the Member State in which the plea of *ne bis in idem* has been raised (here, Italy) must decide that question on the basis of information and assistance provided in accordance with Article 57 CISA by the Member State in which the decision relied on to trigger that principle was handed down (here, Belgium).[33] The test to be applied is that laid down by this Court in *Turanský*.[34] As in the present case, the national court may if necessary turn to this Court for further assistance by making a request for a preliminary ruling.

38. It appears from the order for reference that the effect under Belgian law of the Cour de cassation's ruling of 2 December 2009 is that further prosecution of the defendant in respect of the same facts is precluded. The prosecution was not informally 'put on hold'; it was formally barred from proceeding. True, it is possible to re-open proceedings after a decision of 'non-lieu' where new facts and/or evidence become available; but that possibility is circumscribed. The new factual and/or evidentiary

26 — Cited in footnote 12 above.

27 — *Turanský*, cited in footnote 12 above, at paragraphs 39 and 40.

28 — *Turanský*, cited in footnote 12 above, at paragraph 34.

29 — Paragraph 35.

30 — Case C-261/09 [2010] ECR I-11477, at paragraph 46. Article 3(2) of 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) lists *ne bis in idem* as a ground for the mandatory non-execution of a European Arrest Warrant. In *Mantello* the Court accepted (at paragraph 40) that, '[i]n view of the shared objective of Article 54 [CISA] and Article 3(2) of the Framework Decision … it must be accepted that an interpretation of that concept given in the context of the CISA is equally valid for the purpose of the Framework Decision'. The Grand Chamber went on (at paragraphs 45 to 47) to cite that case-law and to endorse the *Turanský* test.

31 — Eur Court HR, *Sergey Zolotukhin v. Russia* [GC], no. 14939/03, § 83, ECHR 2009.

32 — Cited in point 13 above.

33 — In this regard see *Mantello*, cited in footnote 12 above, at paragraphs 48 and 49.

34 — See point 34 above.

material must be capable either of strengthening the evidence that the indictment division (or, as here, the pre-trial chamber) found to be too weak or of presenting the facts in new ways which are useful in establishing the truth (Article 247 CIC). The proceedings may only be re-opened at the request of the public prosecutor, who has a discretion whether or not to make such a request (Article 248 CIC).[35] So far as I can ascertain, a civil party cannot force the public prosecutor to seek to reopen the criminal proceedings or commence a private prosecution based on the facts and/or evidence examined when the finding of 'non-lieu' was made. In the present case, the ordinary appeals procedure in relation to that finding was pursued and was exhausted by the decision of the Cour de cassation. The finding of the pre-trial chamber of the Tribunal de première instance, Mons, thereby acquired the force of *res judicata* and M is protected by that finding from prosecution in Belgium. The *Turanský* test is thus satisfied.

39. The Belgian Government nevertheless took the view (in its written observations – it did not attend the hearing) that such a decision is not definitive because the possibility exists to re-open the proceedings in the light of new facts and/or evidence; and that the *ne bis in idem* principle in Article 54 CISA therefore does not apply. There are, it seems to me, two strands of thinking that may underpin such a submission. The first is that it was just an unfortunate accident of timing that the Italian criminal trial did not begin until a week after the decision of the Belgian Cour de cassation and that where (as here) the allegations against an accused are serious and unpleasant, he 'should' if possible be brought to trial. The second is that *ne bis in idem* can never apply in a 'second' Member State as long as there is any possibility, however faint or remote, that the criminal proceedings in the 'first' Member State can be either revived or re-initiated. I shall look at each of those aspects in turn.

A question of timing?

40. One of the most striking aspects of the present reference is the chronology of events. The two extensive criminal investigations, in Belgium and in Italy, ran in parallel. The courts of the two Member States were then involved in the following sequence: (a) finding of 'non-lieu' by the pre-trial chamber of the Tribunal de première instance de Mons, Belgium (15 December 2008); (b) committal of M to trial by the examining magistrate of the Tribunale di Fermo, Italy (19 December 2008); (c) finding of 'non-lieu' upheld by the indictment division of the Cour d'appel de Mons, Belgium (21 April 2009); (d) ruling of the Cour d'appel de Mons upheld by the Cour de cassation, Belgium (2 December 2009); and finally (e) trial hearing before the collegiate formation of the Tribunale di Fermo, Italy (9 December 2009).

41. It may be helpful to examine various points in time within that sequence in order to see whether the defendant M can invoke the principle of *ne bis in idem* in Article 54 CISA and, if so, at what stage and why he should be able to do so.

42. On the date when the examining magistrate of the Tribunale di Fermo committed M for trial (19 December 2008), the pre-trial chamber of the Tribunal de première instance de Mons had just made its finding of 'non-lieu' (15 December 2008). However, that decision had not become 'definitive' under Belgian law. It could be (and indeed was) appealed. At that point, therefore, M would not have been able to invoke the principle of *ne bis in idem* to halt proceedings in Italy.

43. If M's trial in Italy had run its course and a verdict had been reached either before 21 April 2009 (decision of the Cour d'appel, Mons) or indeed before 2 December 2009 (decision of the Belgian Cour de cassation), the analysis would be the same. Although in each case there would have been a prior decision in relation to the same person and the same facts in another Member State, that decision would not yet have become 'definitive' under national law.

35 — See further point 44 below.

44. The position changes, however, on 2 December 2009. From that date, M – were he in Belgium – would enjoy the protection from prosecution afforded by the definitive decision of the Cour de cassation upholding the finding of 'non lieu'. True it is that, *if* new facts and/or evidence came to light, Article 248 CIC requires the relevant senior police officer or examining magistrate to send copies of the documents and evidence forthwith to the senior prosecutor to the court of appeal. That step is mandatory. The senior prosecutor then appears to have a discretionary power.[36] He may (presumably, if he considers that the new factual and/or evidentiary material will make the necessary difference) apply to the president of the indictment division to designate a judge before whom a new investigation will proceed. If he takes the view that the new facts and/or evidence make no difference or are insufficient, presumably he will not take that step. However, *absent* the discovery of such new material and the putting in train of that procedure, M would be safe from prosecution.[37]

45. A person should not lose the protection that he enjoys under national criminal law through exercising his free movement rights. For that reason, the effect of the Belgian Cour de cassation's decision of 2 December 2009 must be to preclude M from being tried in Italy after that date.

46. For the sake of completeness, I should deal with four additional points.

47. First, I take the view that the date that matters must be the date on which a judicial decision is taken by a court, not the (later) date on which that decision comes to the attention of a prosecutor or a court in another Member State. That approach is dictated by the requirement of legal certainty. The date of the decision is certain. The date of notification is variable and can be affected by outside agents.

48. Second, a person sent for trial is 'in jeopardy' up to the moment when the decision determining the outcome of his trial is handed down. Some time may elapse (one would hope, not usually as long as in the present case) between the date on which a person is sent for trial and the date on which his trial opens; and the trial itself may take some time to run its course. The principle of *ne bis in idem* is designed to prevent double jeopardy. It follows, in my view, that the principle of *ne bis in idem* does not cease to apply either when a person is sent for trial or on the day that his trial opens. Rather, that principle may be relied upon until the outcome of the trial is determined.

49. Third, once a person *has* been tried and convicted in a 'second' Member State, the fact that a decision against the same person based upon the same facts in the 'first' Member State subsequently becomes definitive is irrelevant. That is because, when he was *tried* in the second Member State there was not (yet) a definitive decision in the first Member State. Of course the decision in the second Member State can be appealed, under national law, on any ground of appeal recognised by the criminal law of that Member State. Article 54 CISA may not, however, be invoked.

50. Fourth, it is necessary to provide some answer to the question, 'what of the wasted police time and public expenditure on detailed investigation in the second Member State if *ne bis in idem* applies in such circumstances and the prosecution of a person already committed for trial cannot go ahead?'

36 — The French text has, '… sur la réquisition du procureur general…' ('at the formal request of the senior prosecutor'); the implication being that the latter can choose whether or not to present such a request.

37 — See point 38 above.

51. There is clearly an underlying issue, worthy of serious consideration, about the 'race to prosecute' and possible conflicts of jurisdiction in criminal matters. At present, there are no agreed EU-wide rules on the allocation of criminal jurisdiction.[38] The application of the *ne bis in idem* principle resolves the problem in a limited, sometimes an arbitrary, way.[39] It is not a satisfactory substitute for action to resolve such conflicts according to an agreed set of criteria.

52. Some provision does now exist under EU law for the exchange of information between investigating authorities in different Member States.[40] Council Framework Decision 2009/948/JHA,[41] which was published and came into force on 15 December 2009 (and thus just post-dates the Italian proceedings in the main action), requires the competent authority of a Member State to contact the competent authority of another Member State if it has reasonable grounds to believe that parallel proceedings are being conducted there, with a view to initiating direct consultations. Those consultations are to be aimed at avoiding adverse consequences arising from such parallel proceedings and may, where appropriate, lead to the concentration of the criminal proceedings in one Member State.

53. To some extent, that addresses the issues that underlie the present case (and that arose earlier in *Miraglia*). However, Council Framework Decision 2009/948/JHA does not harmonise national laws and procedures in this area of law. In particular, it does not oblige a Member State either to waive or to exercise jurisdiction.[42] Unless and until the legislature addresses the issue of parallel proceedings more comprehensively, the principle of *ne bis in idem* in Article 54 CISA will, of necessity, have to be pressed into service to fill the gap.

'If proceedings might (possibly) be reopened, ne bis in idem does not apply'

54. Neither Article 54 CISA nor Article 50 of the Charter expressly address what is meant to happen to the principle of *ne bis in idem* if new facts and or evidence become available. The Explanations relating to Article 50 of the Charter helpfully indicate that, where the Charter right applies in the context of a single Member State, 'the guaranteed right has the same meaning and the same scope as the corresponding right in the ECHR'.

55. Turning therefore to the ECHR, Article 4(2) of Protocol 7 to the ECHR provides that the provisions of Article 4(1) (protecting the right not to be tried or punished twice for the same offence) do not prevent the re-opening of the case 'if there is evidence of new or newly discovered facts'. The Explanatory Report to Protocol 7 clarifies[43] that the term 'new or newly discovered facts' includes 'new means of proof relating to previously existing facts'. Thus, the exceptional possibility under Belgian law to re-open criminal proceedings following a decision of 'non-lieu' closely mirrors what is envisaged by Article 4(2) of Protocol 7.

38 — For attempts to address the problem, see the Commission's Green Paper (SEC(2005) 1767) on Conflicts of Jurisdiction and the Principle of *ne bis in idem* in Criminal Proceedings, and its Annex, COM(2005) 696 final (23 December 2005) and the responses thereto. See also the comment by M. Fletcher, 'The problem of multiple criminal prosecutions: building an effective EU response', in *Yearbook of European Law* Vol. 26 (2007), pp. 33-56. For *ne bis in idem* cases that – at least to some extent – may have arisen out of dissatisfaction at the fact that the authorities in another Member State had prosecuted first, see (for example) Case C-436/04 *Van Esbroeck* [2006] ECR I-2333, and Case C-367/05 *Kraaijenbrink* [2007] ECR I-6619.

39 — For a thoughtful discussion of this wider issue, see M. Fletcher, R. Lööf and B. Gilmore, *EU Criminal Law and Justice* (Elgar European Law, 2008), pp. 131-138, especially pp. 132-133.

40 — In terms of institutional bodies, see Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime (OJ 2002 L 63, p. 1); and the Convention based on Article K.3 of the Treaty on European Union, on the establishment of a European Police Office (Europol Convention) (OJ 1995 C 316, p. 2).

41 — Decision of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings, OJ 2009 L 328, p. 42.

42 — See recital 11 in the preamble to the Framework Decision.

43 — See paragraph (31), set out at point 12 above.

56. As I read Protocol 7 to the ECHR, Article 4(1) establishes *ne bis in idem* protection. Article 4(2) then contains a derogation allowing a case to be reopened (in accordance with the law and the penal procedure of the State concerned) notwithstanding that the *ne bis in idem* principle would otherwise apply. That does not mean (and, I would say, surely cannot reasonably be construed as meaning) that as long as there is a theoretical possibility of 'new means of proof relating to previously existing facts' being discovered, *ne bis in idem* does not apply. Theoretically, new facts and/or evidence can always turn up to supplement what was previously available. The reading advocated by Belgium would therefore eviscerate the principle of *ne bis in idem*. Notwithstanding a finding of 'non-lieu' that has been confirmed by the highest court and that has acquired the force of *res judicata*, a defendant would be deprived of the very protection that national law recognises that he should have. Had a second set of proceedings been launched in Belgium (rather than in Italy) without new facts and/or evidence, it is clear that they would be barred by virtue of that decision.

57. Should the conclusion be different where the second set of proceedings are in a different, 'second' Member State?

58. I do not think so. The purpose of Article 54 CISA is, precisely, to prevent a person who exercises rights of free movement losing the *ne bis in idem* protection that he would otherwise enjoy. It is clear that the triggering of the *ne bis in idem* principle by a decision in one Member State (here, Belgium) may operate to bar prosecution in another Member State (here, Italy) even though the courts of the second Member State may have reached a different conclusion on the basis of essentially the same facts and/or evidence. The possibility of different outcomes is, however, a consequence of the fact that *ne bis in idem* operates notwithstanding the absence of harmonisation, being based upon a high level of mutual trust. [44]

59. More fundamentally, however, it is clear that *ne bis in idem* is no bar to reopening proceedings if new facts and/or evidence emerge. [45] If, in the present case, the Italian prosecuting authorities make what is in their possession available to their Belgian colleagues, the latter will be able to evaluate that factual and/or evidentiary material and decide whether to try to get the Belgian proceedings reopened under Articles 246, 247 and 248 CIC. However, I emphasise that (in my view) any further proceedings against a defendant who benefits from a definitive decision of 'non-lieu' must be initiated *in the Member State in which that decision was taken* (i.e., in the first Member State). It is not open to the courts in a second Member State to short-circuit the process (and the procedural guarantees offered to the defendant by the national law of the first Member State) by deciding to use what may (or may not) be 'new' facts and/or evidence to try that defendant.

Conclusion

60. In the light of the foregoing, I propose that the Court should give the following answer to the question referred by the Tribunale di Fermo (Italy):

Article 54 of the Convention implementing the Schengen Agreement should be interpreted as meaning that a definitive decision of 'non-lieu' terminating criminal proceedings, reached following a detailed investigation, which precludes further prosecution of the same person for the same facts but which, in accordance with national law, may be set aside if new facts and/or evidence emerge, is a decision that finally disposes of the case and gives rise to the application of the *ne bis in idem* principle enshrined in that article.

44 — See the *Conclusions* of the Presidency (Nr: 200/1/99) following the European Council at *Tampere* on 15 and 16 October 1999 and *Gasparini*, cited in footnote 12 and point 32 above, paragraph 30.

45 — See points 54 to 56 above.