

TURANSKÝ

JUDGMENT OF THE COURT (Sixth Chamber)

22 December 2008 \*

In Case C-491/07,

REFERENCE under Article 35 EU for a preliminary ruling from the Landesgericht für Strafsachen Wien (Austria), made by decision of 8 October 2007, received at the Court on 31 October 2007, in the criminal proceedings against

**Vladimir Turanský,**

THE COURT (Sixth Chamber),

composed of J.-C. Bonichot, President of the Chamber, K. Schiemann and L. Bay Larsen (Rapporteur), Judges,

Advocate General: Y. Bot,  
Registrar: R. Grass,

\* Language of the case: German.

having regard to the written procedure,

after considering the observations submitted on behalf of:

- the Austrian Government, by E. Riedl, acting as Agent,
  
- the French Government, by G. de Bergues and J.-Ch. Niollet, acting as Agents,
  
- the Netherlands Government, by C. Wissels and Y. de Vries, acting as Agents,
  
- the Slovak Government, by J. Čorba, acting as Agent,
  
- the Finnish Government, by J. Heliskoski, acting as Agent,
  
- the Swedish Government, by A. Falk, acting as Agent,

- the United Kingdom Government, by T. Harris, and subsequently by I. Rao, acting as Agents,
  
  
  
  
  
  
  
  
  
  
- the Commission of the European Communities, by R. Troosters and S. Grünheid, acting as Agents,

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

gives the following

### **Judgment**

- <sup>1</sup> 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), signed in Schengen (Luxembourg) on 19 June 1990 ('the CISA').

- 2 The reference was made in criminal proceedings instituted in Austria on 23 November 2000 against Mr Turanský, a Slovak national suspected of having carried out, along with others, a serious robbery on an Austrian national in the territory of the Republic of Austria.

## **Legal framework**

### *The European Convention on mutual assistance in criminal matters*

- 3 Article 21(1) and (2) of the European Convention on Mutual Assistance in Criminal Matters (ETS No 30), signed at Strasbourg on 20 April 1959, concerning the laying of information in connection with proceedings, provides:

‘1. Information laid by one Contracting Party with a view to proceedings in the courts of another Party shall be transmitted between the Ministries of Justice ...

2. The requested Party shall notify the requesting Party of any action taken on such information and shall forward a copy of the record of any verdict pronounced.’

*European Union law*

- 4 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 Republic of Austria, are authorised to establish closer cooperation among themselves, within the scope of the Schengen acquis as set out in the annex to the Protocol.
  
- 5 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, signed in Schengen on 14 June 1985 (OJ 2000 L 239, p. 13), and the CISA.
  
- 6 The Agreement on the Accession of the Republic of Austria to the CISA, signed at Brussels on 28 April 1995 (OJ 2000 L 239, p. 90), entered into force on 1 December 1997.
  
- 7 Pursuant to 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 as the legal bases for Articles 54 to 58 of the CISA.

8 According to Article 3(1) of the Act concerning the conditions of accession to the European Union of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded (OJ 2003 L 236, p. 33), read in conjunction with paragraph 2 of Annex I to that Act, the CISA is binding and applicable in the Slovak Republic from the date of accession of that State, that is 1 May 2004.

9 Title III of the CISA ('Police and Security') contains a Chapter 3 ('Application of the *ne bis in idem* principle'). According to Article 54 of Chapter 3:

'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.'

10 Article 55(1) and (4) of the CISA provide:

'1. A Contracting Party may, when ratifying, accepting or approving this Convention, declare that it is not bound by Article 54 in one or more of the following cases:

- (a) where the acts to which the foreign judgment relates took place in whole or in part in its own territory; ...

...

4. The exceptions which were the subject of a declaration under paragraph 1 shall not apply where the Contracting Party concerned has, in connection with the same acts, requested the other Contracting Party to bring the prosecution ...'

<sup>11</sup> Article 57(1) and (2) of the CISA provide:

'1. Where a Contracting Party charges a person with an offence and the competent authorities of that Contracting Party have reason to believe that the charge relates to the same acts as those in respect of which the person's trial has been finally disposed of in another Contracting Party, those authorities shall, if they deem it necessary, request the relevant information from the competent authorities of the Contracting Party in whose territory judgment has already been delivered.

2. The information requested shall be provided as soon as possible and shall be taken into consideration as regards further action to be taken in the proceedings under way.'

- 12 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 Republic of Austria 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.

*Slovak law*

- 13 Under Article 9(1)(e) of the Code of Criminal Procedure, in the version in force on the date on which the Slovak police authority adopted the decision to suspend the criminal proceedings in question in the main proceedings, such proceedings are not to be instituted or, where already instituted, continued ‘if the matter concerns a person against whom previous criminal proceedings instituted in respect of the same act terminated in a judgment which has become final or if those proceedings were definitively suspended ...’.
- 14 That provision transposes Article 50(5) of the Constitution of the Slovak Republic, according to which a person cannot be prosecuted for an act for which he was already finally convicted or acquitted.
- 15 Article 215(1) and (4) of the Code of Criminal Procedure provide:



‘1. The Public Prosecutor shall suspend the criminal proceedings:

(a) if there is no doubt that the act in respect of which criminal proceedings were instituted did not occur;

(b) if that act is not a crime and there is no reason to investigate the case ...

...

4. The suspension of the proceedings under paragraph 1 can also be ordered by the police, if no charge has been brought. ...’

<sup>16</sup> It is clear from the case-law of the Najvyšší súd Slovenskej republiky (Supreme Court of the Slovak Republic) and in particular from the judgment of 10 July 1980 in Case Tz 64/80, that Article 9(1)(e) of the Code of Criminal Procedure does not preclude proceedings which had been suspended under Article 215(1)(b) of that Code from being subsequently reopened in respect of the same acts, where the earlier proceedings were not terminated by a judgment which has become final.

**The facts giving rise to the criminal proceedings and the question referred for a preliminary ruling**

- 17 Mr Turanský is suspected of having — on 5 October 2000, in the company of two Polish nationals who are being prosecuted separately — robbed a person of a sum of money belonging to him at his home in Vienna (Austria), and of thereafter seriously injuring him.
- 18 On 23 November 2000, the Staatsanwaltschaft Wien (Public Prosecutor in Vienna) therefore requested the investigating judge attached to the referring court to open a preliminary investigation concerning Mr Turanský, who was strongly suspected of serious robbery under the Austrian Criminal Code, and to issue an arrest warrant and an alert for his arrest.
- 19 On 15 April 2003, having been informed that Mr Turanský could be found in his country of origin, the Republic of Austria, in accordance with Article 21 of the European Convention on Mutual Assistance in Criminal Matters, requested the Slovak Republic to reopen proceedings against him.
- 20 Since the Slovak authorities approved that request, the investigating judge attached to the referring court stayed the criminal proceedings pending the final decision of those authorities.
- 21 On 26 July 2004, the police officer in Prievidza (Slovakia) in charge of the investigation opened criminal proceedings into the reported acts without however at the same time charging a specific person. In the course of that investigation, Mr Turanský was heard as a witness.

22 By letter of 20 December 2006, the Prosecutor General of the Slovak Republic notified the Austrian authorities of a decision of the Prievidza District Police Headquarters of 14 September 2006, ordering the suspension under Article 215(1)(b) of the Code of Criminal Procedure of the criminal proceedings relating to the alleged robbery. In that decision, the Prievidza police officer in charge of the investigation wrote:

‘Under Article 215(1)(b) [of the Code of Criminal Procedure], I order, with regard to the criminal proceedings concerning the case of robbery in concert with others,

the suspension of the proceedings

since the act does not constitute a crime and there is no reason to continue the case.

Explanation of the grounds

... That has also been proved by the statements of the victim ... and the statements of the witness [Turanský]. This means that Mr Turanský’s act did not constitute the crime of robbery ...

Even if one had to take into account the act of not preventing the crime ..., it would likewise no longer be possible to continue the proceedings ... with the objective of issuing formal charges, since prosecution would not be permitted in the present case, owing to expiry of the limitation period ...'

23 A complaint, having suspensive effect, could be brought against that decision within a period of three days following the date on which it was pronounced. No such complaint was however made.

24 The Landesgericht für Strafsachen in Vienna has doubts whether the decision to suspend the criminal proceedings, taken by a Slovak police authority in an investigation into the same acts as those on which the proceedings pending before it are based, can give rise to the application of Article 54 of the CISA and, therefore, preclude the continuation of the pending proceedings.

25 Since it has to rule on the question whether the decision of the Slovak police authority of 14 September 2006 precludes the investigating judge from continuing the preliminary proceedings which were stayed in the Republic of Austria, the referring court decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Must the bar on a second prosecution for the same acts (*ne bis in idem* principle) contained in [the CISA] be interpreted as precluding the prosecution of a suspect in the Republic of Austria when criminal proceedings instituted in the Slovak Republic in

respect of the same acts, after its accession to the European Union, were discontinued after a police authority, following an examination of the merits of the case and without further sanction, terminated them with immediate effect by ordering their suspension?’

### **Jurisdiction of the Court**

<sup>26</sup> It should be pointed out that, as is clear from paragraph 12 of this judgment, in the circumstances of this case the Court has jurisdiction to give a ruling on the interpretation of the CISA pursuant to Article 35 EU.

<sup>27</sup> In that regard, it should be noted that Article 54 of the CISA applies *rationae temporis*, as contended by the Austrian Government, to criminal proceedings such as those in the main proceedings. Although it is true that the CISA was not yet in force in the Slovak Republic on 5 October 2000, when the acts referred to in the main proceedings were committed in Austria, it was however in force in the two States concerned not only when those acts were first assessed, in September 2006, by the police authorities in the Slovak Republic, but also when the conditions governing the applicability of the *ne bis in idem* principle were assessed in October 2007 by the referring court before which the proceedings which gave rise to the present reference for a preliminary ruling were brought (see, to that effect, Case C-367/05 *Kraaijenbrink* [2007] ECR I-6619, paragraph 22).

28 In addition, it should be pointed out, in the first place, that the question of the *ne bis in idem* effect of the decision by the Slovak police authority to suspend the criminal proceedings must, as the Commission of the European Communities correctly observed, be examined on the basis of Articles 54 to 58 of the CISA, since Article 21 of the European Convention on Mutual Assistance in Criminal Matters, under which the Republic of Austria requested the Slovak Republic to institute criminal proceedings against Mr Turanský, does not deal with the effect of the taking over of the criminal proceedings by the requested State on the proceedings underway in the requesting State.

29 In the second place, it should be added that, even if the Republic of Austria has made a declaration under Article 55(1)(a) to (c) of the CISA (BGBl. III of 27 May 1997, p. 2048), and even though the exception contained in point (a) of that provision precisely covers a situation such as that at issue in the main proceedings, since the acts referred to took place in the territory of the State making the declaration, that reservation cannot however apply to those proceedings because of Article 55(4), which rules out the application of the reservations where the Contracting Party concerned — namely, in relation to the proceedings in question, the Republic of Austria — has requested the other Contracting Party, namely the Slovak Republic, to bring proceedings in respect of the same acts.

### **The question referred for a preliminary ruling**

30 By this question, the referring court asks, essentially, whether the *ne bis in idem* principle enshrined in Article 54 of the CISA applies to a decision such as that at issue in the main proceedings, whereby a police authority, after examining the merits of the case brought before it, makes an order, at a stage before the charging of a person suspected of a crime, suspending the criminal proceedings which had been instituted.

31 It is clear from the very wording of Article 54 of the CISA that no one may be prosecuted in a Contracting State for the same acts as those in respect of which his trial has been ‘finally disposed of’ in another Contracting State.

32 With regard to the concept of ‘finally disposed of’, the Court has already declared, first, in paragraph 30 of Joined Cases C-187/01 and C-385/01 *Gözütok and Brügge* [2003] ECR I-1345 that when, following criminal proceedings, further prosecution is definitively barred, the person concerned must be regarded as someone whose trial has been ‘finally disposed of’ for the purposes of Article 54 of the CISA in relation to the acts which he is alleged to have committed.

33 Second, it has held in paragraph 61 of Case C-150/05 *Van Straaten* [2006] ECR I-9327, that Article 54 of the CISA applies to a decision of the judicial authorities of a Contracting State by which the accused is finally acquitted for lack of evidence.

34 It follows that, in principle, a decision must, in order to be considered as a final disposal for the purposes of Article 54 of the CISA, bring the criminal proceedings to an end and definitively bar further prosecution.

35 In order to assess whether a decision is ‘final’ for the purposes of Article 54 of the CISA, it is necessary first of all to ascertain, as contended by the Austrian, Netherlands, Finnish and United Kingdom Governments and by the Commission, 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.

36 A decision which does not, under the law of the first Contracting State which instituted criminal proceedings against a person, definitively bar further prosecution at national level cannot, in principle, constitute a procedural obstacle to the opening or continuation of criminal proceedings in respect of the same acts against that person in another Contracting State.

37 With regard more specifically to the definitive character, under Slovak law, of the decision in question in the main proceedings, it should be pointed out, as is moreover clear from the observations of the Netherlands Government and the Commission, that Article 57 of the CISA has put in place a cooperation mechanism which allows the competent authorities of the second Contracting State to request relevant legal information from the authorities of the first State, in order to clarify, for example, the precise nature of a decision adopted in the territory of the first State.



38 That cooperation mechanism, which was however not activated in the main proceedings, would have made it possible to establish that, in fact, a decision such as that in question in the main proceedings was not, under Slovak law, of such a nature that it must be regarded as having definitively barred further prosecution at national level.

39 In that regard, it emerges clearly from the written observations of the Slovak Government in the present case that a decision ordering the suspension of the criminal proceedings at a stage before a particular person is charged, taken under Article 215(1)(b) of the Slovak Code of Criminal Procedure, does not, under national law, preclude the institution of new criminal proceedings in respect of the same acts in the territory of the Slovak Republic.

40 Therefore, it must be held that a decision of a police authority such as that in question in the main proceedings which, while suspending the criminal proceedings, does not under the national law concerned definitively bring the prosecution to an end, cannot constitute a decision which would make it possible to conclude that the trial of that person has been 'finally disposed of' within the meaning of Article 54 of the CISA.

41 That interpretation of Article 54 of the CISA is compatible with the objective of the article, which is to ensure that a person whose trial has been finally disposed of is not prosecuted for the same acts in the territory of several Contracting States on account of his having exercised his right to freedom of movement (see, to that effect, *Gözütok and Brügge*, paragraph 38).

42 The application of that article to a decision to suspend criminal proceedings such as that taken in the main proceedings would have the effect of precluding, in another Contracting State, in which more evidence may be available, any possibility of prosecuting and perhaps punishing a person on account of his unlawful conduct, even though such a possibility is not ruled out in the first Contracting State, in which the trial of the person is not considered to have been finally disposed of under national law.

43 Such an outcome would, as pointed out by the Swedish and United Kingdom Governments in their written observations, be contrary to the very purpose of the provisions of Title VI of the Treaty on European Union as stated in the fourth indent of the first paragraph of Article 2 thereof, that is, to take 'appropriate measures with respect to ... prevention and combating of crime' while developing the Union as an area of freedom, security and justice in which the free movement of persons is assured.

44 It should be added that, while the goal of Article 54 of the CISA is to ensure that a person, once he has been found guilty and served his sentence, or, where applicable, been acquitted by a final judgment in a Member State, may travel within the Schengen territory without fear of being prosecuted for the same acts in another contracting State (see, to that effect, Case C-436/04 *Van Esbroeck* [2006] ECR I-2333, paragraph 34), it is not intended to protect the suspect from having to submit to possible subsequent investigations, in respect of the same acts, in several Contracting States.

45 In the light of the foregoing, the answer to the question referred must be that the *ne bis in idem* principle enshrined in Article 54 of the CISA does not fall to be applied to a decision by which an authority of a Contracting State, after examining the merits of the case brought before it, makes an order, at a stage before the charging of a person suspected of a crime, suspending the criminal proceedings, where the suspension decision does not, under the national law of that State, definitively bar further prosecution and therefore does not preclude new criminal proceedings, in respect of the same acts, in that State.

## Costs

46 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Sixth Chamber) hereby rules:

**The *ne bis in idem* principle enshrined in Article 54 of the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, signed in Schengen (Luxembourg) on 19 June 1990, does not fall to be applied to a decision by which an authority of a Contracting State, after examining the merits of the case brought before it, makes an order, at a stage before the charging of a person suspected of a crime, suspending the criminal proceedings, where the suspension decision does not, under the national law of that State, definitively bar further prosecution and therefore does not preclude new criminal proceedings, in respect of the same acts, in that State.**

[Signatures]