Case C-505/19

Request for a preliminary ruling

Date lodged:

3 July 2019

Referring court:

Verwaltungsgericht Wiesbaden (Administrative Court, Wiesbaden, Germany)

Date of the decision to refer:

27 June 2019

Applicant:

WS

Defendant:

Federal Republic of Germany

VERWALTUNGSGERICHT WIESBADEN

(ADMINISTRATIVE COURT, WIESBADEN)

ORDER

In the administrative proceedings of

W S

Applicant

[...]

v

Federal Republic of Germany,

[...]

Defendant

concerning

data protection law **[Or. 2],**

the Administrative Court, Wiesbaden […]

made the following order on 27 June 2019:

1. The proceedings are stayed.

2. The proceedings are referred to the Court of Justice of the European Union for a preliminary ruling pursuant to Article 267 TFEU with regard to the following questions:

   a) Is Article 54 of the CISA in conjunction with Article 50 of the Charter to be interpreted as meaning that even the initiation of criminal proceedings for the same act is prohibited in all the Contracting States of 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 of 14 June 1985 (Schengen *acquis* as referred to in Article 1(2) of Council Decision 1999/435/EC of 20 May 1999, OJ L 239 of 22 September 2000, p. 13, 'the CISA') if a German public prosecutor's office discontinues initiated criminal proceedings once the accused has fulfilled certain obligations and, in particular, paid a certain sum of money determined by the public prosecutor's office?

   b) Does Article 21(1) of the Treaty on the Functioning of the European Union (in the consolidated version of 7 June 2016, OJ C 202, p. 1, 47; 'the TFEU') result in a prohibition on the Member States implementing arrest requests by third States in the scope of an international organisation such as the International Criminal Police Organisation — Interpol — if the person concerned by the arrest request is a Union citizen and the Member State of which he is a national has communicated concerns regarding the compatibility of the arrest request with the prohibition of double jeopardy to the international **[Or. 3]** organisation and therefore also to the remaining Member States?

   c) Does Article 21(1) TFEU preclude even the initiation of criminal proceedings and temporary detention in the Member States of which the person concerned is not a national if this is contrary to the prohibition of double jeopardy?

   d) Are Article 4(1)(a) and Article 8(1) of Directive (EU) 2016/680 in conjunction with Article 54 of the CISA and Article 50 of the Charter to be interpreted as meaning that the Member States are obliged to introduce legislation ensuring that, in the event of proceedings whereby further prosecution is barred in all the Contracting States of 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 of 14 June 1985 (OJ L 239 of 22 September 2000, p. 13), further processing of red notices of the International Criminal Police Organisation — Interpol — intended to lead to further criminal proceedings is prohibited?

[e]) Does an international organisation such as the International Criminal Police Organisation — Interpol — have an adequate data protection level if there is no adequacy decision under Article 36 of Directive (EU) 2016/680 and/or there are no appropriate safeguards under Article 37 of Directive (EU) 2016/680?

[f]) Are the Member States only allowed to further process data filed at the International Criminal Police Organisation — Interpol — in a red notice by third States when a third State has used the red notice to disseminate an arrest and extradition request and apply for an arrest which is not in breach of European law, in particular the prohibition of double jeopardy?

3. It is asked that the request for a preliminary ruling be dealt with under the urgent preliminary ruling procedure provided for in Article 107 et seq. of the Rules of Procedure of the Court of Justice. **[Or. 4]**

Grounds

I.

1. **Article 50 of the Charter of Fundamental Rights** of the European Union — the Charter — (OJ 2016 C 202 of 7 June 2016, p. 389) reads as follows:

‘*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.*’

2. **Article 21(1) of the Treaty on the Functioning of the European Union — TFEU** — (in the consolidated version of 7 June 2016, OJ C 202, p. 1, 47) reads as follows:

‘*Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect*.’

3. **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 of 19 June 1990 — **CISA** — (OJ L 239 of 22 September 2000, p. 19) — CISA — reads as follows:

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

4. **Article 4 of Directive (EU) 2016/680** of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing **[Or. 5]** Council Framework Decision 2008/977/JHA, of 27 April 2016 (OJ 2016 L 119, p. 89) regulates the

Principles relating to processing of personal data

Member States shall provide for personal data to be:

(a) processed lawfully and fairly;

(b) collected for specified, explicit and legitimate purposes and not processed in a manner that is incompatible with those purposes;

(c) adequate, relevant and not excessive in relation to the purposes for which they are processed;

(d) accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that personal data that are inaccurate, having regard to the purposes for which they are processed, are erased or rectified without delay;

(e) kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which they are processed;

(f) processed in a manner that ensures appropriate security of the personal data, including protection against unauthorised or unlawful processing and against accidental loss, destruction or damage, using appropriate technical or organisational measures.

5. **Article 8 of Directive (EU) 2016/680** regulates the

Lawfulness of processing

1. Member States shall provide for processing to be lawful only if and to the extent that processing is necessary for the performance of a task carried out by a competent authority for the purposes set out in Article 1(1) and that it is based on Union or Member State law.

2. *Member State law regulating processing within the scope of this Directive shall specify at least the objectives of processing, the personal data to be processed and the purposes of the processing.* **[Or. 6]**

II.

6. The applicant opposes a red notice filed at the International Criminal Police Organisation — Interpol — by a state outside of the European Union. Under Article 82 of Interpol's Data Processing Rules, the objective of a red notice is locating and detaining a person for the purpose of extradition. The arrest request is based on allegations of bribery against the applicant. It is precisely because of those allegations of bribery that the Public Prosecutor's Office of Munich I conducted investigation proceedings which were ultimately discontinued against fulfilment of a monetary obligation pursuant to the first sentence of Paragraph 153a(1) of the Strafprozessordnung (Code of Criminal Procedure; StPO) (on the question of whether the public prosecutor's office is an independent body, see Court of Justice, judgment of 27 May 2019, C-509/18, ECLI:EU:C:2019:457; on the question of the independence of the court, see Case C-272/19). The prohibition of double jeopardy barring further prosecution would therefore apply, as the public prosecutor's office of a Member State, without the involvement of a court, discontinued criminal proceedings initiated in that Member State once the accused fulfilled certain obligations and, in particular, paid a certain sum of money determined by the public prosecutor's office (Court of Justice, judgment of 11 February 2003 — Joined Cases C-187/01 and C-385/01, *Hüseyin Gözütok* [C-187/01] and *Klaus Brügge* [C-385/01], also see Court of Justice, judgment of 29 June 2016 — C-486/14).

7. The red notice of a State outside of the European Union has the objective of apprehending the applicant by arrest warrant via Interpol in all the current 190 Member States and therefore also all the EU Member States and all Schengen Contracting States. In 2013 the Federal Republic of Germany had an 'addendum' inserted by Interpol, according to which the National Central Bureau — the Bundeskriminalamt (Federal Criminal Police Office) — proceeded on the basis of the application of the prohibition of double jeopardy to the facts underlying the alert. The red notice that is still valid has the effect that the applicant is unable to reside in any of the EU Member States and the Schengen area without running the risk of being wrongly arrested, as — despite the reference to the 'ne bis in idem' principle — all the States have obviously placed him on the wanted lists because of the red notice. **[Or. 7]**

8. The defendant has indeed stated that the applicant is not to appear in the Schengen Information System (SIS). However, the applicant is, according to his own searches, listed in the national databases of the Member States of the European Union and the Schengen States.

9. Under Article 8(1) of Directive (EU) 2016/680, processing of personal data — in this case the red notice — is lawful only if and to the extent that processing is

necessary for the performance of a task within the meaning set out in Article 1(1) of Directive (EU) 2016/680 and that it is based on Union law or Member State law.

10. Therefore, Article 54 of the CISA in conjunction with Article 50 of the Charter must apply even without an entry in the SIS. According to the settled case-law of the Court of Justice, the

11. 'ne bis in idem *principle in Article 54 of the CISA is intended, on the one hand, to ensure, in the area of freedom, security and justice, that a person whose trial has been finally disposed of is not prosecuted in several Contracting States for the same acts on account of his having exercised his right to freedom of movement, the aim being to ensure legal certainty — in the absence of harmonisation or approximation of the criminal laws of the Member States — through respect for decisions of public bodies which have become final*'

(Court of Justice, judgment of 28 September 2006, C-150/05 (*Van Straaten*), [*Translator's note: this should read 'judgment of 29 June 2016, Kossowski, C-486/14, EU:C:2016:483'*] paragraph 44; also see Court of Justice, judgment of 27 May 2014, C-129/14 PPU (*Spasic*), paragraph 63; Court of Justice, judgment of 28 September 2006, C-150/05 (*Van Straaten*), paragraphs 45 and 46; Court of Justice, judgment of 9 March 2006, C-436/04 (*Van Esbroeck*), paragraph 33; Court of Justice, judgment of 10 March 2005, C-469/03 (*Miraglia*), paragraph 32).

12. Article 54 of the CISA is a core legal consequence of the principle that the Contracting States have mutual trust in their criminal justice systems. This also and particularly applies if the various criminal laws of the Contracting States attach different legal consequences to the act (Court of Justice, judgment of 28 September 2006, C-150/05 (*Van Straaten*), paragraph 44; Court of Justice, judgment of 28 September 2016, C-467/04 (*Gasparini*), paragraph 30; Court of Justice, judgment of 9 March 2006, C-436/04 (*Van Esbroeck*), paragraph 31).

13. The restriction of the application of Article 54 of the CISA to criminal offences listed in the SIS would be incompatible with those objectives. The area of freedom, security and justice, the protection of the data subject and the principle that the **[Or. 8]** Contracting States have mutual trust in their respective criminal justice systems must also claim validity in the case of criminal offences not listed in the SIS.

14. In its decision of 6 September 2016, C-182/15 (*Aleksei Petruhhin* v *Latvijas Republikas Generalprokuratura*, ECLI:EU:C:2016:630), the Court of Justice stated that, even in the relationship between a Member State and a third State with regard to extraditions, EU law in the form of Article 21 TFEU applies (paragraph 30 of the judgment). Nothing different can apply in the relationship between a Member State and a third state if an International Organisation such as Interpol acts as an intermediary and passes on arrest requests and other law

enforcement enquiries. Risks arising in respect of the freedom of movement of Union citizens as a result of the fact that residence in a Member State other than their home Member State is made impossible with the risk of unlawful extradition due to an unlawful accusation in a third State that is in breach of the prohibition of double jeopardy and therefore contrary to EU law can only be countered through such a broad interpretation of the scope of Article 21(1) TFEU. Furthermore, the protection, existing on the basis of the decision of the Court of Justice of 6 September 2016, C-182/15 (*Aleksei Petruhhin* v *Latvijas Republikas Generalprokuratura*, ECLI:EU:C:2016:630), against unlawful extradition by affording the Member State of which the person concerned by the red notice is a national the opportunity to issue a European arrest warrant (paragraph 48 of the judgment) cannot have any effect here, because the prohibition of double jeopardy precisely precludes the issuing of a European arrest warrant.

15. The rights of the Charter of Fundamental Rights, in this case Article 50, are also to be safeguarded because the Member States, when examining arrest requests, as outlined, have to apply Article 21(1) TFEU and, therefore, EU law (cf. judgment of the Court of Justice of 6 September 2016, C-182/15 (*Aleksei Petruhhin* v *Latvijas Republikas Generalprokuratura*), ECLI:EU:C:2016:630, paragraph 52).

16. Article 54 of the CISA in conjunction with Article 50 of the Charter expressly contains not only the prohibition of further punishment, but also the prohibition of further **[Or. 9]** prosecution in all the Schengen Contracting States. According to the case-law of the Court of Justice, there is also a final conviction within the meaning of those provisions where proceedings are discontinued under the first sentence of Paragraph 153a(1) of the StPO once the obligations ordered have been fulfilled (Court of Justice, judgment of 11 February 2003, Joined Cases C-187/01 and C-385/01, *Hüseyin Gözütok* [C-187/01] and *Klaus Brügge* [C-385/01], paragraph 27 et seq.).

17. In accordance with Article 8(1) of Directive (EU) 2016/680, processing is lawful only if it is based on Union law. Furthermore, Directive (EU) 2016/680, according to recital 2 and recital 93 of Directive (EU) 2016/680, is intended to protect the ‘fundamental rights and freedoms’ of natural persons. According to recital 25 of Directive (EU) 2016/680, the ‘fundamental rights and freedoms’ are expressly also to be respected in exchanges with Interpol. Article 54 of the CISA and Article 50 of the Charter constitute Union law and Article 50 of the Charter concerns a fundamental right enshrined in Union law. Under the first sentence of Article 51(1) of the Charter, the Charter is admittedly addressed to Member States only when they are implementing Union law. However, the Member States also apply Union law in this sense when transposing directives (Court of Justice, judgment of 5 April 2017, C-217/15 and C-350/15 (*Baldetti*), paragraph 16; Court of Justice, Grand Chamber, judgment of 26 February 2013, C-617/10 (*Åkerberg Fransson*), paragraph 25).

18. Therefore, processing within the meaning of Article 8(1) of Directive (EU) 2016/680 can be lawful only if it is compatible with Article 54 of the CISA and Article 50 of the Charter as well as Article 21 TFEU.

19. Transferring the arrest and extradition request in the form of the red notice constitutes processing of personal data within the meaning of Directive (EU) 2016/680.

20. Under Article 2(1) in conjunction with Article 1(1) of Directive (EU) 2016/680, the directive applies to the processing of personal data 'for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security'. **[Or. 10]**

21. Under Article 3(1) of Directive (EU) 2016/680, personal data in this sense means any information relating to an identifiable natural person. Under Article 3[(2)] of Directive (EU) 2016/680, processing in this sense means any operation 'which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction'.

22. Those conditions are satisfied in the present case. The transfer of the data contained in the red notice into national search systems is aimed at the prosecution of criminal offences or the execution of criminal penalties, albeit for a third State. It involves information relating to an identifiable natural person. The transfer operation constitutes storage. There is also use of personal data, as these serve as a basis of investigation in the national search system with the aim of arrest and possible surrender to the third state.

23. However, if processing is lawful only if it is compatible with Article 54 of the CISA and Article 50 of the Charter as well as Article 21(1) TFEU, the search requests would have to be erased in the Member States. In this respect, Article 7(3) of Directive (EU) 2016/680 stipulates that if it emerges that incorrect personal data have been transmitted or personal data have been unlawfully transmitted, the recipient is to be notified without delay. In such a case, the personal data must be rectified or erased or processing restricted in accordance with Article 16 of Directive (EU) 2016/680. This does not, however, take place.

24. This is because Interpol does not erase the data. All Member States are indeed affiliated to the International Criminal Police Organisation (Interpol). To fulfil its mission, Interpol receives, stores and circulates personal data to assist the competent authorities in preventing and combating international crime. 'It is therefore appropriate to strengthen cooperation between the Union and Interpol by promoting an **[Or. 11]** efficient exchange of personal data whilst ensuring respect for fundamental rights and freedoms regarding the automatic processing of

personal data. Where personal data are transferred from the Union to Interpol, and to countries which have delegated members to Interpol, this Directive, in particular the provisions on international transfers, should apply. This Directive should be without prejudice to the specific rules laid down in Council Common Position 2005/69/JHA and Council Decision 2007/533/JHA' (recital 25 of Directive (EU) 2016/680).

25. Implementation of Article 40 of Directive (EU) 2016/680 (International cooperation for the protection of personal data) is not apparent, nor even any intent of the Federal Government to do so, having regard to corresponding comments by the defendant. According thereto, in relation to an International Organisation such as Interpol, appropriate steps would have to be taken to:

    (a) develop international cooperation mechanisms to facilitate the effective enforcement of legislation for the protection of personal data;

    (b) provide international mutual assistance in the enforcement of legislation for the protection of personal data, including through notification, complaint referral, investigative assistance and information exchange, subject to appropriate safeguards for the protection of personal data and other fundamental rights and freedoms;

    (c) engage relevant stakeholders in discussion and activities aimed at furthering international cooperation in the enforcement of legislation for the protection of personal data;

    (d) promote the exchange and documentation of personal data protection legislation and practice, including on jurisdictional conflicts with third countries. **[Or. 12]**

26. Nothing is known in this respect.

27. Article 36 of Directive (EU) 2016/680 and Article 37 of Directive (EU) 2016/680 only regulate the case of data transmission to Interpol. ***The reverse case of data transmission from Interpol to the Member States*** is not regulated in Directive (EU) 2016/680. Directive (EU) 2016/680 therefore contains a lacuna which needs to be closed. If Interpol, despite the prohibition of double jeopardy, does not refrain from transmitting the data of the red notice to all the Member States and does not ensure that the data is erased without delay, the referring court has considerable doubts regarding the reliability under data protection law of the International Organisation 'Interpol'. This unreliability ultimately leads to the question of whether, due to the lack of appropriate safeguards at Interpol, the Member States should not refrain entirely in this respect from cooperating with Interpol, as this is the only way of safeguarding freedom of movement within the context of European Union. This is because only in this way can the Union quite clearly constitute the area of freedom and ensure the freedom of movement of the individual (cf. Article 67 TFEU). As there is quite clearly no coordination of red notices within the EU and in the absence of a uniform regulatory framework, the

freedom of the citizens of the Member States can only be ensured through withdrawal from Interpol.

28. The statements in recital 64 of Directive (EU) 2016/680 that where personal data are transferred from the Union to controllers or to other recipients in third countries or international organisations, the level of protection of natural persons provided for in the Union by the directive should not be undermined (also see Article 35(3) of Directive (EU) 2016/680), including in cases of onward transfers of personal data from the third country or international organisation to controllers in the same or in another third country or international organisation, must also apply to the personal data transferred from a third country or an international organisation — in this case Interpol — to the Member States of the European Union. Otherwise, ***the level of protection provided for by Directive (EU) 2016/680 is precisely not guaranteed***. **[Or. 13]**

29. Corresponding coordination would also be possible to the extent that a Member State reaches an agreement with the remaining Member States on the handling of such a red notice in a verbal note, which, however, is precisely not the intent of the defendant [...] in the present case.

30. Otherwise, it would have to be ensured that the Member States are only allowed [to further process] data [filed] at the International Criminal Police Organisation — Interpol — in a red notice by States which are not a Contracting State of the CISA if a non-Member State of the EU has used the red notice to disseminate an arrest and extradition request and has applied for the arrest and this is not in breach of European law.

31. The outcome of the dispute depends on the questions referred. This is because, if the double jeopardy principle applies and the further alert by a third State via a red notice were unlawful in the Member States, none of the Member States would be allowed to process the red notice and the applicant's freedom of movement within the European Union and the Schengen area would be ensured. Whether this takes place through withdrawal from Interpol for all the Member States or through corresponding further development of Directive (EU) 2016/680 by the Court of Justice would be a question of the further formulation of the ruling in this respect.

III.

32. The dispute has the necessary urgency (cf. Article 107(2) of the Rules of Procedure of the Court of Justice).

33. The urgency results in particular from the age of the applicant. The applicant was born on 17 November 1937 and is 80 years old. The applicant is practically unable to leave German territory until a ruling has been given on the dispute. German and United States criminal prosecution authorities have been investigating the applicant since 2008. The applicant cannot reasonably be expected to endure proceedings lasting months or years, **[Or. 14]** even though it has only now been possible to make the referral due to chronic overloading of the Court.

IV.

34. [...]

[...]