Court of Justice of the European Union
PRESS RELEASE No 143/20
Luxembourg, 19 November 2020

Press and Information

Advocate General's Opinion in Case C-505/19
WS v Bundesrepublik Deutschland

Advocate General Bobek: The prohibition of double jeopardy applicable to the Schengen area may also bar extradition to a third State

This prohibition, if applicable, does not only bar any subsequent prosecution in other Member States, but also precludes the temporary detention in the other Member States, on the basis of a red notice issued by Interpol, in view of potential future extradition to a third State

A German citizen and resident brought an action before a German court [1] requesting that Germany be ordered to take the necessary measures to remove a red notice [2] issued by Interpol with a view to locating him, arresting him or restricting his movements for extradition purposes. The red notice was based on an arrest warrant issued by the United States' authorities for charges of corruption, money laundering and fraud.

The citizen concerned asserted that he could not travel to any Schengen-State without risking arrest. Indeed, because of the red notice, those States had placed him on their lists of wanted persons. He argued that this situation was contrary to the prohibition of double jeopardy (*ne bis in idem* principle, which prohibits a duplication both of proceedings and of penalties of a criminal nature) as a German public prosecutor's office had already initiated an investigation procedure against him concerning the same acts. Those proceedings were definitely discontinued after he paid a certain sum of money. He also maintained that the further processing, by the Member States' authorities, of his personal data contained in the red notice was contrary to Union law.

Against that background [3], the German Court asks the Court of justice whether EU law precludes Member States, when a red notice is issued by Interpol upon request by a third State and that notice relates to acts for which the *ne bis in idem* principle may be applicable, from (i) implementing that notice by restricting the wanted person's freedom of movement, and (ii) further processing his or her personal data contained in the notice.

In today's Opinion, Advocate General Michal Bobek proposes, in the first place, that the *ne bis in idem* principle, as applicable to the Schengen area [4] and elevated to a fundamental right by the Charter of Fundamental Rights of the European Union [5], together with the right of EU citizens to free movement [6], **preclude the Member States from implementing a red notice issued by Interpol at a request of a third State**, and thereby restrict the freedom of movement of a person, **provided that there has been a final determination adopted by the competent authority of a Member State as to the actual application of the *ne bis in idem* principle in relation to the specific charges for which that notice was issued**.

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[1] The Verwaltungsgericht Wiesbaden (Administrative Court, Wiesbaden, Germany).
[2] Red notices are issued for persons wanted either for prosecution or to serve a sentence. They are, in essence, requests to law enforcement authorities worldwide to locate and, where possible, provisionally restrict the movements of wanted persons pending a request for their extradition (which must be formulated separately).
[3] The red notice in question was meanwhile deleted by Interpol. The citizen concerned is now asking the German court to order Germany to take all the necessary measures to prevent a new red notice concerning the same acts from being issued by Interpol.
[4] 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 ('the CISA') (OJ 2000 L 239, p. 19).
[5] See Article 50.
[6] Article 21 TFEU.

The Advocate General first points out that a decision by which a public prosecutor definitively discontinues criminal proceedings with the agreement of the competent court, having for effect that once the accused has satisfied certain conditions, any further prosecution is precluded under national law, enters the scope of the application of the *ne bis in idem* principle as applicable to the Schengen area.

He then states that **the *ne bis in idem* principle, if applicable, does not only bar any subsequent prosecution in other Member States, but also precludes the temporary detention in the other Member States in view of potential future extradition to a third State**. Indeed, one legal space means one legal space, internally as well as externally: Persons who, when prosecuted, have their cases finally disposed of have to be left undisturbed. They must be able to move freely without having to fear a fresh prosecution for the same acts *in*, and not only *by*, another Schengen State. A person that is subject to arrest or temporary detention, in view of his or her extradition, despite being entitled to benefit from the *ne bis in idem* principle, is not left undisturbed or able to move freely within the Union.

With respect to the present case, the Advocate General notes, however, that the question of whether the two proceedings at issue do concern the same act has, apparently, not (yet) been determined, let alone finally determined, by the competent authorities of either Germany or any other EU Member State. Consequently, at least for the time being, there is no decision that other Member States, in the light of the principle of mutual trust, could and should recognise and accept as equivalent their own decisions. In those circumstances, it seems to him that nothing prevents the Member States other than Germany from implementing a red notice issued by Interpol against the German citizen in question. Mere concerns expressed by a Member State's police authorities that *ne bis in idem* could be applicable cannot be equated to a final determination that that principle is indeed applicable.

As regards the data protection issue, Advocate General Bobek proposes that Union law [7] does not preclude the further processing of personal data contained in a red notice issued by Interpol, even if the *ne bis in idem* principle were to apply to charges for which the notice was issued, provided that the processing is effected in accordance with the applicable data protection rules.

The fact that an individual may benefit from the *ne bis in idem* principle in relation to the charges for which a red notice was issued does not mean that the data contained in that notice were unlawfully transmitted. *Ne bis in idem* cannot call into question the veracity and accuracy of data such as, for example, the personal information, the fact that that person is wanted in a third State for having been accused or found guilty of certain crimes, and that an arrest warrant has been issued against him or her in that State. Nor was the initial transmission of that data unlawful. Therefore, the application of the *ne bis in idem* principle does not entail, for the person concerned, the right to request that his personal data be erased.

Further processing of personal data is not only lawful but, in the light of the purpose of the processing, even required. Thus, a consultation, adaptation, disclosure or dissemination may, especially in the interest of the person against whom the red notice was issued, be required to avoid a situation in which that person is wrongly subject to criminal measures in Member States or, if such measures have been adopted, to ensure a rapid lifting of those measures.

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are

[7] 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 Council Framework Decision 2008/977/JHA (OJ 2016 L 119, p. 89), read in conjunction with Article 54 of the CISA and Article 50 of the Charter. (8, 139)

responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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