

Case C-435/22 PPU

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

1 July 2022

Referring court:

Oberlandesgericht München (Germany)

Date of the decision to refer:

21 June 2022

Parties to the proceedings:

Generalstaatsanwaltschaft München (Germany)

HF

Subject matter of the main proceedings

Convention implementing the Schengen Agreement – Interpol – Red notice – Arrest of a third-country national in a Member State on the basis of a red notice – Extradition request from the third country which requested the red notice – Conviction already handed down for the offences in question in another Member State – *Ne bis in idem* – Extradition agreement between the Member State in which the arrest took place and the third country which made the extradition request

Subject matter and legal basis of the request

Interpretation of EU law, Article 267(1) [TFEU]

Question referred for a preliminary ruling

Must Article 54 of the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, signed on 19 June 1990 in Schengen,

read in conjunction with Article 50 of the Charter of Fundamental Rights of the European Union, be interpreted as meaning that those provisions preclude the extradition of a third-country national who is not an EU citizen in terms of Article 20 of the TFEU by the authorities of a contracting state to that Convention and an EU Member State to a third country if final judgment has been passed against the person concerned by another Member State of the European Union for the same offences to which the extradition request relates and that judgment has been enforced and where the decision to refuse to extradite that person to the third country would be possible only at the cost of breaching a bilateral extradition treaty that exists with that third country?

Provisions of European Union law relied on

Article 54 of the Convention implementing the Schengen Agreement of 14 June 1985 ('the CISA')

Article 50 of the Charter of Fundamental Rights of the European Union ('the Charter')

Provisions of national law relied on

Extradition Treaty between the Federal Republic of Germany and the United States of America of 20 June 1978 ('the Germany-US Treaty') in conjunction with the Supplementary Treaty of 21 October 1986 ('the ST 1') and the second Supplementary Treaty of 18 April 2006 ('the ST 2')

Article 8 of the Germany-US Treaty reads as follows:

'Extradition shall not be granted when the person whose extradition is requested has been tried and discharged or punished with final and binding effect by the competent authorities of the Requested State for the offence for which his extradition is requested.'

Succinct presentation of the facts and procedure in the main proceedings

- 1 HF was provisionally arrested in Germany on 20 January 2022 and has been held in custody since then. This arrest was made on the basis of a red notice issued by Interpol and requested by the United States of America because HF is alleged to have committed various offences (conspiracy to participate in racketeer influenced corrupt organisations and conspiracy to commit bank fraud and fraud by means of telecommunication under Title 18, US Code, Section 1962 [d] and Title 18, US Code, Section 1349) during the period between September 2008 and December 2013.
- 2 By letter dated 25 January 2022, the US authorities submitted the arrest warrant issued by the Federal District Court for the District of Columbia on 4 December

2018 in connection with the indictment issued by the Grand Jury in the Federal Court for the District of Columbia on 4 December 2018. On 17 March 2022, the US authorities submitted the extradition documents.

- 3 At the request of the referring court and the Munich Prosecutor-General's Office, the Slovenian authorities provided the following information:

HF was sentenced to 1 year and 3 months in prison by the judgment of the District Court of Maribor (Slovenia) of 6 July 2012, final and binding since 19 October 2012, for the offence of 'Attack on information systems' pursuant to Article 221(IV) in conjunction with paragraph (II) KZ-1 of the Slovenian Criminal Code, committed during the period between December 2009 and June 2010; the prison sentence handed down was replaced by 480 hours of community service. HF completed the community service by 25 June 2015.

By order of 23 September 2020, the District Court of Koper (Slovenia) rejected a request for the extradition of the requested person for the purposes of criminal prosecution in the United States of America as the judgment of the District Court of Maribor had constituted a final and binding judgment with regard to the facts presented in the extradition request until June 2010. With regard to the other facts post June 2010 set out in the extradition request, the District Court held that there was no suspicion that a criminal offence had been committed. This judgment was confirmed by the ruling of the High Court of Koper (Slovenia) of 8 October 2020 and is final and binding.

- 4 The extradition request of the United States of America addressed to the Slovenian authorities and the facts communicated therein, on which the District Court and the High Court of Koper had to rule, and the documents available to the referring court based on the extradition request of the United States of America addressed to the Federal Republic of Germany, concern the same facts. Furthermore, the facts on which the District Court of Maribor had to rule are identical to the facts of the extradition request addressed to the Federal Republic of Germany with regard to offences committed up to June 2010.
- 5 HF is a Serbian and Kosovan national. At the time of his arrest in Germany, he said his place of residence was in Slovenia and he was carrying a valid Serbian passport, a Slovenian residence permit issued on 3 November 2017 and that expired on 3 November 2019, and a Kosovan ID card. In 2020, his application to renew his Slovenian residence permit had been rejected by the Slovenian authorities.

Succinct presentation of the reasoning in the request for a preliminary ruling

- 6 The decision on the admissibility of HF's extradition to the United States of America in respect of the offences he was charged with until June 2010 in the

arrest warrant issued by the Federal District Court for the District of Columbia on 4 December 2018 in connection with the indictment of the Grand Jury in the Federal Court for the District of Columbia on 4 December 2018 depends on the question referred.

- 7 This question was not answered by the Court of Justice in the judgment of 12 May 2021, *Bundesrepublik Deutschland (Interpol red notice)* (C-505/19, EU:C:2021:376) because the present proceedings differ as follows: HF is not an EU citizen and the case does not concern a provisional arrest on the basis of an Interpol search, but a formal extradition request sent by the United States of America to the Federal Republic of Germany after HF was arrested in Germany on the basis of an Interpol red notice.
- 8 According to the bilateral agreements between the Federal Republic of Germany and the United States of America, the legal situation is as follows: the extradition of HF is based on the Germany-US Treaty in conjunction with ST 1 and ST 2. The United States of America have submitted the documents required pursuant to Article 14 of the Germany-US Treaty.
- 9 According to Article 2(1)(a) of the Germany-US Treaty in conjunction with Article 1(a) ST 1, offences are extraditable if they are punishable under the law of both states. The criminal liability under US law of the conduct with which HF is charged arises specifically from the US federal statutes submitted, namely Title 18 Sections 1344, 1349 1963(a), 1962, 1349. The conduct of which HF is accused is also punishable under German law pursuant to Paragraphs 129, 303b, 202c of the Strafgesetzbuch (German Criminal Code; ‘the StGB’).
- 10 The offence is extraditable pursuant to Article 2(2) of the Germany-US Treaty. Under US law, the offences carry a prison sentence of 20 years and 30 years, respectively, and under German law they carry a prison sentence of between 2 and 10 years.
- 11 There are also no impediments to extradition that may make it inadmissible. In particular, the fact that HF has already been convicted by final and binding judgment of the District Court of Maribor (Slovenia) on 6 July 2012 for part of the offences, namely the offences committed in the period up to June 2010 which are the subject of the present extradition request, and that the sentence imposed has already been enforced, does not – without taking into account the questions referred – constitute an impediment to extradition pursuant to Article 8 of the Germany-US Treaty.
- 12 According to the unambiguous wording, the principle *ne bis in idem* only precludes an extradition if the requested person has been convicted with final and binding effect by the competent authorities of the requested state, in this case the Federal Republic of Germany.
- 13 Due to this specific rule under international law, an interpretation that this provision also covers convictions in other EU Member States is not possible.

Moreover, the Federal Republic of Germany and the United States of America agreed during the negotiations on the bilateral treaty of 1978 that judgments handed down in third countries do not prevent an extradition.

- 14 The fact that Article 8 of the Germany-US Treaty cannot be interpreted in that way is also reflected in that ST 2, which adapted the bilateral Germany-US Treaty to the Extradition Convention between the EU and the United States of America of 25 June 2003, which functions as a framework treaty, does not contain a separate provision to extend the prohibition of double jeopardy to all EU Member States and that Article 8 of the Germany-US Treaty was not amended.
- 15 Furthermore, according to the case-law of the Federal Constitutional Court (Germany), there is still no general rule of customary international law and thus no minimum standard under international law in the field of human rights that has the same quality as mandatory international law and according to which the principle of the prohibition of double jeopardy must also be observed with regard to convictions in third countries.
- 16 It is uncertain, however, whether Article 50 of the Charter in conjunction with Article 54 of the CISA prohibit the Federal Republic of Germany from extraditing HF to the United States of America with regard to the offences that were ruled on by the District Court of Maribor (Slovenia), namely with regard to the offences of the present extradition request that were committed up to and including June 2010.
- 17 The conditions of Article 50 of the Charter in conjunction with Article 54 of the CISA have been met. These provisions are not linked to EU citizenship or citizenship of a Member State.
- 18 According to the case-law of the Court of Justice, a provisional arrest of a person who is the subject of a red notice issued by Interpol at the request of a third country constitutes a prosecution within the meaning of Article 50 of the Charter in conjunction with Article 54 of the CISA (see judgment of 12 May 2021, *Bundesrepublik Deutschland (Interpol red notice)*, C-505/19, EU:C:2021:376). Similarly, a decision on the admissibility of the extradition, whose implementation leads to the extradition of the requested person to the third country for prosecution, must be regarded as a prosecution within the meaning of Article 50 of the Charter in conjunction with Article 54 of the CISA.
- 19 The decision on the admissibility of the extradition of a third-country national arrested in a Member State to the United States of America also involves the implementation of Union law as required by Article 51 of the Charter. This is because it involves the Agreement on extradition between the European Union and the United States of America of 25 June 2003 (OJ 2003 L 181, p. 27; ‘the EU-US Agreement’). This was transposed into German law by ST 2, and the fundamental rights of the Charter must therefore be taken into account when applying the law.

- 20 In addition, at the time of his arrest, HF had the right to freedom of movement pursuant to Article 20(1) of the CISA in conjunction with Article 6(1)(b) of Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ 2016 L 77, p. 1) and Article 4(1) of Regulation (EU) 2018/1806 of the European Parliament and of the Council of 14 November 2018 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (OJ 2018 L 303 p. 39), as he was exempt from the visa requirement as a Serbian national. The fundamental rights laid down in the Charter must also be taken into account in the application of Article 20 of the CISA in conjunction with the abovementioned regulations.
- 21 The question arises whether the fulfilment of the requirements of Article 50 of the Charter in conjunction with Article 54 of the CISA means that a third-country national may not be extradited to the United States of America, which is neither a contracting state to the CISA nor an EU Member State.
- 22 In its judgment of 12 May 2021, *Bundesrepublik Deutschland (Interpol red notice)* (C-505/19, EU:C:2021:376), the Court of Justice held that Article 54 of the CISA and Article 21(1) of the TFEU, in each case in conjunction with Article 50 of the Charter, must be interpreted as not precluding the provisional arrest, by the authorities of a State that is a party to the CISA, of a person in respect of whom Interpol has published a red notice, at the request of a third State, unless it is established, in a final judicial decision taken in a State that is a party to that agreement or in a Member State, that the trial of that person in respect of the same acts as those on which that red notice is based has already been finally disposed of by a State that is a party to that agreement or by a Member State respectively (see paragraph 122).
- 23 However, in the reasons for its decision, the Court of Justice always referred to the right to freedom of movement as defined by Article 21 of the TFEU of the person affected by the red notice in the proceedings in question, i.e. a German national. As a Serbian national, HF does not enjoy the right to freedom of movement under Article 21(1) of the TFEU as he is not an EU citizen.
- 24 He does, however, enjoy the right to freedom of movement under Article 20 of the CISA. As a preliminary and incidental question, it must therefore be examined whether the principles established by the Court of Justice in its judgment of 12 May 2021, *Bundesrepublik Deutschland (Interpol red notice)* (C-505/19, EU:C:2021:376), with regard to the right to freedom of movement within the meaning of Article 21 of the TFEU, also apply to the right to freedom of movement within the meaning of Article 20(1) of the CISA.
- 25 Furthermore, the subject of the abovementioned decision was a request for provisional arrest on the basis of a red notice issued by Interpol. In this case,

however, a formal extradition request was made after the person concerned was arrested in a Member State on the basis of a red notice issued by Interpol.

- 26 In the view of the referring court, the answer to the question referred for a preliminary ruling must be that Article 54 of the CISA in conjunction with Article 50 of the Charter does not preclude the extradition of HF to the United States of America in the present case since the obligation of the Federal Republic of Germany under international law vis-à-vis the United States of America to extradite the requested person must be complied with.
- 27 It is true that Article 351(1) of the TFEU does not apply directly since the Germany-US Treaty only entered into force on 30 July 1980 pursuant to Article 34(2) of the Germany-US Treaty and was thus entered into between the Federal Republic of Germany and the United States of America after 1 January 1958.
- 28 However, the referring court shares the view expressed by legal scholars that Article 351(1) of the TFEU applies to agreements which, although entered into by a Member State after 1 January 1958, concern a subject matter that fell within the EU domain only later once the EU responsibilities were increased, and the shift in responsibility could not have been objectively foreseen by the Member State when the agreement was entered into. It would appear that the Court of Justice has not handed down a ruling on that question.
- 29 The Schengen Agreement entered into force on 14 June 1985 and the CISA on 19 September 1990 and thus well after 30 July 1980. The Schengen Agreement was not incorporated into EU law until the Treaty of Amsterdam in 1997 and thus also only after 30 July 1980. This means that it was not foreseeable for the Federal Republic of Germany in 1978 and 1980 that the questions of a European-wide *ne bis in idem* principle and police and judicial cooperation in the area of criminal law would fall within the EU domain.
- 30 The later amendments in ST 1 do not change this fact. On the one hand, ST 1 does not constitute a fundamental renegotiation of the Germany-US Treaty and, on the other, ST 1 already entered into force on 11 March 1993 and thus also at a time when it was not yet foreseeable that such areas of law would fall within the EU domain.
- 31 With ST 2, the Federal Republic of Germany only transposed the EU-US Agreement. Again, this did not include a specific provision regarding the prohibition of double jeopardy which applies across Europe. Pursuant to Article 17(1) of the EU-US Agreement, further grounds for refusal provided for in the bilateral extradition treaties may be invoked if the EU-US Agreement does not provide for this. However, the Germany-US Agreement does not contain any additional grounds for refusal but rather provides for an obligation to extradite.
- 32 Since the EU-US Agreement does not contain a provision that corresponds to Article 50 of the Charter in conjunction with Article 54 of the CISA, it must in

turn be concluded that a bilateral extradition treaty such as the Germany-US Agreement, which only provides for a national prohibition of double jeopardy, must continue to be complied with.

- 33 The referring court asks the Court of Justice to rule on the reference for a preliminary ruling in an urgent procedure under Article 107 of the Rules of Procedure of the Court of Justice, as HF is currently in custody (Article 267(4) TFEU) and the question referred concerns issues relating to Part Three of the TFEU.

WORKING DOCUMENT