

AG: Union Ne bis in idem Rules Shelter Union Citizens from Extraditions to Third Countries

Thomas Wahl

Advocate General *Bobek* concludes in his [Opinion in Case C-505/19 of 19 November 2020](#) that the fundamental principle of ne bis in idem, in conjunction with the right to free movement, precludes Member States from implementing a red notice issued by Interpol at the request of a third country and from restricting the freedom of movement of a citizen of the Union under Art. 21 TFEU. In the AG's view, the prohibition of double jeopardy enshrined in Art. 50 of the Charter of Fundamental Rights, once a final decision has been issued by a competent authority, precludes any further criminal prosecution by the Member States of the Convention Implementing the Schengen Agreement (CISA). Temporary arrest in another member state for the purpose of possible future extradition is also excluded.

The AG adds however, that the judicial authorities of the Member State concerned must have adopted a final decision that the ne bis in idem principle in relation to the specific charges in the red notice applies. Mere concerns on the applicability of the ne bis in idem rule voiced by police authorities do not suffice. If there are indications that the ne bis in idem principle is applicable, Member States should apply the procedure foreseen in Art. 57 CISA.

In the present case, a German national has brought an action against the *Bundeskriminalamt* (Federal Criminal Police Office) on the ground that he considers that a request for a search warrant issued by the United States, which has been distributed via the Interpol system to all States affiliated to Interpol, infringes the Union-wide prohibition of double jeopardy. For details of the case and the questions referred to -> [eucrim 2/2019, 106-107](#).

In the first place, the AG repeats the settled CJEU case law: a decision by which a public prosecutor definitively discontinues criminal proceedings, having for effect that once the accused has satisfied certain conditions, any further prosecution is precluded under the national law (here: Germany), meets the requirement of "finally disposed of" enshrined in Art. 54 CISA/Art. 50 CFR. In the second place, he finds that the objective pursued by Art. 54 CISA, i.e. to move freely within one single legal space, must also have consequences on potential extraditions. He mainly argues:

- One legal space means one legal space, internally as well as externally;
- The rationale of Art. 54 CISA given by the CJEU also applies in the present case: persons who, when prosecuted, have their cases finally disposed of have to be left undisturbed. They must be able to

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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.

The AG discards a variety of counter-arguments, e.g. that the present case does not relate to the concept of “prosecution”, but rather to “precautionary measures”; the solution found would amount to an “extra-Schengen” application; and expansion of the scope of Art. 54 CISA would create an ad hoc refusal ground in extradition law that is not foreseen in bilateral international extradition treaties.

As regards the second set of questions put forward by the referring Administrative Court of Wiesbaden, the AG concludes that further processing of the person’s data contained in a red notice is not precluded by Union law. It does, in principle, not matter that the *ne bis in idem* principle were to apply to the charges in the red notice. In sum, 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.

Lastly, the AG proposes the CJEU not answering the question which doubts the adequacy of Interpol’s data protection, because the question would have no bearing on the specific situation of the applicant.

Put in focus

The AG’s opinion must be seen in a much wider context. It answers the general question whether the union-wide transnational *ne bis in idem* guarantee – not to be prosecuted twice for the same act (Art. 54 CISA, Art. 50 CFR) – has extraterritorial effects. The former prevailing opinion was that Art. 54 has only “intra-Community effects”, but leaves the relationship between EU Member States and third States, such as the US, untouched. This assumption was in fact shaken by the CJEU’s judgment in *Petruhhin*, which found that the right to free movement in Art. 21 TFEU has also effects to extraditions of Union citizens to countries outside the bloc (→ [eucrim 3/2016, p. 131](#)). In this context, AG *Bobek* emphasises that the *Petruhhin* logic does not only apply if a Union citizen has made use of his freedom, but also if he/she is actually and genuinely *seeking* to make use of it (as in the present case).

The AG’s opinion is generally in line with the recent decision of the Higher Regional Court of Frankfurt a.M. which denied extradition of a Union citizen to the US who had already been tried for the offence as referred to in the extradition request by the Italian authorities (→ [eucrim 2/2020, 110](#)). Relying on the concept in *Petruhhin*, the court in Frankfurt ruled that prosecution of an EU citizen in his home (EU) country must take precedence over prosecutions in third countries. The AG shares this view when he argues: “Once that decision [first decision on the subject matter by an EU Member State] has been taken, and if an extradition request has been refused, a Union citizen will benefit from a certain ‘protective umbrella’ within the Union, with that EU citizen being allowed to move freely within the Union without the fear of being prosecuted for the same act(s).”

However, AG *Bobek*’s opinion is somewhat contradictory to AG *Hogan*’s opinion of 24 September 2020 in Case C-398/19 (→ [related link](#)). AG *Hogan* recommends the CJEU giving up the concept established in *Petruhhin*. He, *inter alia*, raises the question how far Union law can go in order to influence international treaty obligations (in the case C-398/19: the 1957 European Convention on Extradition).

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