

Art. 54 CISA and Red Notices

German Administrative Court Casts Doubt on Reliability of Interpol



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News

Thomas Wahl

Whether the maintenance of Red Notices by Interpol is in line with a person's right to free movement within the European Union is the subject of a [reference for preliminary ruling by the Administrative Court of Wiesbaden, Germany](#), launched on 27 June 2019.

In the case at issue, a former manager of a large German company had been prosecuted for bribery acts allegedly committed between 2002 and 2007 in Argentina. While, in 2009, the public prosecutor in Munich discontinued proceedings once the defendant paid a certain sum of money determined by the prosecutor, parallel prosecutions were upheld in the USA. In particular, the U.S. prosecutor issued a Red Notice via Interpol seeking the arrest of the defendant and his surrender to the USA. In line with the CJEU's judgment in *Gözütok/Brügge* (Joined Cases C-187/01 and C-385/01), the German Federal Police Office (*Bundeskriminalamt*) informed Interpol that the defendant can no longer be prosecuted twice within the Schengen area pursuant to Art. 54 CISA, Art. 50 CFR. Interpol denied erasure of the Red Notice, however, because this can only be carried out by the USA, which is not bound by Art. 54 CISA.

The defendant sued the Federal Police Office before the administrative court of Wiesbaden, seeking erasure of the Red Notice against him in the Interpol system. He argued that the decision of the public prosecutor in Munich unequivocally triggers application of the *ne bis in idem* rule pursuant to Art. 54 CISA/Art. 50 CFR, which is why he enjoys the right to free movement within the European Union and the Schengen area. However, he cannot exercise this right as long as the Red Notice is upheld in the Interpol system, because he must fear arrest and extradition to the USA by any other EU Member State if he leaves Germany. According to the defendant, compliance with the Red Notice by other EU Member States is illegal and unduly restricts his right to free movement.

Against this background, the administrative court of Wiesbaden referred several questions to the CJEU about the lawfulness of national law enforcement authorities processing Interpol Red Notices. The CJEU should, *inter alia*, clarify whether the right to free movement prohibits the person's provisional arrest in any other EU Member State if the country of origin (here: Germany) informed the states about the application of the Union-wide ban not to be prosecuted twice.

The court also casts doubt on whether Interpol has an adequate level of data protection or, at least, provides appropriate safeguards, so that the data transfer between Interpol and the EU Member States is legally possible in accordance with Arts. 36 and 37 of the EU's data protection Directive 2016/680. In general, the

AUTHOR

Thomas Wahl

Senior Researcher
Max Planck Institute for the
Study of Crime, Security and
Law

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court questioned whether searches for arrest via Interpol can be processed by the EU Member States if they violate fundamental principles of Union law (here: free movement of person and *ne bis in idem* rule).

Put in focus: The reference is very interesting, since it tackles the more fundamental problem of the extent to which mutual recognition of Member States' judicial decisions are applied in favour of citizens ("reverse mutual recognition"). The CJEU must, however, also take into account international obligations of the EU Member States in this particular case. In addition, it must assess which legal consequences can be drawn from the fact that the US as a third state is not bound by the European *ne bis in idem* rule in Art. 54 CISA and Art. 50 CFR.

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