

# CJEU: EU's Double Jeopardy Ban also Applies to Non-EU Citizens and Blocks Extradition to Third Countries

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On 28 October 2022, the CJEU (Grand Chamber) ruled that the principle *ne bis in idem*, as enshrined in Art. 50 CFR and Art. 54 CISA, precludes the extradition, by the authorities of an EU Member State, of a third country national to a third country, if that national has been convicted by final judgment in another Member State for the same acts as those referred in the extradition request and has been subject to the sentence imposed in that State. Furthermore, this solution cannot be called into question by the fact that a bilateral treaty between the requested EU Member State and the third country limits the scope of the principle *ne bis in idem* to judgments handed down in the requested State.

## Background of the case

This judgment in [Case C-435/22 PPU \(HF / Generalstaatsanwaltschaft München\)](#) follows the landmark ruling in [Case C-505/19 \(WS v Germany\)](#), in which the CJEU ruled that EU Member State authorities can refuse (on the basis of Art. 54 CISA) to follow an Interpol red notice seeking extradition of an individual to a third country if he/she has already been finally tried in one of the EU Member/Schengen States (→ [eucrim 2/2021, 100-101](#)).

The referring Higher Regional Court of Munich, Germany (*Oberlandesgericht München*) doubted, however, whether the ruling in the *WS* case can be transferred to the case at issue. In the case before the Munich court, the defendant (*HF*) is a Serbian national who is sought by an US extradition request for bank fraud and computer sabotage. He defended his extradition from Germany to the United States by pointing out that he was already convicted for the offences at issue by a Slovenian court and he fully served the sentence. He believed that Art. 54 CISA applies and extradition is inadmissible.

By contrast, the Munich court questioned as to whether Art. 54 CISA and Art. 50 CFR can block extradition and hinted at the following differences to the *WS* case:

- *HF* is not a Union citizen;
- The proceedings concern a formal extradition request and not solely the execution of an Interpol red notice for provisional arrest;
- According to the Germany-USA Extradition Treaty, Germany is obliged to extradite because its Art. 8 only allows refusal of extradition on account of *ne bis in idem* if the respective judgment was handed down by the requested State (here: Germany) and does not cover convictions from other EU Member States;

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- HF enjoys not a right to free movement on the basis of a Union citizenship (Art. 21 TFEU), but only a right to free movement because he has been exempted from the visa requirement (Art. 20 CISA) and, in 2020, Slovenian authorities rejected HF's application to renew a residence permit.

#### Questions referred

Therefore, the Higher Regional Court of Munich asked whether the principle *ne bis in idem* requires it to refuse the US extradition request for offences for which final judgment has been passed in Slovenia and whether the extradition treaty concluded between Germany and the United States affects the application of that principle.

#### The CJEU's reasoning

The judges in Luxembourg first gave their view on the scope of the Union-wide *ne bis in idem* principle as enshrined in Art. 54 CISA/Art. 50 CFR. They held that according to the wording, context and objectives of the provisions, all citizens (and not only nationals of a Member State), who were acquitted or finally judged within the Schengen area, enjoy this fundamental right. They ensure that every person may travel within the Schengen area without fear of being prosecuted in another Member State for the same acts again.

In addition, enjoyment of this fundamental right is not subject, as regards third-country nationals, to conditions relating to the lawful nature of their stay or to a right to freedom of movement within the Schengen area. The only requirement established by Art. 54 CISA, and applicable in all cases, is that of the trial having been finally disposed of in one of the Member States.

The conclusion that Art. 54 CISA also applies to third-country nationals and regardless of whether or not their stay was unlawful can be founded on the principles of mutual trust and mutual recognition of judicial decisions in criminal matters on which the Union-wide *ne bis in idem* principle is based.

Second, the judges in Luxembourg ruled that Art. 54 CISA must also be applied in the extradition relations between an EU Member State and a third country (here: Germany and United States). The fact that the Germany-USA Extradition Treaty limits the scope of the principle *ne bis in idem* to judgments delivered in the requested State cannot call into question the applicability of Art. 54 CISA. The CJEU argued in this context on the basis of Art. 17(2) of the Agreement on extradition between the European Union and the United States of America, which, in principle, allows for denying extradition requests where the constitutional principles of, or final judicial decisions binding upon, the requested State may pose an impediment to fulfilment of its obligation to extradite. According to the CJEU, Art. 17(2) constitutes an autonomous and subsidiary legal basis for the application of the principle that extradition of persons who have already been finally judged in respect of the same offence for which extradition is sought in another Member State where the applicable bilateral treaty does not enable that question to be resolved.

#### Put in focus

By its judgment in HF, the CJEU continues its case law initiated with the WS decision. It emphasises the primacy of EU law over international treaties. Thus, Art. 54 CISA now has a very broad extraterritorial scope. Citizens who have been acquitted for or convicted of their crimes by a Schengen State have a good chance of not being extradited for the same facts to third countries where they would most likely have had to fear much higher penalties.

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