

CJEU Judgment on Compatibility of Interpol Searches and Arrests with Ne bis in idem Principle

Thomas Wahl

States that are party to the Schengen Agreement can refuse 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 Schengen States. The CJEU delivered this groundbreaking [judgment](#) on 12 May 2021 in [Case C-505/19 \(WS v Germany\)](#).

Background of the case

The case concerns a German citizen (WS) whose criminal proceedings for bribery acts were discontinued by a decision of the German prosecution office in Munich after he paid a sum of money in accordance with Sec. 153a of the German Criminal Procedure Code. He claimed that he is subject to a red notice from the USA which was distributed via the Interpol system and seeks his provisional arrest for extradition for the same offences as treated in Germany. He brought an action against the Federal Republic of Germany requesting that all necessary measures are taken in order to arrange the withdrawal of the red notice. He argued in particular that the red notice in the Interpol system infringes his right not to be prosecuted twice for the same offence as enshrined in Art. 54 CISA and Art. 50 CFR as well as his right to free movement, as guaranteed under Art. 21 TFEU. In this context, the Administrative Court of Wiesbaden referred several questions to the CJEU. A first set of questions concerned the applicability of the European ne bis in idem principle and its implications for criminal prosecution in third countries. A second set of questions related to the consequences for the processing of personal data contained in such red notices in line with the provisions of Directive (EU) 2016/680 – the EU’s data protection rules for police and criminal justice authorities.

For more background information on the case, the questions referred and the opinion of AG *Bobek*, see [eucrim 4/2020, 287-288](#) and [eucrim 2/2019, 106-107](#).

The CJEU's findings regarding the scope of the ne bis in idem principle

The CJEU points out that the first set of questions seek guidance of whether Art. 54 CISA and Art. 21(1) TFEU, read in the light of Art. 50 CFR, preclude the provisional arrest by the authorities of a Schengen State if the person is subject to an Interpol red notice at the request of a third State (here: USA). In the first place, the CJEU confirms its case law that Art. 54 CISA applies to procedures by which the public prosecutor of a Member State discontinues, without the involvement of a court, a prosecution brought in that State once the accused has fulfilled certain obligations, such as the payment of a sum of money set by the prosecutor (cf. judgment of 11 February 2003, [Joined Cases C-187/01 and C-385/01 \(Gözütok and Brügger\)](#)).

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In the second place, the CJEU clarifies the meaning of “being prosecuted” in the sense of Art. 54 CISA, as a result of which the person concerned may not be provisionally arrested. In this context, the CJEU reiterates the objectives pursued by Art. 54 CISA, *inter alia*:

- Ensuring exercise of the freedom of movement;
- Ensuring legal certainty;
- Reflecting mutual trust in the respective criminal justice systems of the Contracting States.

However, the judges in Luxembourg stress that the European *ne bis in idem* principle does not bar *per se* the risk of impunity and does not preclude the maintenance of measures that prevent a person from evading justice.

In conclusion, Art. 54 CISA and Art. 21(1) TFEU preclude the provisional arrest of a person who is the subject of an Interpol red notice only if it is established by a final judicial decision that the person’s trial has been finally disposed of by a State that is party to the Schengen Agreement or by an EU Member State in respect of the same acts as those forming the basis of the red notice. As soon as it is ascertained that the conditions of the *ne bis in idem* rule are satisfied, the authorities of the Schengen States must refrain from making a provisional arrest or keeping a person in custody following an Interpol red notice. Also these measures that are preliminary to an extradition constitute “prosecution” within the meaning of Art. 54 CISA.

The CJEU stresses that the Member States must ensure the availability of legal remedies enabling the persons concerned to obtain such final judicial decision that ascertains the applicability of the prohibition to be prosecuted twice as laid down in Art. 54 CISA.

The CJEU's findings regarding data processing

Regarding the second set of questions, the Administrative Court of Wiesbaden seeks to ascertain whether the authorities of the Schengen States can record and retain personal data appearing in an Interpol red notice in circumstances where the *ne bis in idem* principle applies. The CJEU first notes that any operation performed on those data, such as registering them in a Member State’s list of wanted persons, constitutes “processing” which falls under Directive 2016/680. Such processing, however, pursues a legitimate purpose and is not unlawful solely on the ground that the *ne bis in idem* principle *may* apply to the acts that are described in the red notice. That processing by the authorities of the Schengen States may indeed be indispensable precisely in order to determine whether the *ne bis in idem* principle applies. However, the prerequisites of the data protection Directive are no longer fulfilled, i.e. record and retention of personal data are no longer necessary, if it is established that the person concerned can no longer be the subject of criminal proceedings and, consequently, cannot be arrested for the acts covered by the red notice. In this case, the data subject must be able to require erasure of his/her data. In any rate, the authorities must flag that the person concerned can no longer be prosecuted in a Schengen State for the same acts by reason of the *ne bis in idem* principle.

Put in focus:

The CJEU’s judgment in *WS* is of extraordinary importance insofar as it grants extraterritorial effect to the European *ne bis in idem* principle. This guarantee as established in Art. 50 CFR and Art. 54 CISA has been thought by many scholars to have intra-Community effects only. Its scope now extends to third countries although they are not bound by Union law. The CJEU stresses that this approach is not surprising since similar effects are implied in extradition law. In accordance with the *Petruhhin* doctrine, also here EU Member States must ensure the right to move and reside freely within the territory of the EU Member States by applying the EAW system preferentially to extradition requests from third countries (→ [eucrim 3/2016, 131](#))

and [eucrim 4/2020, 288-289](#)). Thus, similarities between the CJEU case law in *Petruhhin* and *WS* are evident, which the CJEU also refers to in its judgment. With regard to the scope of the ne bis in idem principle, the judges in Luxembourg fully follow the Advocate General's opinion of 19 November 2020 (→ [eucrim 4/2020, 287-288](#)).

The CJEU strengthens the individual rights of citizens who have been subject to a final conviction or acquittal by the authorities of the Schengen States/EU Member States. Nevertheless, the decision is only a partial success for the prosecuted person. He must enforce a court decision in the Schengen States/EU Member States confirming the application of the transnational European ne bis in idem rule. For the time being, he is not immune from provisional arrest or other measures restricting his freedom of movement on the basis of an Interpol Red Notice. The system thus also entails that persons have to provide information on their offences in order to convince the national courts that the concluded criminal proceedings and the Red Notice cover the “same acts”. This comes especially true if one considers that the description of facts and offences in red notices is regularly very brief. This burden of proof is difficult to reconcile with the principle of the presumption of innocence. In addition, in many cases, the prosecuted person will probably only be successful if he organises a double defence in the countries concerned.

Ultimately, the CJEU's ruling poses major challenges especially for the legislators of the Member States. They must now create effective mechanisms, if they do not already exist, that guarantee judicial decisions on the existence of the conditions of the trans-European ne bis in idem principle. It remains to be seen whether these court decisions will resolve all individual cases without renewed involvement of the judges in Luxembourg.

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