

37 Int'l Enforcement L. Rep. 187 (May 2021)

European Court of Justice Rules against Detention for Interpol Red Notice Due to Ne Bis in Idem

By Bruce Zagaris

On May 12, 2021, the Grand Chamber of the European Court of Justice issued a decision, in response to a request for a preliminary ruling from a German Administrative Court, held that where the individual against whom an INTERPOL Red Notice was issued pursuant to a U.S. arrest warrant, the principles of *ne bis in idem*, prohibited his arrest and further processing.¹

The request arose in proceedings between WS (the relator) and Bundesrepublik Deutschland (the Federal Republic of Germany), represented by the Bundeskriminalamt (Federal Criminal Police Office, Germany) ('the BKA'), concerning the measures, which the German government must take in order to protect WS against the adverse effects that may arise from the publication, at the request of a third State, of a red notice issued by Interpol with respect to WS's ability to exercise his right to move freely.

In 2012, at the request of the U.S., Interpol published a Red Notice in respect of WS, a German national, in order to locate the latter and detain or arrest him or restrict his movements to extradite him to the U.S. The U.S. had issued an arrest warrant concerning corruption accusations against WS.

The rules of Interpol require that, after a Red Notice is published, the country where the person has been located must immediately take measures to provisionally arrest the wanted person or monitor or restrict his/her movement.

The Verwaltungsgericht Wiesbaden (Administrative Court, Wiesbaden, German), the Staatswaltschaft München I (Public Prosecutor's Office I, Munich, Germany) had already started an investigation procedure into WS concerning the same acts as those covered by the Red Notice, before that notice was published. The criminal case was terminated by a decision of January 27, 2010, after WS had a fine in accordance with Paragraph 153a(1) of the stop. Hence, criminal proceedings could not be brought in Germany.

In 2013, after communications with WS, the BKA arranged for Interpol to attach an addendum to the Red Notice in respect of WS, stating that the BKA considered that the *ne bis in idem* principle applied to the acts referred to in that notice.

In 2017, SWS brought an action before the referring court against the German government, which the BKA represents. WS requested that the German government take all necessary measures to arrange for the withdrawal of the Red Notice. WS argued that adding his name to the Schengen list of wanted persons violates Article 54 of the Convention Implementing the Schengen Agreement, read in

¹ Case C-505/19, European Court of Justice (Grand Chamber), May 12, 2021.

conjunction with Article 50 of the Charter.² WS contended they prohibit enforcing laws against a person whose acts are subject to *ne bis in idem*.³ He also argued it was contrary to the right of free movement of citizens of the EU pursuant to Article 21 of the Treaty on the Functioning of the European Union (TFEU).⁴

The Court observed that Article 17(2) of the extradition treaty between the EU and the U.S. states that, “(w)here constitutional principles of, or final judicial decisions binding upon, the requested State may pose an impediment to fulfilment of its obligation to extradite, and resolution of the matter is not provided for in this Agreement or the applicable bilateral treaty, consultations shall take place between the requested and requesting States.” Hence, the provisions of Art. 17(2) refer to both constitutional or fundamental principles, of which *ne bis in idem* applies, and final decisions binding on the requested State (i.e., the above-mentioned decision of January 27, 2010).

The Court ruled that Article 54 of the Schengen Convention and Article 21(1) TFEU, read in the light of Article 50 of the Charter of Fundamental Rights of the EU, must be interpreted as allowing the provisional arrest by Schengen members of a person in respect of whom Interpol has published a Red Notice, at the request of a third State. Unless, a final judicial decision taken in an Interpol member, that the trial of that person in respect of the same acts as those on which the Red Notice is based has already been finally disposed of by an Interpol member. The above-mentioned decision of January 27, 2010, finally disposed of WS’s case.

The Court also ruled that the provisions of Directive (EU) 2016/680 of the European Parliament and of the Council of April 17, 2016, on the protection of natural persons with regard to the processing of personal data by competent authorities to prevent, investigate, detect or prosecute criminal offenses or execute criminal penalties. Additionally, the court ruled on the free movement of such data, read in light of Article 54 of the Schengen Convention and Article 50 of the Charter of Fundamental Rights. The law must be interpreted as not precluding the processing of personal data appearing in a Red Notice issued by Interpol in the case where a final judicial decision has not occurred in a State that is a party to the Schengen Convention or in an Interpol member that the *ne bis in idem* principle applies in respect of the acts on which that notice is based, provided that the processing fulfills the conditions in the above-mentioned directive. The above-mentioned decision of January 27, 2010, constitutes a final judicial decision disposing of WS’s case and hence preventing the processing of the Red Notice.

Technically, the decision of the European Court of Justice only applies within the EU. However, many countries outside the EU will take note. They may follow its jurisprudence since *ne bis in idem* is considered a fundamental principle of extradition and international human rights law. Other courts will at least follow the principle in deciding whether to detain an individual. The principles governing the

² For the text of Art. 50 of the Charter of the Fundamental Rights of the European Union, see <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX%3A12012P/TXT>.

³ For a text of Art. 54 of the Schengen Convention, see https://www.ejtn.eu/PageFiles/3103/ne_bis_in_idem.pdf.

⁴ For the text of Art. 21, see <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008E021:en:HTML>.

processing of personal data are not as well established yet outside the EU, so the second part of the decision may not have as significant an impact as the first part of the decision.

The case shows the efforts by Interpol, its members, Schengen members, and the EU institutions (here the European Court of Justice) try to balance international criminal cooperation with international human rights principles.